

OPINION OF ADVOCATE GENERAL

POIARES MADURO

delivered on 13 July 2006¹

1. The Court of Justice is requested to rule on the appeal brought by the Commission of the European Communities against the judgment delivered by the Court of First Instance of the European Communities on 12 July 2005 in Case T-157/04 *De Bry v Commission* ('the judgment under appeal'),² which granted the application for annulment of the decision of 26 May 2003 approving the applicant's career development report ('CDR') for the period 1 July 2001 to 31 December 2002, on the grounds in particular that that report was adopted in breach of the official's right to a fair hearing.

2. Although the facts of the case are relatively straightforward, in the ground put forward by the appellant the Court is requested to define the scope of an official's right to a fair hearing which his hierarchical superiors responsible for appraising him are required to afford him.

I — Background to the appeal

A — Relevant documents

3. Article 43 of the Staff Regulations of Officials of the European Communities ('the Staff Regulations') provides that the ability, efficiency and conduct in the service of each official, with the exception of those in Grades A1 and A2, are to be the subject of a periodical report made at least once every two years as provided for by each institution.

4. On 26 April 2002 the Commission adopted a decision on general provisions for implementing Article 43 of the Staff Regulations ('the GIP'), Article 1 of which provides that a report, entitled 'Career development report', is to be drawn up periodically on the ability, efficiency and conduct in the service of each permanent member of staff.

¹ — Original language: Portuguese.

² — ECR-SC [2005] I-A-199 and II-901.

5. The main aspects of the appraisal procedure as set out in those rules can be summarised as follows.

6. The persons involved in the procedure are, first, the reporting officer, who is normally the Head of Unit, the direct superior in hierarchy of the official being appraised (Article 3(1) of the GIP), secondly, the countersigning officer, who is normally the Director, the direct superior in hierarchy of the reporting officer (Articles 2(2) and 3(1) of the GIP) and, lastly, the appeal assessor, who is normally the Director-General, the direct superior in hierarchy of the countersigning officer (Article 2(4) of the GIP).

7. The appraisal procedure is described in Articles 7 and 8 of the GIP. It starts with a 'self-assessment' prepared by the official being appraised, which will form an integral part of the final report. A discussion is then held between the official being appraised and the reporting officer, who prepares a report and sends it to the official concerned. The latter either signs and returns the report, which is then signed by the reporting officer, countersigned by the countersigning officer and becomes final, or he asks for a meeting with the countersigning officer, at the end of which the latter confirms the report or amends it. If the official being appraised is not satisfied with the countersigning officer's decision, he may ask him to refer the matter to the Joint Evaluation Committee ('JEC').

The role of the JEC is to ascertain whether the CDR has been produced fairly, objectively and in accordance with normal reporting standards. To that end, it issues a reasoned opinion on the basis of which the appeal assessor either amends or confirms the CDR, it being understood that if he departs from the recommendations contained in that opinion he must give the reasons for his decision.

8. In July 2002 the Commission brought to the attention of its staff a document entitled 'Career Development Review System — Guide' ('the Appraisal Guide').

B — Background to the dispute in the main proceedings

9. Mr De Bry, a Commission official in Grade A5, was the subject of a CDR for the period 1 July 2001 to 31 December 2002 which, following a meeting with the reporting officer on 30 January 2003, was signed by the latter on 18 February 2003 and approved and signed by the countersigning officer that same day.

10. On 25 February 2003 Mr De Bry requested a review of his appraisal. Following a meeting on 11 March 2003 the countersigning officer made some amendments to the descriptive comments, whilst keeping the markings awarded unchanged. Under the heading 'Conduct in the service', he added the following descriptive comment:

'Mr De Bry is always available to finish his work by working overtime during the week, and even at weekends. However this availability outside normal working hours is frequently accompanied by failure to comply with the normal hours of work.'

11. On 26 March 2003 Mr De Bry appealed against his marking. On the recommendation of the JEC, the appeal assessor, by decision of 26 May 2003, dismissed the appellant's appeal and made the contested CDR final.

