JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
26 October 1993 *

In Case T-59/92,

Renato Caronna, an official of the Commission of the European Communities, residing in Brussels, represented by Jean-Noël Louis, of the Brussels Bar, with an address for service in Luxembourg at the offices of Fiduciaire Myson SARL, 1 Rue Glesener,

applicant,

supported by

Union Syndicale-Bruxelles, whose registered office is in Brussels, represented by Véronique Leclercq, of the Brussels Bar, with an address for service in Luxembourg at the offices of Fiduciaire Myson SARL, 1 Rue Glesener,

intervener,

v

Commission of the European Communities, represented by Gianluigi Valsesia, Principal Legal Adviser, acting as Agent, assisted by Benoît Cambier, of the Brussels Bar, with an address for service in Luxembourg at the office of Nicola Annecchino, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for an order that the Commission compensate the applicant for the non-material damage which he claims to have suffered, firstly as a result of the publication of an article in the newspaper, *Le Canard Enchainé,* and secondly as a result of the Commission's breach of its duty to have regard for the welfare of its

* Language of the case: French.

official by failing to take the measures necessary to vindicate his honour which had been called into question by that press article,

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

composed of: C. W. Bellamy, President, H. Kirschner and A. Saggio, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 6 July 1993,

gives the following

Judgment

Facts and procedure

1 The applicant, Mr Renato Caronna, an official in Grade A4, Step 8, in DG III (Directorate-General for Industry, formerly Directorate-General for the Internal Market and Industrial Affairs) of the Commission has been assigned, since the Autumn of 1989, to Unit II/D-2 'Construction', where he was instructed to draw up a draft directive on builders' liability. To this end, early in 1991 the applicant set up four working groups made up of experts appointed by the European associations responsible in this sector, which included associations of architects, engineers, insurers, builders and those responsible for subsidized housing. The brief of these working groups was to compile material to provide a basis for the preparation of the preliminary draft directive. In September 1991 the European Committee for the Coordination of the Social Habitat (Cecodhas) withdrew its experts from the four working groups.

2 On 11 December 1991, *Le Canard Enchainé*, a French weekly newspaper, published an article entitled 'The concrete lobby lays down the law in Brussels', criticizing the Commission's work on the grounds that too important a role was given to builders in the abovementioned working groups. That article reads as follows:

'In the pipeline: shrinking guarantees for its customers.

The European Commission has entrusted representatives of construction companies with the task of devising the guarantees their own customers will enjoy in the future. It is a bold scheme: if this draft European directive drawn up by the concrete lobby is adopted, the "ten-year contract bond" valid at present in France and several neighbouring countries will be limited to five years. And on expiry of this shortened period, the guarantee will no longer be watertight. Contrary to current legislation, it will be up to the purchaser to prove that the builder is at fault. And in the meantime, it will be up to the purchaser to find the money to mend his leaking roof or crumbling wall.

These behind-the-scenes amendments to regulations, which have already been mentioned in the trade press, will allow builders to reduce their expenditure on defective building work by at least a third. An item which in France cost them nearly 4 billion in 1988 alone.

There have been several stages in this offensive by the construction kings. As early as 1988 their European Federation, the FIEC, pleaded with the European Community for a change in the current guarantee system which it felt was "too long and financially crippling".

Friends in the right places

These grievances were taken fully on board by the Commission in Brussels which in 1990 instructed 48 experts to draw up for the following year a European directive to "harmonize the law on liability and after-sales guarantees for housing".

Builders formed the majority amongst these experts. And it was their federation (the FIEC) which was entrusted with the task of coordinating the work and producing the first draft.

The concrete brotherhood has friends in the right places. For instance, Renato Caronna, the high-ranking official in charge of this file in Brussels, is a former employee of the Italian association of civil engineers. And of course he gave the FIEC the job of overseeing the work of the 48 experts.

This mutual backscratching caused some consternation, particularly amongst the leaders of a federation representing subsidized housing organizations at European level (Cecodhas) of which Roger Quilliot, Socialist mayor of Clermont-Ferrand, is chairman. He has no wish to see the slender resources for subsidized housing swallowed up in making good the defective workmanship of others.

In a letter to Jacques Delors in late October Quilliot announced that the representatives of his federation were giving up on Brussels because no-one was prepared to listen to them. Was the work of the European Commission riddled with defects too?'

3 On 11 December 1991, three European associations — Cecodhas, the European Bureau of Consumers' Unions (BEUC) and the Confederation of Family Organizations of the European Community (Coface) — invited the press to a conference to be held on 16 December in order to denounce the procedure used by the Commission to draw up the draft directive in question.

4 The Director-General of DG III, Mr Perissich, reacted to these two events by sending a note to the Commission's spokesman, Mr Dethomas, asking him to intervene as a matter of urgency 'to defend the work of the Commission and the probity of the official concerned'. A draft press release was attached to that note. Copies of the note were sent, *inter alia*, to the office of the Commission President, to the office of the Vice-President, Mr Bangemann, who was responsible for DG III, and to the Secretary-General of the Commission.

5 Mr Dethomas did attend the press conference held on 16 December 1991 by the three European associations and explained the work of the Commission. However, it is accepted that he did not defend the applicant by name in public.

6 On the same day the Commission invited the press to a conference at which it distributed a press release answering the criticisms levelled at it without mentioning the applicant's name. The relevant passage in the press release reads as follows: 'In September 1991 Cecodhas decided to withdraw its experts from the four working groups, which caused no problems for the progress of the work, given the lack of cooperation shown by these experts ... It was at the express request of the European associations and not — as some people claim — at the suggestion of the European Commission that the Federation of the European Construction Industry (FIEC) was appointed to coordinate the work of the four groups. All the material compiled during the course of the work of these groups will enable the Commission's departments to draw up a preliminary draft directive early in 1992, on which as usual the interest groups concerned, including consumers, and the Member States will be consulted before it is submitted to the Commission for approval.'

7 In reply to a question put by the Court of First Instance as to the reaction of the media to the press conference held by the Commission, the latter stated that it could find no trace of any, given the length of time which had elapsed, whereas the applicant produced an extract from the Bulletin Européen du Moniteur No 74 of 23 December 1991, a publication for the building trade, which, without mentioning it by name, refers to the press article in issue and reproduces in full the press release distributed by the Commission.

8 On 20 December 1991, Mr Perissich sent a note — drawn up by the applicant — to Mr De Koster, Director-General of Personnel and Administration, and sent a copy to Mr Dewost, Director-General of the Legal Service. In that note, after referring to the appearance of the article in issue in *Le Canard Enchainé*, the holding of

the press conference by the three European associations, the contents of his own note to Mr Dethomas and those of the Commission's press release of 16 December 1991, he went on to state: 'There remains to be resolved the problem of the defamation of my official, who, under Article 17 of the Staff Regulations, is bound to exercise the greatest discretion and cannot therefore undertake his own defence. Accordingly, I urge you to apply without delay the principles which are binding on the Communities under Article 24 of the Staff Regulations and to inform me of the provisions adopted and the procedures implemented by the Commission in this matter to defend the honour and probity of my official. In this test case I would not wish my official, in the absence of any reaction from the Commission, to make a formal request, within the meaning of Article 90(1) of the Staff Regulations, for help and assistance.'

