Decision of the Administrative Tribunal of 29 March 1996

Appeal No 208/1995 (MARECHAL v. Governor of the Social Development Fund of the Council of Europe)

The Administrative Tribunal, composed of:

Mr Carlo RUSSO, Chairman
Mr Kåre HAUGE,
Mr Hans G. KNITEL, Judges

assisted by:

Mr Sergio SANSOTTA, Registrar, and
Mrs Claudia WESTERDIEK, Deputy Registrar

has delivered the following decision after due deliberation.

PROCEEDINGS

1. Mr Jean-Pierre Maréchal lodged his appeal on 9 June 1995. The appeal was registered on 12 June 1995 under file number 208/1995. The appellant lodged a supplementary memorial on 9 June 1995.

2. At the request of the Governor of the Fund, the Tribunal asked the Chair of the Disciplinary Board to forward copies of all the documents which have been provided to the parties during the disciplinary proceedings against the appellant. These documents were filed with the Tribunal, which acknowledged receipt of them on 28 August 1995.

3. The public hearing took place in Strasbourg on 25 January 1996. The appellant was represented by Mr J. D. Sicault, who practises as an avocat in the Paris Court of Appeal; the Governor of the Social Development Fund of the Council of Europe was represented by Mr De Forges, who likewise practises as an avocat in the Paris Court of Appeal.

THE FACTS

4. The appellant was initially recruited to the Social Development Fund of the Council of Europe, as assistant to the Head of Treasury, on a fixed-term contract on grade A2 starting on 1 November 1987. At the time of the matters at issue, he was on grade A4, step 4, and his new fixed-term contract, dated 30 October 1992, had effect from 1 November 1992, and was for a period of five years. He held the post of Head of Financial Services and was responsible to the Director of

Finances and Treasury.

5. From 30 October 1992, in connection with his duties as Head of Financial Services and head of the back office, the appellant was responsible for ensuring that certain duties were carried out and also had certain specific responsibilities of his own, in particular checking the activities of the front office.

6. The Disciplinary Board's report of 24 January 1995 shows that the appellant was responsible for administering and entering positions arising from transactions handled by the Market Operations Department, the Borrowing, Issuing and Financial Analyses Service and the Loans Service, particularly in connection with interest rate and currency swaps.

He was also responsible for administering all transactions conducted by the Market Operations Department, managing and settling payments arising from market operations, monitoring all relations and contacts with banks concerning the confirmation, management, settlement and/or renewal of operations handled by the Market Operations Department, drawing up and submitting to the Market Operations Department and senior management reports on exchange rate, interest rate and liquidity risks and dealing with all anomalies concerning treasury flows identified by Fund departments or by counterpart banks.

He also had certain specific personal responsibilities: he directed and supervised the activities of a group of officials and took part in their training. He was also responsible for ensuring compliance with operational procedures, making appropriate recommendations for keeping them up to date and examining complexities and claims arising from inadequate transactions, co-ordinating analysis of them and dealing with them in accordance with the regulations in force.

He also co-ordinated exchanges of information with the Accounting Department and was responsible for co-ordinating with the computer services, undertook data searches and analyses to facilitate the management of Market Operations Department transactions, took part in preparatory activities prior to negotiations with banks and could be asked to perform any other duties connected with the work of his directorate.

Finally, the appellant was specifically authorised by the Governor to sign confirmations of operations concluded by the Market Operations Department for forwarding to the banks and to authorise secure computerised payments relating to the Fund's operations, other than those relating to the Directorate of Administration, the Budget and Personnel.

7. Disciplinary proceedings were instituted against the appellant, and he was suspended from his duties. After the proceedings he was dismissed.

8. The appellant appealed against his dismissal, following the disciplinary proceedings.

The Social Development Fund (the “Fund”)

9. The Social Development Fund - formerly the Council of Europe Resettlement Fund - was set up in 1956 under a Council of Europe partial agreement. It is also open to non-member states.

10. The Fund is an intergovernmental financial institution with headquarters in Paris. Its capital is made up of financial contributions which its member states make by subscription of participating certificates offered to them in accordance with the percentage apportionment laid down in the Articles of Agreement. The Fund's priorities are aid to refugees, aid to migrants, and aid to populations stricken by natural or ecological disaster.

11. The Articles of Agreement were revised in 1993 but the revised version has not yet come into force since not all the member states have completed the ratification procedure.

12. The Fund comprises the Governing Board, which is its supreme organ and, among other things, lays down management policy; the Administrative Council, which has all necessary powers to manage the Fund and issues general or specific instructions to the Governor; the Governor, who is responsible to the Administrative Council for day-to-day management of the Fund; and the Auditing Board, which audits the accounts and the balance sheet.

13. Secretarial services to the Governing Board, the Administrative Council and the Auditing Board are provided by the Council of Europe. The Governor and his secretariat are located in Paris.

