OPINION OF ADVOCATE GENERAL LA PERGOLA
delivered on 14 March 1996 *

I — Introduction

1. This dispute is concerned essentially with whether the defence *inadimplenti non est adimplendum* (non-performance of a synallagmatic contract) can be relied on by the defendant insurance companies against a claim by the Commission for specific performance of the contract which it concluded with those companies.

II — Facts

2. On 28 January 1977 the European Communities concluded with the eight defendant insurance companies an Insurance Agreement ('the Agreement') intended to cover the financial consequences for the Communities of the application of Article 73 of the Staff Regulations and the provisions adopted pursuant to that article.

Article 3.1 of the Agreement provides that the Community and the insurers are to lay down implementing rules relating to information on accidents and occupational diseases and on their administrative operation so as to enable the insurers to monitor the development of individual cases and to facilitate any exercise of their right of recourse against liable third parties and the constitution of prudential reserves as required by law.

Article 3.3 of the Agreement adds that 'draft decisions likely to give rise to the award of underwritten benefits (medical expenses — invalidity — death) shall be notified to the insurers for their opinion in accordance with the implementing rules provided for in Article 31 before they are notified to the interested persons by the competent authority of the Communities'. [1]

Article 5 of the Agreement provides that, failing a settlement out of court, any disputes relating to the performance of the Agreement itself are to be brought before the Court of Justice of the European Communities. Article 5 further provides that the insurers are to forgo recourse to legal proceedings on disputes of a medical nature, provided always that the appointing authority's decision determining the pecuniary rights of

* Original language: Italian.

1 — Free translation of the original French.

the person concerned is consistent with the opinion drawn up by the insurers' experts or with the opinion given by the Medical Committee provided for in Article 23 of the aforementioned implementing rules and that the expert nominated by the insurers was a member of the Medical Committee. If those conditions are satisfied, the insurers are to reimburse to the Communities the whole amount of the sums paid out to the victim or his successors as a result of the aforementioned decision of the appointing authority.

Article 10.2 of the Agreement designates as the intermediary between the Communities and the insurers J. Van Breda & Co. International (hereinafter 'Van Breda').

3. By letter from Van Breda dated 27 January 1989 and addressed to the European Communities, the agreement concluded between the insurers and the Communities on the rules for the application of the Agreement was confirmed with effect from 1 February 1989.

Point II of the letter in question provides that the draft decision, which is to be the subject of prior notification pursuant to Article 3.3 of the Agreement in order for the insurers to give their opinion as laid down, must be accepted or rejected by the insurers within the shortest possible period. The same letter states that the insurers will use their best endeavours to confirm their agreement or disagreement with the draft decision within one month of the transmission of the said draft to the intermediary.

Point II of the letter adds that if, on the expiry of the one-month period, the insurers have still not expressed a view on the draft, they are to notify the reason for their conduct to the appointing authority. In such case, the period is to be extended by one month. If the insurers are still not in a position to communicate their view within that extended deadline, they are to propose to the appointing authority and the intermediary that a consultation procedure be initiated in order to determine how to proceed and to fix a new deadline, which is to expire by no later than the end of the fourth month.

4. Mr L., a Commission official, requested on 26 November 1990 that two illnesses contracted by him whilst working for the Community be recognized as being occupational diseases within the meaning of the Staff Regulations. The two diseases, the official maintained, resulted from the fact that he had been exposed to asbestos at the Commission's premises known as the Berlaymont Building in Brussels.

5. Dr Dalem, the doctor nominated on 21 June 1991 by the Commission with the agreement of the insurers in order to provide a medical opinion finding whether or not the disease was of an occupational nature, asked Professor Bartsch, a lung specialist, for his expert opinion.

Professor Bartsch gave his expert opinion on 3 February 1992, holding that the disease was not occupational in origin. Dr Dalem

then drew up his own report in line with that opinion on 14 February 1992.

On that basis, the appointing authority notified to Mr L. on 17 February 1992 the draft decision rejecting his application that the disease should be recognized as having an occupational origin. Thereupon, on 23 February 1992, Mr L. sought the opinion of the Medical Committee and, on 16 September 1992, appointed Dr Cognigni as a member of the Committee. On 8 December 1992 the appointing authority appointed, at the proposal of the insurers, Professor Brochard as a member of the Committee. On 29 January 1993 those two members appointed Professor Maltoni as the third member of the Medical Committee.