9 As the Commission took no action on the note of 20 December 1991, the applicant took various informal steps to obtain the Commission's assistance. At that point, on 24 January 1992, he was informed by DG IX (Directorate-General for Personnel and Administration) that he himself had to submit a formal request for help and assistance pursuant to Article 24 of the Staff Regulations applicable to officials of the European Communities (hereafter 'the Staff Regulations').

10 On 28 January 1992 the applicant submitted such a request, which the applicant and defendant have produced to the Court after being invited to do so. Having heard nothing from the Commission, the applicant telephoned DG IX on 13 February. He was told that his request would be dealt with 'shortly'.

11 On 21 February 1992 the applicant sent a note through official channels to the appointing authority, in which, after outlining the facts and, in particular, the steps taken by his Director-General, Mr Perissich, he contended that the Commission was bound, in performing its duty under Article 24 of the Staff Regulations, to take proceedings of its own motion against the author of the press article in issue because of its defamatory nature and the serious professional harm which it had caused to him. Referring to Article 17 of the Staff Regulations, which, he mentioned, prevented him from defending himself, he repeated his request that the

appointing authority inform him of the action it had taken against the author of the article in issue and the newspaper which published it. Furthermore, he asked the Commission to specify what steps the Communities had taken pursuant to the second paragraph of Article 24 of the Staff Regulations to compensate him jointly and severally with the author of the article in issue and the newspaper for the damage he had suffered. The applicant stated that, if he did not receive those particulars by 1 March 1992 at the latest, he would submit a complaint against the failure to act of which the Commission was guilty by not taking steps in time to defend his interests and compensate him for the damage he had suffered.

12 By note of 11 March 1992, Mr De Koster informed the applicant that, following an administrative inquiry held by his officers and having received a favourable opinion from the Legal Service, he had decided, in his capacity as appointing authority, to grant him the assistance requested in the form of a letter to *Le Canard Enchainé* 'outlining the steps actually taken by the Commission in respect of liability in the construction industry and formally denying the statements made about you'.

13 Again on 11 March 1992, Mr De Koster sent a letter, on behalf of the Commission, to the Editor-in-Chief of *Le Canard Enchainé*, asking him to grant a right of reply and to publish that letter in the next issue of the newspaper, in order to vindicate the honour and probity of the applicant. The letter made clear that, although in the article in issue the applicant was accused of bias in that he allegedly favoured civil engineers over consumers because of his professional experience before he entered the service of the Commission, an administrative inquiry conducted by the Commission's officers had established his complete integrity. Mr De Koster commented, by way of a general point, that the article in question was inaccurate and pointed out that the way the matter had been dealt with in fact was explained in a press release on 16 December 1991. On the subject of the applicant, Mr De Koster stressed that 'contrary to your allegation, it was not he, on behalf of the Commission, but the European associations responsible in this area who requested that the Federation of the European Construction Industry (FIEC) coordinate the work of the working groups responsible for compiling the information to serve as a basis for the preparation of the draft directive in question'.

14 Although the words 'copy to Mr Caronna' had been typed at the bottom of the page, no copy of that letter was sent to him at that time and he only came to hear of it three months later (see paragraph 17, below).

15 *Le Canard Enchainé* did not publish the letter. The Commission took no further action.

16 On 1 April 1992 the applicant submitted a complaint pursuant to Article 90(2) of the Staff Regulations, received by the General Secretariat of the Commission on 2 April, 'against the decision of the Commission ... to limit its assistance to sending one letter to *Le Canard Enchainé* which did no more than deny the accusations published in that newspaper'. The applicant claimed, *inter alia*, that, although it was informed in good time of the libellous nature of the article in issue, the appointing authority took no action to vindicate his honour or to obtain compensation from the newspaper for the damage done to its official. As for the letter sent by the Commission to *Le Canard Enchainé*, he argued that a request for publication, in exercise of a right of reply, more than three months after the publication of the article in issue only served to exacerbate the damage to him. Indeed, it was the principle of the right to a fair hearing which obliged a newspaper to publish a reply to anything published which directly compromised a person. That right of reply was accordingly only of value if it was exercised shortly after the appearance of the article in issue. Even if the newspaper in issue in this case did agree to publish a late reply, he could not but draw attention to the Commission's delay in taking action and the fact that it was acting under coercion, and thus could not fail to point to the logical conclusion. It was, therefore, clear that the late publication of a reply only exacerbated the damage already suffered by the applicant, which had become irreparable through the fault of the Commission. The applicant concluded that he had not been given — and no longer had — the opportunity to restore his honour publicly solely as a result of the appointing authority's failure to act, as it was required, under Article 24 of the Staff Regulations, to intervene of its own motion to provide assistance and to compensate him for the extremely serious non-material damage arising both from the publication of the libellous article and its own failure to act. As measures such as those described in the note sent to him on 11 March 1992 were not appropriate to vindicate his honour publicly, the applicant requested that the decision in issue be withdrawn and replaced by a decision which complied with the Commission's obligations under Article 24 of the Staff Regulations. The complaint concluded with the following sentence: 'He

requests, moreover, that the Commission compensate him for the damage he has suffered by payment of the sum of ECU 100 000.'

17 That complaint was considered at a meeting of an interdepartmental group on 17 June 1992. On that occasion the applicant received a copy of the letter which Mr De Koster had sent to the Editor-in-Chief of *Le Canard Enchainé* on 11 March.

18 On 18 June 1992 the applicant's lawyer sent a letter to the Commission criticizing, *inter alia*, the fact that the letter sent to *Le Canard Enchainé* had not been communicated to the applicant in advance. The applicant did not hear of it until 17 June. That additional procedural error, the lawyer argued, made it utterly impossible for the applicant to organize his defence personally in his own best interests. He argued further that the publication of a reply more than six months after the publication of the defamatory article could only exacerbate the damage suffered and therefore called on the Commission to uphold the complaint and adopt measures to vindicate the honour publicly.

19 Although the applicant sent a reminder on 16 July 1992 the Commission did not reply to the complaint which, therefore, was implicitly rejected on 2 August 1992.

20 Accordingly, the applicant brought the action in this case by application registered at the Court Registry on 20 August 1992.

21 The written procedure followed the normal course. By order of 18 February 1993, the President of the Fourth Chamber of the Court of First Instance granted the Union Syndicale-Bruxelles leave to intervene in support of the form of order sought by the applicant, pursuant to its request lodged at the Registry of the Court of First Instance on 8 December 1992. Following the lodging of the statement in intervention the written procedure was closed. Upon hearing the report of the

Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure without any preparatory inquiry. It did however put questions to the parties.

Forms of order sought

22 The applicant claims that the Court should:

— declare that the Commission is in breach of its duty to have regard for the welfare of its officials in so far as it failed to take measures, at the appropriate time, to vindicate the honour and dignity of the applicant and that it is bound to compensate the applicant for the damage caused to him by the publication of the article in *Le Canard Enchaîné*;

— accordingly, order the Commission to pay the applicant the sum of ECU 100 000 by way of compensation for the non-material damage he has suffered;

— order the Commission to pay the costs of the case.

23 The intervener claims that the Court should:

— allow the applicant's claims and order the Commission to pay the costs of the case including those incurred by the intervener.

24 The Commission contends that the Court should:

— dismiss the application as inadmissible or, at the very least, as unfounded;

— make an appropriate order as to costs.

