

OPINION OF ADVOCATE GENERAL

GEELHOED

delivered on 23 February 2006¹

I — Introduction

1. In this application, the Commission requests the Court to find that in recruiting and benefiting two of her personal acquaintances during her term in office as a member of the Commission, Mrs Edith Cresson was guilty of favouritism, at least, of gross negligence. The Commission maintains that Mrs Cresson thereby acted in violation of her obligations under Article 213(2) EC and Article 126(2) EA.² It, therefore, requests the Court to impose an appropriate financial sanction as provided for in the final paragraph of these Treaty provisions.

2. This case is the first of its kind which will lead to a judgment by the Court. A previous case, brought by the Council against former Commissioner Bangemann in respect of an

appointment he intended to accept after his term of office, was withdrawn.³ The case, therefore, provides the Court with a unique opportunity to clarify which obligations are incumbent on members of the Commission within the meaning of Article 213 EC. And indeed, more generally, the Court's judgment will be of relevance in laying down standards for all those holding high office within the institutions of the European Union.

II — Legal framework

3. Article 213(2) EC provides:

‘The Members of the Commission shall, in the general interest of the Community, be completely independent in the performance of their duties.

1 — Original language: English.

2 — As both provisions are identical, throughout the rest of this text reference will be made to Article 213(2) EC only.

3 — Case C-290/99 *Council v Bangemann*, removed from the Court's register by order of 3 February 2000, OJ 2000 C 122, p. 17.

In the performance of these duties, they shall neither seek nor take instructions from any government or from any other body. They shall refrain from any action incompatible with their duties. Each Member State undertakes to respect this principle and not to seek to influence the Members of the Commission in the performance of their tasks.

guilty of serious misconduct, the Court of Justice may, on application by the Council or the Commission, compulsorily retire him.'

The Members of the Commission may not, during their term of office, engage in any other occupation, whether gainful or not. When entering upon their duties they shall give a solemn undertaking that, both during and after their term of office, they will respect the obligations arising therefrom and in particular their duty to behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits. In the event of any breach of these obligations, the Court of Justice may, on application by the Council or the Commission, rule that the Member concerned be, according to the circumstances, either compulsorily retired in accordance with Article 216 or deprived of his right to a pension or other benefits in its stead.'

III — Facts presented by the Commission

4. Article 216 EC provides:

'If any Member of the Commission no longer fulfils the conditions required for the performance of his duties or if he has been

5. Mrs Edith Cresson was a Member of the European Commission from 24 January 1995 until 8 September 1999. The Commission had resigned collectively on 16 March 1999, but stayed in function until 8 September 1999. Her portfolio within the Commission included the fields of Science, Research and Development, Joint Research Centre (JRC) and Human resources, education, training and youth. The Commission services responsible for these fields at the time were Directorates-General (DG) XII, XIII.D and XXII and the JRC.

6. The Commission's allegation that Mrs Cresson displayed favouritism whilst in office is based on dossiers concerning two of her acquaintances, Mr René Berthelot and Mr Timm Riedinger.

A — *The Berthelot dossier*

7. Shortly after taking up office, Mrs Cresson expressed her wish to recruit Mr Berthelot as a personal adviser. Mr Berthelot, who was a trained dentist, at the time lived close to Châtellerault, a town in France of which Mrs Cresson was mayor. In view of the fact that Mr Berthelot was 66 years old and her cabinet had already been constituted, Mrs Cresson was advised by her chef de cabinet that he saw no possibilities for him being recruited by the Commission. Nevertheless, some months later at Mrs Cresson's request, Mr Berthelot was offered a contract as a visiting scientist at DG XII as from 1 September 1995 for an initial period of six months. Although the position of visiting scientist implies that the person concerned works in one of the Commission's centres or services dealing with research, it turned out that Mr Berthelot worked exclusively as a personal adviser to Mrs Cresson. The initial period of six months ultimately was extended till the end of February 1997.

8. At the end of April 1996, in application of an anti-accumulation rule which was applicable to visiting scientists, Mr Berthelot's salary was reduced in order to take account of a pension he was receiving in France. Shortly after this measure was taken, at Mrs Cresson's personal request, 13 mission orders to Châtellerault were drawn up in Mr Berthelot's name and sent to the Commission's administrative services. These orders referred to missions which allegedly took place between 23 May and 21 June

1996. In consequence, an amount of EUR 6 930 was transferred to Mr Berthelot. As from 1 September 1996, Mr Berthelot was reclassified into a higher grade for visiting scientists which resulted in a significant salary increase of some EUR 1 000. This increase more than compensated the loss of salary due to the application of the anti-accumulation measure.

9. At the expiry of his contract with DG XII, Mr Berthelot was offered a new contract as a visiting scientist, this time at the JCR, for a period of one year. This extended his stay at the Commission to two and a half years, despite the fact that visiting scientists are only engaged for a maximum period of 24 months.

10. On 2 October 1997, the Commission's auditing department asked for the reports of activities which Mr Berthelot should have submitted at the end of his first contract. The reports which were sent to this department were extremely brief. In fact, they consisted of a number of memos drafted by different authors, which were put together by Mrs Cresson's cabinet.

11. On 11 December 1997, Mr Berthelot, for medical reasons, requested the termination of his contract as from 31 December 1997. This request was accepted. Mrs Cresson, thereupon, asked her chef de cabinet to find a solution in order to prolong the contractual relationship with Mr Berthelot as from 1 January 1998. This solution consisted of him being engaged as a special adviser. However, Mr Berthelot refused to accept this position.

15. Although the necessary budgetary commitments were registered for these three contracts, none of them was performed, nor was any payment made in respect of them to Mr Riedinger.

12. Mr Berthelot died on 2 March 2000.

IV — Procedure

A — Preliminary enquiries

B — *The Riedinger dossier*

13. Mr Riedinger, who is a commercial lawyer, was offered three contracts in 1995 by Commission services coming within Mrs Cresson's purview. At least two of these were offered at her express request.

16. Prior to the Commission's application to the Court under Article 213 EC, the dossiers relating to Mr Berthelot and Mr Riedinger were the subject of a number of enquiries by various bodies. The Commission's application is based on the findings of these enquiries.

14. These contracts related to the following three subjects: (1) an analysis of the feasibility of establishing a network between think-tanks centres in Central Europe and the European Community, (2) the accompaniment of Mrs Cresson on an official visit to South Africa from 13 to 16 May 1995 and the drafting of a report and (3) a pre-feasibility study on establishing a European institute for comparative law.

17. The first was conducted by the Committee of Independent Experts, created under the auspices of the European Parliament. Its task was to draft a first report which 'could seek to establish to what extent the Commission, as a body, or Commissioners individually, bear specific responsibility for the recent examples of fraud, mismanagement or nepotism raised in Parliamentary discussions, or

in the allegations which have arisen in those discussions'. In its report of 15 March 1999,⁴ the Committee concluded in respect of the Berthelot dossier that 'what we have here is a clear-cut case of favouritism. A person whose qualifications did not correspond to the various posts to which he was recruited was nonetheless employed. The work performed was manifestly deficient in terms of quantity, quality and relevance. The Community did not get value for money'.⁵

18. In the wake of the Committee of Independent Experts' Report, the Commission, which took office on 9 September 1999, decided to instigate a process of reforms aimed at preventing the practices which had been criticised by the Committee and to improve its internal administrative and financial procedures. In this context, OLAF (Office européen de lutte anti-fraude) conducted its own investigation which resulted in a report of 23 November 1999. Thereupon disciplinary proceedings were opened in respect of a number of Commission officials and agents.

19. On 20 February 2001, the Commission decided to start proceedings to recuperate the amounts which were unduly paid to Mr Berthelot. This procedure concerns his heirs.