6. The Medical Committee's report, which was adopted by a majority of its members on 25 February 1994 and forwarded to the appointing authority on 1 March 1994, recognized that Mr L.'s disease was occupational in origin. The report further found that he was suffering from total permanent invalidity (100%) and held that he should have an allowance of 30% on account of the permanent scars and serious psychological disturbances connected with the disease. However, Professor Brochard drew up a dissenting opinion which he sent in the form of a report on 3 March 1994. The appointing authority forwarded the two reports to Van Breda on 10 and 18 March 1994 respectively.

7. On 23 March 1994 Van Breda informed the appointing authority that the documents forwarded were being studied by the insurers. By a subsequent letter dated 29 March, Van Breda notified the appointing authority that the insurers intended to put further questions to the members of the Medical Committee. In the same letter, Van Breda stated that it had pressed the insurers to make the content of their questions known as soon as possible. The letter put the insurers on notice that from that point the further one-month period provided for by the Agreement started to run.

A further letter sent by Van Breda to the applicant on 8 April 1994 indicated the points on which the insurers wished to put further questions to the Medical Committee. The letter also stated that the insurers intended to appoint a doctor, who was a colleague of Dr Dalem, to draw up those questions. Van Breda ended the letter by stating that it had asked the insurers to forward their questionnaire, within the time-limits laid down by the Agreement, by 29 April 1994 in order that the applicant institution might formulate questions accordingly.

On 15 April 1994 the appointing authority informed Mr L. that the Medical Committee had found that the disease had an occupational cause and definitively established a rate of total permanent invalidity of 130%. The Committee thereupon paid Mr L. the sum of BFR 25 794 194 due to him under the decision recognizing that he was suffering from occupational invalidity.

8. On 6 May 1994 the Commission wrote to Van Breda informing it that it had paid the allowance in question to Mr L. in accordance with the conclusions of the Medical Committee.

9. As from that date, there was an exchange of letters between the Commission and Van Breda, following which, by letter dated 13 October 1994, the insurers refused to pay the Commission the sum which it had paid to Mr L. The insurers' position was backed up by a legal opinion, annexed to Van Breda's letter and dated 6 September 1994, drawn up by one of the insurers' legal advisers.

10. In this situation, the Commission, by application lodged on 13 March 1995, brought the insurers before the Court pursuant to the arbitration clause contained in the Agreement. The Commission claimed that the insurers should be ordered to pay over the sums already paid to Mr L., together with default interest on those sums from 6 May 1994 and costs.

11. The defendants, represented for the purposes of these proceedings by Royale Belge SA, entered an appearance on 22 May 1995, when they claimed that the Court should dismiss the Commission's application as inadmissible or, failing that, unfounded, and order the applicant to pay the costs. The defendants also asked the Court in the alternative to declare the Commission's claim inadmissible or, at least, unfounded as regards the payment of an allowance in excess of 100%.

III — The relevant provisions

12. Article 73(1) and (2)(b) of the Staff Regulations provide as follows:

'1. An official is insured ... against the risk of occupational disease and of accident subject to rules drawn up by common agreement of the Institutions of the Communities after consulting the Staff Regulations Committee. ...

2. ...

(b) In the event of total permanent invalidity:

Payment to the official of a lump sum equal to eight times hisannual basic salary

calculated on the basis of the monthly amounts of salary received during the twelve months before the accident.'

13. The relevant Rules on the Insurance of Officials of the European Communities against the Risk of Accident and of Occupational Disease, adopted pursuant to Article 73(1) of the Staff Regulations, are as follows:

'*Article 12*

1. Where an official sustains total permanent invalidity as a result of an accident or an occupational disease, he shall be paid the lump sum provided for in Article 73(2)(b) of the Staff Regulations.

2. Where an official sustains partial permanent invalidity as a result of an accident or an occupational disease, he shall be paid a lump sum calculated on the basis of the rates laid down in the invalidity scale contained in the Annex hereto.'