25 The Court of First Instance finds, first of all, that the applicant is seeking compensation for two separate wrongs, firstly, the initial wrong done to him by the publication in *Le Canard Enchainé* of the press article in issue and, secondly, the subsequent wrong arising from the Commission's breach of its duty to provide assistance. Accordingly, the claim that the Commission should be ordered jointly and severally to compensate the applicant pursuant to the second paragraph of Article 24 of the Staff Regulations, for the initial harm caused to him by the publication of the press article in issue should be considered at the outset.

The claim that the Commission should be ordered jointly and severally to compensate the applicant, pursuant to the second paragraph of Article 24 of the Staff Regulations, for the initial harm allegedly caused to him by the publication of the press article in issue

Arguments of the parties

26 The applicant points out that the second paragraph of Article 24 of the Staff Regulations requires the Communities jointly and severally to compensate their officials for damage suffered. On that basis the applicant argues that he is entitled to seek compensation from the Commission for the damage he suffered as a result of the publication of the article in *Le Canard Enchainé* on 11 December 1991. Although it was informed as early as 13 December 1991 of the defamatory nature of the article in issue, the Commission took no action to obtain compensation from the newspaper for the damage caused to its official. As the applicant's Director-General pointed out in his note of 20 December 1991, under Article 17 of the Staff Regulations the applicant was required to exercise the greatest discretion with regard to all facts and information coming to his knowledge in the course of the performance of his duties and thus was unable to act in his own defence against the author of the article in issue.

27 As to the extent of the damage inflicted by the publication of the article in question, the applicant states in his reply that, given the length of time which had elapsed, he felt that it was no longer possible for him to force the author of the wrong to 'vindicate his honour publicly ... by payment of a token sum'. The applicant therefore 'abandoned a claim which had become pointless and limited his action to obtaining compensation for the damage arising from the Commission's failure to take any action in time to vindicate his honour publicly'.

28 The intervener points out, in this connection, that the requirement for discretion imposed on officials prevented the applicant from taking action on his own initiative against those responsible for the damage inflicted by the publication of the article in issue.

29 In its defence the Commission points out that the obligation jointly and severally to compensate an official under the second paragraph of Article 24 of the Staff Regulations only applies where the official has taken legal action but has been unable to obtain compensation from the third party responsible. It cannot be denied that the applicant did not initiate any proceedings, civil or criminal, and accordingly his claim for compensation does not meet the conditions laid down by the above article. It takes the view that the applicant is wrong in claiming to be entitled to compensation when he did not initiate legal proceedings against those responsible for the press article on the ground that he could not have taken action himself because of his duty to exercise discretion.

30 In its rejoinder the Commission argues that the claims made by the applicant on the basis of the second paragraph of Article 24 of the Staff Regulations are inadmissible because he did not first endeavour to obtain compensation for the damage allegedly done to him from those responsible for the press article in issue. In the alternative, the Commission argues that the applicant has yet to establish, by means of a decision from the only courts having jurisdiction in this matter, namely the French courts, that any wrongful act or defamation had occurred at all. Similarly, only the French courts could establish the existence of damage and of a causal link between the damage and the wrongful act and fix the amount of compensation accordingly.

Findings of the Court

31 The Court of First Instance points out that, under the second paragraph of Article 24 of the Staff Regulations itself, an application for compensation which puts in issue the joint and several liability prescribed in that article can be granted, only if, amongst other things, the official who has suffered damage has been unable to obtain compensation from the person who caused it. Accordingly, it should be considered first of all whether that condition determines the admissibility of the application or falls to be considered in connection with its merits.

32 Reference should be made on this point to the decisions of the Court of Justice in the matter of non-contractual liability to the effect that the admissibility of an action for compensation pursuant to Article 178 and the second paragraph of Article 215 of the EEC Treaty may be conditional, in certain cases, on the exhaustion of national remedies, provided always that such national remedies provide an effective means of protection for the individuals concerned and are capable of resulting in compensation for the damage alleged (see, for example, the Case 175/84 *Krohn* v *Commission* [1986] ECR 753, paragraph 27, and Case 81/86 *De Boer Buizen* v *Council and Commission* [1987] ECR 3677, paragraph 9).

33 The Court of First Instance considers that, whilst the Court of Justice has thus regarded the exhaustion of national remedies as constituting an implied condition for the admissibility of an action for compensation in which the Community's liability for damage caused by its own institutions or servants is in issue, that approach must also apply, *a fortiori*, to the situation covered by the second paragraph of Article 24 of the Staff Regulations, in which the Community, far from being required to make reparation for damage caused by itself, has, by virtue of its duty to provide assistance, to meet only a joint and several — and subordinate — obligation to compensate one of its officials for damage caused to him by a third party.

34 In this case, the Commission has submitted in its defence that the applicant did not satisfy the condition laid down by the second paragraph of Article 24 of the Staff Regulations. That plea, as put forward, is admissible, since its characterization in law, in the Commission's rejoinder, as a plea of inadmissibility merely represents an additional argument.

35 As for the condition laid down in the abovementioned decisions of the Court of Justice that national remedies must provide effective protection for the individuals concerned in that they are capable of resulting in compensation for the damage alleged, this Court considers that, in a case where the second paragraph of Article 24 of the Staff Regulations applies, a provision which lays down merely a joint and several, and subordinate, obligation on the part of the Community to make compensation, the official who has allegedly suffered damage must at least adduce

evidence of a nature such as to give rise to serious doubts as to the effectiveness of the protection afforded by national remedies.

36 In this case, the applicant, who never attempted to approach either the author of the press article in issue or *Le Canard Enchaîné* on his own account in order to obtain compensation, if necessary before the French courts, has adduced no evidence to establish that the reason for which he took no such steps was that the relevant provisions of French law would have made it impossible or particularly difficult to obtain an order against those responsible for the press article in issue for payment of compensation for the damage he considers himself to have suffered.

37 In so far as the applicant attempts to justify his failure to take action against those responsible for the press article in issue by reference to his duty under Article 17 of the Staff Regulations to exercise discretion, the Court considers that in the circumstances of this case the discretion required of the applicant by that article could not be greater than that exercised by the Commission itself in the matter. The Commission defended itself, on 16 December 1991, by making it known, by public statements, that it was the European associations and not the Commission itself which had requested that the FIEC be appointed to coordinate the work of the groups of experts. The applicant could have referred to those statements in the proceedings which he ought first to have initiated, by virtue of the second paragraph of Article 24 of the Staff Regulations, against those responsible for the damage he considers himself to have suffered. He should at least have taken the minimum initiative, which, under the second paragraph of Article 24 of the Staff Regulations, lies with the official rather than the administration, of discussing with the latter the details of the manner in which his duty to exercise discretion fell to be performed, with a view, possibly, to preparing an action for compensation.

38 It follows that the claim seeking an order for compensation against the Commission on the basis of the second paragraph of Article 24 of the Staff Regulations must be dismissed as inadmissible without there being any need to consider whether sufficient particulars of the amount of compensation sought were given for the purposes of Article 44(1)(c) of the Rules of Procedure, or whether the pre-litigation procedure was conducted properly from that point of view.