14. In 1993 the Fund had 62 staff, on fixed-term or indefinite contracts.

15. On 18 July 1956 the Administrative Council adopted Resolution 4 (1956), which provides that regulations of the Council of Europe - including the Staff Regulations - apply to staff of the Fund. It also provides "In relation to officials of the Fund, the Governor shall exercise the powers assigned to the Secretary General of the Council of Europe under the above provisions".

16. In Resolution 247 (1993) the Governing Board of the Fund adopted the new Articles of Agreement (not yet in force), Article XI, Section 1 (d) of which provides: "The Council of Europe Staff Regulations shall be applicable to the staff of the Fund in any matter not covered by a specific decision of the Administrative Council".

17. An agreement between the Governor of the Fund and the Secretary General of the Council of Europe which came into force on 16 February 1994 extended the Administrative Tribunal's jurisdiction to cover appeals lodged in the manner prescribed in Article 60 of the Staff Regulations against administrative acts of the Governor (as defined in Article 59 para. 1 of the Staff Regulations).

The facts of this particular case

18. Internal audit reports in 1992 revealed malfunctioning and irregularities within the Fund. These irregularities were confirmed in a report dated 16 September 1993, prepared by an official accountant (Mr Violette).

19. In a communiqué dated 10 November 1993, the Committee of Ministers of the Council of Europe deplored the malfunctioning and irregularities within the Fund. It declared its support for all the measures taken to remedy this situation, and in particular for the Fund member states' decision to revise the Articles of Agreement. Lastly, it recommended that the Fund's organs "clarify the responsibilities of the [Fund's] personnel" and "suspend urgently the persons called

into question by the audit".

20. On 15 November 1993, the Governor of the Fund, Mr Roger Vanden Branden, resigned.

21. The new Governor, Mr Raphaël Alomar, took up his duties on 20 December 1993.

22. The Fund's balance sheet at 31 December 1993 was certified on 8 March 1994 by the external auditor, Coopers and Lybrand.

23. Checking of the accounts in connection with drawing up the Fund's balance sheet at 31 March 1994 revealed inconsistencies between the results of the investment portfolio and those of the covering swaps. The Governor questioned the accountants Coopers and Lybrand, who had certified the balance sheet at 31 December 1993.

24. The Governor held an informal meeting on 26 April 1994, attended by a specialist from Coopers and Lybrand, two advisers and the appellant.

25. Coopers and Lybrand informed the Governor in a letter dated 27 April 1994 that, following additional investigations and further conversations with the head of the back office, serious irregularities had come to light, consisting in the creation of fictitious swaps, and that, having regard to the sums involved, it appeared to be necessary to modify the Fund's financial state at 31 December 1993.

The auditors stated that normal auditing methods would not necessarily bring fraudulent transactions of this kind to light since these methods were based on random checks of operations carried out. The auditors added that the 18 swaps concerned were not marked out in any way in the detailed accounts "which implies collusion between the head of the front-office and the head of the back-office, who at no time mentioned these particular transactions" in the course of numerous conversations.

26. At the Governor's request, the appellant drafted two memorandums, on 29 April and 2 May 1994, setting out his understanding of the situation and clarifying certain points relating to asset swaps discussed at the meeting of 26 April. He said, for example, that when the internal swaps were arranged, that is in late 1992, the head of the front office had told him on a number of occasions that the then auditors (KPMG FIDES) had agreed to these transactions. He added that he had also discussed these transactions with KPMG Fides during 1993 and with Coopers and Lybrand in early 1994.

27. On 16 May 1994, Coopers and Lybrand certified the amended accounts.

28. On 20 May 1994, the appellant was asked for a list of "genuine asset swaps" - swaps which had real back-to-back cover - and replied that there were none.

29. In its report, dated 25 May 1994, on the 1993 balance sheet and operational accounts the Fund's Auditing Board expressed the view, in particular, that "registering swaps without any external counterpart in the way in which and for the purposes for which this had been done was unacceptable and contrary to international rules and misrepresented the state of the Fund's

finances”.

30. The amended accounts were approved on 26 May 1994 by the Fund's Administrative Council.

31. On 24 June 1994, the Secretary General of the Council of Europe lifted the appellant's diplomatic immunity.

32. In answer to a question put to him at the hearing before the Tribunal on 25 January 1996, the Governor said that, with a view to instituting disciplinary proceedings against the appellant, he had consulted the Chairman of the Disciplinary Board on 17 October 1994 about suspending the appellant. The latter was heard on 18 October 1994. On the same day, the Governor drew up a report to the Council of Europe's Disciplinary Board opening disciplinary proceedings and ordered that the appellant be suspended from his duties. During the period of suspension, the appellant continued to receive his full salary. The report to the Disciplinary Board was received by the Chairman on 24 October 1994, and was sent to the appellant on 26 October 1994.

33. In the report of 18 October 1994, the Governor stated that serious irregularities, consisting in the creation of fictitious swaps contracts, had been committed and that the accounts had been rigged accordingly. As head of the back office, the appellant could not have been unaware of the fictional, and therefore unacceptable, nature of these operations. The Governor criticised him for not refusing to record these transactions in the Fund's accounts, as required by article 30 of the Staff Regulations. He also alleged that the appellant had not revealed until 7 September 1994 an accounting manipulation concerning a swap contract that could have been paired back to back with an asset (19th swap), concluded on 27 May 1992, after having concealed the existence of this forward swap.

