OPINION OF MR ADVOCATE GENERAL MANCINI DELIVERED ON 5 APRIL 1984 [1]

Mr President,
Members of the Court,

1. The present case concerns an action which Carlo Albertini and Mario Montagnani, scientific officials at the Joint Nuclear Research Centre (hereinafter referred to as "the Centre") at Ispra, have brought against the Centre and the Commission; by their action the applicants seek the annulment of various decisions and the award of damages.

Since the early seventies the applicants have been carrying out research into the dynamic behaviour of materials in the Applied Mechanics Division. In 1976 Mr L. H. Larsson was appointed as the new Head of Division. According to the applicants, he very quickly showed that he did not appreciate the true value of their work and imposed unacceptable restrictions on their activities. In particular Mr Larsson:

(a) refused Mr Albertini and Mr Montagnani permission to publish a scientific paper (memorandum of 7 October 1982 and note of 5 November 1982);

(b) refused them permission to participate in an international conference (note of 5 November 1982);

(c) forbade them to maintain contacts with certain external experts in connection with their work (notes of 27 September and 6 October 1982);

(d) withdrew from them responsibility for research into the dynamic behaviour of materials (Internal Memorandum of 10 November 1982).

On 10 December 1982 the two officials submitted various complaints to the superior authority pursuant to Article 90 of the Staff Regulations and on 23 December 1982 brought an action under the combined provisions of Articles 90 (2) and 91 (4), claiming an infringement of Articles 17, 21 and 24 of the Staff Regulations. On the same day they applied for the suspension of the operation of the measures contested by their action. Their application was, however, dismissed by the President of the Court by orders of 23 December 1982 and 1 February 1983. Finally, on 17 May 1983, after the administrative complaint was deemed to have been dismissed by expiry of the period laid down in the Staff Regulations, the complaint was formally dismissed by the Commission.

During the oral procedure the representative of the Commission produced the proceedings of the conference referred to in (b) above. It includes the paper which Mr Larsson had not authorized to be published, bearing the signatures of the applicants together with their particulars.

2. The action, which must be regarded as directed against the Commission alone, since the Centre is an integral part

1 — Translated from the Italian.

of its administrative structure, is therefore mainly concerned with the annulment of the various decisions adopted by the Head of the Applied Mechanics Division of the Centre.

Let us consider first of all the decisions of 7 October and 5 November 1982 by which Mr Larsson refused the applicants permission to publish the paper entitled "Constitutive equations of austenitic stainless steels in dynamics — Experiments and calibration procedure", prepared by the applicants in collaboration with two professors of the University of Bologna. The paper was to have been presented and discussed at the Second Conference on Mechanical Design and Production, held at Cairo University on 27 to 29 December 1982.

The documents before the Court disclose the following facts:

On 13 July 1982 the applicants sent the original text and a number of copies of the paper to Professor Eleiche, the Secretary General of the conference, so that he could submit it to the scientific committee thereof.

In a letter dated 30 July 1982 Professor Eleiche informed the applicants that the paper had been accepted by the committee.

On 31 August 1982 the applicants requested permission to publish their paper pursuant to Article 17 of the Staff Regulations.

On 7 October 1982 the Head of Division sent them a memorandum refusing their request. It was stated that the applicants had failed to observe the proper procedure by sending the paper before obtaining permission. Furthermore, the paper was not, from a scientific point of view, ready for publication.

On 19 October 1982 the applicants replied to the Head of Division, explaining the scope of their paper and defending its scientific merits.

On 5 November 1982 the Head of Division sent Mr Montagnani a note confirming the refusal of permission.

In a letter dated 30 November 1982 the applicants asked Professor Eleiche to regard their paper as withdrawn if the requisite permission was not received in time. That request was confirmed at a meeting which they had with Professor Eleiche at Ispra during the summer of 1983.

On 9 March 1983 the applicants requested permission to publish a paper entitled "Dynamic mechanical properties of austenitic stainless steels. Fitting of experimental data on constitutive equations", once again prepared in collaboration with the two professors of the University of Bologna and intended for a conference to take place in Chicago in August 1983 (SMIRT VII). Permission was granted for this work, which related to subjects similar to those dealt with in the earlier paper.

The paper intended for the Cairo conference appeared with the names and particulars of the four authors in the publication "Current advances in mechanical design and production — Proceedings of the Second Cairo University MDP Conference, 27-29 December 1982", at p. 475 et seq. The applicants' names and particulars have, however, been deleted from the copy retained in the library at Ispra.

Having set out the facts, I shall now turn to the applicants' complaints. Albertini and Montagnani state first of all that when requesting permission to publish they followed the practice in force at the Centre at that time, as set out in Internal Memorandum No 13/79 of 15 May 1979 and in a statement made on 20 January 1983 by three scientific officials working at Ispra. They state that they are not responsible for the publication of the paper since they informed the organizers of the conference in good time that they had not obtained the relevant permission.