The claim seeking an order against the Commission for compensation for the damage allegedly caused by it through breach of its duty to provide assistance under the first paragraph of Article 24 of the Staff Regulations

Admissibility

The subject-matter of the various heads of claim

39 Apart from the claim for compensation in the strict sense of the term, namely that seeking an order against the Commission for payment of a sum of ECU 100 000 in compensation for the non-material damage suffered by the applicant, the action also comprises claims for a declaration that the Commission is in breach of its duty to provide assistance and that it is required to make good the damage resulting from that breach of duty.

40 As regards, first, the claim for a declaration that the Commission is in breach of its duty to provide assistance, the Court of First Instance held in its judgment in Case T-73/89 (*Barbi* v *Commission* [1990] ECR II-619, paragraph 21), referring to the case-law of the Court of Justice (Case 68/63 *Luhleich* v *Commission* of the ECSC [1965] ECR 727 and Joined Cases 10/72 and 47/72 *Di Pillo* v *Commission* [1973] ECR 763), that such a claim may be made in an action for compensation, in which, by virtue of the second sentence of Article 91(1) of the Staff Regulations, the Court has unlimited jurisdiction. That decision was, moreover, confirmed by the judgments of the Court of First Instance in Case T-156/89 *Valverde Mordt* v *Court of Justice* [1991] ECR II-407, paragraph 141, and Case T-84/91 *Meskens* v *Parliament* [1992] ECR II-2335, paragraph 30, in which claims for a declaration of maladministration which were formulated in an application for compensation were held to be admissible.

41 As for the applicant's claim for a declaration by the Court of First Instance that the Commission is required to make good the damage he considers himself to have suffered, claims of this nature have also been held by the Court of Justice to be admissible, particularly in cases where particulars of the extent of the damage had been provided only at a later stage. Thus, in its judgment in Case 90/78 *Granaria* v *Council and Commission* [1979] ECR 1081, paragraph 6, the Court of Justice held that, in an action for damages under Article 178 of the EEC Treaty, a decision

could, for reasons of economy of procedure, be given at a first stage of the proceedings on the question whether the conduct of the defendant institution was such as to give rise to its liability.

42 Accordingly, the various heads of claim in the application must all be declared admissible in so far as, in each case, their subject-matter is concerned.

The pleas of inadmissibility raised by the Commission

43 Without raising a formal plea of inadmissibility for the purposes of Article 114 of the Rules of Procedure, the Commission, in its defence, raises three pleas of inadmissibility alleging respectively a discrepancy between the subject-matter of the initial request for assistance and that of the later complaint and application to the Court, the absence of any act adversely affecting the applicant and the imprecise and indeterminable nature of the subject of the complaint and the application.

The discrepancy between the subject-matter of the initial request for assistance and that of the subsequent complaint and application

— Arguments of the parties

44 The Commission contends that the subject-matter of the initial request for assistance and that of the subsequent complaint and application differ radically. The present application merely seeks compensation whereas no such claim was even mentioned in the initial request of 28 January 1992 and was thus not the subject of a prior request within the meaning of Article 90(1) of the Staff Regulations, with the result that the application is inadmissible (judgment of the Court of First Instance in Case T-5/90 *Marcato* v *Commission* [1991] ECR II-731). Moreover, the change made in the subject-matter of the request during the course of the administrative procedure also renders the application inadmissible. That change distorted the proper conduct of the pre-litigation procedure, the whole purpose of which is to promote an amicable settlement, which implies that the subject-matter of the complaint should not be different from that of the initial request.

45 The Commission argues further that the fact that the request for assistance of 28 January 1992 might have ceased to have any purpose is of no relevance since the applicant was not thereby prevented from relaunching the procedure *ab initio* and submitting a request pursuant to Article 90 of the Staff Regulations prior to his application for compensation.

46 The applicant reiterates that, as the Commission took no effective action, he was forced to the conclusion that it was no longer possible for him to compel the perpetrator of the wrong to vindicate his honour publicly given the length of time which had elapsed. He, therefore, quite logically — and rightly — refrained from formulating a claim for annulment which had ceased to have any purpose and limited his action to compensation for the damage arising from the Commission's refusal to take any action in good time to vindicate his honour publicly. As the Commission did not take any immediate action to defend him, the damage done to him could now only be made good by the payment of a sum of money in compensation for the damage suffered.

47 The intervener argues that the change made in the subject-matter of the request for assistance during the course of the pre-litigation procedure could not have distorted the proper conduct of that procedure. All the applicant could do was to submit a complaint against the decision of 11 March 1992 which did not vindicate his honour publicly. As for the fact that the purpose of the pre-litigation procedure is to allow an amicable settlement to be reached, the intervener maintains that the Commission was well aware of the aim pursued by the applicant. Moreover, as the Commission did not reply to the note from Mr Perissich, took more than a month and a half to respond to the request for assistance submitted by the applicant and did not reply to his complaint, it cannot claim to have endeavoured to reach an amicable settlement in this matter.

48 The intervener also points out that, although the request for assistance of 28 January 1992 was not designed to obtain compensation, the note of 21 February, which supplemented it, expressly called on the Commission to specify what steps would be taken jointly and severally with the author of the article in issue and the newspaper to compensate the applicant for the damage he had suffered. In that note the applicant also made it clear that, if necessary, he would lodge a complaint against the Commission's failure to take steps in good time to defend his interests

and obtain compensation for the damage he had suffered. The intervener concludes from this that it is incorrect to claim that, before initiating the pre-litigation procedure, the applicant never requested compensation for the damage caused to him by the publication of the article in issue.

— Findings of the Court

49 It must first be ascertained whether or not the applicant altered the subject-matter of his claims during the course of the administrative procedure. In his request of 28 January 1992 he merely asked the Commission for assistance pursuant to Article 24 of the Staff Regulations to defend his honour and integrity. In his note of 21 February 1992 he repeated that request. He asked the Commission to specify what steps had been taken jointly and severally with the author of the article in issue and the newspaper to compensate him for the damage he had suffered and stated that, in the absence of such clarification, he would lodge a complaint against the Commission's failure to act in order to obtain compensation for that damage. Accordingly, before the decision of 11 March 1992, the applicant did not submit any request for compensation for damage caused by any failure to act on the part of the appointing authority. In the note of 21 February 1992 he announced his intention to do so without actually carrying it out.

50 The subject-matter of the complaint of 1 April 1992 differs from that of the initial request in that the applicant sought, for the first time, the payment of ECU 100 000 in compensation for, *inter alia*, the damage arising from an alleged failure to act on the part of the appointing authority.

51 Accordingly, it falls to be considered whether that fact vitiated the pre-litigation procedure. On this point, it must be observed that the pre-litigation procedure under the Staff Regulations is different where the damage for which reparation is sought was caused by an act adversely affecting the person concerned from that necessary where the damage was caused by conduct involving nothing in the nature of a decision. In the first situation, the admissibility of the action for damages is subject to the condition that the person concerned submitted to the appointing authority a complaint against the act which caused him damage and that he brought

his action within the period prescribed, whereas in the second situation the administrative procedure which must necessarily precede the action for compensation, under Articles 90 and 91 of the Staff Regulations, comprises two stages, a preliminary request for damages and, if that is rejected, a complaint (see the order of the Court of First Instance in Case T-64/91 *Marcato* v *Commission* ECR II-243, paragraphs 32 and 33, and the judgment in *Meskens* v *Parliament* above, paragraph 33).

