JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
18 October 2001 *

In Case T-333/99,

X, residing in Frankfurt am Main (Germany), represented by N. Pflüger, R. Steiner and S. Mittländer, lawyers, with an address for service in Luxembourg,

applicant,

v

European Central Bank, represented by C. Zilioli and V. Saintot, acting as Agents, assisted by B. Wägenbaur, lawyer, with an address for service in Luxembourg,

defendant,

* Language of the case: German.

APPLICATION for annulment of the decision of the Executive Board of the European Central Bank of 9 November 1999 to continue the suspension of the applicant and to withhold one half of his basic salary, and of the decision of 18 November 1999 dismissing the applicant,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of: J. Azizi, President, K. Lenaerts and M. Jaeger, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 20 February 2001,

gives the following

Judgment

Legal framework

1 The Protocol on the Statute of the European System of Central Banks and of the European Central Bank (hereinafter 'the ECB'), as annexed to the EC Treaty (hereinafter 'the ESCB Statute'), contains, in particular, the following provisions:

'Article 12

...

12.3 The Governing Council shall adopt Rules of Procedure which determine the internal organisation of the ECB and its decision-making bodies.

...

Article 36

Staff

36.1 The Governing Council, on a proposal from the Executive Board, shall lay down the conditions of employment of the staff of the ECB.

36.2 The Court of Justice shall have jurisdiction in any dispute between the ECB and its servants within the limits and under the conditions laid down in the conditions of employment.'

2 Pursuant to Article 36.1 of the ESCB Statute, the Governing Council adopted the Conditions of Employment for Staff of the European Central Bank ('the conditions of employment'), which, in the version thereof applicable to the facts in issue, provide *inter alia* as follows:

'4. (a) Members of staff shall perform their duties conscientiously and without regard to self-interest. They shall conduct themselves in a manner befitting their position and the character of the ECB as a Community body.

...

9. (a) Employment relations between the ECB and its members of staff shall be governed by employment contracts issued in conjunction with these Conditions of Employment. The Staff Rules adopted by the Executive Board shall further specify the application of these Conditions of Employment.

...

(c) No specific national law governs these Conditions of Employment. The ECB shall apply (i) the general principles of law common to the Member States, (ii) the general principles of European Community (EC) law, and (iii) the rules contained in the EC regulations and directives concerning social policy which are addressed to the Member States. Whenever necessary, these legal instruments will be implemented by the ECB. EC recommendations in the area of social policy will be given due consideration. In interpreting the rights and obligations under the present Conditions of Employment, due regard shall be shown for the authoritative principles of the regulations, rules and case-law which apply to the staff of the EC institutions.

10. (a) Employment contracts between the ECB and its members of staff shall take the form of letters of appointment which shall be countersigned by members of staff. The letters of appointment shall specify the terms of employment as required by Council Directive 91/533/EEC of 14 October 1991....

...

11. (a) Contracts of members of staff may be terminated by the ECB on a reasoned decision of the Executive Board in accordance with the procedure laid down in the Staff Rules and on the following grounds:

(i) in the case of continued unsatisfactory performance. Termination of a contract by the ECB for this reason shall be subject to a period of

notice of three months and to a severance payment of one month's salary per completed year of service, up to a maximum of 12 months. The Executive Board may release a member of staff from actual duty during his/her period of notice;

(ii) in the case of redundancy....

(iii) for disciplinary reasons.

...

41. Members of staff may ask for an administrative review of complaints and grievances in respect of the consistency of actions taken in their individual cases with the personnel policy and conditions of service of the ECB, using the procedure laid down in the Staff Rules. Members of staff who remain dissatisfied following the administrative review may use the grievance procedure laid down in the Staff Rules.

Such procedures may not be used to challenge:

(i) any decision of the Governing Council or any ECB policy, including any policy laid down in these Conditions of Employment or in the Staff Rules;

(ii) any decision for which special appeals procedures exist; or

(iii) any decision not to confirm the appointment of a member of staff serving a probationary period.

42. After all available internal procedures have been exhausted, the Court of Justice of the European Community shall have jurisdiction in any dispute between the ECB and a member or a former member of its staff to whom these Conditions of Employment apply.

Such jurisdiction shall be restricted to the legality of the measure or decision, unless the dispute is of a financial nature, in which case the Court of Justice shall have unlimited jurisdiction.

43. The following disciplinary measures may be taken, as appropriate, against members of staff who fail in their duties to the ECB:

(i) a written reprimand may be issued by a member of the Executive Board;

(ii) the Executive Board may decide on:

— a temporary reduction in salary;

— demotion or a change in the employment position of the member of staff within the ECB;

— a permanent reduction in salary;

— dismissal.

Disciplinary measures must be in proportion to the gravity of the breach of discipline and the grounds on which they are based must be stated. They shall be adopted in accordance with the procedure laid down in the Staff Rules. The said procedure shall ensure that no member of staff may be subjected to a disciplinary measure without an opportunity to reply to the relevant charges first being granted.

44. Where an allegation of serious misconduct is made against a member of staff by the ECB management, whether this amounts to a failure to carry out official duties or to a breach of the law, the Executive Board may decide that he/she is suspended forthwith.

The decision shall specify whether he/she is to continue to receive the full basic salary during the period of suspension or whether a part thereof is to be withheld. In the latter case, the part withheld shall not be more than one half of the member of staff's basic salary.

If within four months from the suspension a final decision has not been taken or no measure other than a written reprimand has been taken, the member of staff shall be entitled to reimbursement of the amount of salary withheld.

Where, however, the member of staff is prosecuted for those same acts, a final decision shall be taken only after a final verdict has been reached by the court hearing the case.

45. A Staff Committee whose members are elected by secret ballot shall represent the general interests of all members of staff in relation to contracts of employment; staff regulations and remuneration; employment, working, health and safety conditions at the ECB; social security cover; and pension schemes.

46. The Staff Committee shall be consulted prior to changes in these Conditions of Employment, the Staff Rules and related matters as defined under paragraph 45 above.

47. In the event of a dispute of an individual nature, a member of staff shall be entitled to seek the assistance of a staff representative in internal procedures.'

3 Pursuant to Article 12.3 of the ESCB Statute, the Governing Council adopted the Rules of Procedure of the ECB (OJ 1999 L 125, p. 34), which provide *inter alia*:

'Article 11

Staff of the ECB

...

11.2 Without prejudice to Articles 36 and 47 of the Statute, the Executive Board shall enact organisational rules (hereinafter referred to as "Administrative Circulars"). Such rules shall be obligatory for the staff of the ECB.

...

Article 21

Conditions of Employment

21.1. The employment relationship between the ECB and its staff shall be determined by the Conditions of Employment and the Staff Rules.

21.2. The Conditions of Employment shall be approved and amended by the Governing Council upon a proposal from the Executive Board. The General Council shall be consulted under the procedure laid down in these Rules of Procedure.

21.3. The Conditions of Employment shall be implemented by Staff Rules, which shall be adopted and amended by the Executive Board.

21.4. The Staff Committee shall be consulted before the adoption of new Conditions of Employment or Staff Rules. Its opinion shall be submitted, respectively, to the Governing Council or the Executive Board.'

4 Pursuant to Article 21.3 of the Rules of Procedure of the ECB and Article 9(a) of the Conditions of Employment, the Executive Board of the ECB adopted the

European Central Bank Staff Rules (hereinafter 'the Staff Rules'), which provide *inter alia*:

'8.3.2 When the Executive Board decides to dismiss a member of staff the dismissal shall take effect from the day of suspension. The member of staff concerned shall retain such amounts as have been paid to him/her during the suspension period.'

5 On 12 November 1998 the ECB adopted Administrative Circular 11/98 headed 'ECB Internet Usage Policy' (hereinafter 'Circular 11/98') laying down the rules governing the use by staff members of computers providing a link to the internet and enabling electronic mail to be sent and received. This provides, in particular:

'3.1 The ECB internet facilities are provided for business use.'

Facts

6 The applicant, who had been a servant of the European Monetary Institute ('the EMI'), entered into the service of the ECB on 1 July 1998. He was assigned to the ECB's archives section, where he worked as a documentation officer. His work-

station was equipped with a computer which was linked, like all the ECB's other computers, to a central server. In November 1998 the applicant's computer was fitted with an internet link and a facility enabling him to send and receive electronic mail.

7 In August 1999, following a complaint by one of the applicant's colleagues, the Personnel Department opened an internal investigation.

8 On 18 October 1999 the administration of the ECB informed the applicant of the opening of disciplinary proceedings against him and of the fact that the Executive Board of the ECB had decided, on the same day, to suspend him from his duties pursuant to Article 44 of the Conditions of Employment, on the basis that he should continue to be paid his full basic salary. It also informed the applicant that he was suspected, first, of having repeatedly procured through the internet documents of a pornographic and political nature and of having sent them to third parties by electronic mail. Second, he was suspected of having importuned the colleague who had submitted the complaint, in particular by sending him numerous messages by electronic mail containing material of a pornographic and/or ideologically extreme nature, despite the fact that the colleague in question had clearly indicated that he did not approve.

9 Thereafter, the Personnel Department, in collaboration with the competent management and the Legal Service of the ECB, heard a series of witnesses. In addition, certain checks were carried out concerning the internet sites consulted by the applicant and the electronic mail messages sent by him. The applicant's computer was disconnected from the ECB network and placed under seal.

10 On 28 October 1999 the Personnel Department of the ECB sent to the applicant's lawyer three files containing approximately 900 pages of documentation

regarded as evidence by the defendant, together with a CD-ROM on which were saved the pornographic images and sets of images taken from the internet which the applicant had distributed by electronic mail within and outside the ECB during the period covered by the computer checks.

11 On 3 November 1999 the applicant, assisted by his lawyer, by a member of the Staff Committee and, at his request, by an interpreter, was heard by members of the Personnel Department, of the division to which he was attached and the Legal Service of the ECB. Minutes of the hearing were kept. The applicant's lawyer contested the validity of the suspension of 18 October 1999 and alleged that Circular 11/98 and the circumstances in which the evidence adduced against his client had been obtained were illegal.

12 On 8 November 1999 the administration issued a reasoned opinion on the disciplinary proceedings initiated against the applicant, with a view to bringing to the knowledge of the Executive Board of the ECB the facts, the evidence and the legal assessment of the matter proposed following those proceedings.

13 The conclusions reached in that opinion were, first, that the applicant had harassed a colleague by sending the latter by electronic mail, despite his protestations, messages containing pornographic and/or ideologically extreme material, by refusing to respect that colleague's working environment, by provoking him with gestures of a sexual nature, by insinuating that the colleague in question was homosexual and by threatening physical assault. Second, the applicant was alleged thereby to have poisoned the working atmosphere in the office which he shared with other employees of the ECB. Third, the applicant had allegedly misused service equipment, in this instance by making unreasonable and intolerable use, for non-professional purposes, of the internet and of the electronic mail system. Fourth, it was stated that the applicant had failed to fulfil his obligation to conduct himself with dignity in the performance of his employment contract, by consulting internet sites and sending by electronic mail messages of a pornographic nature or relating to behaviour which was probably

criminal. According to the opinion, those messages were unacceptable by any common sense standards, and particularly so in the case of a member of the Community public service. Fifth, the applicant was alleged to have compromised the image and the credibility of the ECB, (i) by sending to addressees outside the ECB, from the latter's e-mail address, electronic mail messages containing material which was pornographic or related to probably criminal behaviour and (ii) by consulting, in the name of the ECB, sites not intended for use in his employment.

14 In its reasoned opinion, the administration characterised the abovementioned matters as violating the fundamental principles protecting the dignity of persons in the workplace and as infringing Article 4(a) of the Conditions of Employment and Article 3.1 of Circular 11/98. Having arrived at the view that the matters established against the applicant were of a serious nature, it proposed to the Executive Board that he should be dismissed.