20. A further investigation was undertaken by DG ADMIN and later, following its establishment on 19 February 2002, by IDOC (Investigation and Disciplinary Office of the Commission) in respect of the Riedinger dossier. It also conducted two additional enquiries into the Berthelot case, one in respect of the role of DG XII, the other in respect of the involvement of the JRC. During these enquiries many hearings took place. Mrs Cresson was invited by the competent services and by the Commissioner responsible for the internal reforms, Mr Kinnock, to be heard. Mrs Cresson, however, preferred to provide written answers. A report relating to Mr Riedinger was finalised on 8 August 2001. An IDOC report dealing exclusively with the Berthelot case was presented on 22 February 2002.

B — Procedure within the Commission in respect of Mrs Cresson

21. On 21 January 2003, the College of Commissioners decided to address a notice of objections (*communication des griefs*) to Mrs Cresson in the context of a possible procedure based on Article 213(2) EC. In this notice the Commission asserted that in the cases of Mr Berthelot and Mr Riedinger, Mrs Cresson had acted in violation of the obligations arising from the office of a Member of the Commission. It considered that her behaviour in both cases was not determined by the general interest, but was essentially guided by the wish to favour two

4 — Committee of Independent Experts, First Report on Allegations regarding Fraud, Mismanagement and Nepotism in the European Commission.

5 — At paragraph 8.1.35 of the report.

of her personal acquaintances. At any rate she had not exercised due caution, by verifying whether the internal procedures had been respected in the two cases. The Commission therefore accused her of a breach of the obligations arising from her office either intentionally or, at least, as a result of gross negligence.

22. In order to respect the rights of the defence, the Commission also decided to grant Mrs Cresson access to the case-file and to invite her to respond to the Commission's notice of objections. This was followed by voluminous correspondence between Mrs Cresson's counsel and the Commission on the scope of the proceedings and on whether she should be granted access to certain documents.

23. Mrs Cresson responded to the notice of objections on 30 September 2003. She contests primarily that Article 213(2) EC is the appropriate legal basis for the notice of objections. She also claims that this provision violates fundamental rights of the defence. She asserts, furthermore, that the facts of which she is accused are not covered by this article. At any rate, the Commission's objections have not been substantiated. She criticises the imprecision of the notions of favouritism and gross negligence as defined in the notice of objections. Finally, she demands an amount of EUR 50 000 in damages for the material and moral harm she has suffered as a result of the disciplinary proceedings against her.

24. In the light of her written observations, the Commission decided to repeat its offer to hear Mrs Cresson directly and personally by the College of Commissioners. The hearing took place on 30 June 2004.

25. The Commission decided to apply to the Court in its meeting of 19 July 2004.

C — Criminal proceedings in Belgium

26. In parallel to the enquiries and the procedure conducted within the Commission, the Berthelot dossier was the subject of a criminal investigation by the Belgian criminal authorities. This procedure was initiated following a complaint lodged by a Member of the European Parliament against a number of persons believed to have been involved with various malpractices within the Commission, including Mrs Cresson. The Commission intervened in the proceedings as a civil party.

27. The investigating judge (juge d'instruction) considered whether criminal liability could be established for Mrs Cresson in respect of the following points:

- the recruitment of Mr Berthelot as a visiting scientist in breach of the Commission's internal rules, considering that this could be qualified as forgery and conflict of interest in public office (*faux, usage de faux et prise d'intérêt*);

- Mr Berthelot's final reports — forgery and fraud;

- orders and declarations (*décomptes de mission*) for Mr Berthelot's missions — forgery and fraud.

28. At the following stage of these proceedings, the public prosecutor, however, decided to withdraw the first point on the grounds that the recruitment was not contrary to Community rules. The second point was rejected as it was not directed against Mrs Cresson. As to the third point, it was initially maintained, but finally also dismissed.

29. By order of 30 June 2004, the *Chambre du conseil* of the *Tribunal de première instance* in Brussels decided that there were no grounds for continuing the criminal proceedings against the accused (*non-lieu*). As regards Mrs Cresson, in particular, the court observed that there was no charge that she was aware of the facts at issue.

D — *Procedure before the Court*

30. The Commission's application was registered on 7 October 2004.

31. The Commission requests the Court to:

- rule that Mrs Cresson has acted in breach of the obligations incumbent on her under Article 213 EC;

- wholly or partially deprive Mrs Cresson of her pension rights and/or all other benefits linked to those rights or of other benefits in its stead, whereby the Commission leaves it to the discretion of the Court to determine the scope and the duration of the deprivation of those rights;

- order Mrs Cresson to pay the costs of these proceedings.

33. By Order of the President of the Court of 2 June 2005 the French Republic was granted leave, in accordance with Article 93(7) of the Rules of Procedure, to intervene during the oral hearing in support of Mrs Cresson.

32. Mrs Cresson requests the Court:

- primarily, to declare the application lodged by the Commission inadmissible;

34. By Order of the Court of 9 September 2005, Mrs Cresson's request to order the Commission to provide access to a number of documents relating to the Commission's decision to initiate proceedings against her under Article 213(2) EC, was rejected.

- in the alternative, to reject the application as being illegal and unfounded;

35. The Commission and Mrs Cresson, as well as the French Republic, presented oral observations at the hearing on 9 November 2005.

- to order the Commission to submit the complete minutes of the discussions which led this institution to adopting, on 19 July 2004, the decision to apply to the Court, as well as a number of other documents listed in the defending party's request and confirmative requests of 26 April and 5 October 2004 respectively;

V — Submissions of parties

A — Commission

1. Article 213 EC

- to order the Commission to pay the total of the costs.

36. The Commission explains that an action based on Article 213(2) EC against a (former)

Member of the Commission presupposes that he or she has acted in violation of the obligations arising from that office, within the meaning of that Treaty provision. The Commission considers that it is up to it to determine the substance and scope of these obligations under the judicial scrutiny of the Court. In its view, there is a breach of these obligations where a Commissioner does not act in the general interest or where he is guided by personal, private or financial interests.

must comply with the applicable Community rules on recruitment and they have a duty to verify with particular care that decisions in this regard are taken in the general interest and in accordance with the applicable rules. This duty extends to all of the administrative stages following the recruitment of a person, concerning e.g. the extension of a contract, or promotions.

37. In the light of this interpretation, favouritism is both contrary to the general interest and the integrity and discretion which attaches to the office of Commissioner. The Commission defines favouritism as an act or an attitude which is contrary to both the general interest and integrity of public office and consisting of according an advantage to a person (often through recruitment) who possesses neither merit nor competence or whose merits are manifestly insufficient having regard to the position to be fulfilled or where the advantage has been conferred without having regard to the position concerned, but is conferred because it involves a personal friend or any other person one wishes to reward.

38. The Commission points out that in certain cases Members of the Commission enjoy large discretion and that this is especially the case where it comes to composing their cabinets. Beyond that, they

2. Response to Mrs Cresson's response to the notice of objections

39. In its application, the Commission responds to Mrs Cresson's reaction to the notice of objections.

40. Mrs Cresson contests that the Commission's application can be based on Article 213 EC and contends that the procedure laid down in this provision has no bearing on the objections raised against her. It also does not provide an effective judicial remedy. The Commission, on the contrary, maintains that Article 213 EC does constitute an appropriate legal basis for its application. This procedure can be compared with procedures laid down in national constitutions in respect of misuse of public office. There, direct access is opened to the highest court of the land, precisely with a view to providing additional guarantees. The behaviour and

acts of Members of the Commission are subject to specific provisions. The disciplinary rules applicable to Community officials do not apply to them. The Commission does not consider that Article 213 EC disregards the right to an effective judicial remedy. Article 213(2) EC relates to all obligations incumbent on Commissioners and not only to the examples named in that provision.

41. Where Mrs Cresson objects that the IDOC reports cannot constitute the basis for the notice of objections due to a lack of competence, the Commission observes that administrative enquiries had commenced before the creation of this service. The notice of objections was based both on these enquiries and on the IDOC and OLAF reports. At any rate, it is the Commission and not IDOC, who addressed the notice of objections to Mrs Cresson.