52 Accordingly, it falls to be considered whether the damage in question was caused by conduct of the appointing authority involving nothing in the nature of a decision or by an act adversely affecting the applicant. Consideration of this point merges with that of the second plea of inadmissibility raised by the Commission.

The absence of any act adversely affecting the applicant

— Arguments of the parties

53 The Commission contends that its decision of 11 March 1992 granted the request for assistance made by the applicant and informed him that the assistance sought would take the form of a letter to *Le Canard Enchainé*. Accordingly that decision could not have affected the applicant adversely, as it was he himself who, six weeks previously, had asked for that measure. It was therefore not open to the applicant to lodge a complaint against such a decision which granted him what he had requested. Although the applicant eventually decided against exercising a right of reply in his complaint, this was not because of any alleged delay, but because it had become evident that the Commission had by means of its press conference of 16 December 1991, re-established the truth and put an end to any controversy. The applicant therefore decided that it was probably preferable to do nothing that might serve as a pretext for further controversy and to apply directly to the Commission for compensation.

54 The Commission adds that the fear that the exercise of a right of reply might reopen the controversy and exacerbate the damage was justified irrespective of whether that right was invoked in the fortnight following publication of the defamatory article or some months later. Finally, the fact that a reply was sent after

three months (letter of 11 March 1992) rather than after a month and a half (request of 28 January 1992) clearly does not give rise to special or different damage.

55 The applicant replies that the contested decision, although it grants his request, adversely affects him in that the assistance given is inappropriate and even likely to exacerbate the injury already suffered. It cannot be denied that the newspaper in question did not fail to note that it was not until three months after the publication of the article in issue that the Commission came to the assistance of its official with a mere request for publication, asserting a right of reply which no longer existed because of the length of time which had elapsed, so that there was no prospect of the request being given effect. It is therefore the Commission's decision to confine its assistance to sending a request for publication by way of right of reply three months after the publication of the defamatory article which constitutes the act adversely affecting an official within the meaning of Article 90(2) of the Staff Regulations.

56 According to the intervener, the decision of 11 March 1992 is contested in that the appointing authority confined its assistance to a letter to *Le Canard Enchainé*, in other words, therefore, because of the ineffectiveness of the measures taken. The despatch of a request for publication by way of right of reply was not a measure of a nature such as to restore the applicant's rights. The appointing authority must have been aware that *Le Canard Enchainé* would take no action is response to such a request, which was made exactly three months after the publication of the article in issue.

— Findings of the Court

57 It is settled case-law that the only acts which affect an official adversely are those which are capable of directly affecting his legal position (see, most recently, Case T-50/92 *Fiorani* v *Parliament* [1993] ECR II-555 paragraph 29).

58 In this connection, it should be pointed out that Article 24 of the Staff Regulations, which imposes on the Communities a duty to assist their officials, appears in Title

II concerning the 'rights and obligations of officials'. Accordingly, in each situation where the required factual conditions are met, that duty to provide assistance is the counterpart of a right of the official concerned under the Staff Regulations and thus confers on him a legal position which can be affected within the meaning of the abovementioned case-law. In this case, by the decision it adopted in response to the request made by the official concerned, the appointing authority confined its action to a letter sent to the newspaper in question, which, moreover, was not followed by any publication by that newspaper. Accordingly, given the Commission's limited response to the applicant's request, the decision of 11 March 1992 may be considered to have been liable to affect the legal position of the applicant.

59 If it should prove that the Commission failed to take full account of its duty to provide assistance, the decision in issue would constitute an act adversely affecting an official. Accordingly, the finding on the question whether there was an act adversely affecting the applicant depends on what emerges from consideration of the substance of the case. The answer to be given to that question must be considered later together with the questions of substance raised by the proceedings (Case T-108/89 *Scheuer* v *Commission* [1990] ECR II-411, paragraph 25).

60 Accordingly, the finding to be made on the second plea of inadmissibility alleging irregularities in the pre-litigation procedure will depend on what emerges from consideration of the substance of the case.

The imprecise and indeterminable nature of the subject of the complaint and of the application

— Arguments of the parties

61 The Commission maintains that the request for compensation made in the complaint is subordinate to a principal request for a 'decision in conformity with the obligations' of the Commission. However, the applicant did not make clear what he meant by that. He never informed the Commission in precise terms what form of assistance he sought. Nor does he specify, even now, what steps he expected to be taken. The main subject of the complaint was thus uncertain, which rendered

the request for compensation inadmissible and the procedure preceding the application to the Court irregular.

62 The applicant maintains in reply that the facts and the tenor of the pleas he put forward in his complaint were discussed at the abovementioned interdepartmental meeting for more than an hour and a half and that the representative of DG IX said he understood perfectly the objectives pursued and the steps which needed to be taken to attain them.

63 The intervener contends that the Commission is required, under Article 24 of the Staff Regulations, to assist its officials where they are the victims of defamation. In view of that obligation, the applicant therefore did not have to submit a formal request for assistance under Article 90(1) of the Staff Regulations. Rather, given the fact that this case set a precedent and given its political implications, the Commission should have taken, on its own initiative, all the steps it considered most appropriate to vindicate its official's honour publicly. The Commission is therefore wrong in complaining that the applicant was not more explicit about the nature of the measures he sought. The intervener adds that, if the Commission had not understood the implications of the request for assistance referred to it, it only needed to ask for more details. Moreover, the Commission did not complain of the applicant's alleged lack of precision until the action had been brought. It is not open to the Commission to raise such a plea of inadmissibility after the application to the Court has been lodged.

— Findings of the Court

64 On this point it is sufficient to observe that, according to the case-law of the Court of Justice, the administration has, on the one hand, a discretion, subject to review by the Community judicature, in the choice of the ways and means of implementing Article 24 of the Staff Regulations (Case C-137/88 *Schneemann and Others* v *Commission* [1990] ECR I-369, paragraph 9) and, on the other hand, a duty to take all necessary steps, pursuant to the same article, to restore the good name of an official whose professional integrity has been called in question (Case 128/75 *N.* v *Commission* [1976] ECR 1567, paragraph 10).

65 Accordingly, an official who seeks the assistance of his administration may confine himself to invoking the duty to provide assistance as laid down in Article 24 of the Staff Regulations without giving any further particulars and the administration is then required to take the steps which are objectively necessary and appropriate in the matter. Moreover, the Commission has itself pointed out (paragraph 9 of the rejoinder) that it is for itself to determine the most appropriate manner of complying with its duty to provide assistance.

66 In his complaint and application the applicant claims that the Commission did not publicly vindicate his honour and dignity. This aspect of his complaint and application is thus adequately defined.

67 Accordingly, the third plea of inadmissibility must be rejected.

Substance

68 Since the application contains three different heads of claim, the Court considers it appropriate to begin by examining the claim for a declaration that the Commission has failed in its duty to provide assistance and has thereby committed a service-related fault.

The merits of the claim for a declaration of service-related fault

Arguments of the parties

69 The applicant charges the Commission, firstly, with having failed in its duty to provide assistance under the first paragraph of Article 24 of the Staff Regulations. Retracing the course of events since the appearance of the article in issue in *Le Canard Enchainé*, he states that, although the Commission was informed by Mr Perissich on 13 December 1991 of the defamatory nature of that article, it took no steps — either at the press conference organized by the three European associations

or in its own press release — to vindicate his honour by name and in public, despite the fact that he had been made the subject of defamatory allegations solely on account of action which he had taken exclusively in the interests of the Commission. While the applicant admits that the reference made in the article in issue to his work in the Italian association of civil engineers is not in itself defamatory, he maintains that it does not give a true picture of the facts and that the defamation lies unquestionably in the tone of the article and the insinuations contained in it.

