

JUDGMENT OF THE COURT (Full Court)

11 July 2006*

In Case C-432/04,

ACTION pursuant to the third subparagraph of Article 213(2) EC and the third subparagraph of Article 126(2) EA, brought on 7 October 2004,

Commission of the European Communities, represented by H.-P. Hartvig and J. Currall, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Édith Cresson, represented by G. Vandersanden, L. Levi and M. Hirsch, avocats,

defendant,

* Language of the case: French.

supported by:

French Republic, represented by E. Belliard, C. Jurgensen and G. de Bergues, acting as Agents, with an address for service in Luxembourg,

intervener,

THE COURT (Full Court),

composed of V. Skouris, President, P. Jann, A. Rosas and K. Schiemann, Presidents of Chambers, J.-P. Puissochet, R. Schintgen, N. Colneric, S. von Bahr (Rapporteur), R. Silva de Lapuerta, K. Lenaerts, P. Kūris, E. Juhász, G. Arestis, A. Borg Barthet, M. Ilešič, J. Klučka and E. Levits, Judges,

Advocate General: L.A. Geelhoed,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 9 November 2005,

after hearing the Opinion of the Advocate General at the sitting on 23 February 2006,

gives the following

Judgment

- 1 By its application, the Commission of the European Communities requests the Court to declare that there was conduct amounting to favouritism or, at least, gross negligence constituting a breach by Mrs Cresson of the obligations laid down under Article 213 EC and Article 126 EA and, consequently, to order that Mrs Cresson be deprived in whole or in part of her right to a pension or other benefits in its stead.

Legal framework

- 2 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.

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.

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.'

3 Article 216 EC states:

'If any Member of the Commission no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct, the Court of Justice may, on application by the Council or the Commission, compulsorily retire him.'

4 The provisions of Article 126(2) EA are identical to those of Article 213(2) EC.

The rules relating to visiting scientists

5 On 19 December 1989, the Commission adopted a decision laying down administrative guidelines applicable to visiting scientists within the framework of certain research programmes ('the decision on visiting scientists').

- 6 That decision specifies, *inter alia*, the professional categories to which those eligible for attachment as visiting scientists must belong, the relevant pay structure and the period for which contracts may be entered into. It also provides that a visiting scientist is to draw up a report on the activity which was the purpose of his visit within one month of the end of his contract.

Facts

- 7 The principal facts, as set out in particular in the application, are as follows.
- 8 Mrs Cresson was a Member of the Commission from 24 January 1995 to 8 September 1999. The Commission, of which Mr Santer was the President at the time, resigned collectively on 16 March 1999, but remained in office until 8 September that year. Mrs Cresson's portfolio comprised: science, research and development, human resources, education, training and youth, together with the Joint Research Centre (JRC). Apart from the JRC, those sectors were covered at the time by Directorates-General (DG) XII, XIII.D and XXII.
- 9 The complaints made by the Commission against Mrs Cresson can be divided into two parts: the first relates to Mr Berthelot, and the second to Mr Riedinger.

Mr Berthelot

10 When Mrs Cresson took up office, her Cabinet was already in place. However, Mrs Cresson expressed a wish to appoint one of her close acquaintances, Mr Berthelot, as her 'personal adviser'. According to his curriculum vitae, Mr Berthelot was a doctor, who had made a career as a dental surgeon, had carried out the duties of head of a hospital service and had been a special adviser at the Agence nationale de valorisation de la recherche (National agency for the exploitation of research) (Anvar) for a period of three months. He lived in a commune close to the town of Châtellerault (France), of which Mrs Cresson was mayor. Because he was 66 years old at the relevant time, Mr Berthelot could not be appointed as a member of temporary staff in order to serve as a member of a Commissioner's Cabinet. Moreover, Mr Lamoureux, who was Mrs Cresson's Chef de cabinet, had advised her that, having regard to Mr Berthelot's age, he saw no possibility of the latter being employed by the Commission.

11 Mrs Cresson, who nevertheless wished to engage Mr Berthelot as a personal adviser, then asked the administration to consider how it might be possible to appoint him. Various types of contract were put forward by the administration, including a consultancy contract, which was rejected on the basis that it would be unduly onerous, and a contract as a visiting scientist, which was the solution ultimately adopted.

12 Mr Berthelot was thus engaged as a visiting scientist with DG XII from 1 September 1995, for an initial period of six months. That period was then extended until the end of February 1997. Although attachment as a visiting scientist implies that the person concerned is mainly to work either in the JRC or in the services dealing with research, Mr Berthelot worked exclusively as a personal adviser to Mrs Cresson.

- 13 As Mr Berthelot did not have an office of his own, he used, amongst others, the Cabinet's '*bureau de passage*'. He generally arrived at the Commission on Tuesday morning and left on Thursday evening. He reported orally to Mrs Cresson on his activities.
- 14 Under an anti-accumulation rule, Mr Berthelot's monthly allowance as a visiting scientist was reduced from April 1996, in order to take account of a pension which was paid to him in France.
- 15 Shortly after that reduction was made, 13 mission orders to Châtelleraut, for the period from 23 May to 21 June 1996, were drawn up by Mrs Cresson's Cabinet, in Mr Berthelot's name, for payment to him of a sum of approximately EUR 6 900. A criminal investigation carried out in Belgium from 1999 found that the missions to which the mission orders related were fictitious
- 16 As from 1 September 1996, Mr Berthelot's position was reclassified, as a result of which he was moved from Group II to Group I as a visiting scientist. His monthly allowance, which was then of the order of EUR 4 500, was increased by approximately EUR 1 000.
- 17 On the expiry of his contract with DG XII on 1 March 1997, Mr Berthelot was offered another visiting scientist's contract, with the JRC, for a period of one year expiring at the end of February 1998. His attachment as a visiting scientist thus lasted for a total period of two and a half years, whereas the rules specify a maximum duration of 24 months.