42. The Commission denies that Mrs Cresson's rights of the defence were violated, as she claims. As to her right for proceedings to be introduced within a reasonable delay, it observes that no delay is mentioned in Article 213 EC, nor has Mrs Cresson demonstrated that the time-lapse in any way affected her right to defend herself. The Commission was required to act with

due caution in applying Article 213 EC for the first time. It cannot be said, furthermore, that the procedure laid down in Article 213 EC is inequitable, as it implies that the rules of the Statute of the Court of Justice and the Rules of Procedure are respected. The decision to institute proceedings before the Court was not preceded by a decision adversely affecting her interests. The procedure did not affect Mrs Cresson's right to be informed of reasons underlying the accusation. It is clear from her response to the notice of objections that she was fully aware of the Commission's complaints and that she had every opportunity to respond. As to the alleged partiality of the Commission, the latter observes that it is not it, but the Court which decides whether or not a sanction should be imposed. Finally, as regards the infringement of her right to access to documents, the Commission remarks that at all times she was offered access to the case-file regarding her.

43. As regards the effects of the decision in the Belgian criminal investigation, the Commission observes that 'le pénal tient le disciplinaire en l'état' referred to by the Court of First Instance in *François*⁶ means that disciplinary proceedings must be suspended pending the outcome of the criminal procedure. At any rate the principle should apply, not to the Commission, but to the Court, as it is the disciplinary body in this context. The Commission does accept that the disciplinary body is bound by the findings of fact the by criminal court. However, this is of no assistance to Mrs

6 — Case T-307/01 *François v Commission* [2004] ECR II-1669

Cresson as the decision in the criminal proceedings do not relate to the facts which are at issue in the present proceedings, i.e. the favouritism demonstrated in recruiting Mr Berthelot and in renewing his contract and in the steps taken to favour Mr Riedinger. The decision not to further prosecute Mrs Cresson does not therefore constitute a legal barrier to the present disciplinary action.

the Commission remarks that this service possesses a general mandate to investigate suspected fraud and that there was no need to issue specific mandates for each step of the procedure. Neither was the Commission obliged to inform Mrs Cresson of its contacts with OLAF. Nor did summaries of certain meetings need to be undersigned. Finally, the Commission does not see the relevance of the alleged illegality of the Report of the Committee of Independent Experts, as its application is based on its own inquiry into the facts.

44. The Commission contests Mrs Cresson's argument in respect of the applicability of a *de minimis* rule concerning the amounts involved. If at all valid, such an argument relates to the substance, not to the admissibility of the Commission's application.

46. Where Mrs Cresson claims damages, the Commission fails to see how the introduction of Article 213 EC proceedings can amount to wrongful conduct, unless the relevant decision constitutes misuse of powers or is perverse, e.g. by the presentation of an empty file.

45. Mrs Cresson claims that a series of procedural irregularities occurred in respect of the enquiries conducted within the Commission. She thus refers to an infringement of the decision establishing IDOC, the fact that IDOC encroached upon the domain reserved to OLAF, the fact that the IDOC reports were incomplete, the fact that disciplinary procedures overlapped and the fact that the problem relating to Mr Riedinger was addressed in the context of the Berthelot dossier. The Commission responds that there is no indication of how these alleged irregularities affected the rights of the defence. Furthermore, as regards her observations on the enquiry conducted by OLAF,

3. The Dossiers of Berthelot and Riedinger

47. The essential facts relied on by the Commission have already been summarised in Chapter III of this Opinion. Rather than repeating those here, suffice it to note that the Commission submits that, taken together, the two cases provide evidence of personal intervention by Mrs Cresson in favour of two of her personal acquaintances. Although formally speaking it was the

service involved or her cabinet which acted, it must be concluded that the relevant decisions can be attributed to Mrs Cresson. The Commission takes the view that Mrs Cresson's behaviour constitutes a serious breach, either intentionally or, at least, through gross negligence, of her obligations under Article 213(2) EC.

B — *Mrs Cresson*

1. General observations

4. Sanction

48. The Commission requests the Court to impose a sanction, but leaves it up to the Court to determine its extent. This could result in either the full or the partial deprivation of pension rights or in the deprivation of other benefits. The Commission takes the view that a sanction should be imposed taking the principle of proportionality into account. In this regard, it suggests that the factors mentioned in Article 10 of Annex IX to the Staff Regulations could be relevant. In the present case the Commission considers that the misconduct was serious as it concerned an ethical rule which undermined confidence in Mrs Cresson, even though she no longer is a Member of the Commission; that she fully realised that her acts constituted favouritism; and that there are credible indications that at least certain of Mrs Cresson's acts were intentional.

49. First of all, Mrs Cresson complains of the veritable war machine which has been deployed against her, having had to appear before the Budgetary Control Committee of the European Parliament (Cocobu) and having been subject to consecutive enquiries by OLAF, IDOC and DG ADMIN. These measures are out of all proportion to the facts of which she is accused. This can undoubtedly be explained by the climate surrounding the whole affair which led to the collective resignation of the Santer Commission. She next sets out that the affair was sparked by a newspaper article published by a Belgian journalist, who has been convicted in Belgium and France for several criminal offences. Subsequently, a former Commission official, Mr Van Buitenen, in his quest to reveal alleged instances of fraud against the interests of the Community, sent the file to the Belgian justice authorities, the Committee of Independent Experts, OLAF and the press. In June 1999, a Belgian investigating judge took up the file and obtained the waiver of Mrs Cresson's immunity.

50. As to the criminal proceedings in Belgium, Mrs Cresson points out that she was heard only once by the investigating judge during a period of five years. She observes that the Commission sent its notice

of objections about the time she learned from the press that she was being charged. This illustrates the close link between the disciplinary and criminal proceedings. Mrs Cresson emphasises that ultimately no charge was maintained against her and that that procedure ended in a decision not to pursue the criminal proceedings (*non-lieu*). Moreover, the Commission did not appeal against this decision.

2. Legal arguments

(a) Inadmissibility

51. As regards the procedure before the Commission, it was only three years after the resignation of the Santer Commission that she was informed of the fact that the Commission considered that she had been guilty of favouritism and that this constituted a serious breach of her obligations as a Commissioner. The procedure was also criticised by Mrs Cresson's counsel in respect of the time-limits for reacting, the independence of the Commission, the respect of fundamental rights and the absence of a clearly defined procedural framework for dealing with the matter. Mrs Cresson also notes that the Secretary-General of the Commission at one point raised the question of the coordination of the criminal and the disciplinary proceedings. Mrs Cresson considers that given the manner in which the proceedings were conducted and, particularly, the fact that no questions were addressed to Mrs Cresson during the hearing by the College of Commissioners, the Commission was apparently intent on transferring the file to the Court.

52. Mrs Cresson argues that in view of the purpose of Article 213 EC to enable heavy sanctions to be imposed on Members of the Commission, it should be interpreted strictly. She recalls that Article 213(2), first and second paragraphs, EC, require Members of the Commission 'in the general interest of the Community [to] be completely independent in the performance of their duties'. If they fail to do so the provisions of Article 216 EC are applicable. By contrast, Article 213(2), third paragraph applies when a Commissioner does not display integrity and discretion in accepting to undertake external activities whilst they are in office or after the end of their mandate. In that case, the sanction is either retirement in accordance with Article 216 EC or the deprivation of pension rights or other benefits. As Mrs Cresson is not accused of acting in breach of her duties in relation to external activities, the provisions of Article 213(2), third paragraph do not apply to her. Besides Article 213(2) EC, there is no other legally binding obligation which can be invoked against Mrs Cresson. The code of conduct for Commissioners was only adopted after the facts of the case and, moreover, does not contain any obligation which is relevant to the facts of which Mrs Cresson is accused. Once again, Mrs Cresson refers to the absence of written

procedural rules guaranteeing the rights of the defence in this context, which renders the Commission's action unlawful. Article 213(2) EC cannot therefore serve as a legal base for the Commission's decision of 19 July 2004 to apply to the Court.

