OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 12 December 1989 *

Mr President,
Members of the Court,

1. By an application lodged at the Court Registry on 9 October 1987 Alfredo Grifoni, the proprietor of an undertaking of the same name based in Ispra, asks the Court to declare that the European Atomic Energy Community (EAEC) is liable for the damage which he suffered as a result of an accident of which he was the victim and, consequently, order the EAEC to pay appropriate compensation.

2. Since the events prior to the application and the submissions and arguments of the parties are described in great detail in the Report for the Hearing, I shall summarize the facts of the present case briefly.

3. By letter of 21 May 1984 the Joint Research Centre at Ispra (hereinafter referred to as 'the Centre') accepted an offer from Mr Grifoni's undertaking to conclude a pre-contractual agreement governing their future relations in respect of the performance of certain tin-plating and ironwork at the Joint Research Centre's meteorological station. Clause 2 of that pre-contractual agreement stipulated that the agreement was to be valid for one year, to run, however, from the date of the first order placed by the Joint Research Centre.

4. On 20 October 1985, when the agreement was not yet in force, Mr Grifoni, accompanied by an employee of the Centre, Mr Danielato, climbed onto the roof of the Centre's meteorological station in order to take measurements. On that occasion he fell from a height of approximately 4.5 metres and suffered serious injuries. As a consequence of the accident and since the Commission of the European Communities refused his request for compensation, Mr Grifoni brought the present action.

5. In support of his application Mr Grifoni submits primarily that the EAEC bears contractual liability, and in the alternative that it bears non-contractual liability.

The jurisdiction of the Court

6. Before expressing an opinion on the substance of the case, I consider it necessary to deal briefly with the question of the Court's jurisdiction, even though it is not disputed by the Commission.

7. In so far as Mr Grifoni's application is based on contractual liability, the Court's jurisdiction appears to stem from Article 153 of the Euratom Treaty and from clause 17 of the pre-contractual agreement, which in turn refers to clause 16 of the General Terms and Conditions; jurisdiction is thus derived from an arbitration clause. For the time being, we may leave aside the question whether the validity of the abovementioned clause must be assessed in accordance with

* Original language: Italian.

Italian law, which the parties have designated as the applicable law; and whether, if that is the case, the clause satisfies the formal conditions laid down in Article 1341 of the Italian Civil Code governing the terms of arbitration clauses. However, I must express my very strong doubts in that regard.

8. With regard to the EAEC's alleged non-contractual liability, the Court's jurisdiction is derived from the combined effect of the provisions of Article 151 and the second paragraph of Article 188 of the Euratom Treaty. The latter provision is couched in terms which leave no room for doubt. This Court has exclusive jurisdiction both when non-contractual liability is alleged in relation to individual or legislative acts of the Community, and when the damage caused to the victims is itself caused by the material conduct [1] — acts or omissions — of the institutions or their servants in the performance of their duties. For an example of damage caused by objects or materials which are in the care of or are used by the Communities for performing their institutional tasks and which can give rise to the Community's non-contractual liability, one need look no further than the damage caused by the use of radioactive substances. [2]

A further example of non-contractual liability, arising this time from the Community's failure to act, can be found in the judgment of 7 November 1985 in Case 145/83 *Adams* v *Commission* [1985] ECR 3539. It is clearly stated in paragraph 44 that 'by failing to make all reasonable efforts to pass on to the applicant the information which was available to it . . . the Commission has incurred liability towards the applicant in respect of that damage'.

As regards the link between the fact which it is claimed gave rise to the liability and the performance of the duties of the institutions or their servants, in my view there is no doubt that that link does exist. In the first place, I consider that the functions and duties of an institution certainly include ensuring health and safety on the premises on which it functions. Moreover, any possible doubts in that regard are removed by the fact that a servant of the institution, and specifically the Director-General, has been expressly given the task of taking 'on behalf of the Commission . . . all measures necessary to ensure the safety of persons and installations for which he is responsible' (Commission Decision 71/57/Euratom of 13 January 1971, Official Journal, English Special Edition, Second Series, September 1974, p. 14).