- 18 On 2 October 1997, pursuant to the decision on visiting scientists, the Commission's auditing department asked to have sight of the report of activity further to Mr Berthelot's contract which had expired at the end of February 1997. In the terms of that decision, Mr Berthelot should have drawn up such a report at the end of that first contract, as well as at the end of his contract with the JRC. After a number of reminders, reports, which consisted of a collection of memoranda drafted by various persons put together by Mrs Cresson's Cabinet, were ultimately provided in July 1998.
- 19 On 31 December 1997, Mr Berthelot requested the termination of his contract from that date, on medical grounds. His application was accepted.
- 20 Notwithstanding that, Mrs Cresson asked her Chef de cabinet to consider whether a 'solution', to use the latter's expression, could be found for Mr Berthelot as from 1 January 1998. It was accordingly proposed that Mr Berthelot be appointed as a special adviser, but he rejected that offer.
- 21 Mr Berthelot died on 2 March 2000.

Mr Riedinger

- 22 Mr Riedinger, who is a commercial lawyer and a personal acquaintance of Mrs Cresson, was offered three contracts by the Commission in 1995, at least two of which were offered at her express request.

- 23 The first contract, which was signed by the Director-General of the JRC, related to an ‘analysis of the feasibility of establishing a network between think-tank centres in Central Europe and in the European Community’. That contract was linked to the development of the Institute for Prospective Technological Studies in Seville (Spain) and was intended to strengthen relations with Central European countries in that field.
- 24 The second contract, which was for a sum of ECU 10 500, related to ‘accompanying Mrs Cresson on a visit to South Africa from 13 to 16 May 1995 and [the] drawing up of a report’. There were two aspects to that mission. The first concerned a conference on the information society. The second related in particular to the sending, under ‘voluntary service’ arrangements, of young German doctors to South Africa. The visit also involved an element of tourism.
- 25 The subject-matter of the third contract comprised a ‘pre-feasibility study on establishing a European institute for comparative law’. The institute was intended to promote an improved understanding of legal problems arising in the field of research, in particular as regards intellectual property and patents.
- 26 Although budgetary commitments were registered for those three contracts by the departments for which Mrs Cresson was responsible, none of them was implemented, nor was any payment made under them.

The investigations carried out and procedures initiated

- 27 Investigations were first of all undertaken by a committee of independent experts, then by the European Anti-Fraud Office (OLAF) and, finally, by the Investigation

and Disciplinary Office of the Commission (IDOC). A preliminary investigation was also opened by a Belgian investigating judge (*juge d'instruction*) and a procedure was initiated by the Commission.

The investigation by the Committee of Independent Experts

28 A Committee of Independent Experts, created on 27 January 1999 under the auspices of the European Parliament and the Commission, was instructed to prepare an initial report, in order to establish to what extent the Commission, as a body, or one or more of its Members individually bore responsibility for the recent examples of fraud, mismanagement or nepotism raised in Parliamentary discussions.

29 In its report submitted on 15 March 1999, the Committee concluded as regards Mr Berthelot that there was a clear case of favouritism.

The investigations by OLAF and IDOC

30 In the wake of the findings of the Committee of Independent Experts, OLAF conducted its own investigation and submitted a report on 23 November 1999.

31 That report led to a number of disciplinary proceedings being initiated in respect of officials of the Commission and members of its staff and to proceedings for the recovery of the amounts that were wrongly paid to Mr Berthelot.

- 32 The Personnel and Administration Directorate-General ('DG ADMIN'), and then IDOC, after its creation by decision of 19 February 2002, undertook an investigation with regard to Mr Riedinger and two additional investigations in relation to Mr Berthelot, one in respect of the role of DG XII, and the other with regard to the involvement of the JRC.
- 33 As part of those investigations, several dozen hearings took place and Mrs Cresson was contacted on a number of occasions by the responsible departments and by Mr Kinnock, Vice-President of the Commission, in charge of administrative reform. Mrs Cresson submitted her observations by letters of 24 September, 22 October and 17 December 2001.
- 34 DG ADMIN presented its report concerning Mr Riedinger on 8 August 2001. IDOC submitted a report regarding Mr Berthelot on 22 February 2002.

The criminal proceedings

- 35 Following a complaint by a Member of the Parliament, a criminal investigation concerning Mr Berthelot's file was opened in 1999. The Commission claimed damages against Mrs Cresson in those proceedings.
- 36 The investigating judge charged Mrs Cresson, Mr Berthelot and Commission officials and members of its staff with forgery, fraud or unlawful conflict of interest on the basis of the following three points:

- the appointment of Mr Berthelot as a visiting scientist, which was effected in breach of the rules laid down by the Commission;

- Mr Berthelot's final reports as a visiting scientist; and

- Mr Berthelot's mission orders and claims for mission expenses.

37 In his written submissions to the Chambre du conseil of the Tribunal de première instance de Bruxelles (Court of First Instance, Brussels) (Belgium), which is the court which, on a preliminary investigation being concluded, has to decide whether or not a person is to be sent for trial before the Tribunal correctionnel (criminal court), the public prosecutor set aside the charges relating to the first point on the ground that Mr Berthelot's appointment was not contrary to Community rules and that the provision of the Belgian Criminal Code regarding conflicts of interests did not apply, at the time of the facts in question, to persons holding a public office in an organisation governed by public international law. The public prosecutor also set aside the charges relating to the second point, on the ground that there was, in his opinion, nothing in the documents before him to suggest criminal involvement on Mrs Cresson's part. The charges relating to the third point were retained at the outset, but were subsequently dropped.

38 By order of 30 June 2004, the Chambre du conseil of the Tribunal de première instance de Bruxelles, taking note of the oral submissions of the public prosecutor and having regard to the grounds set out in his written submissions, declared the criminal proceedings to be at an end in Mr Berthelot's case by reason of his death and held that there was no ground for sending the other defendants for trial. With respect to Mrs Cresson, the court held that there was no suggestion that any knowledge she may have had of the alleged facts relating to Mr Berthelot's mission orders amounted to criminal conduct on her part.