34. On 18 November 1994, the appellant presented his observations to the Disciplinary Board. In particular, he stated that if the accounts had been rigged, this had occurred in May 1994, when the accounts for the 1993 financial year had been corrected.

35. On 14 December 1994, the Governor of the Fund presented his written observations in reply to those of the appellant. He maintained his view that the creation and recording of fictitious swap contracts was illegal and that the appellant bore some responsibility in this regard, as well as in connection with the forward swap.

36. He added that the appellant's description of the operations to rectify the Fund's accounts since April of that year must be deemed libellous and a breach of the duty of discretion and loyalty incumbent on all staff. He considers that such conduct constitutes, in itself, a disciplinary offence.

37. The Disciplinary Board heard the appellant and the Governor's counsel on 20 January 1994. On the same day, it also heard the evidence of Mrs Perrier, a partner of the consultants Coopers and Lybrand, and Mr Poirel, the Fund's Deputy Financial Director.

38. On 24 January 1995, the Disciplinary Board delivered its opinion, in which it stated that responsibility for entering the contested transactions in the Fund's accounts rested with the former Governor, the Director General of Finances and the successive auditors, KPMG FIDES and

Coopers and Lybrand. It also found that the fact that the appellant had not informed Mr Poirel of the existence of the swap contract concluded on 27 May 1992 until 7 September 1994 did not in itself constitute a disciplinary offence. Finally, the Board found that the contents of the observations in defence of the appellant did not constitute a breach of his duty of discretion and loyalty.

39. In a decision of 7 February 1995, the Governor, after hearing the appellant, dismissed him with effect from 10 February 1995.

He considered that the appellant had committed a serious offence by recording fictitious swap contracts with no external counterparts, which he knew to be unacceptable and gave the misleading appearance of reduced losses and risks.

He thought that this offence was compounded by the absence of documentation concerning these transactions, which made it possible to conceal them from two firms of auditors (KPMG FIDES and Coopers and Lybrand) appointed by the Administrative Council. The Governor also considered that the appellant had committed a disciplinary offence in not revealing the existence of a forward swap contract dated 27 May 1992 until 7 September 1994.

Finally, he considered that the appellant had also seriously breached his duties of loyalty and discretion, firstly by accusing the Governor of wishing to manipulate the presentation of the Fund's results for 1994 and secondly by thereby directly calling into question the probity of the Fund's organs and their chairmen, who had approved the proposed changes.

40. In an administrative appeal of 8 March 1995, the appellant contested the legality of the decision of 7 February 1995. He relied on the Disciplinary Board's lack of jurisdiction and the unlawful nature of the proceedings. He also stated that the Governor had relied on charges which the appellant challenged and which, according to the Disciplinary Board, could not be sustained. Finally, he relied on failure to apply the proportionality principle.

41. The Governor rejected the administrative appeal on 5 April 1995. He found that the proceedings were in order, the facts had been established and the appellant bore responsibility for his actions.

42. On 9 June 1995, the appellant appealed against the Governor's decision of 7 February 1995 to dismiss him.

43. In May 1995, the appellant was recruited by the Bank of America as a deputy vice-president.

THE LAW

44. The appellant firstly challenges the lawfulness of the proceedings that culminated in his dismissal. He maintains that the Disciplinary Board lacked jurisdiction and that the procedure leading to his suspension was not in order.

He also disputes the disciplinary nature and the accuracy of the alleged facts. Finally, he maintains that the penalty imposed was disproportionate to the alleged facts.

45. The Governor considers that the procedure that preceded the decision was fully in order, that the alleged facts were of a disciplinary nature, that these facts had been established and that the penalty was proportionate to the misconduct attributable to the appellant. The Governor also accuses the appellant of a serious breach of his duties of loyalty and discretion to himself and the Fund's organs.

46. In his observations in reply, the appellant repeats and expands his previous observations and also denies having breached his duties of loyalty and discretion to the Governor and the Fund's other organs.

I. ON THE LAWFULNESS OF THE PROCEEDINGS

47. In his appeal, the appellant maintains firstly that the Disciplinary Board has no jurisdiction with regard to officials of the Fund since the latter have not taken part in the appointment of staff representatives to the Board.

48. The appellant also maintains that the proceedings which preceded the dismissal decision, were in breach of articles 57, sub-paragraph 1 and 55, sub-paragraph 3 of the Staff Regulations. He argues that the disciplinary proceedings were instituted after his suspension of 18 October 1994, since the report to the Chairman of the Disciplinary Board was not sent until the following day. He further states that the Chairman of the Disciplinary Board was not consulted in advance. Finally, he argues that there was no authority for consulting the Chairman of the Council of Europe's Disciplinary Board about his suspension, given his status as an official of the Fund.