'*Article 14*

After consulting the medical officers referred to in Article 19 or the Medical Committee referred to in Article 23 the official shall be granted an allowance in respect of any injury or permanent disfigurement which, although not affecting his capacity for work, constitutes a physical defect and has an adverse effect on his social relations.

This allowance shall be determined by analogy with the rates laid down in the invalidity scale referred to in Article 12. Where disfigurement results from an anatomical functional lesion the abovementioned rates shall be increased accordingly.'

The final paragraph of the scale of rates of invalidity annexed to the Rules states that:

'The total allowance for invalidity on several counts arising out of the same accident shall be obtained through addition but such total shall not exceed either the total lump sum of the insurance for permanent or total invalidity or the partial sum insured for the total loss or the complete loss of use of the limb or organ injured.'

'*Article 19*

Decisions recognizing the accidental cause of an occurrence including a decision as to whether the occurrence is to be attributed to

occupational or non-occupational risks, or decisions recognizing the occupational nature of a disease and assessing the degree of permanent invalidity shall be taken by the appointing authority in accordance with the procedure laid down in Article 21,

— on the basis of the findings of the doctor(s) appointed by the institutions; and

— where the official so requests, after consulting the Medical Committee referred to in Article 23.'

'*Article 21*

Before taking a decision pursuant to Article 19, the appointing authority shall notify the official or those entitled under him of the draft decision and of the findings of the doctor(s) appointed by the institution. ...'

'*Article 23*

1. The Medical Committee shall consist of three doctors:

— one appointed by the appointing authority;

— one appointed by the official concerned or those entitled under him;

— one appointed by agreement between the first two doctors.

...

On completing its proceedings, the Medical Committee shall set out its opinion in a report to be communicated to the appointing authority and to the official or those entitled under him.

...'

'*Article 25*

Recognition of total or partial invalidity pursuant to Article 73 of the Staff Regulations and to these Rules shall in no way prejudice application of Article 78 of the Staff Regulations and vice versa.'

IV — Consideration of the dispute

14. There are two issues before the Court. First, it has to be established whether the applicant conducted itself unlawfully, as the insurers maintain, through its breach of the contractual clauses requiring it to consult the insurers before adopting the contested measure. The second aspect of the dispute is the defendants' claim that that measure is unlawful because its reasoning is defective.

Before going into the substance of the case, it should be observed that the defendants maintain that the applicant's claims are inadmissible. That objection of inadmissibility should be rejected: no reasons are given for it and no reason capable of justifying it can be inferred from the documents before the Court.

Alleged infringement of the procedure laid down in the Agreement

15. As regards the substance, the defendants claim, in respect of the first aspect of the case, that the Commission failed to comply with the rules laid down by the Agreement and set forth in the letter of 27 January 1989. They say that the Commission notified the person concerned of the decision recognizing that his invalidity had an occupational origin on 15 April 1994, that is to say, before it had received the insurers' observations, which had to be submitted by 29 April 1994. The defendants aver that they informed the applicant through Van Breda of their intention to put further questions to the Medical Committee. In so far as the Commission notified the aforementioned decision on 15 April 1994 and paid the allowance due to the person concerned in accordance therewith, it therefore prevented, through its own conduct, the continuance of the procedure laid down in the Agreement by making it impossible for the defendants to put supplementary questions to the Medical Committee. The insurers are therefore raising against the applicant the *exceptio inadimpleti contractus* (defence of non-performance).

16. The applicant argues in response that Article 5 of the Agreement contains a specific provision derogating from the general procedure provided for in Article 3 of that contractual instrument. It argues that it appears from the scheme of the Agreement that the appointing authority is not entitled to call in question the Medical Committee's conclusions, which should therefore be regarded as definitive. Moreover, according to the case-law of the Court of First Instance, reconsideration of the findings of

the medical experts can be justified only if there is a new fact and there is no new fact here.

The applicant further claims that it duly forwarded all the requisite information to the insurers, making it clear, in point of the law, that the rules governing relations between the appointing authority and the insurers differ from those governing relations between the appointing authority and officials. In this case, the Commission was bound to pay the person concerned the occupational invalidity allowance due to him as an official. Performance of that obligation by the applicant did not, however, prejudice further fulfilment of the procedure laid down in the separate sphere of the contractual rules governing its relations with the insurers. In any event, even if the applicant had been bound to comply with the rules contained in the Agreement — specifically, in so far as it is relevant, Article 3 —, the possible sanction which it would stand to incur for non-compliance with those provisions under Belgian law, which is the proper law in this case, was that of having to make good the damage suffered by the insurer. The defendants have not shown, however, that they have suffered any damage on account of the applicant's conduct and were therefore not entitled to refuse to perform their own contractual obligations.