The procedure initiated by the Commission

39 On 21 January 2003, the College of Commissioners decided to send Mrs Cresson a statement of the complaints against her in the context of the possible initiation of a

procedure under Article 213(2) EC and Article 126(2) EA. It was also decided to grant Mrs Cresson access to her file and to invite her to submit her observations.

- 40 The statement of complaints, which related to the appointment of Mr Berthelot and the contracts offered to Mr Riedinger, was first sent to Mrs Cresson on 17 March 2003 and then, for purely technical reasons relating to the authorisation procedure, the same document, dated 30 April 2003, was sent to her on 6 May 2003.
- 41 Lengthy correspondence then ensued between the advisers to Mrs Cresson and the Commission regarding the scope of the procedure initiated by the statement and the access to be granted to Mrs Cresson to the documents which she considered relevant.
- 42 Mrs Cresson replied to the statement of complaints by a document dated 30 September 2003. In it, she contested, in particular, the legal basis for the statement and argued, in the alternative, that the complaints made were not proved. She also sought payment of EUR 50 000 in respect of material and non-material damage suffered as a result of the initiation of a disciplinary procedure against her.
- 43 Mrs Cresson was heard by the Commission at a hearing which took place on 30 June 2004.
- 44 On 19 July 2004, the Commission decided to bring proceedings before the Court.

Procedure before the Court and the forms of order sought

45 The Commission claims that the Court should:

- declare that Mrs Cresson has acted in breach of her obligations under Article 213 EC and Article 126 EA;

- consequently, order that Mrs Cresson be deprived in whole or in part of her right to a pension and/or any other benefits linked to that right or standing in its stead, the Commission leaving it to the discretion of the Court to determine the duration and extent of that deprivation; and

- order Mrs Cresson to pay the costs.

46 Mrs Cresson contends that the Court should:

- declare the action brought by the Commission inadmissible;

- in the alternative, dismiss the action as being unlawful and unfounded;

- order the Commission to produce the complete minutes of the discussions which led to the decision, taken on 19 July 2004, to bring proceedings before the Court, together with the other documents asked for by the defendant in her request and confirmatory request of 26 April and 5 October 2004 respectively; and

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

- ⁴⁷ By order of the President of the Court of 2 June 2005, the French Republic was granted leave to intervene in support of the form of order sought by Mrs Cresson.
- ⁴⁸ Mrs Cresson's application for the production of certain documents was rejected by the Court by order of 9 September 2005.

The application for reopening of the oral procedure

- ⁴⁹ By letter of 30 March 2006, Mrs Cresson requested the Court to order the reopening of the oral procedure under Article 61 of the Rules of Procedure. In support of her application, she claims that the Opinion of the Advocate General was based in a number of respects on matters that were not discussed between the parties. She essentially argues that the Advocate General, first, reached the conclusions set out in his Opinion by reference only to principles and classified the nature of the proceedings in question as 'constitutional' and, secondly, failed to address the factual issues which it is, however, essential to take into account in order to give a ruling on the conduct complained of.

50 In that regard, it should be noted that the Court may, of its own motion, on a proposal from the Advocate General or at the request of the parties, order the reopening of the oral procedure in accordance with Article 61 of the Rules of Procedure, if it considers that it lacks sufficient information or that the case should be decided on the basis of an argument which has not been discussed between the parties (see, inter alia, order of 4 February 2000 in Case C-17/98 *Emesa Sugar* [2000] ECR I-665, paragraph 18, and Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 25).

51 In the present case, it is clear from the application for reopening that it is in actual fact a commentary on the Opinion of the Advocate General. The application does not make reference to any factual element or legal provision on which the Advocate General based his Opinion and which was not discussed between the parties. In addition, the Court considers that it has available to it all the material which is necessary to give a ruling on the substance of the case.

52 Accordingly, the views of the Advocate General having been heard, the application for reopening of the oral procedure must be rejected.

The action

Preliminary observations

53 The complaints made against Mrs Cresson are based on Article 213 EC and Article 126 EA. As those provisions are identical, references to Article 213 EC should be construed as relating also to Article 126 EA.

- 54 It is necessary in these proceedings to consider the following issues: the scope of Article 213(2) EC, compliance with procedural rules and various rights relied on by Mrs Cresson, in particular the rights of the defence, the consequences of the criminal proceedings, whether there has been a breach of the obligations referred to in Article 213(2) EC and whether a penalty should be imposed.
- 55 A number of reasons are given in support of the objection of inadmissibility raised by Mrs Cresson. First of all, Article 213 EC cannot, in the present case, form a proper legal basis for the bringing of proceedings before the Court. Secondly, the effect of the decision of the *Chambre du conseil* of the *Tribunal de première instance de Bruxelles* not to refer the case for trial was that the disciplinary procedure initiated by the Commission ceased to have any purpose or content. Lastly, the conduct of which Mrs Cresson is accused is of minimal importance.
- 56 However, those grounds of inadmissibility cannot be separated from the substantive issues raised by the case set out in paragraph 54 of this judgment. Thus, the issues concerning the legal basis for the application and the allegedly minimal importance of the conduct complained of are interrelated with the analysis of the issues concerning, in the former case, the scope of Article 213(2) EC and, in the latter, whether there has been a breach of the obligations referred to in that article. The effects of the decision by the criminal court not to send the defendants for trial are connected with the issue which relates to the consideration of the consequences of the criminal proceedings. Those grounds of inadmissibility will accordingly be addressed in the course of considering the substance of the case.

The scope of Article 213(2) EC

Observations of the parties

- 57 The Commission argues that Article 213(2) EC applies to the breach by Members of that institution of the obligations arising from their office. A Commissioner who

does not act in the general interest or who allows himself to be guided by considerations dictated by a personal or private interest, whether it be pecuniary or otherwise, is in breach of those obligations.

58 As that is the nature of the breach which Mrs Cresson is alleged to have committed, the proper basis of the order and penalty sought, namely that she be deprived in whole or in part of her right to a pension or other benefits in its stead, is Article 213(2) EC.