In support of the above, let me add that the jurisdiction of the Court under Article 188 of the Treaty deprives the national court of jurisdiction, the EAEC being immune from civil jurisdiction in a case such as this precisely because it is one of the entity's own functions which is involved.

Contractual liability

9. The accident, as I have pointed out, occurred when the contract was not yet in force. It follows that contractual liability is precluded.

1 — See the judgment of 12 July 1969 in Case 9/69 *Sayag* v *Leduc* [1969] ECR 329.

2 — See G. Venturini: *La responsibilità extracontrattuale delle Comunità europee*, Giuffrè ed., Milan, 1980, p. 97

10. However, it remains to be considered whether it is possible to find in Italian law, which is applicable by virtue of the pre-contractual agreement, and in particular in Article 1337 of the Italian Civil Code, a 'pre-contractual' liability or *culpa in contrahendo.*

Without its being necessary to express an opinion regarding the debate which has arisen within Italian legal and academic circles regarding the nature of such liability — that is, whether it is contractual or non-contractual (see 'Commentario breve al codice civile', Cian/Trabucchi, CEDAM 1988, p. 974) — it is sufficient to point out that none of the pre-conditions for such liability are to be found in the facts of the present case. Article 1337 provides that 'in the negotiations and in the drawing up of the contract the parties shall act in good faith'. First of all, it is common ground that in the present case the parties had gone beyond the stage of negotiating and drawing up the contract. Consequently, none of the pre-contractual duties established by Italian jurisprudence and academic writers was infringed: neither the duty to provide information regarding the factors necessary to form an accurate idea of the contract, nor the duty of care, nor the duty of secrecy.

It is also common ground, again as a matter of general legal theory, that for pre-contractual liability to exist there must be some practical relationship with the subject-matter of the future contract, a relationship against which the traditional obligation of good faith is measured. A textbook example is the seller who significantly reduces the value of the object while negotiations are still in progress, or the party who breaks off the negotiations themselves entirely unreasonably. In the present case, on the other hand, the relationship between the event in question and the contract is merely chronological inasmuch as the event occurred prior to the entry into force of the contract.

11. Consequently, from the above considerations it appears that in the present case neither contractual liability nor pre-contractual liability can be said to have been established.

Non-contractual liability

12. As is stated in the recent judgment of 9 November 1989 in Case 353/88 *Briantex* v *EEC and Commission* [1989] ECR 3623, 'the Court has consistently held [that] non-contractual liability on the part of the Community and entitlement to compensation for damage are conditional upon the existence of an unlawful act committed by one of the Community institutions, on actual damage and on an aetiological link between them'.

I doubt therefore whether the three conditions are met in the present case.

13. According to Mr Grifoni, the unlawful act for which the Commission of the EAEC is liable consists in the infringement, primarily, of several provisions of the Italian legislation on the prevention of accidents (in particular, Article 10 of Presidential Decree No 164 of 7 January 1956 on the prevention of accidents in the building trade (GURI No 78, 31.3.1956), and Articles 26 and 27 of Presidential Decree No 547 of 27 April 1955 on the prevention of accidents at work (GURI No 158, 12.7.1956). The application of those provisions of Italian law within the

Centre is expressly provided for by Article 31 of Annex F to the Agreement of 2 July 1959 between Italy and the EAEC.

Secondly, there has been an infringement of Article 10(3) of Commission Decision 71/57 of 13 January 1971 on the reorganization of the Joint Nuclear Research Centre (Official Journal, English Special Edition, Second Series, September 1974, p. 14), which imposes on the Director-General the duty to take 'on behalf of the Commission . . . all measures necessary to ensure the safety of persons and installations for which he is responsible'.

Thirdly, several conventions and recommendations of the International Labour Organization (ILO), which constitute common general principles in the laws of the Member States, were infringed.

14. The Commission's defence consists mainly in denying *ab initio* the existence of non-contractual liability, placing the facts of the present case within the scope of contractual liability; however, the Commission itself hastens to deny in theory the existence of the pre-conditions for such liability. At the hearing, the Commission's agent was particularly clear on two points which had given rise to uncertainty at the written stage of the proceedings, when he stated:

(a) that Mr Grifoni was acting within the framework of a pre-contractual agreement which he had accepted, an agreement which transferred to him responsibility regarding safety measures;

(b) that if he had fallen from the roof through his own lack of care, the Commission could not be held to be at fault.