12. By letter of 26 August 2003, Mr De Bry lodged a complaint under Article 90(2) of the Staff Regulations. The Appointing Authority rejected that complaint by decision of 6 January 2004. Mr De Bry acknowledged receipt of that decision on 12 January 2004.

13. By application lodged at the Registry of the Court of First Instance of the European Communities on 22 April 2004, Mr De Bry brought an action under Article 236 EC for annulment of the CDR of 26 May 2003.

C — The judgment under appeal

14. In support of his claims for annulment, the applicant raised in particular the plea alleging infringement of his right to a fair hearing. The infringement resulted from the fact that the criticism of failure to comply with the 'normal' hours of work was mentioned in the descriptive comment relating to the heading 'Conduct in the service' in the contested CDR, although the appellant had not received any warnings during the reporting period which would have enabled him to express his views and to understand the countersigning officer's comment. In other words, the appellant contended that as he had not had the opportunity to put forward his own observations on specific instances of delay which may have been attributed to him the alleged absence of punctuality should not have been taken into account in his appraisal.

15. On the basis of a line of argument set out in paragraphs 79 to 94 of its judgment,

the Court of First Instance accepted that plea and, on that ground, it annulled the decision that had approved the contested CDR.

16. According to the judgment under appeal, Article 26 of the Staff Regulations, which contains the specific enunciation of the right of officials to a fair hearing, is intended to prevent decisions affecting their administrative status and career, such as the decision which finalises a CDR, being based on matters relating to their conduct that have not been recorded in their personal file and have not been communicated to them, thus precluding them from expressing their views adequately concerning such factual information.

17. In the view of the Court of First Instance, it follows that factual information which has given rise to value judgments that are unfavourable to the official being appraised must, in order to be relied upon against him, have been recorded in 'documents' within the meaning of Article 26 of the Staff Regulations that have previously been placed on his personal file or, at least, brought to his notice. In the present case, in order to enable Mr De Bry to defend his interests adequately, either by challenging the criticism or by improving his conduct in the service in order to obtain a good marking, his lack of punctuality should have been recorded in written warnings within an appropriate time, that is to say, within a reasonable time after the occurrence of the matter criticised.

18. All the more so, adds the Court of First Instance, because the criticism contrasts with an earlier assessment; the previous staff report had described Mr De Bry's 'personal style as regards working hours' as irreproachable, and even as warranting the highest marking.

19. Lastly, the Court of First Instance notes that in the Appraisal Guide, which it has adopted as its code of conduct, the Commission requires an official's hierarchical superiors to put in writing and within an appropriate time any matters liable to be taken into account unfavourably in his next CDR. The Appraisal Guide also states that nothing in the appraisal should come as a surprise to the person concerned. The guide therefore stresses the need for feedback throughout the reporting period, which should refer to specific aspects of conduct and should be provided as quickly as possible after the work has been done so that individuals are able to find out how they have done on a regular basis. It also requests reporting officers to collect examples of work throughout the reporting period, keep copies of them or write notes.

20. The Court of First Instance goes on to observe that that infringement of the right to a fair hearing may have influenced the marking allocated to the official (see paragraphs 92 to 94 of the judgment under appeal) and so it accepted the plea.

21. In short, the Court of First Instance held in essence that observance of the right of the official being appraised to a fair hearing requires, in order for it to be relied upon against him, that factual information which subsequently gives rise to value judgments contained in the staff report should have previously been recorded in the form of written warnings in 'documents' within the meaning of Article 26 of the Staff Regulations, placed on the official's personal file or, at least, brought to the official's notice. Only if the official had been confronted with the finding of his lack of punctuality, through a written warning issued within the appropriate time, that is to say, within a reasonable time after the occurrence of the matter criticised, would he have been able to defend his interests adequately, either by challenging that criticism or by taking it into account, if only in order to obtain a good marking.

Regulations, which constitutes specific enunciation of it, prevents reporting officers from taking into account in the CDR any matter for which the official being appraised has been criticised that has not previously been put in writing and communicated to the official within the appropriate time.