53. Mrs Cresson asserts that, as from the moment that the Commission intervened in the criminal proceedings as a civil party, the principle according to which disciplinary proceedings arising out of the same facts must await the outcome of the criminal trial 'le pénal tient le disciplinaire en l'état' became applicable. Where the facts in both sets of proceedings are identical, the disciplinary proceedings lose their *raison d'être* if the same complaints are rejected in the context of the criminal procedure. Mrs Cresson points out that although the Belgian public prosecutor initially maintained the charge in relation to Mr Berthelot's missions, she later concluded that there was no reason for her to attribute responsibility to Mrs Cresson. As the facts underlying the complaints are identical in both procedures, irrespective of their legal qualification, the present application serves no purpose and must be deemed to be inadmissible. The decision in the criminal case deprived the Commission's action of its substance.

54. The only complaint which was considered by the Belgian public prosecutor concerned the false orders for missions which involved an amount of EUR 6 930. Besides the fact that the public prosecutor decided that this complaint could not be imputed to Mrs Cresson, this must be considered to be a relatively modest sum of money to which the principle *de minimis non curat praetor* applies.

55. For these various reasons, the Commission's application must be rejected as inadmissible.

(b) Substance

56. In the alternative, Mrs Cresson submits that the complaints raised against her are unfounded.

57. Mr Berthelot was recruited in accordance with the applicable rules in order to serve her in an advisory capacity. As the status of visiting scientist was, in fact, considered to be the most appropriate by the administration, Mrs Cresson never questioned his status. Mr Berthelot's qualifications were not inferior to those of other visiting scientists. He worked effectively and accompanied Mrs Cresson on her missions. It was he himself who ended his contract for health reasons. It was only after he had resigned that the question as to the final report arose. There had been no mention of this beforehand. Mr Berthelot compiled a report on the basis of memos. It is defamatory to suggest that he did not write it himself. As to the orders for missions, Mrs Cresson refers to the facts established by the Belgian public prosecutor.

58. The Riedinger dossier is empty in Mrs Cresson's view. Each of the three contracts offered to him were in the general interest and Mr Riedinger made his contribution without receiving any remuneration. This complaint relating to a lack of integrity was raised for first time in the Commission's application and is unfounded. It would seem that Mrs Cresson is being reproached for a lack of integrity for suggesting the conclusion of two contracts which resulted neither in a report or a study and for which Mr Riedinger received no payment.

59. As further subsidiary points, Mrs Cresson refers to a number of serious procedural irregularities.

60. Mrs Cresson observes, first, that the administrative enquiry was wrongfully opened by the Director-General for Personnel and Administration as the appointing authority on the basis of the IDOC report, whereas it should have been initiated by the College of Commissioners.

61. Next, under this heading, Mrs Cresson claims that the Commission violated fundamental rights and principles in the procedure leading to the present application to the Court. First, initiating the procedure in 2003, seven years after facts occurred, is unacceptable, in view of the fact that the reports the Commission relies upon were long available

and the case is not complex. Second, even though the Commission (wrongly) claims not to be the disciplinary authority, it fulfils various procedural roles which ought to remain separate. Third, the Commission bowed to pressure from the European Parliament, in particular, and it cannot, therefore, be considered to be impartial. Fourthly, various procedural irregularities were committed in the conduct of the internal procedure, concerning inter alia the role of IDOC, the fact that procedures in respect of the Berthelot file overlapped and the imposition of disproportionate time-limits.

62. The most important procedural problem is, however, that unlike Community officials and other staff Mrs Cresson has no possibility of appeal if the Court were to find against her and to impose a sanction. In the context of disciplinary proceedings, Members of the Commission enjoy less guarantees and judicial protection than Community officials. She considers this to be a violation of her fundamental rights. The rights of defence of ministers in the Member States are better protected in this regard.

63. Mrs Cresson emphasises the significant differences which exist between the treatment of officials and Members of the

Commission in the context of disciplinary proceedings. The latter enjoy less guarantees and no effective judicial protection. She considers this to be a violation of her fundamental rights.

64. Mrs Cresson recognises that no claims for damages can be submitted in reconvention. However, she wishes to emphasise the harm she has suffered due to the harassing and excessive approach adopted by the Commission. She requests the Court to order the Commission to pay the costs.

C — The position of the French Republic

65. The French Republic agrees with Mrs Cresson that Article 213(2) EC is inappropriate as a basis for the action against her, both from a substantive and a temporal point of view. It points out that this procedure comes over and above the mechanism of collective political responsibility of the Commission which was already put into effect with the resignation of the Santer Commission. By resigning collectively, the Commission expressed the view that the malpractices which had been established at the time came within the collective responsibility of the Commission. Consequently, no action was taken against individual members.

66. The French Republic shares Mrs Cresson's view that the decision not to continue the criminal proceedings in Belgium deprives the disciplinary action of its basis and refers in this context to the findings of the public prosecutor in that procedure. The Commission's position that the Belgian procedure did not concern favouritism is unclear. Does it consider that the legal qualifications are different or is it the facts themselves which are different? At any rate, the Belgian court clearly concluded that the facts were not established or that they could not be attributed to Mrs Cresson. It also found that the recruitment of Mr Berthelot was not contrary to Community rules. The Commission's allegations of favouritism go against the factual findings of the Belgian court.

67. In these circumstances the French Government considers that imposing a sanction on the basis of Article 213(2) EC would be disproportionate. Such a sanction presupposes a serious breach of duty. It points out that, as regards Community officials, the sanction of the deprivation of pension rights has been imposed only once over a period of 50 years, and that this concerned a reduction by 35% and concerned a case of corruption.⁷ A sanction would also be disproportionate in view of the fact that eight years have expired since the relevant facts occurred. It refers in this context to the speed with which action was taken against former Commissioner

⁷ — Case T-197/00 *Ondi v Commission* [2002] ECR II-325.

Bangemann. Mrs Cresson's case should not be seen in isolation from the practices which existed within the Commission at the time. The Commission did not take action against her when she was still in office. It would be disproportionate to sanction her for activities for which the Commission as a whole was reproached.

VI — General observations on Article 213(2) EC

68. Although the arguments in the present case obviously focus on the allegations against Mrs Cresson and on the precise meaning and function of Article 213(2) EC, the case raises issues which are of broader constitutional importance for the European Union and its institutions. It concerns the standards which persons holding positions of power within the Community institutions must comply with and the manner in which they are held to account where they fail to do so. It is essential to the proper functioning of the Community institutions that persons holding high office are not only regarded as being competent from a professional point of view, but that they are seen to be of irreproachable behaviour. The personal qualities of these persons reflect directly on the confidence the general public has in the Community institutions, their credibility and therefore their efficacy. As the Committee of Independent Experts rightly emphasised in

its Report of 15 March 1999, it is only by respecting basic standards of proper conduct that it will 'be possible for holders of high office to have the authority and the credibility enabling them to offer the leadership which they are required to give.'⁸

69. In order to appreciate the function of Article 213(2) EC in the Community's constitutional framework and also to place the present procedure in its proper perspective, it is important to point out that parallel provisions exist in respect of the other Community institutions and bodies which must observe complete independence and complete impartiality in fulfilling the tasks attributed to them. I refer in this regard to Article 195(2) EC in respect of the European Ombudsman, Article 247(7) EC in respect of the Court of Auditors, Article 11(4) of the Statute of the European System of Central Banks and the European Central Bank in respect of the Executive Board of the European Central Bank and Articles 6 and 47 of the Statute of the Court of Justice in respect of the Court of Justice and the Court of First Instance respectively.

70. What the Commission and these institutions and bodies have in common is that, with the obvious exception of the European Ombudsman, they act as collegiate bodies and that the individual members cannot be removed for reasons relating to the exercise

⁸ — At paragraph 1.5.4 of the Report.

of the functions of these bodies. As the members of these institutions hold the highest office in their respective fields and are not subject to any kind of hierarchical scrutiny, special arrangements must be provided for in order to ensure that any misuse of powers is sanctioned in an appropriate manner. It is inherent to this function that the sanctioning power is vested either in the institution of which the individual concerned is a member or in another institution with equivalent status in the constitutional framework.⁹

71. By ensuring that public office holders are not, by reason of the office they hold, immune from any corrective response where they fail to comply with the requisite standards of personal conduct, procedures of this kind provide basic guarantees that the institutions concerned operate in accordance with their constitutional task. The very existence of these arrangements also serves a preventive function in this regard.