These are the opposing arguments put forward by the parties.

17. The first plea relied on by the defendants as against the Commission's claim for payment relates, specifically, to the alleged *error in procedendo*, which they maintain undermines the applicant's claim.

18. In order to clarify this point and to take the correct approach to it, I shall examine how the applicable rules fit within the framework of the Community legal order and what conduct the applicant and the defendants were bound to adopt on the basis of those rules.

The relevant provisions for the purposes of these proceedings are contained in Article 73 et seq. of the Staff Regulations. Those provisions are set out in Chapter 2, Social Security Benefits, of Title V and link up with Article 15 of the Protocol on the Privileges and Immunities of the European Communities (hereinafter 'the PPI'). That article provides as follows: 'The Council shall, acting unanimously on a proposal from the Commission, lay down the scheme of social security benefits for officials and other servants of the Communities'. Consequently, this satisfies the specific need to protect officials in the social security field and thus has a different importance and application as compared with the rules laid down by the Staff Regulations with regard to the employment relationship between the Communities and officials on the basis of Article 24(1) of the Treaty establishing a Single Council and a Single Commission of the European Communities ('the Merger Treaty'). The second subparagraph of Article 24(1) provides that 'the Council shall, acting by a qualified majority on a proposal from the Commission and after consulting the other institutions concerned, lay down the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of those

Communities'. Within the sphere within which it is intended to operate, Article 15 of the PPI embodies a special limitation as to rule-making with regard to the treatment of officials. We might categorize it as a genuine limitation restricting rule-making to the substantive law and no subordinate source (*riserva di legge*) which is, so to speak, reinforced, because it entails a unanimous vote of the Council and not a qualified majority, as is laid down for the remaining aspects of the Staff Regulations. This procedural reserve is attributable to the particular importance attaching to the interests which are protected. At the national level, the subject-matter covered by Article 15 is precluded from being at the free disposal of the parties in the field of employment relations and, by its nature, is reserved to the sphere of the law and to provisions, let us say, of a public policy nature. The PPI lays down, in the respect with which we have to deal in this case, inalienable, fundamental social rights on the part of officials: rights governed also within the Community legal order by binding provisions, which, however, unfold their effects in several sectors of the system. Suffice it to mention Article 13 of the Protocol, under which the official's salary is subject to a Community tax, but which offsets this by exempting it from taxes of an equivalent nature normally levied on a national basis.

If regard is had to the nature of the individual rights in question and of the provisions safeguarding them, it becomes clear straight away in what manner and for what reasons Article 15 of the PPI has a different sphere of application, which is different and broader than that conferred on Article 24 of the Merger Treaty. Article 15 applies, in parallel to what is laid down by Article 13 of the PPI as regards Community tax, not only to the Community institutions properly so called, but also to a circle of bodies, such as the European Monetary Institute, the future European Central Bank, the European Investment Bank and the European Investment Fund, [2] which form part of the Community in the full sense, yet are not subject to the employment rules laid down by the Staff Regulations pursuant to Article 24 of the Merger Treaty. The provisions contained in Chapter 2 of Title V of the Staff Regulations constitute, in the final analysis, rules which, laid down by the Council in its capacity as the Community's legislator, do not contemplate the individual institutions in their capacity as employers or in their capacity as parties to the public employment relationship with the official. In contrast, those provisions identify in the institutions the characteristics of a public administration placed, for the purposes of the rules in question, in a position of impartiality and of a third party which is peculiar to the body which has to apply binding rules and look over the interests protected by those provisions.