49. The Governor contends that the procedure that preceded the decision to dismiss the appellant was fully in order. From both a legal and a practical standpoint, only the Disciplinary Board of the Council of Europe, whose jurisdiction extends to officials of the Fund, could hear the appellant. He also argues that the correct procedure was followed with regard to the timing of the suspension decision. This was a precautionary measure that he took in the interests of the institution. He challenges the appellant's interpretation of the relevant rules and regulations and maintains that the decision to institute disciplinary proceedings against the appellant was taken after the meeting of 18 October 1994. Moreover, as stated in the suspension order, the Chairman of the Disciplinary Board was consulted by telephone before the suspension. Finally, he maintains that the Chairman of the Disciplinary Board was the appropriate authority to consult, in accordance with article 57, para. 1 of the Staff Regulations.

50. The Tribunal notes that the appellant has not reiterated his arguments concerning the lawfulness of the proceedings at the hearing. Nevertheless, he has referred to his written submissions, which he has “confirmed in their entirety”.

The Tribunal therefore considers it necessary to rule on this point.

51. It recalls that it has already ruled, in its Lelégard, Ernould and Roose decisions of 29 September 1995, on the jurisdiction of the Council of Europe's Disciplinary Board with regard to

officials of the Fund and the authority of the Disciplinary Board's Chairman to be consulted (see ATCE Nos 190, 196, 197/1994 and 201/1995, Lelégard decision of 29 September 1995, paras 98-101; Nos 189 and 195/1994, Ernould decision of 29 September 1995, paras 83-86 and Nos 187 and 193/1994, Roose decision of 29 September 1995, paras 80-83).

52. The Tribunal wishes to confirm that the Council of Europe's Staff Regulations and the Regulations on Disciplinary Proceedings (Appendix X of the Staff Regulations) are applicable to officials of the Fund, that the Disciplinary Board therefore has jurisdiction with regard to these officials and that, equally, the Chairman of the Disciplinary Board has authority to be consulted on their suspension.

53. With regard to the timing of the appellant's suspension, the Tribunal also recalls that there is nothing in articles 55, para. 3 and 57, para. 1 combined of the Staff Regulations to say that suspension can only be ordered after the institution of disciplinary proceedings, as the appellant claims (see ATCE Nos 190, 196, 197/1994 and 201/1995, Lelégard decision of 29 September 1995, para. 79; Nos 189 and 195/1994, Ernould decision of 29 September 1995, para. 63 and Nos 187 and 193/1994, Roose decision of 29 September 1995, para. 60). The fact that the report to the Chairman of the Disciplinary Board was not sent until after 18 October 1994, the date of the appellant's suspension, does not, therefore, imply any irregularity in the current proceedings.

54. Finally, the Tribunal notes that, as was clarified following the hearing before the Tribunal, the Governor consulted the Chairman of the Disciplinary Board about suspending the appellant on 17 October 1994, in other words before the appellant's suspension of 18 October 1994, as provided for in article 57, para. 1 of the Staff Regulations.

55. The Tribunal therefore finds that the proceedings in this case were lawful.

II. ON THE JUSTIFICATION FOR THE PENALTY

56. The appellant disputes firstly the disciplinary nature and the accuracy of the facts. He then argues that the penalty imposed was disproportionate to the alleged facts.

A. On the disciplinary nature of the alleged facts

57. The appellant maintains that the charges relate to matters which were not of a disciplinary nature. He argues that the Staff Regulations draw a distinction between service and conduct and that special procedure relating to conduct is laid down in Article 54 ff of the Staff Regulations, on disciplinary matters. Under Article 54 disciplinary proceedings may be instituted only in respect of "failure by a staff member to comply with his obligations under the Staff Regulations or other regulations, whether intentionally or through negligence on his part". The appellant argues that what is meant here is misconduct. He likewise refers to Article 23 para. 3 of the Staff Regulations, which concerns dismissal, whether for disciplinary reasons "in the case of conduct deemed unsatisfactory (para. b (ii)) or on the ground of manifest unsuitability or unsatisfactory work"(para. b (iii)).

He considers that the complaints about him relate to his standard of work and cannot therefore be deemed disciplinary matters. It follows that in opting to institute disciplinary

proceedings, the Governor has misinterpreted the relevant provisions of the Staff Regulations.

58. The Governor maintains that the creation of internal swaps constitutes a particularly serious violation of the elementary rules of accounting. The effects of such an operation on the trustworthiness of the accounts and the serious damage that could result make it a criminal offence. He concludes from this that the matter is not simply one of professional unsuitability or unsatisfactory work and that the appellant's actions were of a disciplinary nature.

59. The Tribunal notes, as regards the disciplinary nature of the matters at issue, that article 54 of the Staff Regulations refers to "any failure by a staff member to comply with his obligations under the Staff Regulations, and other regulations", drawing no distinction between an unsatisfactory standard of work and unsatisfactory conduct. Moreover, the notion of disciplinary offence may include breach of professional duties, for example with regard to the quality of the work undertaken (see ATILO No 247, Nemeth judgement of 21 October 1974; ATCE Nos 190, 196, 197/1994 and 201/1995, Lelégard decision of 29 September 1995, para. 157; Nos 189 and 195/1994 Ernould decision of 29 September 1995, para. 140).

