OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 21 February 1991 *

Mr President,
Members of the Court,

1. In the applications which have given rise to these proceedings the United Kingdom (Case 51/89), France (Case 90/89) and Germany (Case 94/89) seek the annulment of Council Decision 89/27/EEC of 16 December 1988 adopting the second phase of the programme on cooperation between universities and industry regarding training in the field of technology (Comett II) [1] on the ground that its legal basis is insufficient.

2. The Comett II decision was adopted on the basis of Article 128 of the Treaty and of Council Decision 63/266/EEC of 2 April 1963 laying down general principles for implementing a common vocational training policy; [2] the latter decision was itself based on Article 128 and thus, the applicants all submit, cannot extend the scope of that article.

According to the applicant governments, the Comett II decision should have been based on Article 235 of the Treaty, as indeed was done in the case of the first Comett programme, [3] of which the contested decision constitutes the second phase.

It is more than obvious that such a dispute over the correct legal basis is not of a purely formal nature. Since Articles 128 and 235 contain different rules regarding decision making in the Council, the exclusion of Article 235, and thus of the requirement of a unanimous vote, could have repercussions on the content of the contested decision; [4] an incorrect choice of legal basis may thus constitute a breach of essential procedural requirements such as to impeach the validity of the measure.

3. The applicants challenge the selection of Article 128 alone as the correct legal basis; they submit that that article, which refers to the adoption of general principles for implementing a common vocational training policy, allows the Community institutions to coordinate the national policies in that regard but not to administer independent training schemes under a programme such as Comett II. In particular, they claim that such a programme is operational in nature, has important financial and budgetary implications, and includes projects which fall

* Original language: Italian

1 — OJ 1989 L 13, p. 28.

2 — OJ, English Special Edition 1963-1964, p. 25.

3 — Council Decision 86/365/EEC of 24 July 1986 adopting the programme on cooperation between universities and enterprises regarding training in the field of technology (OJ 1986 L 222, p. 17).

4 — See the judgment of 26 March 1987 in Case 45/86 *Commission v Council* [1987] ECR 1493, at paragraph 12

within the field not of vocational training but of research; those factors make it impossible to regard Article 128 as a sufficient legal basis for the adoption of the programme.

4. With regard to the first two submissions put forward by the applicants, the operational nature of the programme and its important financial and budgetary implications, I need merely observe that they have already been rejected in the *Erasmus* judgment,[5] which was delivered after the applications in these proceedings were brought. In that judgment the Court first of all confirmed that where the Community institutions are expressly granted specific powers, in this case the implementation of a common vocational training policy, they must by necessary implication have 'the means of action needed to carry out that common policy effectively' (paragraph 9). The Court went on to state, specifically with a view to ensuring the effectiveness of Article 128, that the Council must be entitled 'to adopt legal measures providing for Community action in the sphere of vocational training and imposing corresponding obligations of cooperation on the Member States' (paragraph 11).

With regard to the procedural requirements laid down in Article 128, which are less strict than those laid down by other provisions of the Treaty concerning the adoption of measures implementing a common policy, the Court vigorously rejected the idea that that difference could furnish an argument for restricting the scope of application of the provision in question. Similarly, it emphasized that 'the conditions under which legislative powers and budgetary powers are exercised are not the same' and that no conclusions could therefore be drawn from the fact that the procedural requirements laid down for budgetary decisions are more onerous than those laid down in Article 128.

In the light of those considerations the Court therefore concluded that the *Erasmus* decision[6] did not exceed 'the limits of the powers conferred on the Council by Article 128 of the Treaty in the area of vocational training', since in substance it did no more than provide for 'Community information projects and promotional activity' and impose 'on Member States obligations of cooperation' (paragraph 19).

Having regard to the foregoing, I do not think there is anything in the contested decision that can put in question the conclusions at which the Court arrived in the *Erasmus* judgment.

Moreover, in view of that judgment the applicant governments, at the stage of the reply and in the oral procedure, did not persist with these submissions, but simply sought the annulment of the contested decision on the ground that, like the *Erasmus* decision, it goes beyond the ambit solely of vocational training and concerns research as well.

5. In addition, the German Government put forward the submission that the Council has the power, on the basis of Article 128, to adopt only measures concerning 'initial'

5 — Judgment of 30 May 1989 in Case 242/87 *Commission* v *Council* [1989] ECR 1425; see also the judgment of 30 May 1989 in Case 56/88 *United Kingdom* v *Council* [1989] ECR 1615.