15 On 9 November 1999 the ECB sent to the applicant's lawyer a copy of the reasoned opinion and of the four annexes thereto.

16 The applicant's lawyer submitted his observations on the reasoned opinion by letters of 9 and 10 November 1999, written in German. In his letter of 9 November 1999, he stated that the disciplinary regime provided for by the Conditions of Employment was lacking in any legal basis and that it violated general Community principles and principles common to the Member States, as well as the principle of *nulla poena sine lege*. In his letter of 10 November 1999, he argued in essence, first, that the criticisms levelled at the applicant were not sufficiently detailed to enable the applicant to comment; second, that the applicant contested the facts alleged, save for the fact that there was tension between him and the colleague from whom the complaints had emanated, and, in particular, that there was no proof that the applicant had been the only person having access to the computer issued to him; third, that, even assuming that there was any basis to the facts alleged, the ECB had infringed the principle of proportionality by failing to notify the applicant in advance of the opening of disciplinary proceedings, so as to give him the opportunity to rectify his conduct.

17 On 9 November 1999 the Executive Board of the ECB decided, having regard to the disciplinary proceedings then pending, to maintain the suspension of the applicant and to withhold, with effect from 10 November 1999, one half of his basic salary, pursuant to Article 44 of the Conditions of Employment. That decision is hereinafter referred to as 'the decision of 9 November 1999'.

18 On 10 November 1999 the applicant's lawyer requested an administrative review of that decision, on the ground that the disciplinary regime laid down by the Conditions of Employment was illegal.

19 On 12 November 1999 the administration of the ECB informed the applicant's lawyer that, in writing his letters of 9 and 10 November 1999 in German, he had failed to have regard to the fact that the language to be used in reports and communications between the ECB and its employees is English. However, with a view to preventing the proceedings from being delayed, the ECB stated that it was willing to accept those letters, but on the basis that its decision in that connection was not to be regarded as setting a precedent.

20 On 15 November 1999, in response to that letter, the applicant's lawyer sent a letter in English to the President of the ECB in which he stated that the compulsory use of that language in the proceedings then pending constituted an attempt to hamper the applicant's defence and that, unless within three days he received notice to the contrary from the ECB, he proposed in future to write his letters in German.

21 On 17 November 1999 the administration of the ECB informed the applicant's lawyer that the decision of 9 November 1999 could not be the subject of an administrative review within the meaning of Article 41 of the Conditions of Employment, since the Executive Board of the ECB, by whom that decision had

been adopted, was the highest administrative authority within that body. It went on to state that any action against the decision of 9 November 1999 would have to be brought before the Court of Justice of the European Communities.

22 By letter of 18 November 1999, the administration of the ECB, responding to the letter of 15 November from the applicant's lawyer, denied that, in pointing out the principle that English must be used, it had been seeking to hamper the defence of the applicant. It stated that, on the contrary, the ECB, by allowing the use of German in that case, had shown greater leniency towards the applicant than was legally required.

23 By a decision adopted on the same day, the Executive Board of the ECB dismissed the applicant in accordance with Article 11(a) and (b) of the Conditions of Employment and Article 8.3.2 of the Staff Rules. In the statement of reasons for that decision, it rejected the criticisms of the reasoned opinion expressed by the applicant's lawyer in his letters of 9 and 10 November 1999. It stated, in particular, that the issues raised by the applicant, taken as a whole, did not seriously call in question the relevance of the evidence gathered in the course of the disciplinary proceedings. As regards the question of proving that the applicant's computer had been used by him alone, it declared that the use of computers within the ECB was controlled by the use of personal and confidential passwords. It also stated that, given the substantial number of messages sent by electronic mail during office hours over a period of 18 months from the applicant's computer, which was located in an open-plan office occupied by six persons, it was hardly likely that that computer could have been used by a third party without attracting attention. As regards the alleged delay in the intervention of the administration of the ECB, it stated that this could not justify the conduct of the applicant, who was solely responsible for his acts. On the basis of the findings of fact made, the Executive Board of the ECB adopted the view proposed by the administration in the reasoned opinion as to the manner in which the case should be dealt with. Lastly, it rejected the criticisms expressed by the applicant's lawyer as to the legality of the disciplinary proceedings. It added that no organisation could survive without a procedure for penalising infringements of contractual obligations, that a sufficient legal basis for the disciplinary regime was to be found in Article 36 of the ESCB Statute, that that regime had been accepted by the applicant when he signed his contract of employment and that it had been applied in accordance with the general principles of law.

Procedure and forms of order sought by the parties

24 It was in those circumstances that the applicant, by application lodged in the Registry of the Court of First Instance on 25 November 1999, brought the present proceedings.

25 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure.

26 The parties presented oral argument and replied to questions from the Court at the hearing on 20 February 2001.

27 The applicant claims that the Court should:

— declare that the disciplinary proceedings brought against him are illegal;

— declare that the decision of 9 November 1999 is illegal;

— order the ECB to pay the amounts withheld from his salary pursuant to Article 44 of the Conditions of Employment;

— declare that his dismissal is illegal and that the contract of employment concluded by him with the ECB has not been terminated but is still continuing;

— order the ECB to continue to employ him;

— order the ECB to pay the costs.

28 The ECB contends that the Court should:

— dismiss the action;

— order the applicant to pay all the costs.

The jurisdiction of the Court of First Instance

Summary of the arguments of the parties

29 The ECB notes that the applicant purports to base his action on Article 236 EC. However, that article covers only disputes between the Community and its servants, and not those between the ECB and its employees, which are governed by Article 36.2 of the ESCB Statute.

30 It observes that Article 36.2 of the ESCB Statute confers jurisdiction on the Court of Justice and that Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1998 L 319, p. 1), as amended on various occasions, contains no provision expressly conferring jurisdiction on the Court of First Instance in respect of disputes covered by that article. It therefore expresses doubt as to the jurisdiction of the Court of First Instance to hear and determine the present action.

31 It concedes that the authors of the Treaty on European Union signed at Maastricht on 7 February 1992, which set up a European System of Central Banks and the ECB, clearly intended to confer jurisdiction to hear and determine disputes covered by Article 36.2 of the ESCB Statute on the Court of First Instance. It refers in that regard to Declaration No 27 annexed to the final act of the Treaty on European Union, which relates to disputes between the ECB and the EMI and their servants.

32 However, the very existence of that declaration shows that, in the absence of any relevant provisions adopted by the institutions, the Court of First Instance does not have jurisdiction to hear and determine such disputes.

33 In the ECB's view, it is not possible to fill that lacuna merely by reference to the judgment of the Court of Justice in Case 110/75 *Mills* v *EIB* [1976] ECR 955 (paragraphs 11 to 13). It also refers to the judgment of the Court of First Instance in Case T-140/97 *Hautem* v *EIB* [1999] ECR-SC I-A-171 and II-897 (paragraph 77). It maintains that the ECB is in a different position from the European Investment Bank (EIB), in that the Treaty expressly conferred on the Court of Justice jurisdiction in respect of disputes between the ECB and its staff, on a specific legal basis.

34 The applicant considers that jurisdiction vests in the Court of First Instance by virtue of Article 3(a) of Decision 88/591 in conjunction with Article 236 EC.

Despite various amendments made to the EC Treaty following the adoption of Decision 88/591, Article 236 EC continues to state that the 'Court of Justice' is to have jurisdiction in any dispute between the Community and its servants. Consequently, the term 'Court of Justice', in Article 236 EC does not mean the Court of Justice in the strict sense, as opposed to the Court of First Instance. Since the adoption of Decision 88/591, it has in fact meant the Court of First Instance, which has practical jurisdiction to hear and determine such disputes as the court adjudicating on the merits.

35 Article 36.2 of the ESCB Statute refers to the 'Court of Justice' within the meaning applied to that term in Article 236 EC, and does not confer exclusive jurisdiction on the Court of Justice in the strict sense.

Findings of the Court

36 Article 3(a) of Decision 88/591, as amended, provides that the Court of First Instance is to exercise at first instance the jurisdiction conferred on the Court of Justice by the Treaties establishing the Communities and by the acts adopted in implementation thereof, in disputes as referred to in Article 236 EC and Article 152 EA. The disputes thus referred to are those between the Communities and their servants.

37 In thus expressly referring to the abovementioned articles, Decision 88/591 seeks to designate the type of disputes defined by the articles in question, and hence to make it clear that the Court of First Instance is to exercise at first instance the jurisdiction conferred on the Court of Justice in any dispute between the Communities and their servants. As a provision of secondary law implementing provisions of primary law, in particular Article 225 EC, Decision 88/591 has thus established a two-tier judicial system which governs in a uniform, coherent and exhaustive manner the remedies and procedures to be used in disputes between the communities and their servants.

38 Although Article 36.2 of the ESCB Statute forms part of a protocol adopted in the context of the Treaty of Maastricht and thus constitutes a provision of primary law, the legal terms employed in that provision must, in case of doubt, be interpreted in the light of the general body of relevant rules in force at the time of its adoption, inasmuch as that will ensure that there is no conflict with a fundamental principle of Community law, such as the principle of equal treatment.

39 Consequently, Article 36.2 of the ESCB Statute must be interpreted, having regard to the different possible interpretations suggested, in such a way as to ensure that it does not conflict with the general and uniform system of legal remedies for servants of the Community laid down by Decision 88/591 and based on Article 225 EC.

40 That is because, were one to interpret Article 36.2 of the ESCB Statute as precluding actions by certain servants against certain institutions or organs — in this instance, by servants of the ECB against the ECB — from the improved system of legal remedies introduced by Decision 88/591 for the same type of dispute, that departure from the general system of legal remedies, for which there is no objective justification, would be in breach of the principle of equal treatment and therefore of a fundamental principle of Community law.

41 The term 'the Court of Justice' in Article 36.2 of the ESCB Statute is therefore to be interpreted as referring to the Community judicature as a whole within the meaning of Article 7 EC and thus as including the Court of First Instance. Consequently, the Court of First Instance has jurisdiction to hear disputes for the purposes of Article 36.2 of the ESCB Statute.

42 Indeed, that was precisely the wish expressed by the intergovernmental conference following the adoption of the ESCB Statute. Declaration No 27, annexed to the final act of the Treaty on European Union, states: 'The Conference

considers it proper that the Court of First Instance should hear this class of action in accordance with Article 168a of the Treaty establishing the European Community'.

43 In the legal context explained above, the Council was not bound to act on the invitation made to it by the conference 'therefore... to adapt the relevant rules accordingly', in other words, to add to the list set out in the article in question an express reference to Article 36.2 of the ESCB Statute.

44 It follows that the Court of First Instance has jurisdiction to hear and determine the present dispute.

The admissibility of certain heads of claim

A — *The applicant's claim for an order requiring the ECB to continue to employ him*

Summary of the arguments of the parties

45 The ECB considers that the applicant's claim that the Court should order it to continue employing him is inadmissible. According to the ECB, it is settled case-law that the Court of First Instance is not empowered to make declarations of principle or to address directions to Community bodies within the framework of Article 236 EC.

46 The applicant concedes that, in the context of staff actions, the Court of First Instance may in principle only annul the contested decision and is not empowered to issue directions to the defendant. However, that is the position only where the action is brought against an act adopted by the defendant in the exercise of its discretion. Where, on the other hand, a case does not concern the exercise of any discretion by the defendant or relates to a dispute of a financial nature, the Court may order the defendant to adopt specific measures (see the judgments of the Court of Justice in Case 185/80 *Garganese* v *Commission* [1981] ECR 1785 and Case 103/81 *Chaumont-Barthel* v *Parliament* [1982] ECR 1003). If the dismissal in the present case was improper, the applicant's personal rights must require him to be restored to the position which he occupied prior to the dismissal. This involves the legal effect of the legal concept of an *actio negatoria* under Roman law, which constitutes a general principle of Community law.