19. Let us now look at the consequences which flow from what has just been said as regards the position of the parties to these proceedings. The provisions cited in the first place define the course of the procedure which culminates in the measure making a finding of occupational invalidity. That administrative procedure involves the official, the appointing authority and the medical officer or Medical Committee acting in an

2 — The PPI applies to those bodies by virtue of appropriate reference provisions: for the EMI it is Article 21 of its Statute, for the ECB Article 40 of its Statute, for the EIB Article 22 of the PPI and Article 28 of the Merger Treaty and for the EIF Article 30(5) of the Statute of the EIB.

expert capacity. These are provisions which embody for the interested party social rights on the basis of the aforementioned legal limitation of the matter to legislation, and are brought into existence by Council regulation or in such ways as it authorizes. The rules so laid down do not admit of the intercession of third parties, who might, without being empowered to do so by the legislation, influence the course of the procedure, which the regulation reserves to the persons mentioned and no others. It cannot be permitted that contractual stipulations should interfere with the observance and application of the regulation and the related implementing provisions, by prolonging the time-scales or changing the procedures for executing the administrative measure or by imposing on the potential beneficiary additional burdens and acts not expressly provided for *ex lege*.

The procedure established between the parties by the Agreement and the letter of 27 January 1989 would involve a considerable increase in the time required for the adoption of the definitive decision by the appointing authority, resulting in the loss by the official of rights conferred on him by the Staff Regulations. [3]

What conclusion should be drawn from this observation? The clauses of the Agreement and of the letter of 27 January 1989 which require the Community to conduct itself in a way which is not in conformity with the procedure laid down by the Staff Regulations unduly interfere with the application of those regulations. In so far as the said contractual clauses are incompatible with the procedural rules laid down by the Staff Regulations which are designed to protect the official's interests at issue in this case, they must be regarded as inapplicable in this case. Such stipulations therefore cannot be relied on by the parties in order to assert claims or raise objections in this connection.

The criterion which I consider must be adopted does not, moreover, sacrifice the position of the insurers, which are third parties here. Indeed, they enjoy adequate protection, both because the member of the Medical Committee appointed in accordance with the Staff Regulations by the appointing authority is nominated under the Agreement by agreement between the appointing authority and the insurers [4] and because the insurers are empowered in general, and therefore also in this case, to raise objections pursuant to its contractual relationship with the appointing authority as to the validity of the administrative measure granting the allowance underwritten and to refuse, on that basis, to carry out the performance due from them under the contract.

20. If the point of view which I have put forward is accepted, the first plea raised by the defendants must be rejected. May I add, however, that the reasons relied on in support of their argument are not justified even

3 — As the Court held in Case 152/77 *Miss B.* v *Commission* [1979] ECR 2819, Case 156/80 *Morbelli* v *Commission* [1981] ECR 1357 and Case 186/80 *Suss* v *Commission* [1981] ECR 2041, improper delay in the payment of the allowance due to an official under the Staff Regulations causes entitlement to the payment of default interest to arise.

4 — See, in this connection, Case 2/87 *Biedermann* v *Court of Auditors* [1988] ECR 143.

in point of fact. A mere observation will assist in this regard. The parties were to agree on the time within which the insurers should have specified their questions designed to elicit new information from the Medical Committee on the disputed occupational origin of the invalidity. The date in question was 29 April 1994. At that time, the applicant was not aware, however, of the questions which the insurers intended to put, after consulting with their medical adviser. Van Breda's letter of 8 April expressly referred to a questionnaire which the insurers themselves should have forwarded by 29 April. In the circumstances, therefore, the applicant was not in a position to go back again to the Medical Committee, and this was due to the negligent conduct of the defendants.

Moreover, the defendants' omission was certainly not due to the fact they were aware that the occupational invalidity allowance had been paid over. The documents before the Court show in fact that they did not learn of this until 19 May 1994 from the applicant's letter to Van Breda dated 6 May. Moreover, the questions were never ever received by the applicant.

21. The insurers' argument that the notification of the appointing authority's decision to Mr L. deprived them of the possibility of putting their intended questions to the Medical Committee is also implausible. As I have said, the procedure under the Staff Regulations is on a different level from the rules concerning relations between the Community and the insurers, which are contractual. Let us leave aside the fact that by the deadline of 29 April 1994 the questions which the insurers wished to put to the Medical Committee had not yet arrived and were not sent thereafter. The questions could have been put and possibly have had the result of making manifest the alleged contradictions or illogicality in the reasoning of the Medical Committee's report, even after the decision was notified to Mr L. The insurers could in fact have benefited by those clarifications in any event within the ambit of their contractual relations with the Community. That this did not happen is therefore still because of their omission to act. For that reason, too, the defences put forward by the insurers are unfounded.