70 The applicant then states that despite the Commission's claim to the contrary, it did not, at the press conference which it held on 16 December 1991, express its full support for its official whose reputation was in issue. In particular, it did not dispel all doubt in the eyes of the press and the institutions themselves.

71 The applicant maintains that the letter sent to *Le Canard Enchainé* on 11 March 1992 by the Commission in exercise of the right of reply was manifestly too late. A right of reply is only of any value if it is exercised within days of the appearance of the article in issue. Otherwise, in the commentary accompanying the reply, the author of the defamatory article will not fail to point out the lateness of the response, which will give the newspaper the opportunity to revive the altercation. Moreover, in this case, nothing was published in the newspaper in point in response to the letter requesting publication of a correction and the Commission sent no reminder or letter before action.

72 The applicant states further that his Director-General had pointed out, in his note of 20 December 1991, that the applicant was required, under Article 17 of the Staff Regulations, to exercise the greatest discretion with regard to the facts and information coming to his knowledge in the performance of his duties; accordingly, the Director-General asked the Commission to act on its own initiative and apply Article 24 of the Staff Regulations in order to give help and assistance to the applicant.

73 He adds that the Commission never released him from the duty to exercise discretion to which he was subject by virtue of Article 17 of the Staff Regulations. Accordingly, he had no possibility of defending himself against the author of the article in issue. Whilst it is true that he could have lodged a complaint with the criminal authorities or instituted civil proceedings, the fact remains that this would have been pointless inasmuch as his Director-General had expressly reminded him of his duty to exercise discretion.

74 The intervener maintains that, by virtue of Article 24 of the Staff Regulations, the Commission is required to assist its officials when they are defamed by reason of their position or duties. As the Commission's power is one which it is required to exercise, it has no discretion as to whether it is appropriate to provide such assistance. In this connection the intervener cites the judgments of the Court of Justice in Case 53/72 (*Guillot* v *Commission* [1974] ECR 791, paragraphs 3 and 4) and in Case 229/84 (*Sommerlatte* v *Commission* [1986] ECR 1805, paragraph 20) as authority for its argument that, in this case, the Commission was required to take steps on its own initiative to provide specific assistance. These were exceptional circumstances given that, because this case set a precedent, the applicant's Director-General had felt it necessary to submit a request for assistance to the appointing authority on behalf of his official. That being so, there was no obligation for the applicant to submit a formal request for assistance under Article 90 of the Staff Regulations.

75 Finally, the intervener espouses the view taken by the applicant on the subject of his duty to exercise discretion under Article 17 of the Staff Regulations. If the Commission considered that the applicant was not bound by such a duty it ought to have disabused him of the idea as soon as it received the note sent on 20 December 1991 by his Director-General.

76 The Commission notes, as on a preliminary point, that the statement contained in the article in issue to the effect that the applicant 'is a former employee of the Italian association of civil engineers' is true and is not in itself defamatory.

77 It states, next, that it is wholly inaccurate to claim that it did not respond in an appropriate manner to the attack made in that article. It claims that, at the press conference which it held on 16 December 1991, that is to say immediately after the publication of the article on 11 December 1991, it accepted all its responsibilities and expressed its full support for the official who was criticized. Any doubts about the applicant were thus dispelled both in the eyes of the press and of the institutions themselves. Through the particulars it provided at that press conference it officially and categorically denied the defamatory allegation made by *Le Canard Enchaîné* to the effect that it was the applicant who made the decision to give 'the FIEC the job of overseeing the work of the 48 experts'. The success of the press conference was demonstrated by the fact that it put an end to all altercations. This proves that the Commission responded appropriately to the defamatory article and fully discharged its duty to provide assistance.

78 The Commission adds that it ill becomes the applicant to criticize it for its inertia when he himself took no action against the author of the article in issue. Still less can he shift the blame for this on to the Commission, since he himself submitted his request for assistance a month and a half after the events took place, thus creating the impression that he too felt that the press conference was an adequate response which had fully re-established the truth.

79 The Commission disputes the applicant's assertion concerning the implications of his duty to exercise discretion under Article 17 of the Staff Regulations. It states that the duty to exercise discretion under Article 17 of the Staff Regulations in no way prevented the applicant from asserting his rights in court proceedings: under Article 35 of the French Law of 29 July 1881 on the freedom of the press, which is applicable in the situation in point, it is the party who makes the statements complained of who bears the burden of proving their truth. Had he lodged a complaint, the applicant would thus not have had to act in breach his duty to exercise discretion, since it would have been for the author of the article to prove the truth and the validity of his allegations. Furthermore, the applicant could easily have proved that the statements in question were incorrect by producing the minutes of the press conference held by the Commission on 16 December 1991. In doing so, the applicant could clearly not have acted in breach of his duty to exercise discretion. Furthermore, the applicant did not ask to be released from his duty to exercise discretion and never expressly requested the Commission to assist him in initiating proceedings against the author of the article or *Le Canard Enchaîné*.

80 The Commission adds that, under Article 48(6) of the above French law and the interpretation given to it in decisions of the French courts, only the applicant was entitled to lodge a complaint in respect of the defamatory remarks made about him in *Le Canard Enchainé*. He therefore has no grounds for complaining that the Commission did not initiate of its own motion initiate proceedings against the journalist or newspaper concerned, since he was the only person entitled to take such action.

81 Furthermore, the applicant never made clear what form of assistance he was seeking nor what steps he expected to be taken. On the other hand, he made known his objection to the letter, sent on 11 March 1992 to the newspaper in issue by the Commission, requesting the publication of a reply. Inasmuch as he justified his objection on the ground that the request for publication came too late and was likely to revive the controversy, the Commission states that it cannot see in what way the publication of a reply one or two weeks after the appearance of the defamatory article would not have the effect feared by the applicant.

82 In that connection, the Commission goes on to insist that it is for itself to decide on the most appropriate manner in which to discharge its duty to provide assistance. In this case it decided to re-establish the truth by holding a press conference on 16 December 1991 and, following a request of the applicant, it sent a reply to the newspaper in question. If the applicant considered those measures inadequate, it was always open to him to initiate the necessary civil or criminal proceedings, and in so doing he would not even have needed to be released from his duty to exercise discretion, since he could have relied on the official denial issued by the Commission at its press conference on 16 December 1991.

83 At the hearing the parties agreed that, while the press article in issue did mention the applicant's name, its primary target was the policy implemented by the Commission in the building industry and its purpose was to hinder the adoption of the planned directive.

84 The Commission explained that, as it was the principal target of the press article in issue, it assumed that the criticisms voiced in that article were directed at itself.

Accordingly, it considered that it was preferable not to mention the applicant by name in its public statements so as to avoid personalizing the problem and giving it greater publicity. There was a danger in this case that the applicant's name would crop up constantly and that the altercation would be fuelled by that link because of the applicant's work in the past as an employee of the Italian association of civil engineers. There seemed all the less need to mention the applicant's name since the article in issue was published in a satirical newspaper. Moreover, the Commission's strategy, which was to prevent any further controversy, was completely successful in this case since the press campaign launched by *Le Canard Enchainé* went no further.