Findings of the Court

47 The claim in question has a purpose other than the annulment of the decision dismissing the applicant. Moreover, it is not exclusively of a financial nature. Consequently, it does not fall within the ambit of the Court's unlimited jurisdiction in disputes between the ECB and its servants, based on the second paragraph of Article 42 of the Conditions of Employment, which provides that the jurisdiction of the Community judicature is to be 'restricted to the legality of the measure or decision, unless the dispute is of a financial nature, in which case the Court of Justice shall have unlimited jurisdiction'.

48 It follows that its subject-matter is covered by the rule prohibiting the Community judicature from addressing directions to the administration (see, to that effect, the judgment of the Court of First Instance in Case T-168/97 *Varas Carrion* v *Council* [1999] ECR-SC I-A-143 and II-761, paragraph 26). It is therefore inadmissible.

B — *The applicant's claim for an order requiring the ECB to pay him the amounts withheld from his basic salary under Article 44 of the Conditions of Employment*

Summary of the arguments of the parties

49 The ECB considers that the applicant's claim for an order of the Court requiring it to pay him the amounts withheld from his basic salary under Article 44 of the Conditions of Employment is inadmissible on the same grounds as those set out in paragraph 45 above.

50 The applicant relies on the arguments set out in paragraph 46 above to challenge that view.

Findings of the Court

51 The claim in question is clearly of a financial nature. Consequently, on account of its subject-matter, it falls within the ambit of the unlimited jurisdiction of the Community judicature, in accordance with the second paragraph of Article 42 of the Conditions of Employment. It is therefore admissible (see, to that effect, the judgment of the Court of First Instance in Case T-197/98 *Rudolph* v *Commission* [2000] ECR-SC I-A-55 and II-241, paragraphs 32 and 33, and the case-law cited therein).

Substance

A — *The objections of illegality*

1. *The objections of illegality concerning the Conditions of Employment*

The lack of competence on the part of the ECB to adopt a disciplinary regime

— Summary of the arguments of the parties

52 The applicant maintains that the ECB had no power to adopt a disciplinary regime. He also refers, in support of his arguments to that effect, to his abovementioned letter of 9 November 1999, reproduced in Annex 21 to the application.

53 Whilst Article 24 of the Treaty establishing a single Council and a single Commission of the European Communities ('the Merger Treaty') empowers the Council of Ministers to adopt the Staff Regulations of officials of the European Communities ('the Staff Regulations of Officials'), Article 36.1 of the ESCB Statute merely conferred on the Governing Council the power to lay down, on a proposal from the Executive Board, the conditions of employment of the staff of the ECB. The relationship between an official and his institution is not, however, of a contractual nature; it is a public-law relationship based on the notion of service and loyalty. The Council of Ministers, duly empowered by Article 24 of the Merger Treaty, was therefore entitled to lay down in the Staff Regulations of

Officials a disciplinary regime resulting from the specific link of subordination existing between officials and the Community. By contrast, the relationship between the ECB and its employees is of a straightforward contractual nature, based on the principle of freedom to contract and resulting from personal rights and freedom to pursue an occupation, the protection of which constitutes a general principle of Community law. It is not, therefore, based on a relationship of subordination. Consequently, the ECB is not empowered to prescribe in the Conditions of Employment, and to apply, a disciplinary regime enabling it unilaterally to modify the terms on which the contract is to be performed, in breach of the principle of freedom to contract. The ECB could have protected itself against breaches by its employees of their contractual obligations without setting up such a regime, by contractually reserving to itself an exceptional right to dismiss employees.

54 To provide for a disciplinary regime in the context of the performance of employment contracts is also contrary to German law.

55 It violates European legal principles, in particular the principle of good faith.

56 The ECB argues, first, that the reference by the applicant to Annex 21 to the application is not in conformity with the Rules of Procedure of the Court of First Instance and that his complaint must therefore be declared inadmissible pursuant to Article 44(1)(c) of those Rules of Procedure.

57 Next, as to the substance of the case, the ECB considers that its Governing Council was competent to lay down a disciplinary regime in the rules applying to the staff.

— Findings of the Court

58 First of all, as regards the objection of inadmissibility raised by the defendant, it should be noted that, despite the reference to an annex, the plea that the ECB was not competent to adopt a disciplinary regime, as set out in the body of the application itself, is presented sufficiently clearly and comprehensively to enable the defendant and the Court to ascertain its scope. It is therefore admissible.

59 As to the substance, the Court observes that the employment relationship between the ECB and its members of staff is defined by the Conditions of Employment, adopted by the Governing Council pursuant to a proposal by the Executive Board of the ECB on the basis of Article 36.1 of the ESCB Statute. Article 9(a) of the Conditions of Employment provides: 'Employment relations between the ECB and its members of staff shall be governed by employment contracts issued in conjunction with these Conditions of Employment'. According to Article 10(a) of the Conditions of Employment, '(e)mployment contracts between the ECB and its members of staff shall take the form of letters of appointment which shall be countersigned by members of staff'.

60 Those provisions are similar to the corresponding provisions of the Staff Regulations of the EIB, which have been interpreted by the Court of Justice as meaning that 'the system adopted for the relations between the Bank and its employees is... contractual and is accordingly founded on the principle that individual contracts concluded between the Bank and each of its employees constitute the outcome of an agreement resting on mutual consent' (*Mills* v *EIB*, cited above, paragraph 22).

61 It must therefore be concluded that the employment relationship between the ECB and its members of staff is of a contractual nature, and not of the type existing between the public service and its officials.

62 Next, it should be noted that the contract in issue was concluded with a Community body which is responsible for the fulfilment of a task in the Community interest and which is empowered to lay down, in the form of regulations, the provisions applicable to its staff.

63 In view of this, and contrary to the applicant's assertions, the Governing Council was entitled, pursuant to Article 36.1 of the ESCB Statute, to provide in the Conditions of Employment for a disciplinary regime enabling it *inter alia*, in the event of non-compliance by one of its staff with the obligations imposed by the employment contract, to take such measures as might be necessary in the light of the responsibilities and objectives assigned to it.

64 The applicant puts forward, in essence, two arguments to the contrary.

65 First, he claims that, unlike Article 24 of the Merger Treaty, the wording of Article 36.1 of the ESCB Statute permits only the adoption of conditions of employment which fully respect the principle of freedom to contract. Article 36.1 refers to the 'conditions of employment' ('régime applicable au personnel', 'Beschäftigungsbedingungen'), as opposed to the 'Staff Regulations of Officials of the European Communities' referred to by Article 24 of the Merger Treaty.

66 However, that textual argument lacks any foundation. Article 24 of the Merger Treaty refers, after the wording just quoted, to the 'Conditions of Employment of other servants of those Communities', a formula equivalent to the 'conditions of employment of the staff' provided for by Article 36.1 of the ESCB Statute. The Conditions of Employment of other servants of the European Communities (hereinafter 'the CEOS') rightly provide for a disciplinary regime in relation to the most important categories of those servants.

67 Second, the applicant argues that the application of disciplinary sanctions enables the ECB unilaterally to change the conditions governing performance of the contract of employment, contrary to the principles governing German labour law and the principles of European law, in particular the principle of good faith.

68 It should be noted in that regard, first, that whilst the employment relationship between the Community institutions or bodies, including the ECB, and their servants who are not officials is of a contractual nature, it forms part of the framework for the performance by the latter of their duties in the public interest and therefore bears strong similarities to the relationship of public service between officials and their institutions, so that it may, on that basis, include a disciplinary regime. Thus, a member of the temporary staff who is subject to the CEOS enjoys the rights, and must comply with the obligations, laid down by Articles 11 to 26 of the Staff Regulations of Officials (Article 11 of the CEOS) and may be liable to disciplinary action in accordance with Title VI of the Staff Regulations of Officials (Article 50a of the CEOS). By the same token, the Staff Regulations of the EIB, which are very similar to the ECB's Conditions of Employment, lay down a disciplinary regime (for examples of the application of that regime, see the judgments of the Court of First Instance in *Hautem* v *EIB*, cited above, and in Case T-141/97 *Yasse* v *EIB* [1999] ECR-SC I-A-177 and II-929).

69 Next, the disciplinary regime at issue forms an integral part of the conditions known to and accepted by the applicant at the time when he freely signed his contract of employment with the ECB, which refers to the Conditions of Employment.

70 Lastly, as regards the applicant's complaint that the disciplinary regime at issue enables the ECB unilaterally to modify the conditions governing the performance of the contract by its staff, whose situation thus differs from that of private-sector employees, it should be observed that in any event that complaint is relevant only in relation to certain disciplinary sanctions provided for by the Conditions of Employment which do not feature in private-sector employment contracts, namely, in particular, compulsory changes in the post of the employee concerned and temporary or permanent salary reductions. However, those sanctions have not been applied in the present case, since the applicant has been dismissed for

serious misconduct. Nevertheless, that right on the part of the employer unilaterally to terminate the employment contract in the event of serious misconduct by the employee is provided for by the private labour laws of most Member States, including Germany. Moreover, under most of those laws, that right is accompanied by fewer guarantees protecting the employee than is the case in the employment relationship between the ECB and its staff.

71 It follows that the plea is unfounded.

The illegality of the obligations concerning conduct pleaded by the ECB

— Summary of the arguments of the parties

72 The applicant challenges the reliance by the ECB, in the dismissal decision, on non-compliance with the rules governing the conduct of staff members, as laid down by Article 4(a) of the Conditions of Employment.

73 He maintains, first, that those rules were not, as such, drawn to his attention. Under Article 2 of Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (OJ 1991 L 288, p. 32), the employer is required to notify the employee of all the important aspects of the employment contract. Although a public servant may be required, as the case may be, to apprise himself of the obligations imposed on him by the terms of his employment, an employee — and, by extension, a member of the staff of the ECB — is bound to comply only with the obligations resulting from the employment contract negotiated between the parties.

74 Second, the applicant claims that the Staff Committee was never consulted about those rules.

75 The ECB challenges that objection of illegality. It maintains that the rules of conduct in issue were brought to the knowledge of the applicant and were discussed in consultations with the Staff Committee of the EMI, the precursor of the ECB.

— Findings of the Court

76 Article 4(a) of the Conditions of Employment provides as follows:

'Members of staff shall perform their duties conscientiously and without regard to self-interest. They shall conduct themselves in a manner befitting their position and the character of the ECB as a Community body.'

77 The applicant maintains, first, that that obligation was not brought to his knowledge, contrary to Article 2 of Directive 91/533.

78 In that regard, the ECB states, without being seriously challenged on the point in any detail by the applicant, that the latter was provided on his recruitment with a copy of the Conditions of Employment. In any event, the applicant's employment contract states that '(t)he Conditions of Employment for staff of the ECB, as they may read from time to time, will form an integral part of this contract'. The applicant signed that contract on 9 July 1998; his signature was preceded by the

words 'I hereby accept the appointment offered to me above upon the terms and conditions stated'. In addition, that contract stated: 'You should not hesitate to contact the [Personnel Directorate] if you require specific information on the terms and conditions of this contract.' On that basis, it must be accepted that the applicant knew, or at any rate could not legitimately have been unaware of the fact, that the Conditions of Employment, including Article 4(a) thereof, formed an integral part of his contractual obligations. Consequently, the ECB was entitled to rely on the Conditions of Employment as against the applicant.

79 As regards Directive 91/533, the Conditions of Employment stipulate, in the second sentence of Article 9(c) thereof, that '(t)he ECB shall apply... the rules contained in the EC regulations and directives concerning social policy which are addressed to the Member States' and, in the second sentence of Article 10(a), that '(t)he letters of appointment shall specify the terms of employment as required by Council Directive 91/533/EEC of 14 October 1991'. The ECB therefore voluntarily undertook to comply with that directive, including Article 2 thereof, which the applicant claims to have been infringed.