22. Having reached that conclusion, it is unnecessary to consider the question raised between the applicant and the defendants as to whether the procedural rule laid down in Article 3 of the Agreement should apply in this case or the rule prescribed by Article 5, which derogates from Article 3. Let us assume that the case in question falls within the more restrictive of the two provisions, Article 3. Let us also assume, hypothetically, that to apply that rule does not conflict with any of the obligations laid down by the Staff Regulations with regard to the adoption of the administrative measure requested by the

official in question. The conduct on the part of the Commission under consideration here would, in any case, be consistent with the procedural requirements agreed between the parties for the reasons which I have explained. Accordingly, which of the two provisions governs this case is irrelevant to the Court's inquiry.

23. Neither is it necessary to examine what effects the breach of contract on the part of the applicant would have, that is to say, whether the defence relied upon aims at paralysing the claim for payment (*exceptio inadimpleti contractus* — defence of non-performance) or, in contrast, only at seeking damages (*exceptio non rite adimpleti contractus* — defence that performance has not been duly made). There was no non-performance on the part of the applicant and the defendants therefore cannot rely on that defence in any respect.

Alleged defective reasoning

24. The second plea raised by the defendants in response to the applicant's claims concerns the lawfulness of the report adopted by the Medical Committee and the actual nature of the dispute. The applicant seeks payment of the sum paid over to Mr L. and ancillary costs on the ground that the defendants have no *locus standi* to raise objections relating to the alleged substantive illegality of the Medical Committee's report. Article 5(2) of the Agreement, the applicant alleges, makes it impossible for the insurers to raise in court proceedings questions of a medical nature where, as in this case, the appointing authority's decision is consistent with the opinion delivered by the Medical Committee, provided that that Committee includes a member appointed by the appointing authority who was nominated by the insurers themselves.

For their part, the defendants consider that the issue raised by them is not a medical one but a question of pure law and relates to the infringement of the rules which the applicant is, in their view, bound to observe (the procedures laid down by the Agreement and the letter of 27 January 1989) and the unlawful nature of the report adopted by the Medical Committee. The defendants criticize that report for lack of reasoning in that it does not adduce sufficient arguments in support of its conclusions, contradicts the preceding medical reports on the case in question and makes no reference to the evidence which the Medical Committee used to determine a rate of permanent invalidity of 100%.

25. The second plea raised by way of defence by the insurers therefore relates to the legality of the report given by the Medical Committee. The report was adopted by a Community administrative measure. The question therefore arises as to whether the Court has jurisdiction to take cognizance incidentally of the legality of such a measure in proceedings brought under Article 181 of the Treaty, which are concerned with questions of private law. If the answer is in the affirmative, it will then be necessary to determine the effects of the judgment resulting

from the exercise of that jurisdiction on the validity of the contested administrative measure and whether the judicial pronouncement made is binding *erga omnes* or *inter partes*.

In my view, the Court certainly does have jurisdiction to take cognizance incidentally of a Community administrative measure in the course of proceedings under Article 181 of the Treaty. This view is given support by the fundamental rule laid down in Article 177, which makes provision for references to be made to the Court for preliminary rulings on 'the validity and interpretation of acts of the institutions of the Community' by the competent national court. Article 181 and the arbitration clause based thereon derogate from the general rule on jurisdiction laid down by Article 183 by shifting the natural forum for the dispute to the Community Court. It would therefore be illogical if the Court were to be seised of the case yet have less powers of interpretation than it would have had if the national court had been seised of the matter.

Secondly, it must be borne in mind that, for present purposes, the Community legal order allocates powers between the Court of Justice and the Court of First Instance. The competence which the Court has *incidenter tantum* in such cases is different, of course, than that which the Court of First Instance would have. Proceedings brought before the Court under Article 181 are one thing; any action for annulment which might be brought before the Court of First Instance against the same measure would be another matter.