Finally, the Commission explained to the Court that, in its view, the accident should be classified as an 'occupational hazard' which could have been foreseen and avoided with a minimum of standard precautionary measures.

15. I must say straight away that the Commission's arguments appear to me to be minimalist and in any event concentrated on only the hypothesis of contractual liability, which I have ruled out. The reference to clause 8 of the pre-contractual agreement is thus irrelevant for the simple but very good reason that it was not yet in force at the material time. I leave aside, yet again, my very strong doubts concerning the validity, for the purposes of Italian law, of clause 8 which, in so far as it limits liability and the capacity to raise objections, should have been expressly agreed to under Article 1341 of the Italian Civil Code, under penalty of nullity.

However, the Commission has made no submission to challenge the argument that it bears non-contractual liability and confines itself to acknowledging that it is a question of 'objective' liability, or liability without fault.

16. Consequently, the first question which must be considered is which criteria are to be taken into account in assessing the unlawfulness of the conduct which allegedly gives rise to non-contractual liability.

17. The reference in Article 188 of the Euratom Treaty to 'general principles common to the laws of the Member States' could, at first sight, give rise to doubts

regarding the possibility of referring exclusively to the provisions of a single national legal system; however, notwithstanding the need to assess liability and its consequences in the light of the general principles common to the laws of the Member States, which has already been explained in a considerable body of case-law, it seems to me that at least one of the conditions for liability, that of unlawfulness, must be considered principally in relation to the provisions of the relevant legal system which are alleged to have been infringed.

The observations I have just made are particularly relevant to a case such as the one now before the Court in so far as, in the first place, it would be strange for the victim of an accident to receive protection, if he were entitled to it, which was inferior to that provided for by the Member State in which the accident occurred; in the second place, the immunity from the civil law of the Member State which exists in a case such as this, and which is the result of the Court's jurisdiction under Article 188 of the Euratom Treaty, must not result in a significant loss of protection.

In the Italian legal system, besides the extremely general provision on non-contractual liability, based quite simply on the principle of *neminem laedere* (Article 2043 of the Civil Code), at least two other provisions of the Civil Code (all applicable to the civil service) come into consideration with regard to the present case, namely:

Article 2051, which provides that:

'Persons are liable for damage caused by objects in their care, unless it can be shown that the damage was caused accidentally';

Article 2087, which provides that:

'The owner of an undertaking is under an obligation to adopt those measures which, depending on the particular nature of the work, experience and technology, are necessary to protect the physical and mental well-being of workers.'

18. That being the general legislation applicable, the relevant facts of the case are the following:

(i) Mr Grifoni was not a worker subordinate to the Centre, nor was he (yet) related to it by a contract for tender; he was merely a third party;

(ii) It is common ground that Mr Grifoni had been 'called in' by officials of the Centre to take measurements on the abovementioned 'cantilever roof' which gave access to the meteorological equipment on the roof, a place which was not known to Mr Grifoni;

(iii) It is common ground that the officials of the Centre were in possession of the key to the door giving access to the 'cantilever roof', which was normally locked, and that on the occasion in question one of the officials, Mr Danielato, accompanied Mr Grifoni, opening the door and thus allowing him access.

19. Those being the facts which emerge as common ground from the documents before the Court and from the hearing, it seems to me first of all that it is possible to apply either Article 2043 of the Italian Civil Code, which lays down the principle of *alterum non laedere*, or Article 2051 of that code

which, being a further elaboration of the principle in question, makes provision for liability for damages caused by objects in a person's care on the assumption that there was effective control over the object.

20. In the first case, liability is based on the notion of fault and the relevant burden of proof lies with the person who suffered the damage; in the second case, the custodian's liability is, on the contrary, based on a presumption of fault and the burden of proof is reversed (*res ipsa loquitur*). In any event, the difference is not relevant in the present case in so far as it is common ground that the Centre did not take any precautions at all, either in respect of its employee Mr Danielato or Mr Grifoni, to prevent the accident, which substantiates the Centre's fault.