60. In the present case, the Governor took the view that the alleged actions were contravention of article 30, para. 1 ("a staff member ... is responsible for discharging the tasks entrusted to him") and that the appellant had therefore committed disciplinary offences.

61. The Tribunal further points out that the Governor is not bound by the opinions of the Disciplinary Board (see, for example, UNAT No 210, Reid v Secretary General of the United Nations Organisation, judgement of 26 April 1976, in particular section IV, where the Secretary General had come to a different conclusion from the Joint Disciplinary Committee and the Joint Appeals Board; see also ATILO No 207, Khelifati v UNESCO, judgement of 14 May 1973, p. 5, and, more recently, ATILO No 1441, Sock v UNESCO, judgement of 6 July 1995, para. 20; see also ATCE Nos 190, 196, 197/1994 and 201/1995, Lelégard decision of 29 September 1995, para. 160; Nos 189 and 195/1994, Ernould decision of 29 September 1995, para 143 and Nos 187 and 193/1994, Roose decision of 29 September 1995, para. 115).

62. The Tribunal therefore considers that the Governor, to whom fall all decisions as to whether to institute disciplinary proceedings (see article 56 of the Staff Regulations), was entitled to decide, and did not thereby exceed his discretionary powers, that the matters to which the charges related were disciplinary offences, the Tribunal's function being merely to determine whether the Governor's decision was invalidated by bias or by significant factual error (see UNAT, Judgement No. 479, Caine v. Secretary General of the United Nations, section III).

B. <u>The substantiation of the charges</u>

63. The appellant disputes the substance of the charges on which the Governor has based his dismissal decision, which he considers unlawful on grounds of an error of fact.

64. With regard to the complaint that he committed a serious offence by arranging the recording of fictitious swap contracts with no external counterparts, the appellant claims that internal swaps constitute a well-established banking practice and that there are no settled rules governing internal asset swaps, at least at the international level.

65. The appellant also formally denies having concealed these swaps from two firms of auditors appointed by the Fund's Administrative Council, from the Fund's supervisory bodies and from the new Governor. He claims that he spoke explicitly about the internal asset swaps to the Coopers and Lybrand team and supplied them with all the relevant documents. He states that if there was an oversight by the auditors, this was the result of their inability to understand the information supplied to them and cannot therefore be attributed to him.

66. In his observations in reply, the appellant adds that the Governor does not dispute the fact that the relevant documents were supplied to Coopers and Lybrand. He also states that he asked the head of the front office whether the auditors had been advised of the various contracts entered into by the Fund and, having done so, checked the transactions undertaken, as part of his duties as head of the back office.

At the hearing, the appellant emphasised that he had checked with his superiors that the auditors had no objection to this accounting technique. He had not checked whether there was anything illegal, but simply that there was no objection to the accounting method used.

67. Thirdly, the appellant denies having falsified the Fund's balance sheet for 1993, to show non-existent profits. He notes that the Fund's own assets on 31 December 1992 were approximately ECU 500 million and that a profit of ECU 307 million was made in 1993, which makes it highly unlikely that he would wish to boost the profits. The only possible explanation for this accusation is that the Fund is no longer making a profit and was even incurring a financial loss on 31 March 1994. He also notes that the technique used to present the accounts for 31 March 1994 made it possible to show a profit of ECU 8 million. In his observations in reply, the appellant states that if the former Governor had really wanted to conceal the losses, he could simply have sold off both the paired-off bonds and the corresponding interest rate swaps.

68. Concerning the allegation that he had not revealed the existence of a forward swap contract until 7 September 1994 (para 33 above), the appellant maintains that this was purely the consequence of an equipment failure, since the swap did not show up in his search for computing reasons. He emphasises that, as soon as he became aware of this omission, he informed the Fund's Deputy Financial Director of this contract. He therefore rejects the Governor's allegation that he concealed this transaction.

69. The appellant also notes that there is clearly a difference of opinion between the Disciplinary Board and the Governor, who failed to take account of the formers exhaustive enquiry.

70. The Governor maintains that the charges are factually accurate. He notes that the Disciplinary Board, whose opinion he considers to be very much in the appellant's favour, in no respect disputes the accuracy of the facts presented.

71. The Governor states firstly that there can be no doubt whatever about the appellant's personal responsibility with regard to the first complaint, concerning the recording of fictitious swap contracts. The contested procedure consisted in setting up eighteen swaps with no external party, the counterpart of the first nine being the nine “mirror-image” swaps. They were thus

internal swaps, and therefore fictitious contracts, in that the Fund was at one and the same time receiver and payer, in other words it was contracting with itself. The aim of the operation - to cover against market risk - was thus in this case unattainable. In 1992, there was only one market operations department and one financial dealer in the Fund. He therefore considers it clear that the creation of these fictitious swaps was irregular and that the appellant's personal responsibility is beyond doubt. As head of the back office and having regard to the way his responsibilities were defined, it was his duty to ensure that operational procedures were respected and he should have refused to execute these unlawful operations. The Governor considers that the Disciplinary Board misjudged the facts when justifying the appellant's conduct in terms of the Fund's "highly informal administrative climate" in 1992.

