OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT
delivered on 15 May 1985 *

Mr President,
Members of the Court,

1. Facts and procedure

1.1. I can see no way of abbreviating the essential points in the extensive file on this case any further than has already been done in the Report for the Hearing. Accordingly, I shall begin by incorporating in my Opinion the outline of the facts and the procedure set out in the Report for the Hearing which I endorse in its entirety.

1.2. *Facts*

On 14 January 1983 the President of the European Parliament informed Mr de Compte, who was at the time an official in Grade A 3 employed as an accountant at the European Parliament, of certain facts which might lead to the institution of disciplinary proceedings against him.

On 28 January 1983, pursuant to Article 87 of the Staff Regulations of Officials, the Director General for Administration, Personnel and Finance of Parliament invited Mr de Compte to submit his views on the matter in question.

On 13 April 1983, pursuant to the second paragraph of Article 87 of the Staff Regulations, the President of the European Parliament submitted to the chairman of the Disciplinary Board a report concerning the allegations made against Mr de Compte, an accountant and head of division at the Parliament.

The Disciplinary Board met on several occasions between 2 June 1983 and 10 February 1984.

On the latter date the Disciplinary Board proposed by three votes to two that Mr de Compte should be reprimanded. The two members who did not support such a measure were in favour of simply dismissing the charges against him.

Pursuant to the final paragraph of Article 7 of Annex IX to the Staff Regulations, Mr de Compte was given an opportunity to submit his views on 8 March 1984 to the President of Parliament in his capacity as the appointing authority.

On 16 March 1984 the President of Parliament decided to remove Mr de Compte from his post as a disciplinary measure without a reduction or withdrawal of his pension rights. The decision stated *in extenso* the reasons on which it was based.

On 21 March 1984 Mr de Compte submitted to the President of Parliament, under Article 90 (2) of the Staff Regulations, a complaint against the decision of 16 March 1984 removing him from his post. A supplementary complaint was submitted on 11 April 1984.

On 10 April 1984 Parliament, by a substantial majority, granted a final discharge to Mr de Compte in respect of the 1981 financial year (the financial year in question).

On 24 May 1984 the President of Parliament, in response to the two complaints, decided that instead of being removed from

* Translated from the Dutch.

his post Mr de Compte should be demoted to Grade A 7, Step 6. That decision was based on the grounds relied upon in support of the initial decision to remove Mr de Compte from his post.

1.3. *Procedure and conclusions of the parties*

(a) On 4 June 1984 Mr de Compte took the following steps:

— he submitted a complaint to the President of Parliament in which he argued that it was no longer appropriate simply to refer to the reasons given for the initial decision to remove him from his post since, in the meantime, Parliament had granted him a final discharge in respect of the financial year in question, thereby recognizing that his activities as an accountant were correct and above criticism;

— he brought this action before the Court for annulment of the aforementioned decision of 24 May 1984 downgrading him;

— he applied for an interim order suspending the operation of that decision until the Court delivered judgment in the main action.

(b) By order of 3 July 1984 the President of the Third Chamber, acting on behalf of the President of the Court, ordered the operation of the decision of 24 May 1984 to be suspended until the Court gave judgment in the main action.

(c) By decision of 4 July 1984 the President of Parliament rejected the complaint submitted by the applicant on 4 June 1984.

(d) In his application, which was received at the Court Registry on 4 June 1984, the applicant claims that the Court should:

'*Primarily*:

— Declare that the disciplinary proceedings taken against Mr de Compte were 'inadmissible' under the principle of *non bis in idem*;and, consequently, annul the disciplinary measure;

In the alternative:

— Declare that the Disciplinary Board on several occasions in the course of the proceedings manifestly acted in breach of the applicant's right to a fair hearing and of the mandatory provisions of Annex IX to the Staff Regulations; and hence annul the disciplinary proceedings and the disciplinary measure which resulted therefrom;

In the further alternative, as regards the substance of the case:

— Find that the European Parliament has granted final discharge to the accounting officer of that institution dated 10 April 1984, without any exceptions or reservations;