21. As regards the suggestion that Mr Grifoni was partly at fault, that does not emerge from any of the documents before the Court, since the Commission, with which the burden of proof lay, neither proved that that was the case nor asked for it to be proved.

22. Let me also add that, besides the usual general provisions on civil liability, the Italian legal system, like most legal systems, contains more specific rules for the prevention of accidents at work. The fact that in the present case an accident at work is at issue cannot reasonably be disputed, as the substantial case-law shows. The concept of an accident at work covers in fact any accidental event which occurs suddenly at work, which causes death or permanent incapacity for work, whether total or partial, or temporary total incapacity which causes absence from work. Moreover, 'at work' is the same as 'for the purpose of work', in so far as it exists whenever the interests of the employer, production or circumstances relating to the employment relationship are found. Despite the Commission's half-hearted attempt at the hearing to deny that this was an accident at work, it is common ground that Mr Grifoni was on the 'cantilever roof' at the Centre for the purpose of carrying out work and certainly not as a mere courtesy.

23. The legislation which is relevant in the present case is contained in Articles 26 and 27 of the rules on the prevention of accidents at work (Presidential Decree 547/55) and Article 10 of the rules on the prevention of accidents in the construction industry (Presidential Decree 164/56), which are relied on by Mr Grifoni, as I have said; there is also the abovementioned general provision in Article 2087 of the Italian Civil Code, which lays down the general principle of accident prevention and is applicable both to private entrepreneurs and to public bodies.

That having been said, a dispute has arisen as to whether the abovementioned special rules are applicable — as claimed by Mr Grifoni but denied by the Commission — to the present case.

24. In principle, the Centre was subject to the abovementioned body of rules as well as to the Italian law on civil liability. In the first place, the legislation on the prevention of accidents at work is, in Italy, of so-called compulsory application ('applicazione necessaria'), since it is related to clear social requirements which cannot be derogated from; and the fact that the EAEC enjoys certain privileges and immunities in the State in which it is based does not exempt it

from complying with Italian laws: immunity from civil and criminal proceedings certainly does not mean immunity also from the law. In the second place, assistance in removing any doubts is provided in the present case by a clear provision of the agreement between Italy and the EAEC for the setting up of the Centre, which in Article 31 of Annex F imposes on the Commission a duty to apply, 'on its own responsibility, the Italian provisions concerning health and safety at work'.

In particular, there is no doubt that the Centre was subject to the obligations imposed by Presidential Decree No 547/65 on the prevention of accidents at work in general. That legislation (Article 1) applies in fact 'to all activities which have been assigned to subordinate workers', as well as to the State and to all public bodies. Article 4 imposes an obligation on employers, managers and supervisors to 'put into effect the safety measures provided for in this decree'.

Article 27 provides that 'parapets shall be provided on scaffolds, gangways, working platforms, and elevated working places and passageways'. That provision has been held to apply not only in the construction industry but whenever work is carried out at a height of more than one and a half metres and also to the case of occasional work (judgment of the Italian Court of Cassation of 29 October 1984, *Rivista penale* 1985, p. 922).

In addition there is the more specific legislation on the prevention of accidents in the construction industry (Presidential Decree 164/56), adopted on the basis of the model set out in the relevant ILO convention, Convention No 62. That legislation (Article 1) applies to 'work on the construction, maintenance, renovation and demolition of fixed structures', and Article 10 provides more specifically that 'when work is carried out on eaves and cornices, roofs and similar places which give rise in some way to the risk of falling from a height, the workers carrying out the work must use appropriate safety harnesses'. Also, the Court of Cassation has stated on a number of occasions that the obligation imposed by Article 10 'is absolute and does not allow derogations or alternatives of any kind whenever work is carried out which gives rise in some way to the risk of a fall from a height and it is not possible to provide safety rails or parapets' (judgment of the Court of Cassation of 29 March 1984, *Rivista penale* 1985, p. 606).