72. It must also be emphasised that application of these constitutional arrangements does not preclude the application of other

corrective mechanisms in respect of the same conduct of public office holders. Nor does the application of other mechanisms constitute a barrier to the application of the constitutional procedure. I refer, in particular, to the mechanisms of political accountability and criminal liability. As to the first, the Commission is accountable to the European Parliament under Articles 197 and 201 EC as a collegiate body only. Parliament does not have the possibility to censure the conduct of individual Members of the Commission. However, following amendment by the Treaty of Nice, Article 217(4) EC requires individual Members to resign if the President of the Commission so requests, after obtaining the approval of the College of Commissioners. As to the second, where the conduct in question constitutes a criminal offence under national law, the public office holder concerned may be liable to criminal prosecution in one of the Member States. In that case, the immunity of the Member of the Commission must be waived as is provided for in Article 20 in conjunction with Article 18 of the Protocol on the privileges and immunities of the European Communities of 8 April 1965. Which mechanism is applied depends on the nature of the infringement and the type of standards involved. All these mechanisms serve different purposes and are therefore not mutually exclusive.

73. In the case of the Commission, there is a direct functional relationship between the standard of conduct to be displayed by Members of the Commission and its role in the institutional framework of the Community. In this respect it is important to emphasise that, besides being the executive

⁹ — Similar constitutional arrangements exist in the Member States for holders of high public office who are not removable for decisions made in the exercise of their functions, as is the case, *inter alia*, for the Presidents of the Federal Republic of Germany (Article 61(2) of the Grundgesetz), the French Republic (Article 68 of the Constitution de la République Française) and the Italian Republic (Article 90 of the Costituzione della Repubblica Italiana). Cf. too, the impeachment procedure in the United States of America provided for in Article II, section 4 of the Constitution of the United States.

body of the Community, the Commission fulfils a vital arbitrating role in conciliating interests of the Member States, trade and industry and Community citizens in the process of defining Community policies and proposing Community legislation. In certain areas, it also fulfils a quasi-judicial role, as in the field of competition or in enforcing Community law obligations against the Member States under Articles 226 and 228 EC. The Commission can only succeed in fulfilling these tasks if it and its individual members are seen to operate with complete impartiality and in complete independence. Only then will it be able to command the authority to gain the requisite confidence of the other institutions of the Community, the Member States and the general public.

74. It is, therefore, inherent to the function and tasks of the Commission that the individual Commissioners at all times meet the highest standards of conduct to guarantee their independence, impartiality and integrity. This applies not only to their external activities, but also to the way in which they operate within the Commission in managing the services for which they are responsible and in maintaining relations with the Commission's other internal services. The internal working culture within the Commission is itself a determinant factor in ensuring the efficacy of the Commission's activities.

75. Any failure to meet these standards by individual Members of the Commission can potentially lead to significant damage to the public image of the institution and undermine confidence in it, which in turn will diminish its efficacy. That this is not merely a hypothetical observation is demonstrated by the effects of the events leading up to the collective resignation of the Santer Commission in 1999.

76. The obligations incumbent upon Members of the Commission are described in a general way in Article 213(2) EC. It follows from this provision that they must perform their duties in complete independence and in the general interest of the Community. They must refrain from any action incompatible with their duties. When taking up office, Members of the Commission are required to give the solemn undertaking that both during and after their term of office, 'they will respect the obligations arising there from and in particular their duty to behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits.'

77. What the obligations referred to in Article 213(2) EC entail more specifically is a matter of interpretation and is, indeed, the central question to this case. At the time the facts of which Mrs Cresson is accused occurred, no code of conduct existed for Members of the Commission specifying

which standards are to be complied with. In the meantime, such a code has been drawn up and put into effect.¹⁰ The code contains various guidelines in respect of ethical questions relating to the independence and the integrity of the function of Commissioner and in respect of loyalty, trust and transparency in the internal functioning of the Commission. It does not appear to contain, however, any guidelines or principles which relate to the facts underlying the present case. Be that as it may, it is inherent to the office of Member of the Commission and the efficacy of the functioning of that institution that certain ethical standards are complied with. In this regard, it may be pointed out that standards are laid down for Community officials in Articles 10 to 12a of the Staff Regulations. Although these rules do not apply to Members of the Commission, it may be accepted that these standards constitute an absolute minimum to be respected by them.

the phenomenon 'civilisation': 'What is civilisation? I don't know. I can't define it in abstract terms — yet. But I think I can recognise it when I see it...'.¹¹

79. The Committee of Independent Experts referred in this regard to 'a common core of minimum standards', which it defined in terms of acting in the general interest of the Community and in complete independence. This requires decisions to be taken solely in terms of the public interest on the basis of objective criteria and not under the influence of their own or of others' private interests. It also implies behaving with integrity and discretion and in accordance with the principles of accountability and openness to the public. The latter implies, *inter alia*, that any personal conflicting interests are honestly and publicly acknowledged.¹²

78. It is not entirely possible, nor is it useful to attempt to lay down standards for proper conduct in public office in an exhaustive manner. There will always be an element in which one may not be able to identify which standard has been breached, yet to be able to conclude that the conduct nevertheless is contrary to the general interest. It is in a way similar to how Kenneth Clark once described

80. In seeking to define standards which must be complied with by holders of public office and therefore to specify the 'common core' referred to by the Committee of Independent Experts, it is useful to refer to the so-called seven principles of public life, identified by the Nolan Committee on Standards in Public Life in the United Kingdom. These principles are: selflessness, integrity, objectivity, accountability, openness, honesty and leadership. The first of

10 — The most recent version is laid down in document SEC(2004) 1487/2.

11 — As remarked in the first programme of the renowned BBC television documentary, 'Civilisation' of 1968.

12 — At paragraph 1.5.4 of the Report.

these principles, selflessness, is further defined as follows: '[h]olders of public office should act solely in terms of the public interest. They should not do so in order to gain financial or other benefits for themselves, their family or their friends.'

C'est en cela que réside la difficulté de notre tâche, mais c'est aussi ce qui lui confère une insigne dignité.¹³

There could be no clearer testimony to the validity of the preceding observations.

81. Finally, it should be noted that the emphasis I place on the need for Commissioners to be able to guarantee their absolute independence and impartiality throughout their term of office as a condition for the Commission being able to fulfil the tasks entrusted to it, is not the result of recent insights or changed values. Referring to the oath to be taken by Members of the Commission on taking up office, as laid down in Article 213(2) EC, at the constituent meeting of the Commission held at Val Duchesse on 16 January 1958, President Walter Hallstein described the essence of the obligations of Members of the Commission in the following words:

VII — Analysis

82. The Commission's application raises a variety of legal questions which can be grouped into the following four categories: admissibility, procedural issues, the merits of the case and the possibility of imposing a sanction.

A — Admissibility

'En prononçant solennellement ces paroles, en notre nom à tous ainsi que l'exigent les termes du Traité, nous reconnaissons l'essentiel des obligations qui nous sont désormais communes.

83. Mrs Cresson contends primarily that the Commission's action is inadmissible on the grounds that Article 213 EC does not constitute an appropriate basis for the action, that, following the decision by the *Chambre du conseil* of the *Tribunal de première instance* in Brussels not to continue criminal

Nous entendons par "l'essentiel" que nos travaux servent l'Europe — l'Europe et non quelconques intérêts particuliers qu'ils soient d'ordre national, professionnel, économique ou personnel.

13 — 'In solemnly pronouncing these words, on behalf of us all as the Treaty requires, we acknowledge the essence of the obligations that we shall henceforth share. By the "essence" of our obligations we mean the fact that we serve Europe — Europe, rather than specific interests of any type whatever, be they national, professional, economic or personal. Herein lies the difficulty of our task, yet here, too, is what endows it with a very special dignity.' COM(58) PV 1 final of 18 April 1958, also to be found at www.ena.lu.

proceedings against her, the present action has been deprived of its substance and that in view of the relatively modest amounts involved the principle *de minimis non curat praetor* should apply.