— Find that the complaints which formed the basis of the appointing authority's report stating its allegations cover the same ground as the issues and questions which were central to the debates leading to the decision to give final discharge;

— In any event, declare that this is the case as regards the first two complaints in the report;

— Declare that it is illogical to take disciplinary action against an accounting officer on grounds identical to those on which he received final discharge;

— Declare that, final discharge having been given on 10 April 1984, the appointing authority's disciplinary action is without foundation in fact or law;

— Hence, annul that decision;

In the further alternative:

— Find that the disciplinary measure adopted is utterly inconsistent with the opinion of the Disciplinary Board;

— Find that the disciplinary measure does not in any way take account of the final discharge received on 10 April 1984;

— Find that in its disciplinary action the appointing authority did not take any account of what the chairman of the Disciplinary Board has described as the 'human and professional environment' which is responsible for the special position of an accounting officer of the European Parliament;

— Find that despite the vigorous protests of the defence, the appointing authority has gratuitously maintained allegations which it has never been able to substantiate;

— Find, finally, that the appointing authority did not in any way take into account the applicant's excellent record;

— Hence, declare that the disciplinary decision was unlawful on grounds of misuse of powers — or, alternatively, that it was flagrantly disproportionate to the real responsibility attributable to an accounting officer;

— Hence, annul the disciplinary measure and order that the applicant should have his rights restored in full as from the date on which the disciplinary decision took effect;

Damages:

— Take formal note that the applicant reserves the right to claim at the appropriate time and place the damages to which he is entitled as a result of the libels and smears to which he has been subjected in the national and international press;

— Order the European Parliament to pay the costs.'

(e) The European Parliament contends that the Court should:

— Dismiss the application;

— Make an order as to costs in accordance with the relevant provisions of the Staff Regulations.

(f) On hearing the report of the Judge Rapporteur and the views of the Advocate General, the Court (Third Chamber) decided to open the oral procedure without any preparatory inquiry.

However, at its administrative meeting of 17 January 1985, the Court (Third Chamber) informed the parties that, having regard to the complexity of the case, it was preferable, in its view, at any rate initially to consider at the hearing of 7 March 1985 only the submissions relating to the legality of the disciplinary proceedings. Accordingly, the parties were requested to confine their pleadings at the hearing to those submissions alone.

The Court also informed the parties that the Advocate General would deliver his Opinion on those submissions at a subsequent hearing, the date of which would be notified to them in due course and that the Court (Third Chamber) would decide, in the light of its examination of those

submissions, whether a second hearing to consider the applicant's remaining submissions was necessary.

2. Submissions and arguments of the parties

2.1. *Introductory remarks*

In accordance with the above-mentioned procedural decisions, I shall consider in my Opinion only the six submissions in which the applicant challenges the legality of the disciplinary proceedings. I shall deal with each of those submissions in turn and, in order to save time, I shall not begin with an outline of all the issues. I shall not discuss or even refer to the applicant's four submissions concerning the reasons stated in the contested decision and the question whether it is well founded. In my view, those four submissions are not even indirectly relevant to the appraisal of the first six submissions. However, I do consider it important to incorporate in my Opinion certain introductory remarks taken from the Report for the Hearing which are set out below together with some comments of my own. Those remarks, which I fully endorse, are concerned with Parliament's response to the applicant's submissions as a whole during the written procedure. From its response I infer that during the written procedure Parliament wished above all to help clarify the complicated factual background to the case. According to the introductory remarks in its defence which are referred to below, on the question whether the complaints relied upon by the applicant, and in particular those relating to the substance, are in fact well founded, Parliament defers to a large extent to the judgment of the Court. However, Parliament has also largely confined its actual defence to the six submissions of the applicant concerning procedural irregularities to oral argument at the hearing.

The introductory remarks which I have incorporated in my Opinion are as follows:

— Although in its observations concerning the application for the adoption of interim measures the European Parliament stated that it would reply in the course of the substantive action to the applicant's various submissions, it did not do so during the written procedure. Parliament, which emphasizes that it is anxious to ensure both 'full and unrestricted observance of all the rights of officials . . . and compliance with the obligations incumbent upon it in its capacity as the budgetary authority', evinced the intention in the introduction to its defence merely 'to inform the Court of all the circumstances of the case and to rely on its judgment as regards the question whether the complaints relied upon by the applicant are admissible and well founded'.