85 In this connection, the Commission further explained that, wherever a problem of a material nature conceals a problem of individuals acting on behalf of the Commission, it avoids intervening *ad hominem* because it considers that such intervention is counterproductive. In such circumstances it prefers to defend its action on its merits and, in doing so, at the same time it inevitably defends its representatives, in this case, the applicant, without entering into disputes of a personal nature.

86 Finally, the Commission said that, generally speaking, it doubted whether it was appropriate to invoke a right of reply *vis-à-vis* a newspaper. The exercise of the right of reply gives the newspaper an opportunity to revive the story and give fresh publicity to it. Accordingly, in such circumstances, the Commission prefers to describe its actions and thereby re-establish the truth, as it did in this case by organizing a press conference on 16 December 1991 at which a press release was distributed. It was only at the insistence of the applicant that the Commission finally took action, which the applicant asked it not to pursue further, to exercise a right of reply.

87 At the hearing the applicant explained that what he expected from the Commission was essentially that it should formally confirm its confidence in him to the outside world, and in particular to the national groups of experts, by taking the course of action it deemed most appropriate for that purpose. For example, the Commission could have made a statement that an administrative inquiry had revealed that the

accusations levelled at the applicant were unfounded. In the applicant's opinion such a statement would have served to restore his reputation publicly.

88 In response to the Commission's claim that the action it took on 16 December 1991, that is the holding of a press conference and distribution of a press release, was appropriate and sufficient, as proved by the fact that the altercation has not since been resumed in the press, the applicant maintains that, if this case is no longer the subject of an altercation, this is solely because the draft directive attacked by the press article complained of no longer has any future. It was therefore not effective action by the Commission which put a stop to all controversy. Quite to the contrary, in practical terms the press campaign defeated the draft directive so that any further altercation became pointless.

Findings of the Court

89 The Court finds first of all that the primary target of the press article complained of is the policy implemented by the Commission in preparing a draft directive on the liability of builders. However, that criticism was also 'personalized' by the insinuations to the effect that the applicant, mentioned by name and described as a 'high-ranking official in charge of this file in Brussels', had favoured the construction lobby in preparing the draft directive solely because of his previous involvement with the Italian building industry and as a 'friend of the concrete brotherhood', and had thereby acted against the interests of consumers. That press article thus publicly — and falsely, as the investigations subsequently carried out by the Commission reveal — accuse the applicant of blatant favouritism in the performance of his duties, which is tantamount to accusing him of serious misconduct in office. Consequently, the article is such as to call into question, in the eyes of the public, the professional integrity of the applicant and constitutes defamation within the meaning of the first paragraph of Article 24 of the Staff Regulations.

90 Secondly, as that public defamation of its official was inextricably linked to the policy it was implementing, the Commission was required to react against those

insinuations and publicly vindicate its official's honour. An individual defence conducted in isolation by the official and accompanied by silence on the part of the Commission could not prevent the impression from spreading among the public that the accusations and insinuations in issue might perhaps not be unjustified. Accordingly, in this case, the appearance of the press article complained of activated the Commission's duty under Article 24 of the Staff Regulations to provide assistance to the applicant. Moreover, in adopting the decision of 11 March 1992, the Commission itself acknowledged that the conditions for it to be required to perform its duty to provide assistance satisfied in this case.

91 It therefore falls to the Court to consider what was the scope of the Commission's duty to provide assistance in the circumstances of this case.

92 On that point, it must be observed that the Court of Justice has held that, while the administration enjoys a wide discretion regarding the choice of the ways and means of implementing Article 24 of the Staff Regulations (*Schneemann and Others* v *Commission*, cited above, paragraph 9), when faced with serious and unfounded accusations concerning the professional integrity of an official in carrying out his duties, it must refute those accusations and do everything possible to restore the good name of the official concerned (*N.* v *Commission*, cited above, paragraph 10). In its order in Case 108/86 (*D. M.* v *Council and ESC* [1987] ECR 3933), a case in which an official had been libelled in an open letter distributed to staff by another official, the Court of Justice held that sufficient assistance was given by the distribution by the administration of a correction in a memorandum addressed to the same staff. Finally, as stated above (see paragraph 65), an official who seeks the assistance of his institution is not bound to specify the steps he expects it to take. In particular, the right of an injured official to have the objectively necessary measures of assistance taken does not depend on his having first taken the initiative of pursuing the person responsible for the attacks against him (see judgment in *N.* v *Commission* above, paragraph 11).

93 In this case, in which the applicant was defamed publicly and by name, it should therefore be considered, in the light of that case-law, whether the measures taken by the Commission following the publication of the press article in issue may be

regarded as an appropriate and sufficient performance of its duty to provide assistance.

94 As to the steps taken by the Commission on 16 December 1991, namely the holding of a press conference and the distribution of a press release on that occasion, and also the despatch of a representative to the press conference organized by the three European associations, Cecodhas, BEUC and Coface, it is apparent that the Commission, by acting quickly in this way, succeeded in defending its own interests as a Community institution in the eyes of the public. However, by defending its work in objective terms without ever mentioning the applicant's name on that occasion, the Commission only provided him with indirect assistance. The Court considers that, given the public, direct and personal defamation which the applicant suffered, such assistance, confined as it was to defending him solely by means of a defence of the work of the Commission, cannot be deemed appropriate and sufficient to vindicate his honour publicly.

95 That view is, moreover, confirmed by the conduct of the Commission itself. By sending the letter of 11 March 1992 to *Le Canard Enchainé*, the Commission, in so doing, implicitly acknowledged that the steps taken on 16 December 1991 could not, on their own, be regarded as appropriate and sufficient assistance.

96 As to the letter sent by the Commission on 11 March 1992 to *Le Canard Enchainé* by way of a right of reply, the Court finds that the Commission, in that letter, did dispute the unjustified accusations which the newspaper had levelled at the applicant. However, that correction did not receive the publicity which the Commission judged to be necessary, since *Le Canard Enchainé* did not grant its request for the publication of a reply in a subsequent edition of the newspaper. That lack of any rectification of the situation persisted up to the Commission's rejection of the applicant's complaint, as *Le Canard Enchainé* had at that time still not published the correction which the Commission itself considered necessary. By that time, at the very latest, it should have been clear to the Commission that the letter it sent to *Le Canard Enchainé* was too weak a measure to defend the applicant's honour

publicly and that it had until then acted in response to its duty to provide protection with a manifest lack of vigour (judgment of the Court of Justice in Case 18/78 *V.* v *Commission* [1979] ECR 2093, paragraph 19).

97 Under those circumstances the Court considers that the Commission could no longer prolong its silence before the public but had to defend the honour of the applicant publicly and by name. The Court considers that a prolonged silence by the Commission as to the qualities of an official who has been publicly attacked might even be interpreted as an indirect confirmation of the press article in question.