In support of the claim for annulment the applicants put forward two complaints: lack of powers and misuse of powers. In relation to the first complaint, they rely on Annex I to the decision of the Director General of the Centre dated 20 November 1979 relating to the exercise of the powers conferred by the Staff Regulations on the appointing authority: the power provided for in the second paragraph of Article 17 (grant of permission to publish) is conferred upon the Director of the Ispra establishment and not upon the Head of Division. In any event, they maintain, Article 17 applies to definitive publications and not to papers sent to scientific conferences. As regards misuse of powers, Albertini and Montagnani maintain that the scientific merits of a contribution cannot be assessed at the stage of the request for permission to publish; in any event their paper was certainly not capable of prejudicing the interests of the Community.

Naturally, the Commission takes a different view. As far as procedure is concerned, there can, it maintains, be no doubt that, in submitting the request for permission after sending the paper to Professor Eleiche, the applicants infringed the rules in force and also Article 17 of the Staff Regulations, the provision on which they are based. As regards the merits of the decision, it must be pointed out that: (a) other members of the division support the view of Mr Larsson; (b) an inter-divisional seminar on behavioural patterns of materials produced results confirming Mr Larsson's opinion; and (c) two outside experts subsequently consulted gave an adverse opinion on the scientific merits of the paper. The applicants' conduct must in any event be considered in the light of the objective of the second paragraph of Article 17, which is "to guarantee observance of the fundamental requirement . . . that the publication should be of the standard which the Commission is entitled to expect of its officials and does not prejudice the reputation of the Centre".

3. Let me say a few words on the rules cited by the parties. The rule concerning the publication of articles written by the staff of the Communities is contained in the second paragraph of Article 17 of the Staff Regulations. That reads: "An official shall not, whether alone or together with others, publish or cause to be published without the permission of the appointing authority, any matter dealing with the work of the Communities. Permission shall be refused only where the proposed publication is liable to prejudice the interests of the Communities." For members of the scientific or technical staff and in particular those at the Centre, Article 94 also applies. The second paragraph thereof reads: "The publication by an official, whether in written form or otherwise, of any matter dealing with the

work of the European Atomic Energy Community shall be subject to the permission of and the conditions laid down by the appointing authority."

For officials of Ispra who wish to submit papers to international scientific conferences there are in addition the rules contained in Internal Memorandum No 13/79, which has already been referred to. That governs the procedure for selecting the persons who are to participate in scientific and technical events, conferences, symposiums, discussions and meetings of experts at which the Commission is officially invited to be represented. It provides that permission to submit a paper must be sought on a special form at least one month before the date fixed by the organizers for the submission of proposed papers. If the competent authority does not inform the applicant of the results of his application he may send the organizers the title or a summary of his paper. On the other hand, the full text may under no circumstances be forwarded until publication has been duly authorized. If permission is not granted the official must withdraw his proposed paper from the organizers (doc. EUR/C-IS 202/79, point 4.1).

4. As I have stated, it was learnt at the hearing that the paper in question appeared, together with the names and particulars of the applicants, in the Proceedings of the Cairo Conference. From that the Commission has concluded that Albertini and Montagnani no longer have any interest in seeking the annulment of the refusal of permission to publish.

That argument seems to me well founded. Even if it is accepted that the applicants neither requested nor authorized it, publication of the paper has certainly removed their interest in pursuing the present action, at least as far as the complaint in question is concerned. Indeed, a decision annulling the refusal of permission would no longer be of benefit to the applicants.

5. Consequently, consideration of the complaints put forward by the applicants is justified only on grounds of completeness. As regards the alleged lack of power, the Commission pointed out in its written observations that the Director of the establishment did not object to the refusal of permission, which was notified to him by the Head of Division; at the hearing it added that at the material time the Director of the establishment had formally delegated to the Head of Division the powers conferred upon him by the decision of the Director of the Centre of 20 November 1979. That statement has not been challenged; I infer from it that Mr Larsson expressed the point of view of the administration or at least that what he did was tacitly ratified by it.

In its judgments of 30 May 1973 in Case 46/72 *(De Greef* v *Commission* [1973] ECR 543) and 49/72 *(Drescig* v *Commission* [1973] ECR 565) the Court confirmed that such a procedure was lawful. In examining a Commission decision similar to that of 20 November 1979, the Court took the view that it involved "a distribution of business within the Commission services" rather than "the conferment of rigid powers".

It is not possible, the Court held, to say that it excludes "in advance all possibility of sub-delegation by the officials appointed or of a deviation from the principles of division of functions . . . A sub-delegation or deviation from these standards can only result in the nullity of an act done by the administration if it is capable of affecting one of the guarantees given to officials by the regulations" (paragraphs 17 to 19 and 20 to 21, at p. 553). I stress the last words, which fully apply to this case. Since it has been established that the paper was published without delay, it can certainly not be said that the guarantees of the officials were in any way adversely affected.