— Parliament has accordingly given a detailed description of the facts of the case, including both the substantive aspects and those relating to the disciplinary proceedings, from July 1981 when the Court of Auditors commenced its investigation into the fund of the Members of the European Parliament until the date on which these proceedings were instituted (there are 53 annexes to the Parliament's statement).

— According to the European Parliament, it is apparent from its description that all the officers of the institution who dealt with this case 'considered that the applicant was in some measure at fault' and that the outright annulment of the

contested decision would enable him to escape punishment altogether.

2.2. *First submission*

In his first submission the applicant maintains that the disciplinary proceedings are 'inadmissible' for infringement of the *non bis in idem* rule embodied in Article 86 of the Staff Regulations. In his view Article 86 (3), which provides that a 'single offence shall not give rise to more than one disciplinary measure', also prohibits two disciplinary proceedings being brought in respect of related facts. The applicant considers that his transfer in May 1982 on account of the irregularities with which he is now charged was itself also to be regarded as a disciplinary measure.

In my view, this submission must be rejected. In the first place, the European Parliament has rightly pointed out that a transfer (not affecting grade) is not included in the list of disciplinary measures in Article 86 of the Staff Regulations. It follows in my view from Article 7 of the Staff Regulations itself that transfer cannot in principle be regarded as a disciplinary measure. Article 7 makes it clear in particular that an official may in principle at any time be transferred in the interests of the service to a post which corresponds to his grade, whether at his own request or otherwise. Finally, at the hearing the applicant did not dispute that he consented to the transfer.

2.3. *Second submission*

In his second submission the applicant maintains that at the preliminary hearing, which constitutes the first stage of the disciplinary proceedings and which is provided for by Article 87 of the Staff Regulations, the appointing authority cannot, as Parliament did in this instance, designate an official to deputize for it, even if he is assigned the necessary powers.

After the European Parliament had referred to the judgment of 8 July 1965 in Joined Cases 27 and 30/64 (*Fonzi* v *Commission* [1965] ECR 481) in which the Court expressly declared that such a procedure was in conformity with Article 87 of the Staff Regulations, the applicant made no further reference to this submission. On the basis of that judgment, I also consider that this submission must be rejected.

2.4. *Third, fourth and fifth submissions*

I intend to deal with the next three submissions together since they all allege infringements of the right to a fair hearing.

(a) In his *third submission* the applicant contends that the principle that there should be 'an inquiry in which each side can submit his case and reply to the case of the other side', laid down in Article 6 of Annex IX to the Staff Regulations, was contravened inasmuch as the documents which he gave to the official concerned at the preliminary hearing were never put before the Disciplinary Board. Initially, some uncertainty arose concerning the accuracy of this submission in the light of the defence of the European Parliament. In the end, however, it was established at the hearing that Parliament had not put before the Disciplinary Board *all* the documents submitted to it by the applicant but only those which it considered relevant for the purpose of clarifying the report referred to in Article 1 of Annex IX to the Staff Regulations. Moreover, it was established at the hearing that the applicant did not avail himself during the disciplinary proceedings of his opportunity to submit the missing documents or copies thereof to the Disciplinary Board in person or to cause

them to be produced by the other party to the proceedings. In that connection I would refer to Articles 1, 2 and 4 of Annex IX to the Staff Regulations. Accordingly, this submission must also be rejected.

(b) In his *fourth submission* the applicant contends that the principle of *audi alteram partem* and of the right to a fair hearing was contravened, inasmuch as the three witnesses called by the Disciplinary Board gave evidence in his absence and without his being notified either orally or in writing of the dates on which they were to be heard. The applicant considers that procedure to be contrary to Article 6 of Annex IX and also to a general principle which is common to the legal systems of various Member States.