What is involved are two distinct forms of review of the legality of the contested measure. This explains the limits to the effectiveness of a decision of the Court of Justice under Article 181 as to the validity of the administrative measure. Incidental cognizance of the measure at issue so as to enable the Court to resolve a civil dispute has the force of *res judicata* only as between the parties to the proceedings brought under Article 181. Otherwise, there would be a breach of the principle that such questions are to be resolved with effects *erga omnes* by the Court of First Instance and by the Court of Justice when it hears an appeal against a judgment given by the Community's first-instance court, [5] and this would detract from the right to a two-tier system of judicial remedies. In addition, if a different solution were to be adopted, this would be in breach of the rule prescribed by Article 173, which lays down that an action will not lie once the peremptory two-month time-limit has elapsed. [6] What I have just said is also reflected on the legislative level by Article 184 of the Treaty, which, as it has been construed by the Court in its case-law, is not, however, applicable in this case. That provision enables the unlawfulness of a measure of general scope to be pleaded in the course of proceedings before the Community judicature.

5 — Subject of course, to those cases in which jurisdiction has been deferred by the Court of First Instance to the Court of Justice under Article 47 of the Statute of the Court of Justice.

6 — Or the time-limit laid down by Articles 90 and 91 of the Statute in the case of measures falling within the scope of Article 179 of the Treaty.

The Community administrative measure which may be impugned by the incidental determination of the Court should therefore be regarded as unlawful only as regards the relations which the parties have brought before the Court. The measure continues to be valid and effective, on the other hand, as far the class of other persons to which it is addressed is concerned.

26. Given that this is so, the first argument adduced by the insurers in this plea fails. The distinction between medical and legal disputes, as provided by Article 5 of the Agreement, which takes account of the case-law of the Court of Justice and the Court of First Instance on this point, [7] does not have any practical application in regard to the conduct with which the Commission is charged in this case for failing to comply with the provisions laid down by the Agreement and the letter of 27 January 1989. We have already seen, in fact, that the failure to observe those stipulations is not attributable, *de facto* or *de jure*, to the Commission.

27. The defendants' other claim by which they essentially ask the Court to review the opinion given by the Medical Committee, which they allege is insufficiently reasoned, must also be held to be unfounded, since it ignores the distinction between the two types of dispute laid down by Article 5 of the Agreement in line with the case-law. As the aforementioned case-law of the Court and the Court of First Instance has made clear in this connection, the reasoning may be impugned as defective or illogical only where the measure is contradictory or incapable of establishing the causal link between the disease and the occupational invalidity. In this case, the Committee's report certainly does not exhibit the features of lack of reasoning or illogicality and cannot be regarded as unlawful. In fact, it is duly reasoned, and justifies, by means of six explanatory points, the conclusions which the Medical Committee reached.

28. Next, the defendants make an observation in order to allege that the Medical Committee did not take account of the opinion given earlier by Dr Dalem and Professor Bartsch or of Professor Brochard's conclusions dissenting from the opinion subsequently given by the Medical Committee. That criticism consists in the final analysis of raising the issue of defective reasoning in other terms. According to the case-law of the Court of Justice and the Court of First Instance, [8] it is for the Medical Committee to decide, if it thinks fit, whether it should refer to preceding medical opinions. As far as this case is concerned, the report adopted by the Medical Committee appears to be sufficiently reasoned and Professor Brochard's very membership of the expert committee supports the view that the opinion — which, as I have mentioned, was adopted by a majority vote — undoubtedly took account of the different views put forward on this case by

7 — Judgments of the Court of Justice in *Morbelli*, *Suss* and *Biedermann*, cited above, and judgments of the Court of First Instance in Case T-165/89 *Plug* v *Commission* [1992] ECR II-367 and Case T-43/89 RV *Gill* v *Commission* [1993] ECR II-303.

8 — Cf. the judgment of the Court of Justice in *Biedermann* and the judgment of the Court of First Instance in *Gill*, cited above.

Professor Brochard and, earlier, by Dr Dalem and Professor Bartsch.

29. Lastly, the defendants raise the question of the determination of the rate of invalidity, which the Medical Committee put at 100%. The defendants argue that the Medical Committee failed to justify their determination of that rate legally. For its part, the applicant notes that the person concerned had already been found to be suffering from total invalidity: recourse to the procedure laid down by Article 73 of the Staff Regulations was intended solely to determine whether the illness was occupational in origin.