59 Mrs Cresson maintains that that provision cannot constitute the legal basis of the proceedings before the Court.

60 In the first place, Article 216 EC provides that a breach by a Member of the Commission of the obligations referred to in the first and second subparagraphs of Article 213(2) EC which occurs during his term of office can, save as regards the acceptance of outside activities, be punished only by compulsory retirement.

61 Inasmuch as the Commission alleges that such a breach arose in Mrs Cresson's case, it has no entitlement to bring proceedings seeking an order to deprive her of her right to a pension or other benefits in its stead. Neither Article 213(2) EC, nor any other provision of Community law, provides for a penalty of that kind.

62 In the second place, the third subparagraph of Article 213(2) EC applies where a Member of the Commission has acted in breach of his obligations of integrity and discretion by agreeing to undertake certain outside activities, either during his term of office or after he has ceased to carry out his duties. In such a case, the penalty laid

down is either, where the activity is carried out during the term of office of the Member of the Commission, compulsory retirement in accordance with Article 216 EC, or, where the activity is undertaken after the expiry of his term of office, deprivation of his right to a pension or other benefits in its stead.

- 63 As Mrs Cresson is not alleged to have acted in breach of the prohibition on undertaking outside activities, the provisions of the third subparagraph of Article 213(2) EC do not apply to her.

Findings of the Court

- 64 In order to determine whether the Commission was correct to base its application on Article 213(2) EC, it is necessary to consider the wording of that provision.
- 65 Article 213(2) contains three subparagraphs, which set out the principal obligations and prohibitions to which the Members of the Commission are subject.
- 66 The first subparagraph requires Members, in the general interest of the Community, to be completely independent in the performance of their duties.
- 67 The second subparagraph defines that obligation of independence, by providing that it is to apply to a Member's relationship with any government and any other body.

68 The third subparagraph starts by prohibiting Members of the Commission from engaging in any other occupation during their term of office.

69 That subparagraph goes on to specify, in general terms, the manner in which the Members of the Commission are to carry out their duties. Thus, they must respect the obligations arising from their office as a Member of the Commission. Those obligations include, in particular, the duties of integrity and discretion as regards the acceptance, following their term of office, of certain appointments or benefits. As that type of duty is mentioned only by way of example, the obligations referred to in that subparagraph cannot, contrary to what Mrs Cresson maintains, be limited to a prohibition on engaging in additional activities during the term of office of the Member of the Commission and to the duties of integrity and discretion when an appointment is accepted on expiry of that term.

70 As there is nothing in the third subparagraph which restricts the concept of 'obligations arising from [a Commissioner's office]', that expression falls to be broadly construed. Having regard to the importance of the responsibilities assigned to them, it is important, as the Advocate General stated in point 74 of his Opinion, that the Members of the Commission observe the highest standards of conduct. That concept therefore falls to be understood as extending, not only to the obligations of integrity and discretion expressly referred to in the third subparagraph of Article 213(2) EC, but also to all of the duties which arise from the office of Member of the Commission, which include the obligation laid down in the first subparagraph of Article 213(2) EC to be completely independent and to act in the general interest of the Community.

71 It is therefore the duty of Members of the Commission to ensure that the general interest of the Community takes precedence at all times, not only over national interests, but also over personal interests.

- 72 While the Members of the Commission are thus under an obligation to conduct themselves in a manner which is beyond reproach, it does not, however, follow that the slightest deviation from those standards falls to be censured under Article 213(2) EC. A breach of a certain degree of gravity is required.
- 73 The third subparagraph of Article 213(2) EC permits the Court to impose a penalty where there is a breach of the obligations arising from the office of Member of the Commission, in the form of compulsory retirement or the deprivation of his right to a pension or other benefits in its stead. The penalty of compulsory retirement will apply only where a breach has arisen, and continues, during the term of office of the Member of the Commission in question. By contrast, he may be deprived of the right to a pension or other benefits in its stead whether the breach occurs during or after his term of office. As there is no provision as to the extent of the deprivation of the right to a pension or other benefits in its stead, it is open to the Court to order deprivation in whole or in part thereof, depending on the degree of gravity of the breach.
- 74 Accordingly, and contrary to what Mrs Cresson contends, the fact that a term of office of a Member of the Commission has expired and that he can no longer be the subject of compulsory retirement cannot prevent the Member of Commission the being punished in respect of a breach which occurred during his term of office, but is discovered or established once this has expired.
- 75 It follows that Article 213(2) EC, which forms the basis of the proceedings before the Court in this case seeking a declaration that Mrs Cresson has acted in breach of her obligations under that provision and an order that she be deprived in whole or part of her right to a pension or other benefits in its stead, constitutes a correct legal basis.

Compliance with procedural rules and various rights relied on by Mrs Cresson, in particular; the right to a fair hearing

Observations of Mrs Cresson

76 Mrs Cresson argues that procedural rules and various rights, in particular the rights of the defence, have not been complied with. As a result, the lawfulness of both the administrative procedure before the Commission and the proceedings before the Court have been undermined and the Court should declare the action inadmissible.

— Lack of competence

77 According to Mrs Cresson, the administrative investigation was wrongly initiated by Mr Reichenbach, the Director-General for Personnel and Administration, in his capacity as Appointing Authority, on the basis of the IDOC report. Mrs Cresson contends that that Director-General did not have the power to decide that the procedure should be initiated, that decision being a matter, where relevant, for the College of Commissioners.

— Failure to comply with reasonable time-limits

78 Mrs Cresson submits that the initiation of the disciplinary procedure in 2003, that is to say more than seven years after the facts relied on by the Commission, is unacceptable, having regard in particular to the existence of various reports relating to the conduct complained of, which have been available for a considerable time, and the lack of complexity of the case.

— The improper overlapping of functions by the Commission

79 Mrs Cresson argues that the Commission allowed the overlapping of a number of functions which should have remained separate.