As regards the actual course of the procedure for the examination of witnesses called by the institution, Parliament pointed out that the evidence given by the three witnesses was recorded on tapes which were transcribed, approved by the witnesses, translated where necessary, and passed on to the applicant and his representative. [1] The applicant was therefore in a position, according to Parliament, to submit his views concerning the evidence given by the witnesses before the Disciplinary Board had completed its proceedings. In the European Parliament's view, that is sufficient for the purposes of ensuring observance of the right to reply. In that regard Parliament relies on the judgment of the Court of 11 July 1968 in Case 35/67 (*Van Eick* v *Commission* [1968] ECR 329, at p. 343). However, I would observe in that connection that neither the cited paragraph nor any other paragraph in that judgment is concerned with the procedure for the examination and cross-examination of witnesses. The cited paragraph relates exclusively to the examination of the *documents* submitted by the institution concerned.

Quite apart from the fact that there was such a long delay in sending the applicant the very important evidence given by the last of the witnesses that the Disciplinary Board did not accord him a reasonable period in which to submit his views, I consider that Parliament's arguments must be rejected. I offer no opinion as to whether that conclusion follows from the wording of Article 6 of Annex IX to the Staff Regulations itself, which is something that is in my view open to doubt. In the first place, it became apparent in my view from a comparison of the different language versions of that provision at the hearing that at least some of those versions are open to differing interpretations. Secondly, it is uncertain in my view whether the procedure for the examination of witnesses, which is referred to in Articles 4 and 5 of Annex IX, is governed exclusively by Article 6 thereof. In any event, Article 6 is by no means concerned *exclusively* with the examination of witnesses. The phrase 'an inquiry in which each side can submit its case and reply to the case of the other side' in that article should therefore, irrespective of the nature of that inquiry, be interpreted as appropriate in each case.

My view to the effect that the applicant should have been given an opportunity to be present when witnesses were called is based on the nature of the disciplinary pro-

1 — It is apparent, however, from Parliament's written answer to a question put to it by the Court during the oral procedure, that the transcript of the last hearing was not sent to the applicant until 6 February 1984 by internal mail. According to the statement made by his representative during the oral procedure, the applicant did not receive that transcript until after 10 February 1984, that is to say after the date on which the Disciplinary Board delivered its opinion.

ceedings and on the principle of *audi alteram partem*, which can be inferred not only from the nature of the disciplinary proceedings but also from the provisions of Annex IX to the Staff Regulations viewed as a whole.

As regards the nature of the disciplinary proceedings, like the applicant I share the view exrpressed by Mr Advocate General Roemer in his Opinion in Case 35/67 (*Van Eick* v *Commission* [1968] ECR 329 at p. 350). On the basis of his analysis of the role of the Disciplinary Board in disciplinary proceedings under Community law, which is still well worth reading, he concluded that 'we need scarcely hesitate to say that the duties of the Disciplinary Board closely resemble those of a court of inquiry' and that it is necessary 'to accept the view that disciplinary proceedings must, as far as possible, follow [the pattern of] those which take place before a court of justice'.

As regards the wording of the relevant annex to the Staff Regulations, the principle of *audi alteram partem* follows in my view from the second paragraph of Article 1, Article 2, Article 4, the first paragraph of Article 6, and Article 7.

In my view, the actual significance of the *audi alteram partem* rule depends on the presentation of arguments or evidence in relation to which it must be possible to exercise the right of reply. In the case of written submissions or supporting documents (as in Case 35/67), the person charged cannot of course demand to be present when the relevant submissions or documents are drawn up. He can reply to them, either orally or in writing, only after they have been drafted. However, as far as the examination of witnesses is concerned, I agree with the applicant that it follows quite clearly from the *audi alteram partem* rule that the person charged must be given an opportunity to put additional questions to those witnesses at the hearing. It has been established that no such opportunity was extended to the applicant in this case.

Accordingly, I consider the applicant's fourth submission to be well founded and, moreover, to regard that procedural defect as so serious that it must *per se* lead to the annulment of the contested decision, since it is clear that the Disciplinary Board formed its opinion following proceedings that were vitiated by that fundamental defect of form.