80 Article 2 of Directive 91/533 provides:

'Obligation to provide information

1. An employer shall be obliged to notify an employee to whom this Directive applies, hereinafter referred to as "the employee", of the essential aspects of the contract or employment relationship.

2. The information referred to in paragraph 1 shall cover at least the following:

(a) the identities of the parties;

(b) the place of work; where there is no fixed or main place of work, the principle that the employee is employed at various places and the registered place of business or, where appropriate, the domicile of the employer;

(c) (i) the title, grade, nature or category of the work for which the employee is employed; or (ii) a brief specification or description of the work;

(d) the date of commencement of the contract or employment relationship;

(e) in the case of a temporary contract or employment relationship, the expected duration thereof;

(f) the amount of paid leave to which the employee is entitled or, where this cannot be indicated when the information is given, the procedures for allocating and determining such leave;

(g) the length of the periods of notice to be observed by the employer and the employee should their contract or employment relationship be terminated or, where this cannot be indicated when the information is given, the method for determining such periods of notice;

(h) the initial basic amount, the other component elements and the frequency of payment of the remuneration to which the employee is entitled;

(i) the length of the employee's normal working day or week;

(j) where appropriate: (i) the collective agreements governing the employee's conditions of work; or (ii) in the case of collective agreements concluded outside the business by special joint bodies or institutions, the name of the competent body or joint institution within which the agreements were concluded.

3. The information referred to in paragraph 2(f), (g), (h) and (i) may, where appropriate, be given in the form of a reference to the laws, regulations and administrative or statutory provisions or collective agreements governing those particular points.'

81 In the present case, the applicant signed on 9 July 1998 a contract of employment indicating, in accordance with the requirements laid down by Article 2(2) of Directive 91/533, the identities of the parties, the place of work, the employment category, the date of commencement of the contract, the expected duration thereof and the initial basic amount of the remuneration. According to Article 2(3) of Directive 91/533, the information relating to the amount of paid leave, the length of the periods of notice to be observed in the event of termination of the contract, the frequency of payment of the remuneration and the length of the normal working day or week, which must also, in principle, be brought to the employee's knowledge, may be given in the form of 'a reference to the laws, regulations and administrative or statutory provisions or collective agreements' governing those matters. The contract in question does in fact contain a reference to the ECB's Conditions of Employment, which set out details

concerning those points. Consequently, the applicant's employment contract contains all the 'essential aspects of the contract' in accordance with Article 2 of Directive 91/533.

82 Moreover, neither Article 2 nor any other provision of Directive 91/533 requires the employer specifically to bring to the knowledge of the employee the obligation at issue regarding his conduct.

83 In any event, that obligation constitutes a basic element of the principle, common to the laws of the overwhelming majority of the Member States, that contracts, and employment contracts in particular, must be performed in good faith. Given its fundamental import, it is so clearly self-evident as to be manifestly applicable, even in the absence of any express stipulation.

84 The applicant claims, second, that the Staff Committee was never consulted about that obligation concerning conduct. By way of supplement to the above remarks concerning the fundamental nature of the obligation in question, it should be noted that the origin of that obligation is to be found in the Conditions of Employment drawn up pursuant to Article 36.1 of the ESCB Statute, which provide that '(t)he Governing Council, on a proposal from the Executive Board, shall lay down the conditions of employment of the staff of the ECB'. They were therefore drawn up within the framework of a procedure which does not provide for the Staff Committee to be consulted. It was only pursuant to the Conditions of Employment that the Staff Committee was set up; Article 46 of the Conditions of Employment provides that it must be consulted regarding any proposed changes to those conditions. However, the provision in question results not from any change to the Conditions of Employment but from the initial version of them. In the present case, therefore, there was no obligation to consult the Staff Committee. Consequently, that argument must be rejected.

The absence of any definition of the circumstances in which disciplinary sanctions may be imposed

— Summary of the arguments of the parties

85 The applicant states that the Conditions of Employment do not define the circumstances in which disciplinary sanctions may be imposed. Thus, Part 8 of the Conditions of Employment, in particular Article 43, merely describes the legal consequences of infringements of the disciplinary rules, without defining those infringements.

86 The ECB argues that the applicant fails to distinguish between an infringement of the law and a penalty imposed on account of such an infringement.

— Findings of the Court

87 It should be noted in that regard that Article 43 of the Conditions of Employment provides that disciplinary measures may be taken against members of staff who fail in their duties to the ECB. Those duties are defined in various articles of the Conditions of Employment, in particular Articles 4 and 5. The applicant's argument must therefore be rejected.

88 It follows from the foregoing that the objections of illegality concerning the Conditions of Employment are unfounded.

2. *The objection of illegality concerning the Staff Rules*

Summary of the arguments of the parties

89 The applicant claims that application of the disciplinary procedure provided for by Article 43 of the Conditions of Employment requires recourse to Part 8 of the Staff Rules: if the latter are illegal, then so is the procedure itself. As it is, the Staff Rules are illegal in two respects.

90 First, they lack any legal basis. They concern the regime applicable to the staff of the ECB. Consequently, they should have been adopted, pursuant to Article 36.1 of the ESCB Statute, by the Governing Council on a proposal from the Executive Board, and not by the Executive Board itself, which was not competent to do so.

91 Second, they have not yet entered into force, since the procedure laid down by Article 46 of the Conditions of Employment, involving consultation of the Staff Committee, has not been concluded.

92 The ECB's principal argument in that respect is that the objection of illegality concerning the Staff Rules is manifestly inadmissible because the applicant's allegation that they are unlawful is couched in abstract and general terms and does not expressly indicate the provisions which are specifically contested (Joined Cases T-6/92 and T-52/92 *Reinarz* v *Commission* [1993] ECR II-1047, paragraph 57).

93 In the alternative, it claims that the two arguments put forward by the applicant are unfounded.

94 First, it maintains that a sufficient legal basis for the Staff Rules is to be found in Article 21.3 of the Rules of Procedure of the ECB.

95 Second, the Staff Rules were the subject of consultation with the Staff Committee of the EMI, prior to their entry into force on 1 July 1998.

Findings of the Court

96 The ECB relies, in support of its argument that the objection of illegality raised by the applicant is inadmissible, on the judgment in *Reinarz* v *Commission*, cited above. According to that judgment, in order for an objection of illegality to be admissible, the general measure claimed to be illegal must be applicable, directly or indirectly, to the issue with which the action is concerned and there must be a direct legal connection between the contested individual decision and the general measure in question (see *Reinarz* v *Commission*, paragraph 57, and the case-law cited therein).

97 In the present case, the applicant rightly states that application of the disciplinary procedure provided for by Article 43 of the Conditions of Employment requires recourse to Part 8 of the Staff Rules. If the Staff Rules are illegal then so, the applicant argues, is the disciplinary procedure itself. There is thus a direct connection in law between the contested decisions and the contested general measure. It follows that the objection of illegality is admissible, at least in so far as it concerns the provisions contained in Part 8 of the Staff Rules.

98 As to the merits of the objection of illegality, as regards, first, the legal basis of the Staff Rules, the applicant asserts that these were adopted by the Executive Board of the ECB, whereas, according to Article 36.1 of the ESCB Statute, it is for the Governing Council, on a proposal from the Executive Board, to lay down the conditions of employment of the staff of the ECB.

99 It should be noted that the Staff Rules, which are intended to define the terms on which the Conditions of Employment are to be implemented, were adopted by the Executive Board pursuant to Article 21.3 of the Rules of Procedure of the ECB, which provides that '(t)he Conditions of Employment shall be implemented by Staff Rules, which shall be adopted and amended by the Executive Board'. The ECB's Rules of Procedure are in turn based on Article 12.3 of the ESCB Statute, which provides that '(t)he Governing Council shall adopt Rules of Procedure which determine the internal organisation of the ECB and its decision-making bodies'.

100 In Article 21.3 of the ECB's Rules of Procedure, the Governing Council therefore delegated to the Executive Board the power to determine the terms on which the Conditions of Employment are to be implemented.

101 The applicant's argument raises the question whether that delegation of powers was lawful, having regard to the fact that the ESCB Statute, which ranks higher, in the hierarchy of norms, than the ECB's Rules of Procedure, provides that it is for the Governing Council to lay down the 'conditions of employment of the staff of the ECB'.

102 As is apparent from the relevant case-law, a delegation of implementing powers is lawful under Community law, provided that it is not formally prohibited by any legislative provision (Case 9/56 *Meroni* v *High Authority* [1957-1958] ECR 133, at 151).

103 In the present case, the delegation in question is not formally prohibited by any legislative provision.

104 Furthermore, the object of that delegation is merely to implement legislation drawn up by the competent authority, and the decision to delegate was taken on the basis of a provision of primary law, namely Article 12.3 of the ESCB Statute. That article empowers the Governing Council to adopt Rules of Procedure determining the internal organisation of the ECB, which entails the power to delegate for that purpose the task of laying down the conditions of employment of its staff.

105 The delegation in the present case must be compared to that arising from Article 24 of the Merger Treaty, which constitutes a provision of primary law providing for the Council of Ministers to adopt the Staff Regulations of Officials and the CEOS. That article does not formally empower the Council of Ministers to delegate that competence. However, the Staff Regulations of Officials, adopted on that basis by the Council of Ministers, provide in Article 110 that '(t)he general provisions for giving effect to these Staff Regulations shall be adopted by each institution'. The legality of that delegation, for which no formal provision is made by any primary legislation, has been implicitly recognised in Community case-law (see, for example, Case T-75/89 *Brems* v *Council* [1990] ECR II-899, paragraph 29).

106 The applicant's argument concerning the adoption of the Staff Rules by the Executive Board of the ECB must therefore be rejected.

107 As regards, second, the argument that the Staff Rules have not yet entered into force because the consultation of the Staff Committee has not yet been concluded, it is clear from Article 46 of the Conditions of Employment and Article 21.4 of the ECB's Rules of Procedure that such consultation is required only where those Conditions of Employment are to be changed or where new Staff Rules are to be adopted.

108 Consequently, the applicant's argument must be rejected.

109 It follows that the objection of illegality concerning the Staff Rules is unfounded.

3. *The objection of illegality concerning Circular 11/98*

Summary of the arguments of the parties

110 The applicant considers that Circular 11/98 is of no effect.

111 In his reply, he states in that regard, first, that his relationship with the ECB is not that of a public servant but rather contractual, that the ECB cannot therefore unilaterally change the terms on which the employment contract is to be performed and that it has not been established that Circular 11/98 was issued pursuant to an agreement freely made between the parties. He infers from this that Circular 11/98 cannot be relied on against him, even though it may have been communicated to him before the matters complained of arose.

112 Second, he maintains that Circular 11/98 has not legally entered into force, because the Staff Committee was not consulted in relation to it.

113 The ECB's principal argument in that respect is that the objection of illegality is inadmissible, since the applicant merely referred in his application to the observations made by him during the disciplinary procedure. In the alternative, it maintains that that objection is unfounded.

Findings of the Court

114 Article 44(1) of the Rules of Procedure of the Court of First Instance provides that an application must contain a summary of the pleas in law on which it is based. That summary must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court to rule on the application, even without further information (see, for example, Case T-111/99 *Samper* v *Parliament* [2000] ECR-SC I-A-135 and II-611, paragraph 27).