23. The appellant's arguments lead me to consider whether, according to the principle of observance of the right to a fair hearing, Article 26 of the Staff Regulations and/or the Appraisal Guide, the Commission was permitted to take into account the criticism relating to Mr De Bry's working hours only, as the Court of First Instance held, on condition that it had previously put it in writing in a 'document' placed on the personal file of the person concerned or, at least, communicated to him, so that the written warning would enable him either to challenge the merits of that criticism or to improve his conduct in order to obtain a good marking.

II — Analysis of the appeal

22. In support of its appeal, the Commission relies on a single ground, alleging that the Court of First Instance failed to have regard to the scope of observance of the right to a fair hearing. It contends that neither the general principle of observance of the right to a fair hearing nor Article 26 of the Staff

24. In other words, the question which lies at the heart of this case is as follows: is the possibility of taking a criticism into account dependent upon a 'document' within the meaning of Article 26 of the Staff Regulations being previously created and previously communicated to the person concerned, or must only 'documents' already in existence relating to that criticism be communicated?

A — *The scope of Article 26 of the Staff Regulations*

taken by the Appointing Authority and affecting his administrative status and career from being based on facts concerning his conduct which are not contained in his personal file'.³

25. The first and second paragraphs of Article 26 of the Staff Regulations provide:

'The personal file of an official shall contain:

- (a) all documents concerning his administrative status and all reports relating to his ability, efficiency and conduct;
- (b) any comments by the official on such documents.

Documents shall be registered, numbered and filed in serial order; the documents referred to in subparagraph (a) may not be used or cited by the institution against an official unless they were communicated to him before they were filed.'

27. Like the Court of First Instance (see paragraph 81 of the judgment under appeal), I agree that the decision finalising a CDR falls within the scope of Article 26 of the Staff Regulations.

28. The fact that staff reports, once adopted, are mentioned in that provision as components of the personal file and must therefore be kept on that file⁴ does not mean that their adoption should be subject to the personal file rule since all the 'documents' used by the administration in order to draw up such a report must have previously been placed on the personal file of the official being appraised.

26. It is settled case-law that the purpose of those provisions of Article 26 of the Staff Regulations 'is to guarantee the official's right to defend himself by preventing decisions

3 — Case 140/86 *Strack v Commission* [1987] ECR 3939, paragraph 7. See also, for a similar wording, Case 88/71 *Brasseur v Parliament* [1972] ECR 499, paragraph 11; Case 233/85 *Bonino v Commission* [1987] ECR 739, paragraph 11; Case C-294/95 P *Ojha v Commission* [1996] ECR I-5863, paragraph 57; Case T-82/89 *Marcato v Commission* [1990] ECR II-735, paragraph 78; and Case T-547/93 *Lopes v Court of Justice* [1996] ECR-SC I-A-63 and II-185, paragraph 80.

4 — See *Bonino v Commission; Lopes v Court of Justice*, paragraph 82; and Case T-78/92 *Perakis v Parliament* [1993] ECR II-1299, paragraph 29.

29. It is of little significance in that regard whether reporting officers can be deemed to be the 'Appointing Authority' within the meaning of the judgments mentioned above. Moreover, a formulation that is used less often requires that the procedural guarantee contained in Article 26 of the Staff Regulations should be complied with more widely in any decision taken by 'the administration' which affects an official's administrative status and career.⁵

30. What determines the applicability of Article 26 of the Staff Regulations is the existence of a decision affecting an official's administrative status and career. That is indisputably the case of a decision finalising a CDR. As the Court of First Instance noted (see paragraph 6 of the judgment under appeal), the reporting and promotion periods are linked, in so far as an official is in principle promoted where both the sum of his merit points, which correspond to the marking contained in the CDR, and the sum of the priority points awarded him under the promotion procedure, accumulated during one or more periods, exceed the promotion threshold. Moreover, the Court of First Instance has had occasion to rule that a staff report must be drawn up in compliance with the provisions of Article 26 of the Staff Regulations.⁶

31. Thus, although the decision finalising a CDR does fall within the scope of the personal file rule, it remains to be decided whether that rule requires that findings of fact may give rise to unfavourable value judgments contained in a staff report only where they have previously been recorded in 'documents' within the meaning of Article 26 of the Staff Regulations, previously been placed on the personal file of the official being appraised or, at least, communicated to him.