80 According to Mrs Cresson, that institution not only assumed the role of disciplinary authority, but also acted as 'investigating judge', by providing the Belgian investigating judge with every piece of information tending to show improper conduct on her part, by supporting a number of investigations and by initiating a disciplinary procedure against her. In addition, it assumed the role of accuser in deciding to bring proceedings before the Court.

81 Such an overlapping of functions undermines the right to a fair hearing.

— The application of pressure on the Commission

82 Mrs Cresson maintains that the Parliament applied pressure on the Commission, to which the latter gave way. The Commission thus failed to observe its duty of impartiality, to Mrs Cresson's detriment.

— Breaches of procedural rules

83 Mrs Cresson submits that a number of breaches were committed of the rules laid down in the decision of 19 February 2002 establishing IDOC. The investigators

appointed by that office were not restricted to members of IDOC's staff, but also comprised officials belonging to other services in the Commission. The IDOC reports did not define individual responsibilities and contained neither recommendations nor conclusions. Whereas the role of IDOC ought to be subsidiary to that of OLAF, in that it is primarily OLAF's duty to carry out an administrative investigation and to bring it to a conclusion in cases of fraud, corruption or any other illegal activity affecting the financial interests of the Community, IDOC undertook additional administrative investigations without regard to that rule. Mrs Cresson adds that she was neither kept properly informed nor heard in the course of those investigations. In particular, she was not informed that she might be implicated and, as the reports of the administrative investigations concerning Mr Berthelot and Mr Riedinger were not communicated to her, she was not given an opportunity to submit observations.

84 Mrs Cresson also claims that there was an overlapping of disciplinary procedures instituted against a number of Commission officials involved in the appointment of Mr Berthelot. She was not kept properly informed of the result of those procedures, notwithstanding their bearing on her case. Lastly, the IDOC investigators responsible for Mr Berthelot's case exceeded their authority by putting questions relating to Mr Riedinger's case in the course of investigating that relating to Mr Berthelot.

85 With respect to the OLAF investigations, the files made available to Mrs Cresson do not contain the required authorisations for all of the members of staff who participated in those investigations. Furthermore, the authorities necessary for each of the actions undertaken by the investigators are missing. According to Mrs Cresson, the result of OLAF's irregular actions is that the administrative investigations which led to the report of 22 February 2002 in Mr Berthelot's case are unlawful.

— The lack of access to two levels of jurisdiction

- ⁸⁶ Mrs Cresson argues that the most serious issue relates to the lack of access to two levels of jurisdiction. Were the Court to decide to impose a penalty on her, Mrs Cresson would have no legal remedy. She points out that an official of the European Communities benefits from considerably more extensive safeguards than those provided for Members of the Commission, both at the stage of the administrative procedure and in proceedings before the Court. In particular, an official may challenge a decision of the Appointing Authority before the Court of First Instance of the European Communities and then bring an appeal before the Court of Justice. The lack of any opportunity to challenge the decision of the Court of Justice constitutes a breach of fundamental rights.

Findings of the Court

- ⁸⁷ As regards Mrs Cresson's first plea in defence, based on the alleged lack of competence of the Director-General for Personnel and Administration to instigate administrative investigations on the basis of IDOC reports and to initiate the administrative procedure, it must be held in the first place that, as the Commission rightly argues, the administrative investigations in question were instituted before IDOC was established.
- ⁸⁸ With respect, in the second place, to the initiation of the administrative procedure, this was implemented when the statement of complaints was sent to Mrs Cresson. That statement was decided on, not by the Director-General for Personnel and Administration, but by the Commission itself. It is therefore the latter, and not the Director-General, which was responsible for initiating the administrative procedure.

89 The first plea in defence is accordingly unfounded.

90 As regards the initiation of proceedings under Article 213(2) EC, that provision does not specify any time-limit. However, the periods available to the Commission in that context are not unlimited. In the absence of any provisions in that regard, that institution must not indefinitely delay the exercise of its powers, in order to comply with the fundamental requirement of legal certainty (see Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano v Commission* [2002] ECR I-7869, paragraph 140, and Joined Cases C-346/03 and C-529/03 *Atzeni and Others* [2006] ECR I-1875, paragraph 61) and in order not make it more difficult for the defendants to refute the Commission's arguments, and not to infringe the rights of the defence (see, to that effect, Case C-96/89 *Commission v Netherlands* [1991] ECR I-2461, paragraph 16).

91 In the present case, the conduct of which Mrs Cresson is accused goes back to 1995, as Mr Berthelot was appointed in September and Mr Riedinger was offered the opportunity to enter into contracts during the same year. The first investigation report drawn up in that regard was the work of the Committee of Independent Experts and is dated March 1999. Investigation reports were then lodged by OLAF and IDOC between 1999 and 2002. The Commission waited for the last of those reports to be submitted before initiating a procedure against Mrs Cresson.

92 Since Article 213(2) EC had never been used to initiate a procedure against a Member of the Commission on the ground of her conduct during her term of office, the Commission was entitled to believe it necessary to display particular vigilance. In such circumstances, the decision to initiate an administrative procedure relating to Mrs Cresson in January 2003 by issuing a statement of complaints and the sending of that statement to her in May that year do not appear unreasonable. Moreover, Mrs Cresson has not put forward any evidence to show that the duration of the

procedure before the Commission had an impact on the way in which she organised her defence.

- 93 Mrs Cresson criticises the Commission for having allowed the overlapping of a number of functions which are the responsibility of separate authorities, thereby infringing the right to a fair hearing. According to Mrs Cresson, that overlapping of functions by the Commission prevented it from being sufficiently impartial in its role as a disciplinary authority.
- 94 This plea must however be rejected, as the Commission has no power to make a finding of a breach of the obligations arising from the office of Member of the Commission. It is clear from Article 213(2) EC that all that the Commission may do is bring proceedings before the Court where it is thought that a Member of the Commission has acted in breach of his obligations. It is for the Court to decide whether a Member of the Commission has acted in breach of the obligations arising from his office and to impose a penalty on him.
- 95 The next plea, relating to the pressure applied by the Parliament on the Commission, which prevented the latter from acting impartially, is also without foundation.
- 96 Whatever the pressures to which the Commission may have been subject, it is for the Court to give a ruling in the matter on the basis of all the documents in the case which have been lodged before it.
- 97 Accordingly, the claim that pressure was put on the Commission does not constitute a relevant argument.