The complaint that there was a misue of powers in the application of the second paragraph of Article 17 is a different matter. In my opinion, that provision may restrict a fundamental right such as that of expressing an opinion and must therefore be interpreted restrictively. If it were necessary to consider in depth the problems connected with the possible conflict between that right and the "interests" of the Community — which is unnecessary here since, as I have pointed out, the applicants have no interest in pursuing their claim — it would be necessary to consider the general principles common to the legal systems of the Member States in relation to free speech. I doubt whether the wide interpretation given by the Commission to the second paragraph of Article 17 (cf. the end of the section 2 above) would stand up to such a test. Let me remind the Court of the maxim of Immanuel Kant: "The official, soldier and priest must have the right to display their intelligence publicly. As a scholar and citizen each has unlimited freedom to use his intelligence, to speak in his own right and to make proposals to improve the organization of the State and Church to which he belongs" *(What is Enlightenment,* 1784).

6. The second claim is for annulment of the decision of 5 November 1982 refusing the applicants permission to attend the Cairo conference. It appears from the documents before the Court that in answer to their requests (31 August and 19 October 1982) the Head of Division sent Mr Montagnani a handwritten note (5 November 1982) informing him that he had examined the programme and considered that it was not worthwhile to send delegates to the conference.

With regard to that claim too, the Commission contends that the applicants have no interest in pursuing their application. I think that its argument is valid. The conference is now past and the applicants would gain nothing from a decision annulling the refusal of permission to attend. Their complaint is in any case without foundation. It presupposes that a scientific official has the right to attend international conferences or even the right to be sent on mission. Such a right however is not recognized by any provision, and it is not possible to infer it from any general principle. In taking a decision regarding missions, the administration therefore has complete discretion.

7. The applicants' third claim is for annulment of the internal memoranda of 27 September and 6 October 1982. By the first memorandum the Head of Division refused their request to invite an outside research worker to the Centre, mainly because his previous visits had been disappointing. In the second the Head of Division asked the applicants to observe the Centre's procedures in such matters.

In the view of Albertini and Montagnani the prohibitions and obstacles thus placed on the relations which they seek to maintain with outside experts adversely affect their career and encroach upon their freedom of scientific research. On the other hand, the Commission contends that officials have no right to invite outside experts. Moreover, the applicants have not shown that they have been forbidden to have contacts with such experts.

I doubt very much whether the measures referred to in the documents produced can be regarded as adversely affecting the applicants. In taking them, the Head of Division, in my opinion, lawfully exercised the powers granted to him in matters of internal coordination for the purpose of ensuring the smooth functioning of the department.

8. The fourth claim is for the annulment of the memorandum of 10 November 1982 by which the Head of Division entrusted the Head of Sector, Mr Verzelletti, with responsibility for research into the dynamic behaviour of materials.

The applicants put forward three complaints:

(a) *ultra vires*, because the decision ought to have been taken not by the Head of Division but by the appointing authority;

(b) no statement of reasons;

(c) misuse of powers, because to withdraw from the applicants, who are the inventors and constructors, responsibility for the "big machine" was "an act of intolerance".

The Commission contends in the first place that Albertini and Montagnani have not been downgraded and assigned to duties which do not correspond to their grade; their complaints therefore have no substance. It adds that the measure is lawful: certain aspects of staff management within a scientific division fall within the powers of the Head of Division. It is his duty in particular to organize the work by entrusting duties and responsibilities in accordance with the requirements of the department.

I agree with the Commission. The object of the measure in issue is not the assignment of an official to a post, which under Article 7 of the Staff Regulations requires the intervention of the appointing authority. The measure affects the internal organization of a unit and is intended to ensure that it runs better; as such there is no doubt that it falls within the powers of the Head of Division.

Nor does it appear that it is subject to any defect. There is no failure to state reasons: the applicants do not deny that the day before the memorandum was issued Mr Larsson informed Albertini of

it and fully explained the reasons for it. The argument to the effect that a person who invents or constructs a machine has in some way an exclusive right to its use is even weaker. For proof of that it is sufficient to refer to the third paragraph of Article 94, which reads as follows: "Any invention made by an official in the course of or in connection with the performance of his duties shall be the undisputed property of the European Atomic Energy Community."

9. Finally, the claim for an order that the Commission should pay compensation for the damage the applicants suffered as a result of the refusal of permission to publish their paper and to attend the Cairo conference must be dismissed. As has been seen, in the case of the paper no damage was caused and, as regards attendance at the conference, the defendant's conduct was lawful.

10. For the reasons which I have given, my opinion is that the Court should dismiss the action brought against the Commission of the European Communities by Carlo Albertini and Mario Montagnani by their application of 23 December 1982.

Furthermore, the parties should be ordered to bear their own costs, including those — reserved by the Court — of the interim proceedings.