72. Knowing that the transactions were improper, and having directly participated in them, the appellant cannot, according to the Governor, "absolve himself of responsibility by taking refuge in instructions from a superior". The Governor also points to the absence of written instructions from the Governor of the time and notes, in this context, an inconsistency between the appellant's statement that he asked the head of the front office and the then Governor if the internal swaps had the internal auditor's approval and his statement elsewhere that he never had any doubts about the propriety of the procedure.

73. The Governor states that all this was taking place without the knowledge of the Fund's organs (apart from the then Governor), which were neither consulted about, nor informed of these transactions. Even if the auditors had not been sufficiently vigilant and had been informed to some extent, the information at their disposal was to say the least limited.

74. Back offices are responsible for checking the plausibility of transactions and documenting operations and procedures. In this case, the inadequate documentation on the questionable transactions, for which the appellant was responsible, made it possible to conceal these transactions from the officially appointed auditors.

75. The Governor notes that at the time when the relevant swaps were being set up, the then Governor's management was being strongly criticised by the Fund's other organs, which considered that excessive risks were being taken. The purpose of the transactions was not to reduce market risks, since the procedure decided on was not capable of doing that, but to conceal these risks from the Fund's supervisory bodies. The whole object was to contrive a fictitious revaluation of bonds, which by their very nature could not be revalued, and thereby to cover up the losses on the interest rate swaps. The appellant's misconduct thus helped to give a false picture of the Fund's real financial situation.

76. With regard to the forward swap, the Governor considers it unlikely that the appellant did not immediately recall the transaction or that it had not been recorded in the accounts. Moreover, the appellant did not reveal its existence until 7 September 1994, even though he was asked for the list of swaps, which could have genuinely been placed back to back on 20 May 1994.

77. The Tribunal recalls that, as regards whether the alleged offences occurred, "it is for the Tribunal to judge, in the light of the evidence submitted by the two parties, whether proof of the charges emerges from the documents in the dossier" (see the aforementioned Khelifati judgement, p 5).

78. In this case, the Tribunal notes that the appellant does not dispute the fact that he arranged the recording of the swap contracts at issue. He simply denies that these internal swap contracts were irregular since, according to him, they constitute a well-established banking practice and the rules governing this area are not settled. The Tribunal considers that the existence of the internal swaps has been established in this case.

It also notes that, in a letter of 27 April 1994, the auditors Coopers and Lybrand, who had certified the accuracy of the balance sheet on 31 December 1993, stated that, following additional investigations and further conversations with the head of the back office, serious irregularities had emerged, consisting in the setting up of fictitious swaps. Moreover, in its report on the balance sheet and the operational accounts for 1993, dated 25 May 1994, the Auditing Board of the Fund expressed the view that "the booking of swap contracts without external counterparts under the conditions in which it was done and the objectives pursued is not acceptable and against international standards, and consequently causes a mistaken impression of the state of the financial situation of the Fund".

The Tribunal therefore considers that the irregular nature of the internal swaps, as practised in the Fund, has also been established.

79. The Tribunal notes that the appellant formally denies the allegation that he concealed the disputed transactions from the two firms of auditors, the Fund's supervisory bodies and the new Governor and maintains that he supplied Coopers and Lybrand with the relevant documents. The Governor states that the information supplied to the auditors was inadequate and that to the Fund's supervisory bodies non-existent.

The Tribunal considers that supplying all the necessary documents to the firms of auditors represents the basic minimum of information that the appellant should provide in circumstances such as those applying in this case.

The Tribunal considers that the appellant had a duty to provide not only full and "documented" but also clear and precise information. Yet it appears from the evidence presented in the case that the information supplied by the appellant regarding the transactions in question was neither adequate nor sufficiently clear, no matter how vigilant the auditors might have been in exercising supervision.

The Governor could therefore lawfully consider that the accuracy of the relevant allegations had been established.

80. Regarding the allegation that the Fund's financial position for 1993 had been rendered untrustworthy, the Tribunal finds that Coopers and Lybrand considered it necessary to modify the Fund's accounts as of 31 December 1993 and this took place on 16 May 1994. In doing so, the firm did not hesitate to withdraw its initial certification of 8 March 1994. In addition, the Fund's Auditing Board stated in its report on the balance sheet and the operational accounts for 1993, dated 25 May 1994, that "a mistaken impression of the state of the financial situation of the Fund" had been given.

The Tribunal considers that, having regard to information provided in the case, the accuracy of this allegation must also be deemed to have been established.

81. The Tribunal also finds that the appellant does not deny that he did not reveal the existence of the forward swap concluded on 27 May 1992 until much later, but maintains that this concealment was simply the consequence of a computer error. The accuracy of this fact is therefore also established.