6 — Council Decision 87/327/EEC of 15 June 1987 adopting an action scheme for the mobility of university students (OJ 1987 L 166, p. 20).

training, to the exclusion of measures concerning continuing education, that is to say, advanced training.

That submission must be rejected, since it finds no support either in the wording of Article 128, which refers simply to 'a common vocational training policy' without being more specific, or in any convincing arguments.

The expression 'vocational training' cannot be restricted to initial training; it is clear that a training programme which did not include continuing education would be robbed of much of its utility. Training is important throughout a person's career precisely because it meets a need for continued adaptation to the requirements of working life and to occupational developments, especially as a result of economic and technological restructuring.

I should also observe that Decision 63/266/EEC, referred to above, includes continuing education among the objectives of vocational training (see the first principle, third paragraph, the second principle, subparagraphs (f) and (g), and the ninth principle, second paragraph) and that Community programmes such as Eurotecnet [7] and Force, [8] both of which are based on Article 128 alone and were not challenged by any Member State, are directed precisely towards the advancement of continuing education.

6. That being the case, it remains to be established whether the contested decision is concerned exclusively with vocational training or, as the applicants claim, [9] also relates to research, so as to entail the need to rely on both Article 128 and Article 235 as a legal basis.

Here it is necessary to be more specific.

As I have just stated, the applicant governments submit that the contested decision should have been based also on Article 235 since it relates to research and goes beyond the field of vocational training. In that regard I should observe first of all that, as the Court has frequently pointed out, 'it follows from the very wording of Article 235 that its use as the legal basis of a measure is justified only where no other provision of the Treaty gives the Community institutions the necessary power to adopt the measure in question'. [10]

It is well known, in so far as it is relevant here, that the Single European Act inserted in the Treaty a new title on research and development (Articles 130f to 130q) and

7 — Council Decision 89/657/EEC of 18 December 1989 establishing an action programme to promote innovation in the field of vocational training resulting from technological change in the European Community (OJ 1989 L 393, p. 29)

8 — Council Decision 90/267/EEC of 29 May 1990 establishing an action programme for the development of continuing vocational training in the European Community (OJ 1990 L 156, p. 1)

9 — In that regard it may be relevant to observe, without wishing to draw any conclusions, that the United Kingdom and France put forward such a submission only at the stage of the reply, that is to say after the Court had stated in the *Erasmus* judgment that the contested decision did not concern solely vocational training but also scientific research, and that the Council therefore did not have the power to adopt it on the basis of Article 128 alone but was obliged, prior to the entry into force of the Single European Act, to base the measure also on Article 235

10 — See the judgment of 26 March 1987 in Case 45/86 *Commission* v *Council* [1987] ECR 1493, at paragraph 13

that in the *Erasmus* judgment the Court stated that before the entry into force of the Single European Act research activities could be based only on Article 235, thus clearly implying — as indeed is obvious — that with effect from that date such activities find a solid foundation in the specific provisions granting powers in that regard, that is to say those laid down in Title VI of the Treaty.

In those circumstances it is thus frankly difficult to understand what led the applicants, given that there are specific provisions concerning research, to argue that the contested decision would still require Article 235 as a legal basis for research projects.

It seems to me instead that if it were to be thought that the contested decision contains elements or projects in the fields of research or technological development the decision should have as its legal basis, in addition to Article 128, the provision of Title VI which grants the power to adopt legislation.

I should add that such a conclusion leaves unchanged the terms of the dispute with which we are concerned inasmuch as, even on that hypothesis, it is not purely formal in character. Article 130q, the provision which would on this hypothesis be the appropriate legal basis, lays down rules different from those in Article 128 with regard both to the voting procedure and to the participation of the European Parliament. Consequently, if it were to be concluded that the correct legal basis for the contested decision was Articles 128 and 130q, the decision would be invalid for breach of essential procedural requirements.

7. And so we come finally to the problem of defining the contested decision from a legal point of view, examining first of all the objective and the content of the measure. [11]

The objective of the decision is quite clear from Article 1, which describes Comett II as a programme for 'intra-Community cooperation between universities and industry regarding initial and continuing training in the field of, in particular, advanced technology'; it is thus an action programme unequivocally aimed at encouraging vocational training.

That conclusion is challenged by the applicants, who refer to a number of provisions of the decision which show, they say, that it is also aimed at furthering research activities.