32. The Court of First Instance gave that ruling, considering that, as the purpose of Article 26 of the Staff Regulations is to prevent decisions affecting an official's administrative status and career being based on matters concerning his conduct which are not mentioned in his personal file, any factual information which may give rise to a value judgment that is unfavourable to the official being appraised must have previously been recorded in a 'document' within the meaning of Article 26 of the Staff Regulations, placed on that official's personal file or, at least, communicated to him within a reasonable time after the occurrence of the matter criticised.

33. This interpretation means that the possibility of a matter for criticism being taken into account in an official's report is dependent upon the creation of a 'document' in the form of a written warning.

5 — See, in particular, Case T-293/94 *Vela Palacios v ESC* [1996] ECR-SC I-A-305 and II-893, paragraph 37.

6 — *Ibid.*, paragraphs 36 to 38.

34. However, that does not appear to be the line taken in the case-law of the Court of Justice. The Court of First Instance cites in support *Strack v Commission*⁷ (see paragraph 84 of the judgment under appeal). It is true that in proceedings for the recognition of an occupational disease the Court held that factual findings of a medical nature must appear in the personal file ‘in so far as the facts which they recount form the basis of reports concerning the ability, efficiency or conduct of the official’.⁸ It is clear that in that case those medical findings had been recorded in documents and the Court observed only that, contrary to what the Commission maintained, such documents although protected by medical confidentiality should have been placed on the personal file, since the facts they described were likely to influence the administrative situation or the course of the official’s career.⁹

35. Also, the Court annulled a decision appointing a competitor, on the ground that the appraisal report for the applicant’s trial period, on which the decision at issue was based, had not been included in his personal file so as to enable him to make his observations on it, in breach of Article 26 of the Staff Regulations.¹⁰ A decision on the early reassignment of an official in the interest of the service, based on a report

not placed on his personal file, or even communicated to him in advance, was also held to be unlawful because it was taken in breach of the second paragraph of Article 26 of the Staff Regulations.¹¹

36. The case-law of the Court of First Instance also requires *existing* documents to be placed in the personal file or, at least, to be communicated to the person concerned. The judges at first instance therefore regarded as a breach of the provisions of Article 26 of the Staff Regulations the fact that the opinions given by hierarchical superiors who were consulted in the context of a promotion or transfer procedure contained, in addition to assessments resulting from the comparative examination of candidates’ applications, information concerning a candidate’s ability, efficiency or conduct which had not previously been placed on his personal file or brought to his notice.¹² They also held that Article 26 of the Staff Regulations requires an interim assessment of the quality of the appellant’s work to be placed on his personal file, since it would serve in the preparation of his next staff report.¹³

37. The general guidelines of the case-law concerning the rules on personal files are

7 — Cited above.

8 — *Ibid.*, paragraph 13.

9 — *Ibid.*, paragraphs 4 to 14.

10 — See *Bonino v Commission*.

11 — See *Ojha v Commission*.

12 — See *Perakis v Parliament*, paragraphs 28 to 32. For a similar outcome, see Case T-76/92 *Tsirimokos v Parliament* [1993] ECR II-1281, paragraphs 34 and 35, and *Lopes v Court of Justice*, paragraphs 81 and 82.

13 — See *Vela Palacios v ESC*, paragraphs 36 to 38.

unambiguous. It is clear from them that any factual information concerning an official's conduct that is put in writing must be deemed to be a 'document' within the meaning of Article 26 of the Staff Regulations and, as such, placed on his personal file or, at least, previously brought to the notice of the person concerned. However, there is nothing in case-law¹⁴ which, to my knowledge, supports an interpretation of Article 26 of the Staff Regulations whereby a matter for criticism can be the subject of a decision affecting an official's administrative status and career unless it has previously been put in writing in a 'document'.

38. Without breaching the letter of that provision, I therefore agree with the Commission in considering that the second paragraph of Article 26 of the Staff Regulations requires the existence of documents within the meaning of subparagraph (a) of the first paragraph of Article 26, but does not lay down an obligation to create such documents.