C. The proportionality of the penalty

82. The appellant contends that the decision to dismiss him was invalidated by legal error, in that it contravened the proportionality principle: from the file, read together with the Disciplinary Board's opinion, it is apparent, he submits, that the penalty was disproportionate to any offences he may have committed.

83. The appellant notes that the Disciplinary Board recommended that no penalty should be imposed. In dismissing him, the Governor applied the most serious penalty available, thus effecting a quantitative leap. The Governor attempts to justify this disproportion by stating that the appellant has breached his duties of loyalty and discretion, but this contention was forcefully rejected by the Disciplinary Board and cannot justify such disproportion. The appellant also considers that the Governor has effected a qualitative leap since the effect of the dismissal was immediate termination of employment, which is reserved for the most serious cases. He therefore considers the penalty to be disproportionate in this case.

84. The Governor states that he is free to choose the penalty, subject only to the reservation that it must not be disproportionate to the seriousness of the offences. In this case, he does not consider dismissal to be in any respect disproportionate to the offences committed. He notes that the manipulations of the accounts make the authors criminally liable for the offences of forgery and the use of forged documents, that the appellant's personal involvement is confirmed, that the nature of his duties required him to prevent these manipulations and that the absence of any reservations expressed at the time to his superiors makes him personally responsible. Finally, the appellant's conduct, both in 1992 and during the disciplinary proceedings, made it impossible for the Fund to keep him on the staff.

85. The Tribunal points out that it is for the administrative authority, in the present case the Governor, to decide which penalty to impose and the Tribunal cannot substitute its own judgement for the administration's (see, mutatis mutandis, ATCE, No 178/1994, aforementioned Fender v Secretary General, para. 39).

86. It likewise points out that, under well-established international case-law (see para. 61 above), the Governor is not bound by the Disciplinary Board's opinions.

87. Although they have no say whether a disciplinary measure is called for, administrative tribunals are allowed to satisfy themselves that the punishment is appropriate and to set aside any punishment which is disproportionately severe.

88. In this connection, there is an error of law if the disciplinary measure is "out of proportion to the objective and subjective circumstances in which the misbehaviour was committed" (See, for example, ATILO No 203, Ferrecchia, judgement of 14 May 1973, para. 2; CJEC, case 46/72, De Greef v Commission, paras 45-48; see also ATCE Nos 190, 196, 197/1994 and 201/1995, Lelégard decision of 29 September 1995, para. 178; Nos 189 and 195/1994, Ernould decision of 29 September 1995, para. 155 and Nos 187 and 193/1994, Roose decision of 29 September 1995, para. 129).

89. The Tribunal notes that, in imposing a severe penalty, the Governor took into account both the nature of the offences and the appellant's conduct. In doing so, he did not exceed his discretionary powers.

90. It takes the view that, despite his grade and his duties, the appellant cannot be held responsible for the Fund's general malfunctioning.

However, as Head of Financial Services, the appellant undertook important duties, for several of which he carried personal responsibility.

91. With regard to the appellant's recording of internal swap transactions, the Tribunal refers to his back-office duties, which show clearly that he was responsible for administering and entering positions arising from transactions handled by the Market Operations Department, the Borrowing, Issuing and Financial Analyses Service and the Loans Service. This meant that he was responsible for administering and entering positions arising from swap transactions. He was also responsible for dealing with any anomalies observed and for ensuring compliance with operational procedures.

The Tribunal therefore considers that the appellant's supervisory duties were not simply confined to implementing the Governor's decisions. Indeed, his duties were such that he was personally responsible for the recording of fictitious swap transactions, to the extent that he failed to exercise his supervisory functions.

Even if the recording of internal swaps, which constitute a rather uncertain practice, might be envisaged in certain banking institutions, this is definitely not the case with international organisations such as the Fund.

The appellant was aware of the policy of reducing speculative transactions decided on by the Fund's supervisory bodies at the time these internal swaps were being set up and the Tribunal considers that, having regard to his grade and his duties, the appellant should, at the very least, have questioned these transactions and referred them to the supervisory bodies.

The Tribunal therefore considers that the appellant displayed fairly serious negligence in this regard.

92. Regarding the complaint that the appellant concealed the disputed transactions, the Tribunal considers that even if he did not wish to conceal them, the documentation was at all events inadequate and did not allow the auditors to gain a clear picture of the actual situation; as a result, the Fund's supervisory bodies did not have access to full information.

This lack of clarity and precision in the Fund's documentation amounts to serious negligence on the part of the appellant, whose duties included drawing up and submitting to the Market Operations Department and senior management reports on exchange rate, interest rate and liquidity risks.

The Tribunal considers that the appellant had a duty whatever the circumstances to make the Fund's financial situation clear to the auditors, which in this case he failed to do. It therefore considers that this also constitutes relatively serious negligence on the appellant's part. The fact that Coopers and Lybrand were unable, using their own resources, to detect the irregularity is irrelevant.