- 98 As regards Mrs Cresson's submissions relating to various breaches of procedural rules and an infringement of the right of access to two levels of jurisdiction, these seek to establish the existence of irregularities or procedural deficiencies affecting the rights of the defence in particular, and are liable to call into question the subject-matter of the proceedings before the Court and its consideration of the case.
- 99 Mrs Cresson first of all raises infringements of the rules laid down in the decision of 19 February 2002 establishing IDOC. The administrative investigations in question were, according to her, not carried out in compliance with those rules.
- 100 However, it must be held that those inquiries began, and were almost fully completed before IDOC was created. As regards Mr Riedinger, the administrative investigations undertaken were completed before that date, because they gave rise to a report which was submitted on 8 August 2001. As regards Mr Berthelot, the investigations were concluded by a report which was submitted three days after the date of IDOC's creation, that is to say 22 February 2002.
- 101 Mrs Cresson also challenges the validity of OLAF's investigations, on which DG ADMIN and then IDOC relied when they carried out their own additional administrative investigations.
- 102 In that regard, without it being necessary to consider Mrs Cresson's claims relating to formal irregularities in the investigation procedure followed by OLAF, it must be held that DG ADMIN carried out its own investigations and prepared its reports independently and that those reports were adopted by IDOC on its creation. The statement of complaints took those reports as a basis, and not the reports which OLAF may have drawn up.

- 103 The question next arises whether, notwithstanding the lack of detailed rules governing the proceedings referred to in Article 213(2) EC, the rights of the defence have been complied with.
- 104 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 which must be guaranteed even in the absence of any rules governing the procedure in question. The Court has consistently held that, in order to respect the principle of the right to be heard, the person against whom an administrative procedure has been initiated must be afforded the opportunity, during that procedure, to make known his views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of Community law (see Case 234/84 *Belgium v Commission* [1986] ECR 2263, paragraph 27).
- 105 It should therefore be determined whether Mrs Cresson was informed in sufficient time of the complaints made against her and whether she had the opportunity of being heard.
- 106 The action brought against Mrs Cresson on the basis of Article 213(2) EC was preceded by an administrative procedure initiated by the Commission on the basis of prior administrative investigations.
- 107 The documents lodged with the Court show that during the administrative investigations Mrs Cresson was contacted on a number of occasions by the responsible departments and that she submitted her observations by letters of 24 September, 22 October and 17 December 2001.

- 108 The administrative procedure was initiated by the sending to Mrs Cresson, on 6 May 2003, of the statement of complaints. Mrs Cresson had access to her file and was invited to submit her observations. She was allowed a period of over four months in which to reply to the statement. Mrs Cresson submitted her observations in writing on 30 September 2003 and orally on 30 June 2004. The Commission decided to bring proceedings before the Court on 19 July 2004.
- 109 The conduct of the administrative procedure reveals nothing that might have infringed the rights of the defence.
- 110 On the contrary, it appears that, by sending Mrs Cresson a statement of complaints setting out all of the facts complained of and a legal analysis of those facts, by giving her access to her file, by inviting her to submit her observations within a period of at least two months and in allowing her to be heard, the Commission followed a procedure which complies with the rights of the defence.
- 111 As regards the proceedings brought before the Court, Mrs Cresson argues that no legal remedy will be available to her in the event of the Court deciding to impose a penalty on her. She contends that such a lack of a legal remedy constitutes an infringement of the fundamental rights of the defence and the right to effective judicial protection. She observes that a European official may, by contrast, challenge a decision of the Appointing Authority before the Court of First Instance and then bring an appeal before the Court of Justice.
- 112 Reference should be made in this regard to Article 2(1) of Protocol No 7 to the European Convention on the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, which provides that everyone convicted of a criminal offence by a court or tribunal has the right to have his

conviction or sentence reviewed by a higher court or tribunal. Even if it be accepted that that provision applies to proceedings based on Article 213(2) EC, it is sufficient to point out that Article 2(2) of that Protocol states that that right may be subject to exceptions in cases, inter alia, where the person concerned was tried in the first instance by the highest court or tribunal.

- 113 It follows that the fact that no appeal may be brought against the Court's decision does not constitute in any way a deficiency which contravenes the rights of Members of the Commission to effective judicial protection and does not, in the present case, invalidate the proceedings before the Court.
- 114 It follows from the above that all of the pleas raised in Mrs Cresson's defence which relate to procedural matters and to compliance with various rights, in particular the rights of the defence, must be rejected.

The consequences of the criminal proceedings

Observations of the parties

- 115 Mrs Cresson maintains that, as the Commission claimed damages in the criminal proceedings, the principle according to which disciplinary proceedings must await the outcome of the criminal trial is applicable. It follows that where the conduct complained of in the criminal and disciplinary proceedings is the same, the findings of the criminal court are binding on the disciplinary authorities. That rule can be established from Case T-307/01 *François v Commission* [2004] ECR II-1669, paragraphs 73 to 75. In the present case, the conduct complained of in both sets of proceedings is the same, that is to say primarily a failure to have regard to the rules

governing Mr Berthelot's appointment and the terms under which he worked, to the detriment of the general interest of the Communities.