Moreover, this measure can only be taken where the Commissioner concerned has not displayed sufficient integrity and discretion as regards the acceptance of certain appointments or benefits after his term of office. Her contention is that, as the allegations against her do not relate to this latter type of infringement, the Commission's application cannot be based on Article 213(2) EC.

84. As such, Article 213(2) EC does not lay down any specific requirements regarding the admissibility of an application by the Commission or the Council under this provision. However, the procedural issues raised by Mrs Cresson are significant and call for an exploration of the function and scope of this provision and of its relationship to other procedures relating to the same allegations.

86. The Commission, by contrast, takes the view that either of the sanctions provided for in Article 213(2) EC can be imposed in respect of a Commissioner in office or in respect of a former Commissioner, where it has been demonstrated that he has failed to respect the obligations arising from the office of Commissioner. Favouritism shown in recruiting persons to the Commission can be regarded as a breach of these obligations.

1. Article 213(2) EC as a basis for the present action

85. Mrs Cresson draws a distinction between the sanctions provided for in the final sentence of Article 213(2) EC. On the one hand, she asserts that the sanction of compulsory retirement is available where a Commissioner has failed to comply with his obligation to perform his duties in the general interest during his term of office. This is the case provided for in Article 216 EC to which Article 213(2) EC refers. On the other hand, the sanction of depriving a Commissioner of his pension rights or other benefits can only be imposed after the Commissioner has ceased to hold office.

87. This discussion relates basically to three aspects concerning the scope of Article 213(2) EC. First, can a distinction be made in respect of the applicability of the sanctions of compulsory retirement and the deprivation of pension rights according to whether or not the Commissioner involved still holds office? Second, can the sanction of depriving a Member of the Commission of his pension be imposed in respect of an infringement of

all the obligations arising from the office of Commissioner or only where the obligations in respect of external activities are concerned? Third, which obligations are envisaged by Article 213(2) EC?

88. As to the first of these questions, it is sufficient to resort to the clear wording of Article 213(2) EC, which, in its final sentence, determines that either one of the two sanctions may be imposed in case of a breach of the Commissioner's obligations. This term 'obligations' can only refer to the same term used in the preceding sentence dealing with the solemn undertaking of Commissioners to respect, both during and after their term of office, the obligations arising therefrom. In other words, the relevant obligations are to be respected at all times by Commissioners and no distinction is made as to whether or not the application to the Court is made during or after the Commissioner's term of office. It is, therefore, possible in theory that, rather than seeking his compulsory retirement, Article 213(2) EC can be invoked against a Commissioner who is still in office in order to deprive him of his pension rights or other benefits.

89. There is therefore no basis for the distinction made by Mrs Cresson in the application of Article 213 EC to sitting and former Commissioners. In her case, imposing a financial sanction is possible in view of

the fact that she was not compulsorily retired under Article 216 EC. Instead she resigned voluntarily together with the rest of the Santer Commission.

90. The second argument, namely that the second sanction provided for in Article 213(2) EC is only available where the Commissioner involved has failed to observe integrity and discretion in accepting appointments or benefits after his term of office has ended, is based on too restrictive a reading of this provision. This specific rule must be regarded as a species of the general obligations to be respected by Commissioners, which is apparent from the use of the words 'in particular' which precede it. In view of its fundamental character, this obligation deserved to be mentioned explicitly in this provision.

91. The third aspect relating to the scope of Article 213(2) EC has already been discussed in the context of my general introductory remarks. Any kind of conduct which is likely to cast doubt on an individual Member of the Commission's independence and impartiality must be regarded as a breach of obligations under this provision which can give rise to the sanctions provided for. Contrary to Mrs Cresson's contention that Article 213(2) EC should be interpreted narrowly in view of the

serious consequences which a breach of obligations may have, there is every reason to interpret the scope of this provision broadly in order to guarantee its effectiveness in discouraging conduct which may have detrimental effects on the functioning of the Commission as a whole.

the findings of fact by a criminal court, in support of this argument. The Commission, on the other hand, disputes that the facts in both cases are identical. Whereas the procedure in Belgium concerned possible forgery and fraud, here it is favouritism that is at issue. It also asserts that the decision not to continue the criminal proceedings was taken on grounds of law, not on grounds of fact.

92. Article 213(2) EC, therefore, can be invoked in respect of a breach of any of the obligations incumbent on a Commissioner, irrespective of whether he still holds office or his term of office has ended. Mrs Cresson's arguments to the contrary must be rejected.

94. First, it is necessary to stress the special nature of the procedure provided for in Article 213(2) EC, which though frequently characterised as disciplinary by both parties to these proceedings, in fact, must be distinguished from such a procedure in view of the level of public office involved. As there is a direct connection between the conduct of a Commissioner and the public image and the functioning of the institution in which he holds office, the procedure under Article 213(2) EC is constitutional in character. This is reflected by the fact that decisions to be taken in this procedure are not taken within the institution itself, but by another institution, the impartial judiciary of the Community.

2. The effects of the decision of the Belgian criminal court

93. Mrs Cresson essentially claims that as criminal proceedings against her in Belgium were discontinued on the grounds that the investigating judge reached the conclusion that the facts constituting forgery and fraud could not be imputed to her and the Commission did not appeal against this decision, there is no basis for an action under Article 213(2) EC in respect of the same facts. She invokes the principle of '*le pénal tient le disciplinaire en l'état*', according to which a disciplinary body is bound by

95. In this context, the Court enjoys a monopoly of jurisdiction, which cannot be

affected by decisions taken by courts at the national level. As the Court is the authority which ultimately must impose a sanction at the request of either the Commission or the Council, it must also be in a position to establish whether the conduct of which a Commissioner is accused is such as to constitute a breach of obligations within the meaning of Article 213 EC. Although the Court, for this purpose, may take account of the findings of fact by a national judicial body, it has its own responsibility in this context which cannot be fettered in any way. Thus, where a national court has established in a national criminal procedure against a (former) Member of the Commission that certain facts have not been proven or that they have been proven, but do not incur criminal liability, this cannot restrict the Court's powers to establish and qualify the same facts in the different and specific context of the procedure of Article 213(2) EC, which is a matter of Community law.

that the facts that were under consideration before the investigating judge in Belgium and in the present case are not wholly identical. What was at issue in the former procedure as regards Mrs Cresson was, *inter alia*, whether there was evidence of forgery and fraud in drawing up the orders for missions for Mr Berthelot and in drafting his final report at the end of his first contract period. The subject of this case, by contrast, is the accusation of the attitude of favouritism displayed by Mrs Cresson in recruiting and treating Mr Berthelot and in offering contracts to Mr Riedinger. This is a completely different problem. The facts which were at issue in the criminal proceedings were merely by-products or expressions of the preferential treatment afforded to both gentlemen at the instigation, so it is alleged, of Mrs Cresson. They are not to be confused with the underlying attitude of favouritism itself, which, moreover, is an issue which lies outside the realm of criminal law.

96. It is for these reasons that I do not consider that the principle known as '*le pénal tient le disciplinaire en l'état*' can apply to the Court in the context of Article 213(2) EC proceedings.

97. Even if the principle were deemed to be applicable in the circumstances of the present case, I agree with the Commission

98. As a further point, I would repeat that there is no objection to a national criminal procedure and an Article 213(2) EC procedure being applied concurrently. Both types of procedure serve different purposes in the national and Community legal orders respectively. Whereas the former is aimed at enforcing standards which are deemed to be essential to the fabric of society at the national level, the latter is designed to ensure the proper functioning of the Community institutions with a view to realising the objectives of the Treaties. Even if the national

criminal procedure had continued and had resulted in the imposition of a penalty, there still would be scope for imposing the sanctions provided for in Article 213(2) EC.