14 — With one exception, which does not seem to me to be totally conclusive. In *Marcato v Commission*, paragraphs 73 to 81, the Court of First Instance annulled a decision of the Appointing Authority establishing a list of officials found to be the most worthy of promotion on the basis of a draft list submitted by the Promotion Committee, on the grounds that that committee had considered the applicant's conduct in the light of the oral statements made by the Director-General's representative despite the fact that, in view of the importance they thus assumed, those statements should, under Article 26 of the Staff Regulations, have been immediately put in writing and placed on the personal file of the applicant whose name had been excluded from that list. It would appear, however, from the reasons stated by the Court that that outcome was due to the fact that the applicant did not have the opportunity to put to the Promotion Committee his observations on the statements made by the Director-General's representative and that therefore his right to a fair hearing had been infringed.

B — *The scope of the principle of observance of the right to a fair hearing*

39. Although the letter of Article 26 of the Staff Regulations does not make such a requirement, it is appropriate at this point to consider whether the interpretation of that article in the light of the principle of observance of the right to a fair hearing or that principle itself does not require that a matter cannot give rise to an unfavourable assessment in an official's report unless it has previously been put in writing in a 'document' or, at least, been the subject of written warnings during the reporting period, brought to the notice of that official within a reasonable period.

40. The Court of First Instance places the interpretation it adopts of the personal file rule in the wider context of the principle of observance of the right to a fair hearing (see paragraph 79 of the judgment under appeal).

41. Indeed, it is settled case-law that 'observance of the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law'.¹⁵ That principle

15 — See, for example, Case C-301/87 *France v Commission* ('*Boussac Saint Frères*') [1990] ECR I-307, paragraph 29; Case C-135/92 *Fiskano v Commission* [1994] ECR I-2885, paragraph 39; Case T-260/94 *Air Inter v Commission* [1997] ECR II-997, paragraph 59; and Case T-277/03 *Vlachaki v Commission* [2005] ECR-SC I-A-57 and II-243, paragraph 64.

was thus held to apply to anti-dumping proceedings,¹⁶ competition proceedings,¹⁷ proceedings concerning State aid,¹⁸ and, of course, in the field of law relating to the employment of Community officials.¹⁹

42. Like any general principle of law, this principle is intended to compensate for the absence of legislation guaranteeing the right to a fair hearing or for any gaps in such legislation, since it applies 'even in the absence of any rules governing the procedure in question'²⁰ or 'even in the absence of any specific rules'.²¹ It could therefore impose procedural restrictions stronger than those provided for by legislation in order to guarantee the right to a fair hearing.

43. This applies all the more where, as is the case for reporting officers when assessing the work of persons on whom they must report, the writer of the report has wide discretion,

exercise of which is subject only to limited review.²² In such cases, the Community judicature strengthens the formal and procedural restrictions with which it requires adoption of the decision to comply. As it has held, 'where the administration has such a power of appraisal, observance of the rights guaranteed by the Community legal order ... is of even more fundamental importance. Those guarantees include, in particular, ... the right of the person concerned to make his views known and to have an adequately reasoned decision'.²³

44. It is known that generally this principle 'requires that the addressees of decisions which adversely affect their interests should be placed in a position in which they may effectively make known their views on the evidence against them on which that decision will be based'.²⁴

45. Is it necessary for that purpose, as the Court of First Instance held, for factual

16 — See, for example, Case C-49/88 *Al-Jubail Fertilizer v Council* [1991] ECR I-3187, and Case C-458/98 P *Industrie des poudres sphériques v Council* [2000] ECR I-8147.

17 — See Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461.

18 — See Case 234/84 *Belgium v Commission* [1986] ECR 2263, and *Boussac Saint Frères*.

19 — See Case T-237/00 *Reynolds v Parliament* [2002] ECR II-163, and *Vlachaki v Commission*.

20 — *Belgium v Commission*, paragraph 27, and *Air Inter v Commission*, paragraph 59.

21 — *Vlachaki v Commission*, paragraph 64. Or again 'even in the absence of any express provision to that effect in the rules governing the procedure in question' (*Reynolds v Parliament*, paragraph 86).