98 In this connection the Commission has argued that to mention the name of the applicant would have turned the case into a personal matter and could have prolonged the altercation. The Court cannot agree with this assessment of the situation, nor does it share the Commission's fears. It is true that, as the Commission itself was the main target of the press article in issue, it was neither necessary nor useful, in defending the applicant's honour, to draw attention either to him as a person or to the fact that he is a former employee of the Italian association of building workers, the only aspect which might have given rise to controversy. The Commission could thus have confined itself to amplifying its defence of its own work, either in its press release of 16 December 1991 or on a subsequent occasion. For example, it could have pointed out, after stressing that the FIEC was appointed to coordinate the work of the groups of experts at the express request of the European associations concerned, that 'it was, therefore, not Mr Caronna, the Commission official responsible for this matter, who gave the FIEC this role of coordinator'.

99 It follows from the foregoing considerations that the Commission, in taking the view that it was not required in the circumstances of this case to defend the applicant publicly and by name, failed to discharge the obligations imposed on it, in these particular circumstances, by the duty to provide assistance which is incumbent on the Community authorities under Article 24 of the Staff Regulations. Accordingly, the Court finds that the Commission has failed in that duty by not taking in sufficient time measures to restore the applicant's honour and dignity publicly. Thus, in infringing the first paragraph of Article 24 of the Staff Regulations, the Commission has committed of a service-related fault.

100 On the basis of that finding, the decision of 11 March 1992 constitutes an act adversely affecting an official, which, on the one hand, could be contested by the complaint of 1 April 1992 and which, on the other hand, caused damage to the applicant. It follows that the first and second pleas of inadmissibility raised by the Commission must be rejected and the claims for a declaration of service-related fault are well founded. Accordingly, it should be declared, in the operative part of this judgment, that the Commission failed in its duty to provide assistance.

The merits of the claim for a declaration that the Commission is required to make good the damage caused by its breach of its duty to provide assistance and for an order that the Commission pay the sum of ECU 100 000

Arguments of the parties

101 The applicant claims that the lack of any public reaction on the part of the Commission with a view to restoring his honour served to reinforce the credibility of the accusations levelled at him in the article in issue and that he suffered considerable non-material damage as a result. To illustrate that damage the applicant states that during the meetings of the four groups of experts responsible for producing an opinion on the draft directive he was repeatedly questioned by people about the measures taken by the Commission following the publication of the article in issue. The Commission's refusal to provide him in good time with the help and assistance to which he was entitled to thus exacerbated the damage caused by the defamation itself and that damage has now become irreversible.

102 As for the sum claimed by the applicant, both he and the intervener take the view that, given that this case sets a precedent, it is justifiable to order the Commission to pay 'exemplary damages', which represents nothing more than just and fair compensation for the damage caused not only by the publication of the article in issue but also by the refusal of the Commission to adopt measures to vindicate the applicant's honour and dignity publicly. In his application the applicant considered that the Commission should therefore be ordered to pay him the sum, calculated *ex aequo et bono*, of ECU 100 000.

103 On that point the Commission confines itself to criticizing the 'astronomical' amount claimed by the applicant, which, in its view, demonstrates that his claims are not made in earnest and may explain why he chose to take action against the Commission rather than initiating proceedings in the French courts against those responsible for the article in issue. It contends that the claims for compensation submitted by the applicant are unfounded as his honour was duly vindicated. Moreover, the applicant is clearly not in a position to prove the existence of any damage, still less its extent.

104 It adds, in reply to a written question put to it by the Court, that for it to incur liability for a wrongful act which it is said to have committed there is no need to apply Article 24 of the Staff Regulations. Moreover, the applicant has not established the Commission's direct and individual liability in this case and did not follow the proper procedure for that purpose.

Findings of the Court

105 It should first be considered whether the Commission's service-related fault caused non-material damage to the applicant.

106 In that connection the Court finds that, although the applicant's professional integrity was already compromised by the publication of the defamatory press article itself, the Commission's failure to take appropriate steps to restore the applicant's honour publicly, when it should have done so (see above, paragraph 90), served to aggravate the non-material damage caused by that publication. The Commission's failure to act is such as to place the applicant in a position of uncertainty and anxiety, as he might, quite understandably, be afraid that such failure to act might be interpreted by the public as indirect confirmation of the press article in question (see above, paragraph 97). Such a situation constitutes non-material damage. Despite the Commission's assertions to the contrary, all the conditions for its liability to be incurred are present in this case. Moreover, the Court of Justice has already held (*V.* v *Commission*, above, paragraphs 16 and 19) that, as a rule, breach of the duty to provide assistance under the first paragraph of Article 24 of the Staff Regulations opens the way to an application for compensation for the non-material damage suffered.

107 As the applicant has sought, firstly, a declaration that the Commission is required to make good that damage and, secondly, an order that it pay ECU 100 000 by way of compensation, the Court — points out that, as it is adjudicating on a dispute of a pecuniary character in this case, it has unlimited jurisdiction under the second sentence of Article 91(1) of the Staff Regulations. In ruling on reparation for the non-material damage suffered by the applicant, it should be borne in mind that the finding, expressly repeated in the operative part of this judgment, of a service-related fault committed by the Commission with respect to the applicant constitutes in itself a form of reparation, particularly since the operative part of this judgment will be published, pursuant to Article 86 of the Rules of Procedure, immediately after the judgment has been delivered, in the *Official Journal of the European Communities* (see, amongst the decided cases concerning the annulment of an administrative act contested by an official, the judgment of the Court of Justice in Joined Cases 44/85, 77/85, 294/85 and 295/85 *Hochbaum and Rawes* v *Commission* [1987] ECR 3259, paragraph 22, and the judgments of the Court of First Instance in Case T-37/89 *Hanning* v *Parliament* [1990] ECR II-463, paragraph 83, and T-158/89 *Van Hecken* v *ESC* [1991] ECR II-1341, paragraph 37). However, in view of the particular circumstances of this case, such publication is not sufficient to make good in full the damage suffered by the applicant. Given that, until the date of publication, the applicant will have remained in an ambiguous situation *vis-à-vis* the public as far as his honour is concerned, the Court considers, having evaluated the damage *ex aequo et bono*, that the payment of a sum of BFR 50 000 constitutes, together with the publication of the judgment, proper compensation for the damage suffered by the applicant. Accordingly, the claims seeking a declaration or compensation must be rejected in so far as they exceed the measure of reparation granted.

Costs

108 Under the first subparagraph of Article 87(3) of the Rules of Procedure, the Court may order that the costs be shared if each party succeeds on some and fails on other heads. However, Article 88 of those Rules provides that in proceedings between the Communities and their servants the institutions are to bear their own costs.

109 Since the applicant has been partially unsuccessful in his claim for compensation, in particular as regards an order that the Commission pay him ECU 100 000, while the Commission has been wholly or partially unsuccessful in its defence to the

applicant's other claims, the Court considers it equitable to order the applicant and the intervener to pay one-quarter of their own costs and the Commission to bear all its own costs and pay three-quarters of the costs of the applicant and the intervener.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. **Declares that, in not taking in sufficient time measures to vindicate publicly the honour and dignity of its official, Renato Caronna, the Commission has failed in its duty to provide assistance under Article 24 of the Staff Regulations;**

2. **Orders the Commission to pay to the applicant the sum of BFR 50 000 by way of damages;**

3. **For the rest, dismisses the application;**

4. **Orders the Commission to bear its own costs and pay three-quarters of the costs of the applicant and the intervener. The applicant and the intervener shall bear one-quarter of their own costs.**

Bellamy Kirschner Saggio

Delivered in open court in Luxembourg on 26 October 1993.

H. Jung C. P. Briët

Registrar President