99. Consequently, Mrs Cresson's argument that the decision by the *Chambre du conseil* of the *Tribunal de première instance* in Brussels of 30 June 2004 not to continue the criminal proceedings initiated against her deprives the Commission's application of all substance and that, as a result, the present proceedings are inadmissible, must be rejected.

3. *De minimis non curat praetor*

100. Mrs Cresson submits that the Commission's application should be declared inadmissible in view of the modest amount of money involved in connection with the orders for missions for Mr Berthelot. The Commission contests this argument and states that, if at all applicable, it relates to the substance of the application, not to its admissibility.

101. Article 213(2) EC contains no requirements as to the degree of seriousness of an

alleged breach of obligations by a (former) Member of the Commission as a criterion for the Commission or the Council making an application to the Court. The decision to initiate proceedings under this Treaty provision is a matter for the sole discretion of the institution involved. Any decision to instigate proceedings under this provision against a (former) Member of the Commission is taken collectively by the College of Commissioners. It may be presumed that such a decision will not be taken lightly.

102. In addition, the fact that the material damage caused to the Community's interests may be modest is no gauge for the seriousness of the underlying breach of the obligations by the Commissioner concerned. What matters is whether the conduct concerned was likely to damage the Commission's authority and credibility and the confidence which other institutions, the Member States and the general public have in the Commission. As is evident in the present case, such damage did result from Mrs Cresson's conduct.

103. The fact that the amount involved in benefiting Mr Berthelot was relatively low does not, therefore, affect the admissibility of the Commission's application. As the Commission correctly observes, this is at most an aspect which can be taken into account in assessing the merits of the case.

4. Conclusion on admissibility

104. In the light of the considerations set out above, I conclude that Mrs Cresson's submissions, to the effect that the Commission's application is inadmissible, are unfounded.

B — *Procedural issues*

105. Mrs Cresson raises a series of objections to the manner in which the procedure was conducted before the Commission prior to submitting its application to the Court, and criticises the lack of procedural guarantees in the application of Article 213(2) EC itself. Even though these complaints, which are summarised in points 51 and 60 to 62 above, were presented as subsidiary points, it is convenient from a systematic point of view to discuss them before turning to the substance of the case.

106. As Mrs Cresson correctly points out, there is no clear procedural framework for the preparation of the decision by the Commission to make an application to the Court under Article 213(2) EC where it considers that one of its Members or former Members has breached the obligations arising from the office of Commissioner. In view of the serious personal consequences such a

decision may have, it is incumbent upon the Commission to act with due care both in respect of fact-finding, assessing the facts, communicating its position to the person concerned and hearing his views on the accusations against him. This duty to act with prudence and to take full account of the rights of the defence is particularly acute in the absence of precedents and of judicially sanctioned preparatory procedures. In a general sense, the Commission did indeed adopt a prudent approach to the preparation of these proceedings by preparing a notice of objections, communicating this to Mrs Cresson and giving her the opportunity to respond in writing and orally. I consider it important to underline this general point before considering Mrs Cresson's separate complaints.

107. Mrs Cresson's first complaint that the administrative enquiry against her should have been opened by the College of Commissioners as the Director-General for personnel lacked competence to do so cannot be accepted. Besides the fact that there is no written or unwritten rule that a decision to investigate suspected malpractice of a Commissioner can only be taken by his peers, a Director-General operates under the direct responsibility of a Member of the Commission. As must be emphasised once again, what is relevant is that, in deciding to open Article 213(2) EC proceedings, the Commission assumed full responsibility for the facts on which it bases its allegations.

108. Under the heading of the violation of her fundamental rights Mrs Cresson asserts, first, that a time-lapse of seven years between the facts of which she is accused and the opening of the procedure against her in 2003 is unacceptable. As regards this complaint, it must be pointed out that Article 213(2) EC does not provide for any time-limit within which proceedings against a (former) Commissioner must be opened. In this case, the decision to open the proceedings against Mrs Cresson was the culmination of a process of investigation and internal reforms within the Commission of which Mrs Cresson must have been aware. Although it may be accepted that a time-lapse of seven years before initiating proceedings which are aimed at imposing a financial sanction is significant, this does not affect the competence of the Commission to apply to the Court under Article 213(2) EC. If the lapse of time did operate as a ground for inadmissibility, as was observed by the Commission, this could prevent it or the Council from bringing an action in cases where the facts were established far later than they occurred. However, I do consider that the time that has passed between the basic facts of the case and the decision to open Article 213(2) EC proceedings may be a factor which can be taken into account in the context of deciding upon a possible sanction. I will return to this matter below.

109. The next aspect of the alleged violation of the fundamental rights of the defence is

that Mrs Cresson was denied a fair procedure, in that during the course of the whole procedure, the Commission assumed the role of investigating judge, by intervening in the criminal proceedings in Belgium and by initiating various administrative enquiries, and later the role of prosecutor by making its application to the Court under Article 213(2) EC. Furthermore, by refusing Mrs Cresson access to the minutes of the Commission's meeting in which the decision to open the present proceedings was taken it violated the principle of adversarial proceedings. As to the first point, I would observe that, throughout the procedure, the Commission properly exercised its powers under the Treaty both in conducting enquiries and in deciding to seize the Court. It is misleading to assimilate its actions in this context with roles which are foreign to it. As to the second point, in view of the fact that Mrs Cresson was fully informed of the accusations against her as laid down in the notice of objections, the refusal to grant her access to the minutes of the Commission's meeting of 19 July 2004, did not infringe her right to a fair procedure.

110. Next, under this heading, Mrs Cresson claims that the Commission was not impartial in taking its decision to initiate Article 213(2) EC proceedings as it acted under political pressure from the European Parliament. Here, again, it must be stressed that, whereas the Commission has its own responsibility in deciding whether or not to make an application to the Court under this provision, it is the Court that ultimately decides whether the conditions for imposing

a sanction are fulfilled and which sanction is appropriate in the circumstances. The question as to whether the Commission has acted impartially in bringing its action is not relevant. This complaint, therefore, must also be rejected.

111. Finally, Mrs Cresson asserts that a series of procedural irregularities occurred in relation to the administrative enquiries. It is useful to point out that the various administrative enquiries which were conducted into alleged cases of favouritism by Mrs Cresson were the direct result of more general allegations of malpractice within the Commission at the time. They were not, as such, envisaged as the preparation of the opening of proceedings under Article 213(2) EC against her. They only acquired that function *ex post facto* on 21 January 2003 when the Commission decided to address its notice of objections to Mrs Cresson. The decision to open Article 213(2) EC proceedings is the sole responsibility of the Commission, acting as a collegiate body, and in taking this decision it also assumes full responsibility for the facts on which it bases its application. It is then up to the Court to assess the merits of this case on the basis of this factual information. Seen from this perspective, the various formal — and to my mind, extremely trivial — irregularities which allegedly took place in the preparatory phase, cannot, even if they did occur, affect

the veracity or the validity of the facts presented to the Court by the Commission.

112. Mrs Cresson's main objection regarding the rights of the defence is that in the context of the present proceedings she has no right of appeal against the judgment of the Court. By comparison she refers to the situation in Community staff cases and to the situation in Belgium in respect of government ministers, where two instances are available for the adjudication of cases of misuse of public office. Though the Court indeed acts in first and final instance in proceedings under Article 213(2) EC, the question is whether this amounts to an infringement of the fundamental rights of the defence. In this regard, I would like to refer once again to the specific nature of the procedure of Article 213(2) EC which cannot be simply likened to disciplinary proceedings against a Community official. This procedure, rather, is of a constitutional nature and is initiated in the general interest of restoring confidence in the functioning of the Commission. As a form of constitutional catharsis, it is appropriate that such cases are adjudicated upon in one single instance by the supreme court of the Community legal order and that they do not remain *sub judice* for longer than is necessary for that function. The procedure before the Court, moreover, provides sufficient guarantees for the protection of the interests of the Commissioner involved. Besides the guarantees laid down in the Statute of the Court of Justice and the Rules of Procedure, one additional guarantee

is that cases of this kind are heard by the full Court (Article 16, fourth paragraph of the Statute). In view of the specific nature and function of the procedure provided for in Article 213(2) EC, I do not consider that the absence of a possibility of appealing against the Court's judgment constitutes a violation of the defendant's fundamental rights.