- 116 Mrs Cresson contends that the Chambre du conseil of the Tribunal de première instance de Bruxelles held that there was no ground for referring the case to the trial court, following its adoption of the views of the public prosecutor that either the facts alleged were not proved or Mrs Cresson's involvement in those matters was not established. The decision not to refer the case for trial rendered the Commission's action devoid of purpose and content.
- 117 The Commission also considers that the principle according to which disciplinary proceedings must await the outcome of the criminal trial applies in Community law, but it draws different conclusions from it. It means, first, that where disciplinary proceedings are initiated at the same time as criminal proceedings and on the basis of the same facts, the disciplinary proceedings must be suspended pending the result of the criminal proceedings and, secondly, that the disciplinary authority is bound by the findings of fact made by the criminal court. However, in this case, the conduct complained of in the criminal proceedings and that complained of in the disciplinary proceedings is different. The criminal court considered the possibility of guilt on Mrs Cresson's part on the basis, in particular, of fraud and a misuse of funds. The task of the Court is to determine whether Mrs Cresson has acted in breach of the obligations arising from her office by displaying favouritism or gross negligence. Consequently, the Court is not bound by the findings of the criminal court or by its decision not to refer the case for trial.

Findings of the Court

- 118 Disciplinary proceedings involving an official or servant of the Communities, such as those which gave rise to the judgment in *François v Commission*, and proceedings involving a Member of the Commission are not subject to the same rules. The former are governed by the Staff Regulations of Officials of the European Communities and the latter by a discrete procedure under Article 213(2) EC.

Accordingly, solutions applied in the former cannot necessarily be transposed to the latter.

119 In Mrs Cresson's case, the criminal proceedings resulted in an investigation from 1999 to 2004 of the complaints made against her.

120 In so far as the findings made in the course of those proceedings relate to facts which are the same as those investigated in the context of the procedure referred to in Article 213(2) EC, and those findings are put to the Court in the documents which are before it, they may be taken into account by it in its examination of the conduct of which Mrs Cresson is accused for the purposes of that article.

121 However, the Court is not bound by the legal characterisation of the facts made in the context of the criminal proceedings and it is for the Court, exercising its discretion to the full, to investigate whether the conduct complained of in proceedings brought under Article 213(2) EC constitutes a breach of the obligations arising from the office of Member of the Commission.

122 The decision of the Chambre du conseil of the Tribunal de première instance de Bruxelles that there was no evidence of criminal conduct on Mrs Cresson's part cannot therefore bind the Court.

123 As regards the only charge initially sustained by the public prosecutor, namely that involving the mission orders relating to fictitious missions drawn up in Mr Berthelot's name, the findings arising from the criminal investigations and adopted by the public prosecutor in his submissions may be taken into account by the Court, but cannot, however, be binding upon it.

- 124 With respect to Mr Berthelot's appointment, the findings set out in the public prosecutor's submissions that Mr Berthelot's curriculum vitae was similar to that of other visiting scientists appointed by the Commission and that members of the Commission's staff were regularly seconded to the Cabinets of Members of the institution or added to the staff officially allocated to a Cabinet, are also relevant and may be taken into consideration by the Court.
- 125 By contrast, the conclusion which is drawn by the public prosecutor from those points, namely that Mr Berthelot's appointment was lawful, in that it did not infringe any rule laid down by the Commission, constitutes an appraisal of the facts. Such an appraisal is based on a consideration and interpretation of the Community rules, in particular those relating to the appointment of visiting scientists, which are not binding on the Court.

Whether there has been a breach of the obligations referred to in Article 213(2) EC

Observations of the parties

- 126 According to the Commission, the files relating to Mr Berthelot and Mr Riedinger show that Mrs Cresson acted in breach of the obligations arising from her office as a Member of the Commission by displaying favouritism or gross negligence.
- 127 Mrs Cresson argues that Mr Berthelot was lawfully appointed and emphasises that his appointment was effected by the administration. A Member of the Commission

cannot be deemed to have been kept informed of all of the administrative aspects of an appointment procedure. Mr Riedinger's file is, for its part, empty.

Findings of the Court

128 The cases involving Mr Berthelot and Mr Riedinger, which are set out in paragraphs 10 to 26 of this judgment, should be considered separately.

— The appointment of Mr Berthelot and the terms under which he worked

129 The question to be answered is whether Mr Berthelot's appointment as a visiting scientist, and the terms under which he worked, in order for him to undertake the role of personal adviser to Mrs Cresson constitutes a breach on her part of the obligations arising from her office as a Member of the Commission.

130 A Member of the Commission has a Cabinet which comprises members of staff who are his personal advisers. Those advisers are appointed *intuitu personae*, that is to say in a manner that is largely discretionary, with those concerned being selected both for their professional and personal qualities and for their ability to adapt to the methods of working specific to the Commissioner concerned and those of the whole of his Cabinet.

131 Apart from the members of his Cabinet, a Commissioner has other human resources available to him. He may, in particular, rely on the members of the

Commission's staff, have recourse to experts or entrust tasks to certain people for limited periods and in compliance with particular rules.

132 In the present case, it is accepted that Mr Berthelot could not be appointed as a member of Mrs Cresson's Cabinet as he had passed the permitted age-limit. In addition, as Mrs Cresson's Cabinet was already in place, with the result that all posts of personal adviser had been filled, Mrs Cresson could not, in principle, engage an additional personal adviser.

133 Mrs Cresson nevertheless managed to arrange for Mr Berthelot to be appointed by her staff. He was appointed as a visiting scientist in order to carry out what were in truth the functions of a personal adviser.

134 In that regard, it is clear from paragraphs 132 and 133 of this judgment that the appointment of Mr Berthelot constitutes a circumvention of the rules relating to the appointment of the members of a Cabinet.

135 The appointment concerned also infringes the rules relating to the attachment of visiting scientists.

136 In the first place, contrary to the provisions of Article 1(3) of the decision on visiting scientists, Mr Berthelot was not appointed in order to carry out the functions of a visiting scientist and, accordingly, the purpose of the visit to be satisfied, that is to say a detailed exchange of knowledge between the visitor and those responsible for research activities in DG XII and the JRC, was not satisfied. The sole aim of his appointment was to allow him to carry out functions within Mrs Cresson's Cabinet.

The rules relating to visiting scientists were therefore not used for their proper purpose.