25. More generally, it should be pointed out that as well as applying the legislation on accident prevention, the courts, both commendably and legitimately, have not failed to draw every useful consequence from the fundamental constitutional principle (Article 32) of the absolute right of the individual, and the corresponding interest of the community, to physical safety, a right which is defined as 'irrevocable and inalienable'. In that context, the courts have, first of all, held that 'a "workplace" must be interpreted as meaning not only the pre-established place where the worker normally expects to carry out tasks appointed to him, but also all other places where the same worker, even if merely exceptionally, may go to fulfil the requirements of his employment' (judgment of the Court of Cassation of 11 October 1979, *Rivista penale* 1980, p. 584).

It should also be pointed out that the Court of Cassation has on a number of occasions confirmed the principle that 'the rules on the prevention of accidents at work to eliminate not only the risks related to the performance of particular employment activities, but also, and above all, those risks which are a consequence of any inexperience, negligence and carelessness of workers themselves, whose safety must always be protected, even against their own will (judgment of the Court of Cassation of 5 December 1977, *Rivista diritto lavoro* 1978, II, p. 499; and followed in the judgment of the Court of Cassation of 24 June 1980, *Rivista penale* 1981, p. 103).

Finally, a substantial and consistent body of case-law of the Court of Cassation has gradually extended the protection afforded by the abovementioned rules both to non-dependent workers and to mere third parties who 'may find themselves in the dangerous situation which the law seeks to prevent by imposing certain precautionary measures' (see judgment of the Court of Cassation of 20 December 1971, *Cassazione penale - Massimatio annotato* 1973, p. 185; judgment of the Court of Cassation of 22 November 1979, *Rivista penale* 1980, p. 584; and judgment of the Court of Cassation of 15 October 1984, *Rivista penale* 1985, p. 606).

26. As regards the case at issue, it seems to me that in view of the facts described above it cannot be assessed without taking into consideration the legal report drawn up for the occasion by the experts of the Unità socio sanitaria locale (USSL) No 5 (annexed to Mr Grifoni's application) which, under Law No 833 of 23 December 1978 setting up the Italian health service [3] is the public body which is competent to monitor compliance with the legislation on accident prevention.

The abovementioned report shows clearly that since the Centre had not taken any safety measures at all — there were no fixed parapets, temporary scaffolding or safety harnesses (either for Mr Grifoni or for Mr Danielato, an employee of the Centre) — it committed an infringement of the abovementioned rules.

It scarcely needs emphasizing that the same report points out that the officials of the Centre, far from denying the truth of the observations made by the experts of the USSL, confined themselves to denying that the Centre was subject to Italian law, relying, moreover, on the very international convention which, as I pointed out above, expressly confirms the Centre's obligation to comply with the national legislation.

27. From all the above considerations, and regardless of the relevance in the present case of the special Italian legislation for the purposes of establishing the EAEC's non-contractual liability under Article 188 of the Treaty, it is sufficiently clear that the Centre has failed to fulfil the undeniable duties of care and prevention which exposure to the risk of a fall from the cantilever roof imposed.

In my opinion, there is no doubt that it can be demonstrated that there is a duty of care and prevention whenever there is a risk of a fall from a height; and that, in concrete terms, that duty results in an obligation to provide those concerned — even those exposed to the risk only by chance — with appropriate safety equipment. Incidentally, I should also point out that the terrace roofs

3 — Ordinary supplement to GURI No 360, 28.12.1978, in particular Article 21

of the Community buildings here in Luxembourg are — as far as I myself have been able to establish — equipped with parapets or in any case with some protection around their perimeters.

28. The duty in question fell to the Centre in so far as it was the Centre which controlled and supervised the premises as a whole. Moreover, as a body of which subordinate workers had expectations the Centre is subject to the specific obligations imposed on owners of undertakings by Article 2087 of the Italian Civil Code and the special accident prevention rules which it contains. By that I mean that the Centre is under an obligation to prevent accidents at work regardless of Mr Grifoni's incident (and it is worth pointing out that Mr Danielato himself, an official of the Centre, was exposed to the risk in question); and that therefore the relevance of those obligations, and indeed their existence or otherwise, does not depend on Mr Grifoni's presence or the nature which may be ascribed to the relationship between Mr Grifoni and the Centre.