115 It must be recalled that, whilst the body of the application may be supported and supplemented on specific points by references to extracts from documents annexed thereto, a general reference to other documents, even those annexed to the application, cannot make up for the absence of the essential arguments in law which, in accordance with the abovementioned provision, must appear in the application (order of the Court of First Instance of 21 May 1999 in Case T-154/98 *Asia Motor France and Others* v *Commission* [1999] ECR II-1703, paragraph 49). Lastly, the fact that a plea in law is set out in the reply cannot remedy the failure of the application to comply with the provision in question. Whilst an applicant is permitted to expand on his pleas in the reply, the right to do so is conditional on the pleas in question having been at least set out in the application (Case T-23/96 *De Persio* v *Commission* [1998] ECR-SC I-A-483 and II-1413, paragraph 49).

116 In the present case, the applicant merely stated in his application:

'Circular 11/98 is of no effect. In order to avoid repetition, reference is made in this context to [the applicant's] observations of 21 October 1999 and to [his] oral observations made at the hearing on 3 November 1999.'

117 It is clear that the matters of fact and law on which the plea in question is based were not set out, even in summary form, in the application. Consequently, the mere fact that the applicant referred to his observations of 21 October 1999 and the matters set out in his reply cannot make up for that shortcoming. The plea in question must therefore be declared inadmissible.

118 The plea is in any event irrelevant: in order for an objection of illegality to be admissible, the general measure claimed to be illegal must be applicable, directly or indirectly, to the issue with which the action is concerned and there must be a direct legal connection between the contested individual decision and the general measure in question (see *Reinarz* v *Commission*, paragraph 57, and the case-law cited therein).

119 In the present case, disciplinary proceedings were brought against the applicant on account of complaints, first, that he had harassed one of his colleagues and poisoned the atmosphere at work and, second, that he had misused the facility for accessing the internet in his workplace. That misuse took a number of different forms: first, consultation of websites and the despatch of electronic mail messages of a pornographic or politically extreme nature and, second, misuse of the internet for private purposes.

120 Circular 11/98 is invoked only in the context of the latter type of misuse, by reference to the very general wording of Article 3.1 thereof, which provides: 'The ECB internet facilities are provided for business use.' The decision dismissing the applicant states in that regard that '(i)n doing so, the Circular applies a general principle of labour law according to which working tools of the employer given to employees at the workplace are to be used for working purposes'. The ECB applies that principle to the applicant by going on to state, in the same decision: 'The length, the number and the frequency of the connections recorded on both Mr [X]'s internet and e-mail accounts, two thirds of which were non-business related, show a clear abuse of a working tool and therefore a breach of the above principle and of Mr [X]'s obligations to perform his duties conscientiously towards the ECB.' However, the latter obligation arises not from Circular 11/98 but from Article 4(a) of the Conditions of Employment, which provides: 'Members of staff shall perform their duties conscientiously and without regard to self-interest.'

121 In addition, as the ECB correctly states, the rule laid down in Article 3.1 of Circular 11/98 is merely an expression of the principle that working equipment provided by an employer to his employee is to be used, generally and subject to any specific exceptions, in the performance by the latter of his professional duties. According to the ECB, that principle merely applies the rule, laid down in Article 4(a) of the Conditions of Employment, that members of staff are to perform their duties conscientiously and without regard to self-interest. That rule is in turn merely an expression of the principle that the contract of employment is to be performed in good faith.

122 Consequently, Article 3.1 of Circular 11/98 is intended merely to express an elementary and fundamental principle which underlies all employment contracts and is obviously applicable even in the absence of any express stipulation. Moreover, it simply applies Article 4(a) of the Conditions of Employment. Irrespective of the legality of Circular 11/98, therefore, the rule expressed by it is in any event applicable, on the basis both of the abovementioned principle and of that provision of the Conditions of Employment.

123 It follows that the obligation incumbent on a member of staff of the ECB, requiring him in principle to use working tools only for working purposes, exists independently of the legality of Article 3.1 of Circular 11/98. Consequently, the objection of illegality is irrelevant and thus inadmissible.

B — *The legality of the contested decisions*

1. *The plea alleging the absence of any preliminary procedure*

Summary of the arguments of the parties

124 In his reply, the applicant states that the decision of 9 November 1999 is illegal. In that regard, he observes that, by letter of 10 November 1999, his lawyer requested an administrative review pursuant to Article 41 of the Conditions of Employment and that the ECB's response, by letter of 17 November 1999, to the effect that the decision in question could not be the subject of such a procedure, is wrong in law and contrary to Article 41 of the Conditions of Employment. According to the applicant, that article precludes such a review only in the case of a decision adopted by the Governing Council. In the present case, however, the decision in question was taken by the Executive Board.

125 The applicant observes that the administrative review procedure provided for by Article 41 of the Conditions of Employment is intended to enable a staff member against whom a complaint is made to compel the ECB to re-examine his arguments prior to adopting a definitive decision. Before that procedure is put into effect, the effects of the initial decision are suspended. Where, however, the administrative review procedure is refused, contrary to Article 41 of the

Conditions of Employment, the decision on the complaint is definitively lacking in any legal effect.

126 In the same pleading, the applicant reiterates that line of argument as regards the dismissal decision. He states in that regard, as a new fact, that, by letter of 22 November 1999, his lawyer requested the ECB to carry out an administrative review of that decision and that by letter of 9 December 1999 — after the application had been lodged — the administration of the ECB informed him that, for the same reasons as those relied on in relation to the decision of 9 November 1999, that decision could not be the subject of such a procedure.

127 The ECB's principal argument is that this plea is inadmissible since it has been raised out of time and, in the alternative, that it is unfounded, given that the contested decisions, having been adopted by the Executive Board of the ECB, cannot be the subject of an administrative review.

Findings of the Court

128 Article 41 of the Conditions of Employment provides:

'Members of staff may ask for an administrative review of complaints and grievances in respect of the consistency of actions taken in their individual cases with the personnel policy and conditions of service of the ECB, using the procedure laid down in the Staff Rules. Members of staff who remain dissatisfied following the administrative review may use the grievance procedure laid down in the Staff Rules.

Such procedures may not be used to challenge:

(i) any decision of the Governing Council or any ECB policy, including any policy laid down in these Conditions of Employment or in the Staff Rules;

(ii) any decision for which special appeals procedures exist; or

(iii) any decision not to confirm the appointment of a member of staff serving a probationary period.'

129 Article 8.1 of the Staff Rules describes (i) the administrative review procedure and (ii) the grievance procedure. Those two procedures are complementary.

130 In the first procedure, where the issue lies primarily within the responsibility of the division to which the staff member concerned is assigned, he is required to raise it with his head of division. Where it lies within the responsibility of the Personnel Directorate, he must raise it with the Director of Personnel. If the issue is not satisfactorily resolved within one month, or if the staff member does not wish to raise it with the authorities referred to, he may raise the matter, in the first instance, with his Director or Director General and, in the second instance, with the Director General of Administration and Personnel. Those persons are required to produce a reasoned opinion and to notify the same to the member of staff within one month of the date on which the matter was referred to them.

131 A member of staff who remains dissatisfied with the decision thus given, or who has not received an answer within that one-month time-limit, may have recourse to the grievance procedure (Articles 8.1.4 and 8.1.5 of the Staff Rules). To that end, the staff member concerned is required to submit to the President of the ECB a memorandum stating the reasons for challenging the decision and the relief sought. The President must respond in writing within one month (Article 8.1.5 of the Staff Rules). The opening of the grievance procedure does not have the effect of suspending the contested decision (Article 8.1.6 of the Staff Rules).

132 In the present case, the applicant requested an administrative review of the decision of 9 November 1999 and, subsequently, of the decision of 18 November 1999 dismissing him.

133 The ECB responded to the first request on 17 November 1999 and to the second request on 9 December 1999 (that is, after the present action was brought on 25 November 1999).

134 As regards the admissibility of the plea, it should be recalled that the first paragraph of Article 48(2) of the Rules of Procedure of the Court of First Instance provides that no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

135 In the present case, the refusal to accede to the request for an administrative review of the decision of 9 November 1999 was notified to the applicant prior to the lodging of the application. On the other hand, the corresponding refusal in respect of the dismissal decision was not communicated until after these proceedings were brought.

136 It follows that the plea contesting the initial refusal, raised for the first time at the stage of the reply, is inadmissible, since it relates to a matter which was known to the applicant before the application was lodged. By contrast, the plea contesting the second refusal is admissible, since it concerns a matter which came to light only in the course of the procedure.

137 As regards the substance of the latter plea, the Conditions of Employment show that a dismissal decision is to be taken by the Executive Board of the ECB (Articles 11(a) and 43(ii)). According to the Staff Rules, however, the competent authority for the purposes of carrying out an administrative review is either the head of division, Director or Director General of the division to which the staff member is assigned, where the issue lies primarily within the responsibility of that division, or the Director of Personnel or the Director General of Administration and Personnel where the issue lies primarily within the responsibility of the Personnel Directorate. Consequently, the Staff Rules do not provide for the possibility of an administrative review of an issue falling within the competence of the Executive Board of the ECB.

138 Moreover, the grievance procedure, which necessarily follows on from the administrative review procedure, could not in the present case be opened pursuant to the Staff Rules. The authority designated by the Staff Rules to act in the grievance procedure is the President of the ECB or, in his absence, the Vice-President or, if both are absent, another member of the Executive Board. Although it is accepted that the member of an institution who, as the appointing authority, has taken a decision adversely affecting a staff member is not obliged to refrain from taking part in the collective decision-making process conducted by the members of that institution in relation to a complaint lodged by the staff member against the decision in issue (Case 101/79 *Vecchioli* v *Commission* [1980] ECR 3069, paragraph 31), a member of an institution or body such as the ECB cannot have sole power to determine a complaint against a decision adopted collectively by the members of that institution or body and thus to assess on his own the complaints made against a collective decision in which he has taken part.

139 It follows that it was not possible, in the present case, for the administrative review procedure and the grievance procedure to be applied pursuant to the Staff Rules.

140 In that regard, the applicant claims, in essence, that the Staff Rules misapply Article 41 of the Conditions of Employment, which does not preclude the possibility of providing for a pre-litigation procedure in respect of challenges to decisions of the type contested in the present case. He bases his argument to that effect on the wording of Article 41 of the Conditions of Employment, which provides that the review procedure may not be used to challenge the three categories of decision listed, namely any decision of the Governing Council or any ECB policy, including any policy laid down in the Conditions of Employment or in the Staff Rules, any decision for which special appeals procedures exist or any decision not to confirm the appointment of a member of staff serving a probationary period. Consequently, the category to which the decision at issue belongs, namely that of disciplinary decisions falling, in accordance with Article 43(ii) of the Conditions of Employment, within the competence of the Executive Board of the ECB, is not covered by any of those exceptions.

141 The question arises, therefore, as to whether the list of matters excluded from the review procedure by Article 41 of the Conditions of Employment is exhaustive.

142 It should be noted in that regard, first, that the Conditions of Employment empower the Executive Board to decide on the disciplinary measures, including dismissal, provided for in Article 43(ii). Second, the only decision-making body within the ECB which ranks higher, in hierarchical terms, than the Executive Board is the Governing Council. However, the latter does not enjoy any competence in respect of disciplinary decisions of the Executive Board. Indeed, Article 11.6 of the ESCB Statute shows that the Executive Board alone is responsible for the day-to-day business of the ECB.

143 Consequently, according to the ESCB Statute and the Conditions of Employment, there exists no other authority competent to conduct the two-stage procedure for review of decisions of the Executive Board, as provided for by Article 41 of the Conditions of Employment.

144 Those decisions are not therefore covered by the procedure laid down by that article, even though it contains no indication in that regard.

145 That absence of any review procedure is compensated for by the fact that the decisions in question are adopted, in accordance with Article 43 of the Conditions of Employment, following a procedure in the course of which each party is heard and in which the staff member concerned must be given the opportunity to comment on the complaints made against him.