93. The Tribunal considers that the appellant's conduct went a long way towards rendering the Fund's financial situation untrustworthy, for which he must also bear responsibility. It notes that, even if the decisions were the responsibility of the former Governor and the appellant was obeying the latter's directives, he still accepted them in full knowledge of the facts (see para. 66 above). So in the light of the appellant's responsibilities laid down in his contract and the requirement to assist and advise his superiors, as provided for in article 30 of the Staff Regulations, the Tribunal considers that he can also be held responsible for the disputed transactions.

94. The Tribunal considers that the failure to declare the forward swap of 27 May 1992 until much later is undoubtedly less serious than the previous cases of negligence but still represents one further example of it. Even if it is accepted that the appellant did not deliberately conceal this swap and that the delay resulted from a computer malfunction, this can only affect the seriousness of his negligence, rather than disproving it, since when using computerised tools he had a duty to remain vigilant.

95. The Tribunal wishes to stress that, even if the appellant operated as a financial dealer within the Fund, he remained an international civil servant and had a duty to conduct himself in accordance with his status.

96. In signing his contract with the Fund, the appellant accepted the status of an international civil servant. He was thereby bound by the provisions of the Council of Europe Staff Regulations, in particular Part III (articles 25 ff of the Statute) on the duties and obligations of staff. He therefore agreed to “to carry out [his duties] ... loyally and conscientiously, respecting the confidence placed in [him]”, to “have regard exclusively to the interests of the Council of Europe” in his official conduct and to “refrain from any action which might reflect upon [his] position as a member of the Council or which might be prejudicial morally or materially to the Council” (article 25 of the Statute).

97. After considering the case file and having regard to the discretionary powers that the Governor enjoys in such matters, the Tribunal does not find any manifest disproportion between the criticisms levelled and the penalty imposed.

98. Moreover, the Tribunal notes that at the time of these events, the Fund was in a state of general disorder. Although the Fund's leadership was mainly to blame for the mismanagement, the Tribunal takes the view that the higher a staff member's grade the greater his personal accountability and that officials in charge of departments are responsible for any shortcomings or

negligence in the handling of issues relating to their department (see ATCE Nos 189 and 195/1994, Ernould decision of 29 September 1995, para. 167 and Nos 187 and 193/1994, Roose decision of 29 September 1995, para. 139).

99. The complaint that there has been an error of law must therefore be rejected.

III. ON THE COMPLAINT REGARDING A BREACH OF THE DUTY OF DISCRETION AND LOYALTY

100. The Governor contends that the accusations made by the appellant in his defence, that the case of the fictitious swap contracts was contrived to conceal mismanagement at the beginning of 1994, directly called into question his own probity and that of the Fund's leadership. He maintains that this constitutes a lack of loyalty to the Fund's bodies that goes beyond what is admissible for defence purposes in adversarial proceedings.

101. In his observations in reply, the appellant denies the charge that he has contravened his duties of loyalty and discretion by expressing, in the course of the disciplinary proceedings, doubts about the management of the current Governor of the Fund. He states that "the present case originates in a desire to cover up the fact that the present Governor's management of the Fund generated losses instead of the profits which his predecessor had routinely achieved". He claims that the amended accounts of 26 May 1994 had enabled the Governor to reduce the profits at 31 December 1993 by ECU 67 million and present the balance sheet at 31 March 1994 in a more favourable light.

102. After considering the arguments deployed - and the terms in which they were couched - before the Disciplinary Board, the Tribunal finds that the appellant expressed his case for the purposes of his defence and in the context of adversarial proceedings, which are by their nature confidential, and that they he did not exceed the bounds of acceptability. The Tribunal therefore considers that, on this point, the complaint made has not been materially substantiated and that the appellant was not at fault.

However, this finding cannot justify the setting aside of the contested decision.

IV. CONCLUSION

103. The Tribunal therefore concludes that Mr Maréchal's appeal against the Governor's decision to dismiss him must be rejected.

V. ON THE APPLICATION CONCERNING THE COSTS OF THE APPEAL

104. At the hearing of 25 January 1996, the appellant drew the Tribunal's attention to article 11, para. 3 of the Statute of the Tribunal, which reads:

> "In cases where it has rejected an appeal, the Administrative Tribunal may, if it considers there are exceptional circumstances justifying such an order, decide that the Council shall reimburse in whole or in part properly vouched expenses incurred by the appellant. The Tribunal shall indicate the exceptional circumstances on which its decision is based."

105. The Tribunal observes that the appellant estimates the expenses incurred at 254 636,80 French francs, without justifying them.

106. The Tribunal notes that the reimbursement provided for in article 11, para. 3 is only justified in exceptional circumstances. The appellant has not indicated any exceptional circumstances and the Tribunal, for its part, has not identified any.

The appellant's application must therefore be rejected.

On these grounds, the Administrative Tribunal:

Declares the appeal unfounded;

Dismisses it;

Rejects the appellant's application for the reimbursement of the costs of the appeal in accordance with article 11, para. 3 of the Statute of the Tribunal; and

Orders that each party bear its own costs.

Delivered at Strasbourg on 29 March 1996, the French text being authentic.

The Registrar of the Administrative Tribunal	The Chairman of the Administrative Tribunal
S. SANSOTTA	C RUSSO