Consequently, the idea that the Centre was not under an obligation to prevent the accident merely because Mr Grifoni was not an employee of the Centre must be rejected completely. The theory is wholly unfounded from two points of view, both decisive. In the first place, the specific obligations to prevent accidents are, as I have already emphasized, intended to protect not only subordinate workers but also third parties who are exposed to the risk by chance. In the second place, the Centre, in so far as the roof was 'in its care', in the aforementioned sense of exclusive control, is liable for the damage caused in particular to third parties in accordance with the general principle laid down in Article 2051 of the Italian Civil Code. Nor is it necessary to refer to the 'occupational hazard' to which Mr Grifoni was exposed as an autonomous worker or, according to the Commission's theory, as a (future) successful tenderer. In fact, discussion of that issue is possible only and exclusively if control of the 'cantilever roof' had already been transferred from the Centre to Mr Grifoni, as happens when the principal 'consigns the work' to the successful tenderer and therefore transfers to him all control of, and responsibility for, the property on which the work ordered is to be done. In that regard, moreover, it must be pointed out first that according to Italian case-law it is occasionally necessary to ascertain whether the organization of the work has been entrusted wholly to the successful tenderer or whether, on the contrary, the principal has reserved some power of control over the performance of the work. The successful tenderer has exclusive liability for accidents only in the first case ('when the successful tenderer is not working absolutely autonomously, the principal, who participates in the performance of the work, is also liable for failure to adopt accident prevention measures, and in such a case is also under a duty to ensure safe working conditions with regard to the work contracted out': judgment of the Court of Cassation, Criminal Division III, of 27 November 1989, No 11513).

Secondly, in the present case the problem does not arise, either in law or in fact. It does not arise in law because at the material time there was no contract won by tender between the Centre and Mr Grifoni and the Centre had certainly not 'consigned' the cantilever roof to Mr Grifoni's care to enable him to organize his future work; it does not arise in fact because the cantilever

roof was under the exclusive 'control' of the Centre, inasmuch as it was inaccessible to any stranger who was not accompanied by an official of the Centre who had in his possession the key to the door which gave access to the roof.

29. It scarcely needs pointing out that the legislation to which I have referred, in particular the general rules on civil liability, corresponds to general principles common to the laws of the Member States in the relevant field, and that the specific accident prevention rules correspond exactly to the aforementioned ILO rules.

30. Moreover, since there is in the present case, without there being a need for me to make any further comment, a causal link between the Centre's failure to act and the accident which occurred, and even real and considerable damage, I consider that the EAEC bears non-contractual liability under Article 188 of the Treaty.

31. With regard to the quantification of the damage, the specialist medical report carried out on behalf of Mr Grifoni to assess the consequences of the accident of 20 October 1985 (admission to hospital with uncertain prognosis and diagnosis of cranial injury with a fronto-parietal fracture radiated at the base, a 1/3 proximal fracture of the left leg, a multi-fragment break of the left kneecap, a fracture of the epiphysis of the left radius; see Annex 6 of the application) shows that the consequences of the accident are the following:

(i) complete invalidity for work for nine months;

(ii) capacity for work reduced by 70%.

32. In his application Mr Grifoni reserved the right to quantify, during the proceedings, the amount of damage he suffered. The Commission, which denied liability for causing the accident, has however, in the alternative, criticized the results of the aforementioned medical report. In particular it contested 'the extent of the injuries complained of by Mr Grifoni and which of those injuries was caused by the fall and which on the other hand are to be attributed to the applicant's previous pathological conditions', and it reserved the right to 'carry out independent checks and appropriate preliminary investigations if and when its liability is established'.

Since I would suggest that the Court rule that the Commission bears non-contractual liability for causing the accident of which Mr Grifoni was the victim and since I consider that the Court is not able, from the documents before it, to determine the amount of damage to be compensated, I would suggest that the parties should be asked to reach an agreement, on the understanding that should an agreement not be reached within 6 months, the matter will have to come before the Court again.

33. In conclusion I propose that the Court should:

(i) declare that the Commission of the EAEC is liable for the accident which occurred on 20 October 1985 and of which Mr Grifoni was the victim;

(ii) request the parties to agree — within six months of the judgment being delivered — on the amount of compensation, on the understanding that if agreement is not reached the Court will settle the damages;

(iii) order the Commission to pay the costs.