146 The plea must therefore be rejected.

2. *The plea alleging violation of the* ne bis in idem *principle*

Summary of the arguments of the parties

147 In the applicant's view, the fact that the Executive Board of the ECB decided (i) on 9 November 1999, on the basis of the outcome of the disciplinary proceedings, to maintain the decision of 18 October 1999 suspending him from his duties and to withhold from 10 November 1999 one half of his basic salary pursuant to Article 44 of the Conditions of Employment, and (ii) on 18 November 1999, for the same reasons, to dismiss him, is tantamount to penalising him twice in respect of the same matters and therefore violates the *ne bis in idem* principle.

148 The ECB concedes that the *ne bis in idem* principle prohibits the imposition of more than one disciplinary measure for a single offence (judgment of the Court of Justice in Joined Cases 18/65 and 35/65 *Gutmann* v *Commission* [1966] ECR 103). It maintains, however, that that principle has not been infringed in the present case. A distinction must be drawn between suspension, which constitutes only a provisional measure, and dismissal, which was the only measure imposed in the present case.

Findings of the Court

149 By contrast with the Staff Regulations of Officials, Article 86(3) of which provides that '(a) single offence shall not give rise to more than one disciplinary measure', neither the Conditions of Employment nor the Staff Rules contain any provision requiring that principle to be respected. However, it constitutes a general principle of Community law which is applicable regardless of any legislative provision (see, to that effect, *Gutmann* v *Commission*, cited above, at 119).

150 In the present case, the Executive Board of the ECB successively imposed on the applicant, on 18 October 1999, the measure of suspension without any reduction in salary, pursuant to Article 44 of the Conditions of Employment, proceeded on 9 November 1999 to confirm that suspension and to apply, with effect from 10 November 1999, a one-half reduction in salary, on the same basis, and then on 18 November 1999 dismissed the applicant pursuant to Articles 11(a) and (b) and 43 of the Conditions of Employment.

151 In the decision of 9 November 1999, the Executive Board of the ECB announced a suspension measure; this was of a provisional nature, particularly inasmuch as the third paragraph of Article 44 of the Conditions of Employment, which is based on the fourth paragraph of Article 88 of the Staff Regulations of Officials, provides: 'If within four months from the suspension a final decision has not been

taken or no measure other than a written reprimand has been taken, the member of staff shall be entitled to reimbursement of the amount of salary withheld.' Consequently, the measure in question has nothing to do with the application of the principle at issue.

152 It was not until it adopted its decision of 18 November 1999 that the Executive Board of the ECB terminated the disciplinary proceedings brought against the applicant and imposed on him a sanction provided for by Article 43 of the Conditions of Employment.

153 The plea must therefore be rejected.

3. *The plea alleging infringement of the right to a fair hearing*

Summary of the arguments of the parties

154 The applicant maintains that his right to a fair hearing was infringed in the course of the disciplinary proceedings.

155 He asserts that that infringement affected, in the first place, the hearing which took place on 3 November 1999, in two respects.

156 First, the ECB failed to specify, prior to that hearing, the precise scope of the allegations which it was making against him. It is true that on 28 October 1999

the applicant had been handed a 900-page file and a CD-ROM. However, the ECB did not indicate to the applicant which of the numerous matters set out therein it proposed to raise against him. It was only in the reasoned opinion of 8 November 1999 that the ECB specified the complaints against the applicant.

157 Second, the applicant states in the reply that, having regard to the very voluminous nature of the file, he was not given sufficient time, between its being passed to his lawyer on 28 October 1999 and the hearing on 3 November 1999, in which to prepare his defence.

158 According to the applicant, his right to a fair hearing was infringed, in the second place, by the fact that the ECB, having specified to him for the first time in the reasoned opinion of 8 November 1999 the facts alleged against him, proceeded the very next day to adopt a disciplinary decision, namely the decision of 9 November 1999, without affording him the opportunity to submit his observations. Since the ECB had investigated the matter in the manner of a prosecuting authority, it should have adhered strictly to the principles applicable to a State governed by the rule of law, and should have given the person concerned the right to be heard before taking any decision.

159 The applicant maintains, in the third place, that the fact that the ECB pointed out to his lawyer, following the despatch by the latter of his letters in German of 9 and 10 November 1999, that the working language to be used as a matter of course was English must be regarded as an attempt to make it more difficult to obtain redress and necessarily suggests that he was indeed unable to defend himself effectively by means of letters written in German.

160 The ECB points out that the right to be heard requires that the person concerned be informed in advance of all the matters alleged against him by the competent authority and be given a reasonable time in which to prepare his defence (judgments of the Court of Justice in Case 319/85 *Misset* v *Council* [1988]

ECR 1861, paragraph 7, and of the Court of First Instance in Case T-74/96 *Tzoanos* v *Commission* [1998] ECR-SC I-A-129 and II-343, paragraph 329).

161 According to the ECB, it fully respected those conditions.

Findings of the Court

162 It should be noted, as a preliminary point, that, in disciplinary matters, the staff member against whom the allegations are made enjoys the benefit of the general principle of respect for the rights of the defence (judgment of the Court of Justice in Case C-191/98 P *Tzoanos* v *Commission* [1999] ECR I-8223, paragraph 34). However, disciplinary proceedings are not judicial in nature but administrative, and the administration cannot be characterised as a 'court' within the meaning of Article 6 of the European Convention on Human Rights and Fundamental Freedoms (paragraph 339 of the judgment of the Court of First Instance in *Tzoanos* v *Commission*, cited above, confirmed on appeal by the judgment of the Court of Justice in *Tzoanos* v *Commission*, likewise cited above).

163 The applicant considers that his right to a fair hearing was infringed in three instances, namely (i) on the occasion of the hearing on 3 November 1999, (ii) on the adoption of the decision of 9 November 1999 and (iii) when the ECB pointed out that its internal working language is English.

164 As regards, first, the arguments relating to the hearing on 3 November 1999, the applicant complains that the ECB failed to inform him in advance of the matters alleged against him and that it did not allow him sufficient time for the preparation of his case.

165 As to the argument alleging failure to communicate in advance the matters complained of, it should be noted that Article 43 of the Conditions of Employment provides: '... disciplinary measures... shall be adopted in accordance with the procedure laid down in the Staff Rules. The said procedure shall ensure that no member of staff may be subjected to a disciplinary measure without an opportunity to reply to the relevant charges first being granted.' However, the Staff Rules contain no provision relating to the course which the disciplinary proceedings are to take.

166 The Conditions of Employment and the Staff Rules do not, therefore, contain any provision of the type found in Article 1 of Annex IX to the Staff Regulations of Officials, which provides that an official against whom disciplinary proceedings are brought must be sent 'a report by the appointing authority, stating clearly the facts complained of and, where appropriate, the circumstances in which they arose'. Similarly, the Staff Regulations of the EIB provide that a member of staff against whom disciplinary proceedings are brought 'shall receive written notification of the charges against him... prior to the date set for the [Joint] Committee's meeting', the functions of the Joint Committee in question being similar to those of the Disciplinary Board provided for by the Staff Regulations of Officials (*Yasse* v *EIB*, cited above, paragraph 5).

167 By the same token, the first paragraph of Article 87 of the Staff Regulations of Officials, according to which an official who is the subject of disciplinary action involving only the possible issue of a written warning or reprimand and not necessitating consultation of the Disciplinary Board 'shall be heard before such action is taken', has been interpreted in the relevant case-law as requiring the person concerned to be informed in advance of the complaints levelled against him by the appointing authority (*Misset* v *Council*, cited above, paragraph 7).

168 It follows that that requirement necessarily extends, *mutatis mutandis*, to cover the disciplinary procedure applicable to members of staff of the ECB, *a fortiori* since, according to the Conditions of Employment, the ECB is obliged to give the staff member concerned, in advance, an 'opportunity to reply to the relevant charges'.

169 In the present case, it should be noted, first of all, that, before the hearing on 3 November 1999, the applicant was notified of the decision of 18 October 1999 to suspend him, which listed the facts complained of against him, namely (i) his having repeatedly accessed the ECB's internet facility in order to consult websites for non-professional purposes, thereby reducing the ECB's productivity, and having sent by electronic mail various messages containing sexual or political material, and (ii) his having harassed one of his colleagues by repeatedly sending him, despite the latter's protests, electronic mail messages of a sexual nature or containing biographies or photographs of the leaders of the Nazi regime and by exposing him to various types of verbal and non-verbal molestation such as throwing objects at him, engaging in provocative sexual gestures and adopting a threatening approach.

170 Next, those allegations were particularised and supplemented by the handing over, on 28 October 1999, of a 900-page file and a CD-ROM. That file, a copy of which has been supplied to the Court, contains *inter alia*:

— copies of 19 internal electronic mail messages sent by the applicant to the colleague whom he is suspected of having harassed (Annex 1 to the file);

— copies of electronic mail messages sent by that colleague and by the applicant's superiors in response to the abovementioned despatches and by way of reaction to other facts alleged against the applicant, as well as copies of detailed written statements made by that colleague and his superiors concerning the acts of the applicant (Annex 2 to the file);

— a list of electronic mail messages sent by the applicant within and outside the ECB between 16 July and 18 October 1999, classified into non-professional and professional categories, and copies of each of them; a table relating to consultation of internet websites on certain days for non-professional purposes, with a description of the nature of the sites consulted and the

time spent consulting them, and a list of those sites; a list of animated sequences sent by electronic mail within and outside the ECB, mostly containing pornographic material, and a CD-ROM enabling those sequences to be viewed (Annexes 3 to 5);

— copies of the Conditions of Employment, the Staff Rules and Circular 11/98.

171 That file was structured in a very clear way. It contained a list enumerating and describing the contents of all the annexes, and each annex contained a list summarising and classifying its contents. Moreover, most of it was composed of documents emanating from the applicant himself.

172 It follows that, in the present case, the applicant was made sufficiently aware of the facts alleged against him.

173 As to the argument that he was given insufficient time to prepare his case, it should be noted that the ECB objects that this plea is inadmissible on the ground that it was not put forward until the stage of the reply, so that it constitutes a new plea and is thus inadmissible.

174 It is true that the first paragraph of Article 48(2) of the Rules of Procedure of the Court of First Instance provides that no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure. However, a plea which constitutes an amplification of a plea previously put forward, either directly or indirectly, in the application originating the proceedings and which is closely linked to that earlier plea must be regarded as admissible (see paragraph 38 of the judgment in Case

T-28/97 *Hubert* v *Commission* [1998] ECR-SC I-A-435 and II-1255 and the case-law cited therein). In the present case, the applicant put forward in his application a plea alleging that his right to a fair hearing had been infringed on the occasion of the hearing on 3 November 1999. To that end, he claimed that he had been unable properly to defend himself at that hearing, on the ground that the file provided to him on 28 October 1999 did not enable him to ascertain with any precision the facts alleged against him. Consequently, the argument in question, based on the lack of time allowed between the handing-over of that file and the hearing, constitutes an amplification of that plea and is closely connected with it. It is therefore admissible.

175 As regards the substance of that argument, it should be borne in mind that Annex IX to the Staff Regulations of Officials, relating to disciplinary proceedings, provides in the first paragraph of Article 4: 'The official charged shall have not less than 15 days from the date of receipt of the report initiating disciplinary proceedings to prepare his defence.' Article 40 of the EIB Staff Regulations likewise provides that a member of staff against whom disciplinary proceedings are brought 'shall receive written notification of the charges against him at least 15 days prior to the date set for the... meeting' of the Joint Committee called upon to deliver an opinion in the matter.

176 In addition, the abovementioned requirement laid down by Article 87 of the Staff Regulations of Officials has been interpreted in the relevant case-law as meaning that the official concerned must be informed in advance of the complaints against him and must have been given a reasonable time in which to prepare his defence (*Misset* v *Council*, paragraph 7).