The reference made by the European Parliament at the hearing to a judgment of the Belgian Council of State cannot affect that conclusion. Clearly, the interpretation of Annex IX to the Staff Regulations cannot be based on the interpretation of national rules concerning disciplinary proceedings, which moreover have not been submitted to us.

That conclusion is not affected by the defendant's reference to the Court's recent judgment of 29 January 1985 in Case 228/83 (*F.* v *Commission* [1985] ECR 290). On the contrary, it is clear from paragraph 21 of the Court's decision that the applicant in that case had been given an opportunity to be present when all the witnesses were heard, to put questions to them himself and to state his own position at any time before all the members of the Disciplinary Board concerning the evidence given by those witnesses.

(c) In his fifth submission the applicant alleges that the *audi alteram partem* rule and Article 4 of Annex IX to the Staff Regulations were also infringed inasmuch as the Disciplinary Board refused to hear the evidence of witnesses called by him or by his representative.

The fact that those witnesses did not give evidence is not contested by Parliament. However, it contended during the written procedure that the applicant's request was not made until 13 January 1984 and that the Disciplinary Board, in the exercise of its discretion as regards the need to hear witnesses for the defence, was entitled to refuse the request. At the hearing, the debate focused on the question whether the applicant had indicated with sufficient precision the matters on which the witnesses concerned were to give evidence. In my view, it is clear from those passages in the applicant's memoranda of 28 January 1983 and 10 November 1983 addressed to the Disciplinary Board which were submitted in writing after the hearing at the Court's request, that the applicant had done so at least as regards certain witnesses. Furthermore, Parliament's explanations do not in my view justify an 'en bloc' refusal to examine any of the witnesses called by the applicant. The discretion conferred on the Disciplinary Board is not so extensive as to enable the latter to empty of its content the second paragraph of Article 4 — which provides for the right to call witnesses — unless it is shown that the evidence of those witnesses is irrelevant.

Nor can the fact that the Disciplinary Board examined one of the defence witnesses proposed by the applicant who was called by Parliament remedy that essential procedural defect, since that witness gave evidence in the absence of the applicant and, moreover, his evidence did not relate to all the matters which the applicant wished to clarify by calling witnesses at the hearing.

I therefore consider that the applicant's fifth submission is also well founded.

2.5. *Sixth submission*

In his sixth submission the applicant maintains that the Disciplinary Board wrongly refused to suspend its proceedings pending the outcome of the administrative inquiry which was being conducted at the same time by Parliament's Committee on Budgetary Control. He contends that unlike the Disciplinary Board, that committee carried out a detailed inquiry which discharged the accounting officer (the applicant in these proceedings) from any responsibility.

In its written observations Parliament refers to the interim order made on 3 July 1984 by the President of the Third Chamber of the Court which in its view shows that the final discharge procedure, which is intended to determine whether the accounts have been duly drawn up and are accurate and which was the subject of the inquiry conducted by the Committee on Budgetary Control, is different from disciplinary proceedings which concern the responsibility of the accounting officer.

In my view, it is impossible to draw an unequivocal conclusion from paragraph 11 (2) of the order as regards the question whether or not the Disciplinary Board should have suspended its proceedings pending the outcome of the inquiry conducted by Parliament's Committee on Budgetary Control.

However, since the applicant made no further reference to this submission at the hearing, I propose that the Court should not base its judgment upon it either.

3. Conclusion

To summarize, I consider that the fourth and fifth submissions of the applicant concerning the legality of the disciplinary proceedings are well founded. Moreover, I consider that the procedural defects in question are so serious that the contested decision should, in accordance with the first alternative claim in the application, be annulled on the basis of those submissions. Accordingly, the European Parliament should also be ordered to pay the costs.

The submissions and arguments of the applicant on the substance of the case, including the claim that the Court should take 'formal note that the applicant reserves the right to claim at the appropriate time and place the damages to which he is entitled as a result of the libels and smears to which he has been subjected in the national and international press' should not be considered at this stage of the proceedings.