The applicant's observations are well founded. Where recourse is made to the procedure provided for in Article 73 of the Staff Regulations, the appointing authority may, if it thinks fit, use aspects of the appraisal already determined in the context of the procedure for establishing invalidity under Article 78. The alleged independence of the two procedures alleged by the defendants has, in my view, completely different implications than they claim. The Medical Committee is not obliged, but simply authorized, to take into account and consider as definitive the conclusions reached in the other procedure and to use, in its discretion, any data and determinations resulting from that procedure. It is in this way, it seems to me, that Article 25 of the implementing rules should be construed. [9]

It would add the following. Neither Article 73(2)(b) of the Staff Regulations nor Article 12(1) of the implementing rules refers, in dealing with total invalidity, to the rates laid down in the scale annexed to those rules. According to the provisions of the Staff Regulations, the rates of invalidity should instead be used to determine the rate of partial invalidity. In the case of Mr L., total invalidity was involved and the indications given in the scale did not have to be taken into account.

30. In the alternative, the defendants contest the applicant's claim on the ground that the allowance was fixed at over 100%, which is the maximum permitted rate according to the abovementioned scale. The applicant maintains for its part that the invalidity allowance under Article 12 is independent of the allowance determined under Article 14 of the implementing rules. Accordingly, the rules in force allow the total allowance to be determined as 130%.

This issue should, in my view, be resolved by determining the exact meaning of the last paragraph of the scale. It refers expressly to a possible overlapping of *invalidity*, but has nothing to say about the allowances payable under Article 14. [10] It follows that, according to the intention of the legislature, the two

9 — This view is supported, *inter alia*, by Case 731/79 *Miss B.* v *Commission* [1981] ECR 107 and Case 257/81 *K.* v *Council* [1983] ECR 1.

10 — The Court of Justice has moreover already ruled in favour of the possibility of overlapping benefits under Articles 73 and 78 of the Staff Regulations in *Miss B.* v *Parliament*, cited above, likewise the Court of First Instance in *Plug* v *Commission*, also cited above.

allowances are independent and may overlap, even if their total amount exceeds the threshold of 100%. The two allowances may overlap because their functions are different and not incompatible, since they are designed to compensate for different types of lesions.

It is for this very reason that the last paragraph of the aforementioned scale mentions only the case of the overlapping of more than one rate of partial invalidity. Then again, the paragraph in question has to be referred to only the case covered by Article 73(2)(c) of the Staff Regulations and the corresponding provision of Article 12(2) of the implementing rules. But this case falls within the scope of Article 73(2)(b) of the Staff Regulations and Article 12(1) of the implementing rules.

Furthermore, the Commission's claims that there would be a manifest infringement of the principle of equal treatment if an official suffering from total invalidity and from lesions for which an additional allowance to be calculated in accordance with Article 14 of the implementing rules could be paid were in fact to be treated in the same way as an official suffering solely from total invalidity, should be considered to be well founded.

31. For the foregoing reasons, the defences raised by the insurers to the claim for payment made by the applicant in respect of the sums which it paid to Mr L. should be rejected *in toto* and the Commission should be held to be entitled to receive the sums agreed under the Agreement.

32. It is now necessary to rule on the ancillary claim for interest. According to Article 1153 of the Belgian Civil Code, interest is to be calculated on the sum due at the legal rate to be determined in accordance with that law as from the date on which Van Breda received the letter dated 6 May 1994 from the Commission. According to the Court's case-law, [11] that letter constitutes notice of default within the meaning of Article 1153 of the Belgian Civil Code.

V — Costs

33. Under Article 69(2) of the Rules of Procedure, costs follow the event. I therefore propose that the defendants should be ordered to pay the costs.

11 — See, in this connection, Case C-42/94 *Heidemij* v *Parliament* [1995] ECR I-1417.

VI — Conclusions

34. In view of the foregoing considerations, I propose that the Court should:

— order the defendants to pay the sum of BFR 25 794 194;

— order the defendants also to pay default interest at the Belgian legal rate as from the date on which Van Breda received the letter from the Commission dated 6 May 1994;

— order the defendants to pay the costs.