177 That requirement also applies, *mutatis mutandis*, even in the absence of any rules to that effect in the Staff Rules, to a staff member of the ECB against whom disciplinary proceedings are brought, *a fortiori* since Article 43 of the Conditions of Employment provides, in the same way as Article 87 of the Staff Regulations of Officials, that '(t)he said procedure shall ensure that no member of staff may be subjected to a disciplinary measure without an opportunity to reply to the relevant charges first being granted'.

178 In the present case, the applicant's lawyer was given the abovementioned file on Thursday, 28 October 1999, and the hearing took place on Wednesday, 3 November 1999. He therefore had three working days in which to prepare the defence. That period is, in principle, too short, especially having regard to the period of 15 days provided for by the Staff Regulations of Officials and the EIB Staff Regulations. However, taking into account the particular circumstances of the present case, rightly pointed out by the ECB, it must be regarded as reasonable.

179 First, the applicant had already been made aware, by the decision of 18 October 1999 suspending him, of the nature of the facts alleged against him and of the legal assessment of them. The file handed over on 28 October 1999 was intended merely to supplement that information by means of examples and items of evidence. Second, neither the applicant nor his lawyer asked for the hearing to be postponed. Third, the hearing was not the only occasion on which the applicant was given an opportunity to express his view. He was offered that opportunity a second time, on the occasion of the notification of the reasoned opinion on 8 November 1999. Indeed, the letter accompanying that opinion requested him to submit any comments which he might have within the next five working days, that is to say, by 15 November 1999. Moreover, the applicant's lawyer availed himself of that opportunity by sending two letters on 9 and 10 November 1999.

180 Lastly, it must be borne in mind that, although the file handed over on 28 October 1999 contains over 900 pages, it is composed for the most part of communications emanating from the applicant himself. In addition, as the ECB points out, the documents consist of short texts which are easy to understand. Only Annex 2 to the file contains, in part, documents which the applicant had not previously seen, namely written statements by his colleague who had been harassed and his hierarchical superiors. However, those documents amounted to only ten pages or so.

181 The argument alleging insufficient preparation time must therefore be rejected.

182 As regards, second, the complaint that the ECB did not give the applicant an opportunity to submit his observations in advance of the decision of 9 November 1999, it must be borne in mind that that decision constitutes a provisional measure based on Article 44 of the Conditions of Employment. That article, which governs the suspension of members of staff of the ECB, does not formally confer on the staff member concerned a right to be heard.

183 However, respect for the rights of the defence in any proceedings against any person which may culminate in a measure adversely affecting him constitutes a fundamental principle of Community law which must be observed even in the absence of any express provision to that end. A decision suspending a member of staff of the ECB, adopted pursuant to Article 44 of the Conditions of Employment, constitutes a measure adversely affecting the person concerned. It follows that, whilst account must be taken of the urgency with which a suspension decision needs to be taken where serious misconduct is alleged, the rights of the defence must be respected in the adoption of such a decision. Consequently, save where the existence of special circumstances has been duly established, a suspension decision may not be adopted until the member of staff in question has been given a proper opportunity to put forward his view concerning the matters alleged against him and on which the competent authority is proposing to base that decision. Only in special circumstances may it prove impossible in practice, or incompatible with the interests of the service, to proceed to a hearing prior to the adoption of a suspension measure. In such circumstances, the requirements arising from the principle of respect for the rights of the defence may be satisfied by hearing the staff member concerned as rapidly as possible after the suspension decision has been adopted (Case T-211/98 *F* v *Commission* [2000] ECR-SC I-A-107 and II-471, paragraphs 27, 28, 30 to 32 and 34).

184 In the present case, the applicant was able to put forward his views on the matters alleged against him at the hearing on 3 November 1999. In those circumstances, and since the principles referred to above do not additionally require that the staff member concerned be invited to put forward his views on the appropriateness and nature of any suspension measure which might result from the matters alleged against him, the argument is unfounded.

185 As regards, third, the argument alleging that, by demanding that the English language be used, the ECB sought to make it more difficult to exercise the rights of the defence, the file shows the following:

— on 8 November 1999 the Directorate General for Administration and Personnel and the Directorate General for Legal Services of the ECB issued, and sent to the applicant's lawyer a copy of, a reasoned opinion addressed to the Executive Board of the ECB, in which they summarised the facts alleged against the applicant, gave their assessment of them and proposed the imposition of a penalty, namely dismissal;

— on 9 and 10 November 1999, in two letters written in German, the applicant's lawyer submitted comments on that opinion;

— on 12 November 1999 the ECB acknowledged receipt of those two letters and pointed out that English was its internal working language, adding: 'However, with regard to your letters of 9 and 10 November 1999, in order not to delay further the procedure, the ECB will accept these documents even if they are drafted in a language different from the common contractual language and the ECB's vehicular language. This decision shall not be considered as a precedent';

— on 15 November 1999, the applicant's lawyer sent a letter to the President of the ECB, in which he complained about the arrogant tone of the letter of 12 November 1999, declared that he proposed to use the German language in his future letters to the ECB and asked the President formally to confirm to him that the ECB would accept them;

— on 18 November 1999 the Director General for Administration and Personnel sent a reply denying that the tone of the letter of 12 November 1999 had been arrogant and observing that, by agreeing to deal with letters drafted in German, the ECB had shown itself to be more accommodating than it was legally obliged to be.

186 That chronology of the facts shows that the ECB merely pointed out that English was its working language. It did not refuse to accept the letters in German sent by the applicant's lawyer. It even stated that it would accept them despite the fact that they should in principle be drafted in English. The applicant's argument must therefore be rejected.

4. *The plea alleging that certain items of evidence had been improperly obtained*

187 The applicant has put forward the plea in question as follows, in point 3.4 of the application:

'The applicant has already had occasion to observe that, in certain instances, there exists a bar to the gathering of certain items of evidence. The defendant has not to date indicated in any detail — with evidence in support — how it obtained the information giving rise to the complaints relied on in the disciplinary proceedings. Reference is made in that regard to the reservations expressed by the applicant's counsel at the hearing on 3 November 1999.'

188 The ECB's principal contention is that the plea is admissible; it argues, in the alternative, that it is unfounded.

189 The Court observes that, in order for an action or a plea in law to be admissible, the essential facts and points of law on which it is based must be apparent, at least in summary form but in a manner which is coherent and comprehensible, from the wording of the application itself (see, for example, the order of 28 June 2000 in Case T-338/99 *Schuerer* v *Council* [2000] ECR II-2571, paragraph 19).

190 In the present case, the applicant has failed to put forward, even in summary form, the arguments of fact and of law on which the plea in issue is based. He merely refers, without further explanation, to the reservations expressed by his lawyer at the hearing on 3 November 1999. In the absence of any supplementary details, it is difficult to know precisely which of the numerous observations made by the applicant's lawyer during the course of that hearing, as recorded in the minutes, are being specifically referred to. In addition, the applicant has failed to provide any supplementary information in his reply. In any event, it is not for the Court to seek and identify in the annexes the grounds and arguments on which it may consider the action to be based, since the annexes serve purely to provide evidence and assistance (Case T-84/96 *Cipeke* v *Commission* [1997] ECR II-2081, paragraph 34).

191 In those circumstances, the plea must be declared inadmissible.

192 For the sake of completeness, it should be added that the circumstances in which the ECB came into possession of the evidence produced in the present case were specified by it and brought to the knowledge of the applicant. As is apparent from the reasoned opinion (point I) and the dismissal decision (point 4), an investigation was carried out in the context of the disciplinary proceedings, by means of an analysis of the memory of the ECB server to which all the individual computers installed in its premises are linked, of (i) the electronic mail messages sent by the applicant from the computer assigned to him in his workplace to addressees within and outside the ECB and (ii) of the internet websites consulted by the applicant from that computer. There is also a statement to the effect that

there was a hearing of witnesses, namely the head of the Archives Section, the applicant's immediate hierarchical superior and the colleague whom he is suspected of having harassed, and a hearing of the applicant himself, on 3 November 1999.

193 In addition, those investigations were carried out in the context of disciplinary proceedings against the applicant, after those proceedings had been commenced; the applicant was informed of the results of those investigations and was given an opportunity to comment on them.

194 The plea must therefore be rejected.

5. The plea alleging lack of proof of the matters complained of

Summary of the arguments of the parties

195 In the reply, the applicant states that the burden of proving the legality and appropriateness of the disciplinary measure imposed lies with the ECB, this being a substantive and not a procedural rule. He argues that it is for the ECB to establish, pursuant to Article 43 of the Conditions of Employment, the facts on which the disciplinary measure is based and the proportionality of the measure to the seriousness of those facts. It is therefore for the ECB to specify the facts justifying the disciplinary measure and, where necessary, to prove them. The staff member concerned may simply contest the legality of the measure. If he does so, the ECB is required to prove that it is lawful. During the course of the disciplinary proceedings, the staff member may remain silent without thereby waiving his right to challenge the ECB's allegations in judicial proceedings.

196 On the basis of those principles, the applicant denies having acknowledged the facts alleged against him. Indeed, he claims that, far from having remained silent during the disciplinary proceedings, the complaints made against him were denied in his lawyer's letter of 10 November 1999.

197 According to the applicant, the ECB has not provided the slightest proof of the grounds on which his dismissal was based.

198 The applicant observes in that regard, first, that, if the ECB wished to base its case on the 900-page file and the CD-ROM for the purposes of establishing the legality of the disciplinary measures, it should have specified the relevant complaints and allegations. It should also have indicated the subjective considerations on which the dismissal decision was based and which it alone could have known.

199 Second, the applicant denies, in particular, having referred to himself on a regular basis as the 'OaO/MoU' ('One and Only/Master of the Universe'). At the very most, it is true that he occasionally used those terms in an ironic sense amongst his colleagues. He likewise denies having regularly made offensive remarks about his colleagues, having behaved towards them in an indecent or provocative manner, having from the outset displayed a negative attitude towards a specific colleague, having harassed a colleague and having been informed by the latter that he did not approve of this. The applicant claims that it was for the ECB to give details concerning that complaint, in order that he might be able to defend himself.

200 Third, he claims that it was for the ECB to specify the dates on which he allegedly procured the pornographic or political messages which he is then said to have sent to third parties by electronic mail.

201 Fourth, the applicant denies that the pornographic documents and biographies of Nazi leaders contained in the file constitute in themselves grounds for dismissal. They do not mean that the applicant identified himself with the political message of the Nazis. At the very most, it could be argued that those documents prove an infringement of Circular 11/98 prohibiting internet access to such documents. That is not a relevant factor, however, inasmuch as the circular does not form part of the contractual terms agreed by the parties and is not legally in force.

202 Fifth, the applicant claims that the ECB has failed to show that the electronic mail messages complained of were in fact sent by the applicant himself and, consequently, that the applicant alone had access to his computer during the period under consideration.

203 The ECB considers that the plea in question, which was put forward for the first time in the reply, is inadmissible in the light of Article 48(2) of the Rules of procedure of the Court of First Instance.

204 It observes that the applicant does not deny the facts alleged against him or the significance attached to them in accordance with the Conditions of Employment.

205 As to the substance of the matter, it takes the view that the file clearly reveals when the applicant downloaded a given document from the internet and when and to whom he sent a given message by electronic mail. It claims that the documents on the file are very explicit and require no further explanation.

Findings of the Court

206 It was not until the stage of the reply that the applicant put forward for the first time his plea alleging that the facts complained of have not been proved. It should be borne in mind in that regard that the first paragraph of Article 48(2) of the Rules of Procedure of the Court of First Instance provides that no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

207 Those criteria have not been fulfilled in the present case, inasmuch as the issue relates to matters which were known to the parties before the application was lodged, and the plea is therefore inadmissible.