115. As was set out above in Chapter VI of this Opinion, the office of Member of the Commission requires the holders to meet the highest standards of independence, impartiality and integrity, both in their external relations and in their dealings within the Commission.

113. Consequently, the various objections raised by Mrs Cresson against the procedure conducted by the Commission prior to the introduction of the present proceedings and against the procedure of Article 213(2) EC as such, must be rejected as unfounded.

C — *Substance*

114. The next issue to be considered is whether the facts of which Mrs Cresson is accused by the Commission amount to a breach of the obligations arising from the office of Commissioner within the meaning of Article 213(2) EC. Mrs Cresson does not as such contest the facts relating to Mr Berthelot and Mr Riedinger. She essentially asserts, however, that in both cases the applicable Community rules were respected.

116. In this case, as regards the Berthelot dossier, it is undisputed that Mrs Cresson expressed her wish to recruit her personal friend Mr Berthelot as her personal adviser. It is also established, despite the warnings by her chef de cabinet that he saw no way in which he could be employed by the Commission, that Mrs Cresson addressed one of the services for which she was responsible, DG XII, in order to seek a suitable way to engage him. Subsequently, at the proposal of this service, Mr Berthelot was offered a one-year contract as a visiting scientist. His task, as appears from the case-file, was 'to participate in close collaboration with Mrs Cresson's cabinet in the preparation of the Fifth Framework Programme and specific programmes in the domain of life sciences [and] to secure links with the national research community, especially with the French community'. Both in view of his atypical scientific credentials and his work location close to Mrs Cresson, rather than

within DG XII, it is clear that this was an unusual arrangement to permit Mr Berthelot to be employed in the manner indicated previously by Mrs Cresson.

117. It is also not seriously disputed that Mr Berthelot received reimbursement of EUR 6 930 for missions to Châtelleraut, nor that the total length of his contracts extended beyond the prescribed maximum limits, nor that Mrs Cresson sought to extend the contractual relationship with Mr Berthelot after his resignation for health reasons.

118. As regards the Riedinger dossier, it is also established that Mrs Cresson offered another personal friend at least two contracts to perform studies on topics which do not appear to be entirely relevant to the policy areas for which Mrs Cresson bore responsibility. Although these contracts were not performed, nor gave rise to any expenditure from the Community budget, it cannot be presumed that it was foreseeable that this would be the outcome at the time they were offered.

119. It is important in assessing these various facts not to regard them in isolation from the general context in which they

occurred. Mrs Cresson in her defence emphasises that Community rules were complied with, e.g. as regards the recruitment of Mr Berthelot, and that other events could not be attributed to her, as regards e.g. the orders for missions of Mr Berthelot to Châtelleraut. What is relevant, however, is that these various facts are symptomatic of a basic attitude indicating that Mrs Cresson was willing, whilst in office as a Member of the Commission, to use that office to extend benefits to personal friends at the expense of the Community budget. To state it differently, it is inconceivable that Mr Berthelot would have been employed by the Commission on the same terms and would have received the same favourable treatment, had Mrs Cresson not held office as a Member of the Commission.

120. On the basis of the facts presented to the Court both by the Commission and Mrs Cresson, I am of the opinion that Mrs Cresson is correctly accused of favouritism by the Commission, as was also found earlier by the Committee of Independent Experts in its Report of 15 March 1999 and that it is not necessary to consider if this behaviour also amounted to gross negligence. Even if this attitude only found expression in the two dossiers which are at the basis of the present procedure, the mere willingness to display

such conduct in high office is sufficient to cast doubt on Mrs Cresson's integrity and impartiality in her functioning as a Commissioner in general. The mere suggestion of partiality is sufficient to generate such doubts. This necessarily reflected on her role in the collegiate decision-making by the Commission, as she no longer was in a position to guarantee that she fulfilled the necessary conditions to operate in that capacity. In turn, her attitude was such as to put at risk the confidence the outside world had in the Commission's independence. As things turned out, this risk did indeed materialise, inflicting severe damage on the Commission's public image.

121. I, therefore, conclude that by displaying an attitude of favouritism, i.e. a willingness to use her office as a Commissioner to confer benefits on personal acquaintances, Mrs Cresson acted in breach of the obligations arising from the office of Member of the Commission within the meaning of Article 213(2) EC.

D — *Sanction*

122. The Commission requests the Court, in case it finds against Mrs Cresson, to wholly or partially deprive her of her pension rights and/or all other benefits linked to those

rights or to deprive her of other benefits in its stead, as provided for in Article 213(2) EC. Although leaving it to the Court's discretion to determine the nature and size of such a sanction, the Commission does indicate that any sanction should be imposed taking the principle of proportionality into account. It also suggests that the factors applicable in determining penalties in disciplinary proceedings against Community officials, listed in Article 10 of Annex IX to the Staff Regulations, might be of indicative value in this regard.

123. The main consideration in deciding upon the imposition of a pecuniary sanction on the basis of Article 213(2) EC and upon its size is how serious the breach of obligations must be regarded to be both in terms of the nature of the misconduct and in terms of the damage caused to the Commission as an institution. In my discussion on the merits of the case I have already noted that an attitude of favouritism on the part of a Member of the Commission has direct consequences on how the person concerned is perceived to function in the collegiate decision-making process of the Commission. It also has consequences for the public image and reputation of the Commission, which in this case were indeed severely damaged. And, it may be added, that it takes a disproportionate length of time to restore the goodwill and legitimacy, which such an institution has built up over the years. The damage caused is, therefore, considerable and durable.

124. In the light of these observations I have no difficulty in concluding that the breach of obligations by Mrs Cresson is worthy of attracting a pecuniary sanction, as provided for in Article 213(2) EC. More specifically, I am of the opinion that this breach is sufficiently serious to warrant a full deprivation of pension rights and connected benefits. However, there are a number of factors which warrant only a partial deprivation of these rights and benefits.

this is the first time an application under Article 213(2) EC will lead to a judgment by the Court.

125. The first of these is that, as Mrs Cresson correctly submits, a considerable length of time elapsed between the first administrative enquiries and the decision to open Article 213(2) EC proceedings against her. It is only as from that moment that she could seriously consider the prospect of possibly being deprived of her pension rights in whole or in part. In addition, account may be taken of the fact that Mrs Cresson has already suffered considerable damage to her reputation as a result of media coverage. Next, some weight may be given to the fact that Mrs Cresson's attitude apparently found some support in the administrative culture within the Commission at the time.¹⁴ Finally, it may be taken into account that

126. Considering, on the other hand, that it is necessary to respond in a credible manner to the breach of obligations by Mrs Cresson, I would conclude that a reduction by 50% of her pension rights and connected benefits as from the date the Court hands down its judgment in this case would be an appropriate sanction. In view of the fact that she has enjoyed her full pension rights since her resignation in 1999, I see no reason to limit this sanction in time.

VIII — Costs

127. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission asked that Mrs Cresson be ordered to pay the costs and the latter has been unsuccessful in her defence, she must be ordered to pay the costs. In accordance with Article 69(4), the French Republic, which intervened in support of Mrs Cresson, must bear its own costs.

¹⁴ — It is to be noted in this regard that although her first chef de cabinet did indeed warn her against recruiting Mr Berthelot, other services proved to be more willing to cooperate in complying with her wish.

IX — Conclusion

128. In the light of the foregoing observations, I recommend the Court to:

- declare the application brought by the Commission admissible;

- rule that by displaying an attitude of favouritism, i.e. a willingness to use her office as a Commissioner to confer benefits on personal acquaintances, Mrs Cresson acted in breach of the obligations arising from the office of Member of the Commission within the meaning of Article 213(2) EC and Article 126(2) EA;

- deprive Mrs Cresson of 50% of her pension rights and connected benefits as from the date of the judgment in this case;

- order Mrs Cresson to pay the costs;

- order the French Republic to pay its own costs.