22 — See, to that effect, Case 207/81 *Ditterich v Commission* [1983] ECR 1359, paragraph 13, and Case T-278/01 *Den Hamer v Commission* [2003] ECR-SC I-A-139 and II-665, paragraph 58.

23 — See Case T-23/91 *Maurissen v Court of Auditors* [1992] ECR II-2377, paragraph 41, in which the Court of First Instance made a similar ruling, in the situation of the procedure for appraisal of an official, to the ruling the Court of Justice had given earlier in the specific context of the Common Customs Tariff (see Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14).

24 — See, for example, *Reynolds v Parliament*, paragraph 101, and *Vlachaki v Commission*, paragraph 64. See, for a slightly different but equivalent wording, Case C-462/98 P, *Medio-curso v Commission* [2000] ECR I-7183, paragraph 36.

information giving rise to criticism of an official and used in the preparation of a staff report to have been put in writing and communicated to the official being appraised within a reasonable period of their occurrence?

46. The appellant regards the adoption of that stance as a failure to have regard to the scope of the principle of observance of the right to a fair hearing. In its view, the right to a fair hearing can be exercised solely within the actual procedure which is liable to culminate in a measure having an adverse affect; it does not imply an obligation on the originator of that measure to give the person concerned a warning before initiating such a procedure.

47. I consider this ground to be well founded. What is important as regards observance of the right to a fair hearing is that the person concerned may be allowed to express his views '*adequately*' concerning the evidence against him. In other words, it is necessary and sufficient that his observations may be made at the right time to be useful for his defence, that is to say, at a time when they may still alter the assessment of the originator of the measure and thus influence the negative content of the measure the latter is envisaging taking.

48. The appraisal procedure as a whole is based on the adversarial principle in order to guarantee the official being appraised a fair

hearing. He is able to express his views at various stages before the staff report is finalised. To summarise the procedure,²⁵ it begins with a discussion between the official and the reporting officer, and if the official is not satisfied with the report then drawn up by the latter he may ask for a meeting with the countersigning officer, at the end of which the latter may amend the report; finally, if the official is not satisfied with the countersigning officer's decision, he may make a reasoned appeal to the JEC, which issues an opinion in the light of which the appeal assessor finalises the staff report. It is agreed between the parties that in this case, following the meeting Mr De Bry had with the countersigning officer, the latter amended some of the reporting officer's descriptive comments.

49. Moreover, case-law requires observance of the right to a fair hearing, that is to say, that an official to whom a decision is addressed which significantly affects his interests should be offered the opportunity to express his views '*adequately*' only *once* the procedure liable to culminate in such a decision has been *initiated*. This is to be inferred from the words: observance of the right to be heard is required '*in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person*'.²⁶ More specifically, the Court of Justice held that, in the context of anti-dumping proceedings, the undertakings concerned should have been placed

²⁵ — See point 7 above.

²⁶ — Emphasis added (see case-law cited in point 41 above).

in a position in which they could make known their views 'during the administrative procedure'.²⁷ Likewise, in connection with a report from the Court of Auditors, which may also contain value judgments that are unfavourable towards a person, the Court of Justice held that, according to the adversarial principle, a person referred to by name should be invited to express his views on the points concerning him which were 'intended' for inclusion in that report before the report was 'definitively drawn up'.²⁸ It was also held that, in the context of competition proceedings, the principle that both parties must be heard, an essential aspect of the right to a fair hearing, need only be observed from the time the statement of objections was delivered to the undertaking against which proceedings had been brought and not from the preliminary inquiry stage.²⁹ Lastly and above all, the Court of First Instance itself rejected a plea alleging infringement of the right to a fair hearing relied on against a decision adopting a staff report because the applicant had been heard by the appeal assessor, had had the opportunity to refer the matter to the Joint Committee on Staff Reports and had submitted lengthy observations to that committee.³⁰

50. It is purely in an exceptional case that the only way of enabling an official to express his views adequately on matters for which he is criticised that are liable to be taken into account in a decision affecting his administrative status or career is for those matters to

have been recorded in a document which must have been communicated within a reasonable period of their occurrence. It is necessary for there to be a procedure which is liable to culminate in a measure having an adverse effect which does not otherwise offer an opportunity for that person to express his views adequately on those matters.³¹ As I have just shown, that is not so in the present case.