137 The fact noted in the public prosecutor's submissions that members of the Community institutions were regularly seconded to the Cabinets of the Members of the Commission or added to the staff officially allocated to a Cabinet conferred an appearance of regularity on the appointment by placing it within an existing framework. However, the purpose of such secondments was not met in this case. The object of that type of secondment is to enable persons who have previously been appointed on the basis of merit, often by competition, and have demonstrated their ability by carrying out their functions within the Commission in the general interest of the Community, then to make their talents available for the benefit of the Cabinets. The immediate secondment of Mr Berthelot to Mrs Cresson's Cabinet did not reflect the purpose of that common practice.

138 In the second place, the decision on visiting scientists provides for those concerned to be selected from professors or lecturers from a university or an establishment of higher scientific education or from senior scientific staff from other research organisations having a proven reputation in the field of research. In the absence of any particular skill or experience, it cannot be accepted that Mr Berthelot's appointment satisfied the criteria laid down by the rules in question on the basis only of the qualifications referred to by him in his curriculum vitae which are described in paragraph 10 of this judgment. Accordingly, it has not been established that there was an interest in appointing Mr Berthelot to DG XII and the JRC.

139 In the third place, Mr Berthelot's contract, which was for a period of 30 months, exceeded the maximum permitted duration by six months. Mr Berthelot ultimately resigned, not in order to put an end to his appointment for a period which was unduly long, but on health grounds. Such a failure to observe the applicable time-limits displays a disregard for the rules in force, in particular on Mrs Cresson's part. Moreover, once Mr Berthelot had delivered his resignation, Mrs Cresson continued to insist, this time to no effect, that a means of appointing him be found.

140 In the fourth place, contrary to the requirements laid down under Article 7(7) of the decision on visiting scientists, Mr Berthelot did not draw up any report on the activity which had been the purpose of his visits. It was necessary for the administration to ask him to submit reports. Those which were ultimately provided appear to have been drafted, not by Mr Berthelot, but by various persons carrying out duties within Mrs Cresson's Cabinet. It also appears that those reports sought merely to respond in formal terms to the administration's request.

141 The fact that visiting scientists did not systematically submit reports at the end of their visits does not undermine that finding of a breach of one of the obligations laid down in the decision on visiting scientists.

142 Lastly, mission orders relating to fictitious missions were drawn up in Mr Berthelot's name. The drawing up of those documents constitutes a serious breach of the rules laid down by the Community institutions. However, primary responsibility for such a breach lay with Mr Berthelot, and the file does not show that Mrs Cresson was made aware of it, or that she ought to have been. In those circumstances, there is no need to consider the argument raised by Mrs Cresson in her defence that the sums covered by the mission orders relating to fictitious missions were no more than minimal.

143 The various failures to observe the letter and the spirit of the applicable rules which are apparent from a consideration of Mr Berthelot's file, in particular those referred to in paragraphs 136 to 138 of this judgment, demonstrate the manifest

inappropriateness of his appointment as a visiting scientist in order for him to carry out the duties of personal adviser to a Member of the Commission.

- 144 Consideration of the appointment of Mr Berthelot and the terms under which he worked has established that the rules in question were not used for their proper purpose.
- 145 Having regard to her personal involvement in that appointment, since it took place at her express request, after she had been informed that she could not recruit Mr Berthelot to her Cabinet, Mrs Cresson must be held responsible for that appointment and for the circumvention of the rules which it involved. She cannot extricate herself from her responsibility by taking refuge behind the authority to appoint granted by the administration since at no time did she express any concern that the responsible departments should observe the purpose of the applicable rules, even by questioning them on the matter or issuing recommendations to that effect.
- 146 Thus, in appointing a close acquaintance, Mr Berthelot, as a visiting scientist, when he was not going to be engaged in the activities associated with that position, in order to allow him to undertake the role of personal adviser in her Cabinet, even though the latter was fully-staffed and, moreover, Mr Berthelot had passed the permitted age-limit for performing that role, Mrs Cresson became liable for a breach of her obligations that is of a certain degree of gravity.
- 147 It follows from the above that Mrs Cresson acted in breach of the obligations arising from her office as a Member of the Commission, for the purposes of Article 213(2) EC and Article 126(2) EA, in relation to the appointment of Mr Berthelot and as regards the terms under which he worked.

— The offers of work contracts to Mr Riedinger

- 148 The material presented to the Court and referred to in paragraphs 22 to 26 of this judgment does not establish that, by offering the three contracts in question to Mr Riedinger, Mrs Cresson acted in breach of the obligations arising from her office of Member of the Commission. Neither the titles of those contracts, nor such information as has been provided in their regard by the Commission, show that those contracts did not serve the general interest of the Community.

The request for an order that Mrs Cresson be deprived of her right to a pension or other benefits in its stead

- 149 The breach of the obligations arising from the office of a Member of the Commission calls, in principle, for the imposition of a penalty under Article 213(2) EC.
- 150 However, having regard to the circumstances of the case, the finding of breach constitutes, of itself, an appropriate penalty.
- 151 It is therefore appropriate not to impose on Mrs Cresson a penalty in the form of a deprivation of her right to a pension or other benefits in its stead.

Costs

- 152 Under the first subparagraph of 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. Under the first subparagraph of Article 69(3), where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that the parties bear their own costs. Under the first subparagraph of Article 69(4), the Member States which have intervened in the proceedings are to bear their own costs.

- 153 In the present case, since the Commission and Mrs Cresson have been unsuccessful in part, they should be ordered to bear their own costs. The French Republic, as intervener, is to bear its own costs.

On those grounds, the Court (Full Court) hereby:

1. **Declares that Mrs Édith Cresson acted in breach of the obligations arising from her office as a Member of the Commission of the European Communities, for the purposes of Article 213(2) EC and Article 126(2) EA, in relation to the appointment of Mr René Berthelot and as regards the terms under which he worked;**

2. **As to the remainder, dismisses the action;**

3. **Orders the Commission of the European Communities, Mrs Édith Cresson and the French Republic to bear their own costs.**

[Signatures]