208 For the sake of completeness, it should be added that the dismissal decision is based on two sets of facts. First, the applicant is alleged to have sexually and psychologically harassed one of his colleagues and to have poisoned the atmosphere at work. Second, he is alleged to have made improper use of the internet facility in his workplace, consisting of (i) the consultation of websites and the despatch of electronic mail messages of a pornographic or politically extreme nature and (ii) excessive use of the internet for private purposes.

209 Proof of the facts thus complained of is provided in sufficient detail by the file, the contents of which are summarised in paragraph 170 above. The complaint that the applicant harassed a colleague and poisoned the working atmosphere is illustrated by Annexes 1 and 2 to that file. The context in which the acts complained of took place is described in each case in detail in the documents contained in Annex 2 and the written statements reproduced in that annex. The complaint concerning improper use of the internet for private purposes is borne out by Annexes 1 and 3 to 5 to the file, which contain copies of the documents sent and lists of the websites consulted from the applicant's computer. Those documents are sufficiently explicit to rule out any serious denial of the facts complained of.

210 However, the applicant has put forward various arguments concerning the validity of certain of the complaints in issue.

211 The applicant maintains, first, that the ECB should have specified in detail the extent to which it intended to rely on each of the documents in the file in order to justify the disciplinary measures at issue. In that regard, it should be noted, with reference to the findings set out above, that, given the clarity of the structure of the file and the fact that the relevance of those documents emerges from their nature and contents, the applicant's argument is manifestly unfounded.

212 Second, the harassment by the applicant of one of his colleagues and the intimidating and violent nature of his conduct towards the victim are established to the requisite legal standard by the corroborative testimony of the latter, of his immediate hierarchical superior and of the head of the Archives Section, and also by the content of the electronic mail messages sent to the victim by the applicant, as reproduced in Annexes 1 and 2 to the file. Having regard to the very detailed and consistent nature of that evidence, the applicant's assertion that the ECB should have specified more precisely the time at which the wrongful acts were allegedly committed is manifestly unfounded. One is bound to reach the same conclusion as regards the denial by the applicant that the victim clearly gave him to understand that he did not approve; this is clearly shown by the electronic mail message sent by the victim to the applicant at 12.36 hrs on 22 March 1999.

213 Third, as regards the date on which the applicant procured the pornographic or political messages which he sent by electronic mail to third parties, suffice it to say that the despatch of those messages by the applicant to third parties, the nature of those messages, the date and time of their transmission and the identity of the addressees are clearly shown to the requisite legal standard by the very complete file prepared by the ECB. In those circumstances, the ECB was manifestly not bound additionally to establish the time at which, and the circumstances in which, the applicant himself procured the images, symbols and texts in question.

214 Fourth, as regards the denial that the pornographic documents and the items containing biographies or photographs of Nazi leaders were capable in themselves of constituting grounds for dismissal, it must be observed that the documents in question were sent by internal electronic mail to the victim of the harassment and therefore constitute an aspect of that harassment. Furthermore, the file shows that websites of a pornographic nature were consulted on the internet from the applicant's computer and that animated sequences of a pornographic nature were repeatedly sent by electronic mail to addressees outside the ECB, on 11 occasions between 18 August and 18 October 1999. Those facts constitute an infringement of the obligations laid down in Article 4(a) of the Conditions of Employment, which are of fundamental importance for the accomplishment of the ECB's objectives and which constitute an essential element of the way in which its staff are required to behave in order to safeguard its independence and dignity (see *Yasse* v *EIB*, paragraph 110).

215 The ECB rightly observes in that regard that, since the matters referred to above may become public and may be reported by the media, there is a serious risk that they could create a scandal which might be damaging to its image and, possibly, its credibility. In those circumstances, and since, moreover, these were not isolated but repeated occurrences, they could properly be categorised as amounting to misconduct.

216 Fifth, the applicant maintains that the ECB should have established that he was the person who actually sent the electronic mail messages complained of and that no one else had access to his computer. It suffices in that regard to refer to point 6 of the dismissal decision, in which the Executive Board of the ECB states that, taking into account the number of electronic mail messages sent, the time when they were sent (during working hours over a period of 18 months) and the fact that identical attachments were found in other messages sent by the applicant within and outside the ECB, it is scarcely plausible that they could have been sent

by another person. Moreover, since the applicant's computer was located in an open-plan office occupied by six persons, and since its operation required the use of a personal password, it would have been difficult for a third party to use that computer, especially with the frequency and at the times referred to above. This conclusion is *a fortiori* inevitable since the applicant admitted at the hearing that he had not revealed his password to anyone else.

217 The plea is likewise manifestly unfounded.

6. *The plea alleging that the penalty imposed was disproportionate*

Summary of the arguments of the parties

218 In his reply, the applicant claims that, if all the unsubstantiated complaints proved to be well founded, they should have prompted the ECB, applying the principle of proportionality, to issue him, in advance of the dismissal, with a warning as provided for in Article 43 of the Conditions of Employment.

219 The ECB's principal contention in that respect is that this constitutes a new allegation and is therefore inadmissible. In the alternative, in so far as the applicant is seeking to argue that the contested decisions are disproportionate because a written reprimand would have sufficed, it should be borne in mind that, according to case-law, it is for the appointing authority to choose the appropriate disciplinary measure once the allegations made against the staff member concerned have been substantiated. It is not open to the Court to substitute its own assessment for that of the appointing authority unless there is some manifest error, which is not the position in the present case.

Findings of the Court

220 It was not until the stage of the reply that the applicant put forward for the first time his plea alleging that the penalty imposed was disproportionate. Since this relates to matters which were known to the parties before the application was lodged, it is inadmissible on the basis of the principles referred to above.

221 For the sake of completeness, it should be added that application of the principle of proportionality in disciplinary matters comprises two aspects. First, it is for the appointing authority to choose the appropriate penalty where the truth of the matters alleged against the staff member is established, and it is not open to the Community judicature to criticise that choice unless the penalty imposed is disproportionate to the matters alleged against the person concerned. Second, the penalty to be imposed is to be determined on the basis of an overall assessment by the appointing authority of all the concrete facts and matters appertaining to each individual case, inasmuch as Articles 86 to 89 of the Staff Regulations of Officials, like the ECB's Conditions of Employment applicable to its staff members, do not specify any fixed relationship between the disciplinary measures listed by them and the various types of misconduct on the part of officials, and do not state the extent to which aggravating or mitigating circumstances are to be taken into account in the choice of penalty. Consequently, the examination by the Community judicature is limited to a consideration of the question whether the weight attached by the appointing authority to such aggravating or mitigating circumstances is proportionate, and it cannot substitute its own assessment for that of the appointing authority (see the judgment in *Yasse* v *EIB*, paragraphs 105 and 106, and the case-law referred to therein).

222 On the basis of those principles, therefore, the Court's review is limited to assessing whether the penalty imposed is disproportionate to the matters of which the staff member stands accused and whether the weight attached by the ECB to any aggravating or mitigating circumstances is proportionate.

223 In that regard, it is apparent from the file, in particular the testimony of the victim, of his immediate hierarchical superior and of the head of the Archives Section, and also the copies of the electronic mail messages received by the victim, that the applicant harassed him more or less continuously from the time of his recruitment in January 1998 until his suspension on 18 October 1999, save for a brief interruption on account of their having temporarily occupied separate workplaces between March and May 1998 and a period of relative peace and quiet from August to December 1998. That harassment was characterised, in particular, by offensive remarks about the victim made by the applicant to third parties, including hierarchical superiors, by provocative approaches to the victim, including, on 18 February 1998, a message from the applicant to the victim inviting the latter to perform fellatio on him, by the repeated despatch to the victim, on at least 19 occasions, of provocative electronic mail messages including, for example, messages sent on 6 August and 16 September 1999 containing animated sequences of a pornographic nature, a message sent on 24 March 1999 containing biographies of Adolf Hitler and Joseph Goebbels and a message sent on 18 August 1999 containing a photograph of a Nazi officer.

224 The very considerable number and frequency of the incidents recorded demonstrate offensive and violent behaviour on the part of the applicant towards the victim. It cannot seriously be denied that, under the labour law of most of the Member States, such behaviour would have justified summary dismissal. Consequently, the penalty imposed is not manifestly disproportionate, having regard to this objection alone, even if it is considered in isolation.

225 It should also be noted that the random check carried out on the incidence of consultation of internet websites, covering only the most recent period prior to the suspension of the applicant, has shown that, on several occasions between 19 May and 21 June 1999, he consulted websites of a pornographic nature. In addition, the applicant on numerous occasions sent electronic mail messages containing pornographic material to persons outside the ECB (comprising 11 animated sequences between 18 August and 18 October 1999) and, during the three months prior to his suspension, 149 electronic mail messages of a non-

professional nature within the ECB and 117 outside it, amounting to a total of 266 messages, a significant number of which were lengthy and elaborate.

226 Having regard to the particular seriousness of the applicant's non-compliance with his obligations, as illustrated by those myriad complaints, the penalty imposed does not appear to be manifestly disproportionate.

227 This plea is therefore likewise unfounded.

7. The plea alleging that the disciplinary proceedings were disproportionate

Summary of the arguments of the parties

228 The applicant considers that, by February 1998 at the latest, the defendant was aware of the existence of a conflict in the Archives section between him and the person claiming to have been the victim of the harassment. However, the ECB did nothing to resolve that conflict. It let the matter get out of hand. In those circumstances, the disciplinary proceedings brought by it against the applicant were therefore completely disproportionate.

229 The ECB regards this plea as unfounded, since, it claims, it regularly issued instructions with a view to resolving the conflict created by the applicant.

Findings of the Court

230 In the context of this plea, which is separate from the preceding plea, the applicant maintains that the conflict between him and the victim of the harassment should have been resolved in a more effective and preventive way by the administration of the ECB, which should have issued clear working instructions coupled, if necessary, with a warning. In the circumstances, the initiation of disciplinary proceedings was a disproportionate remedy.

231 However, the plea has no factual foundation and the ECB cannot be criticised for having maintained a passive approach to the situation created by the applicant. The victim complained to his hierarchical superior for the first time on 13 August 1998, whereupon the superior in question immediately called upon the victim and the applicant to attend a discussion of the matter and laid down rules of conduct. Following that intervention, the applicant's behaviour seems to have improved for several months. On 25 August 1999 the victim again approached his hierarchical superior to complain about the applicant. This time, an internal investigation was immediately organised, leading to the initiation of disciplinary proceedings.

232 It is clear, therefore, that the ECB reacted promptly to each of the victim's two complaints.

233 In any event, as the ECB rightly states in the dismissal decision (point 8), any failure to act on the part of the applicant's superiors cannot serve to justify the misconduct of the applicant, who remains responsible for his own acts.

234 The plea must be rejected. Consequently, the action must be dismissed in its entirety.

Costs

235 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, under Article 88 of those Rules, in proceedings between the Communities and their servants the institutions are to bear their own costs.

236 The ECB is nevertheless applying for an order requiring the applicant to pay all the costs, on the basis of Article 87(3) of the Rules of Procedure of the Court of First Instance, which derogates from Article 88 of those Rules and which provides, *inter alia*, that the Court may order a party to pay costs which it considers that party to have unreasonably or vexatiously caused the opposite party to incur. The ECB claims that the action is unreasonable, essentially on the ground of its being manifestly unfounded.

237 In the Court's view, that application is unfounded. The action is intended, in particular, to challenge the most serious disciplinary penalty capable of being imposed, namely dismissal. The staff member concerned cannot be criticised for having brought an action against the decision to dismiss him, whatever the validity of the pleas put forward by him in support of that action.

238 In the present case, each party must be ordered to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders the parties to bear their own costs.**

Azizi Lenaerts Jaeger

Delivered in open court in Luxembourg on 18 October 2001.

H. Jung
Registrar

M. Jaeger
President