51. The Court of First Instance maintains, however, that an official being appraised can express his views adequately during the appraisal procedure only with regard to the value judgments themselves, that is to say, the descriptive comments and the marking as a numeric transcription of those comments, and not the factual information which provided the basis for those value judgments (see paragraphs 82 and 83 of the judgment under appeal). In other words, Mr De Bry was not able to defend himself against criticisms of lack of punctuality, a finding which tarnished the glowing assessment that he was 'always available to finish his work by working overtime during the week, and even at weekends'.

52. I admit I do not fully understand the relevance of the distinction so far as observance of the right to a fair hearing is concerned. The criticism of failure to observe normal working hours may be made, and can be proved or disproved; it is not a

27 — *Industrie des poudres sphériques v Council*, paragraph 99 (emphasis added).

28 — Case C-315/99 P *Isméri Europa v Court of Auditors* [2001] ECR I-5281, paragraphs 29 and 30.

29 — See Joined Cases 46/87 and 227/88 *Hoechst v Commission* [1989] ECR 2859, paragraphs 15 and 16).

30 — See *Den Hamer v Commission*, paragraph 73.

31 — See footnote 14 above.

matter for discussion. As for any justification for the lack of punctuality that Mr De Bry might put forward to avoid an unfavourable assessment, in order for him to have an effective right to a fair hearing that justification must be put forward in the course of the appraisal procedure.

53. Indeed, as the Commission rightly states, the obligation on a reporting officer to warn an official being appraised in writing of any matter for which he is liable to be criticised in his staff report within a reasonable period after it occurs significantly changes the very meaning of the right to be heard. It is no longer a right to a fair hearing, it becomes a right to be warned. The purpose of such a right is no longer to place the person concerned in a position in which he can express his views adequately on the matters for which he is criticised that are being taken into account as the basis for a measure which adversely affects him; it is to enable that person to behave in such a way that the conditions for the adoption of such a decision are not met. The acceptance that such a procedural guarantee goes beyond the limits of observance of the right to a fair hearing is, moreover, clear from the grounds of the judgment under appeal. In paragraph 86 of its judgment, the Court of First Instance states in fact that a single written warning concerning his lack of punctuality, sent to the appellant within the appropriate time, would have enabled the latter to defend his interests adequately, either by challenging the criticism or by taking it into account in order to improve his conduct in the service. As I said above, a challenge to the criticism may still be made adequately in the course of

the appraisal procedure. Improving one's conduct in the service is an objective which goes beyond the scope of observance of the right to a fair hearing.

54. That objective is in fact served by the staff report. As the Court of First Instance itself acknowledged, the comments contained in a staff report 'may help an official to improve, where necessary, his merit points, on which the progress of his career necessarily depends'.³²

55. As regards the argument that the need to give Mr De Bry written warnings about his lack of punctuality was increased in this case by the fact that his failure to comply with normal working hours had not given rise to an unfavourable assessment in his previous staff report (see paragraph 89 of the judgment under appeal), that argument is not convincing. A different marking from that given in the previous appraisal, although it requires a more detailed statement of reasons,³³ cannot have any effect whatsoever on the scope of observance of the right to a fair hearing.

32 — Judgment of 20 April 2005 in Case T-86/04 *Sundholm v Commission*, paragraph 32, not published in the ECR.

33 — See, in particular, Case 178/86 *Turner v Commission* [1987] 5367, and Case T-1/91 *Della Pietra v Commission* [1992] ECR II-2145, paragraph 30.

56. Finally, the obligation to put in writing and communicate to an official within a reasonable time any matter concerning his behaviour that is liable to support the inclusion of an unfavourable assessment in his staff report is not affected by the principle of the right to a fair hearing and entails considerable practical difficulties. It means that reporting officers must constantly, on a daily basis, observe the behaviour of officials being appraised and must react very quickly by writing notes, and it makes the keeping of personal files more difficult because they are soon likely to become difficult to handle due to their size. Lastly, it tends to overformalise relations between superiors and their staff, which can only create a source of tension.

C — *The scope of the Appraisal Guide*

57. It remains to be decided whether, as the Court of First Instance maintained (see paragraph 91 of the judgment under appeal), the Appraisal Guide required in the present case a more binding acceptance of the principle of observance of the right to a fair hearing and/or of Article 26 of the Staff Regulations as requiring an official's hierarchical superiors to put in writing within the appropriate time any matters for which he is liable to be criticised in the next CDR.

58. It is true that the Appraisal Guide, which the Commission brought to the attention of its staff in July 2002, can be classed as an internal directive and must, as such, be regarded as a code of conduct for guidance purposes which the administration has imposed on itself. The Commission is therefore required to comply with it unless it gives the reasons which have led it not to do so, since otherwise the principle of equality of treatment would be infringed.³⁴

59. However, the way the Court of First Instance presents the requirements imposed on reporting officers by the Appraisal Guide does not convince me. It seems to me to be excessive to interpret it as requiring any criticism of a matter concerning the behaviour of the person concerned to be put in writing and communicated within a short time after it has occurred. The Appraisal Guide stresses the need for 'timely and constructive feedback [to] be given on a regular basis' so that the appraisal does not come as 'a surprise to the jobholder' (Chapter 3 of the guide). Point 3.2 of the Appraisal Guide states that the feedback 'should be related to specific areas of behaviour' and 'be provided as quickly as possible after the work has been done'. From that point of view, it is true that it requires reporting officers 'to collect examples of work ..., to keep copies of them or write

34 — As it appears from settled case-law. See, in particular, Case 148/73 *Louwage v Commission* [1974] ECR 81, paragraph 12; Case 190/82 *Blomefield v Commission* [1983] ECR 3981, paragraph 20; Joined Cases 129/82 and 274/82 *Lux v Court of Auditors* [1984] ECR 4127, paragraph 20; and Case T-165/01 *McAuley v Council* [2003] ECR-SC I-A-193 and II-963, paragraph 44.

notes' (point 3.1 of the Appraisal Guide). However, it would be wrong to interpret those requirements as meaning that a note must be written regarding each particular aspect of behaviour. The guide states, moreover, in Chapter 3, that feedback may be given through 'formal and *informal* reviews and *one-to-one discussion*'.³⁵ In other words, the criticism concerning a specific behavioural matter may very well take the form of an oral warning.

iors should inform officials being appraised as soon as possible of criticisms that might be made of them in order to enable them to improve their conduct in the service and, thus, ensure the proper functioning of the service.

60. At any event, these requirements laid down in the Appraisal Guide cannot be interpreted as a specific, more binding, expression of observance of the right to a fair hearing. That right, the right to be heard, as has been seen, is a requirement only in the context of the appraisal procedure, and not during the reporting period. The right to be warned, at least orally, as provided in the Appraisal Guide, is more a requirement of good management. It is, in fact, a matter of good management that hierarchical super-

61. It may be argued, it is true, that observance of the right to a fair hearing is 'in the interest of good management'.³⁶ However, although observance of the right to a fair hearing may be seen as a component of good management, that concept goes far beyond the framework of that procedural guarantee. That is so in particular in so far as good management imposes an obligation on reporting officers to warn officials being appraised of any matters which might give rise to an unfavourable assessment in the staff report within a short time of their occurrence.

62. It follows from all the above considerations that the judgment under appeal is vitiated by an error of law in that it failed to have regard to the scope of observance of the right to a fair hearing with regard both to the fundamental principle and to Article 26 of the Staff Regulations and the Appraisal Guide.

35 — Emphasis added.

36 — See, for example, *Vlachaki v Commission*, paragraph 64.

III — Conclusion

63. For those reasons, I suggest that the Court should allow the ground of appeal alleging infringement of Community law and therefore set aside the judgment delivered by the Court of First Instance of the European Communities on 12 July 2005 in Case T-157/04 *De Bry v Commission*.