Reference is made in particular to Article 3, according to which the programme in issue, '*through the training projects it supports*, ... will contribute to the utilization and exploitation of the results, methods and tools of technology *developed* by the Community policy for research and development' and 'facilitate innovation and technology transfer as well as the balanced economic and social development of the Community' (see also the thirteenth recital in the preamble to the decision).

I do not think it can be argued that a programme with such effects necessarily entails research activities, as the United Kingdom submits. It seems clear to me that

11 — See the judgment of 29 March 1990 in Case 62/88 *Hellenic Republic* v *Council* [1990] ECR 1527

that provision, as it is worded, simply calls for the utilization of the results of research (which has already been carried out); that research thus constitutes *a pre-condition* for the training envisaged by the Comett II programme and *not its objective*.

In other words, a vocational training programme in the field of advanced technology necessarily entails the optimization of human resources, the reinforcement of the scientific bases of industry and a spur to innovation, precisely because it provides industry with a highly qualified workforce which is thus able to apply and develop the technological achievements already made. These are thus natural and logical consequences which do of course make plain the existence of a connection between a programme of this kind and research and development policy, but which equally clearly mean that the programme cannot in itself have the objective of encouraging research or impinge on such an objective in any way, except to the extent inherent in any programme of vocational training in the field of technology.

I do not think, moreover, that the fact that in Article 5(10) the Commission is required to ensure 'Comett II is consistent with **other** Community research and development projects already programmed' can be considered decisive. Such a provision cannot be read as meaning that the Comett II programme itself is thus defined as a research programme; it should instead be read as meaning that it is necessary to ensure its consistency with research programmes, not only by avoiding duplication of aspects of such programmes which may in some way concern training but also in order to achieve the best possible coordination between two policies which, although quite separate, are nevertheless connected.

Such an interpretation is confirmed by the fifth recital in the preamble to the decision, in which reference to the decisions establishing research and development programmes is followed by the assertion that the technological and industrial cooperation brought about by those programmes 'must be supported by parallel efforts in the field of vocational training'.

8. Having thus dealt with the objectives of the measure in issue, we must now turn to its content, that is to say the type of projects provided for by the contested decision; these projects are described in the annex to the decision.

The United Kingdom argues that the projects envisaged in Point 4(B)(a), in particular subparagraphs (ii) and (iii), in so far as they call for the allocation of grants, *very probably* concern scientific research work.

The United Kingdom's complaint seems to be not so much that the function of these grants — which in the Council's view are exclusively for training purposes — is to provide an incentive for research work but rather that there is a possibility that they may be used for such purposes; that is to say, that they may go beyond what is expressly provided for and stray into the research sector.

Indeed, this is the main element on which the applicants' arguments focus: the Comett II programme does not as such concern research and development policy, but could *potentially* do so, given the natural and inevitable influence which a programme of that kind may have on research and development activities.

I think that view was fully confirmed during the oral procedure, in which the applicants, in particular the representatives of the United Kingdom and the French Government, specifically insisted on the point that Comett II was not a mixed programme (vocational training plus research) but a training programme which might have some effects in the research field.

9. Having clarified that point, I think we must first establish whether a Community action programme which is, as in this case, undoubtedly aimed at encouraging vocational training may be based on Article 128 alone even if, at least potentially, it is capable of having repercussions on research and technological development policy.

My answer is in the affirmative: I think the mere possibility that the projects contemplated as part of the Comett II programme may have repercussions on the research sector cannot justify the conclusion that the programme in question goes beyond the ambit of vocational training policy and thus prevent the Council from adopting it on the basis of Article 128 alone.

That conclusion cannot, I think, be affected by the fact that the Court took a different view with regard to the *Erasmus* decision, for the simple reason that, contrary to what the applicants submit, it is not possible merely to transpose the Court's reasoning with regard to the *Erasmus* programme to the Comett II programme, given the difference in the objectives and content of the two programmes.

In that regard I should observe first of all that the *Erasmus* programme is restricted to universities: it is intended solely for university lecturers and students, and its objective, in addition to mobility for students, is 'to promote greater cooperation between universities'.

It is precisely because of those features that in the *Erasmus* judgment the Court, after pointing out that the concept of vocational training includes university studies, with the sole exception of courses of study 'intended for persons wishing to improve their general knowledge rather than prepare themselves for an occupation',[12] nevertheless went on to state that scientific research is characteristically one of the functions off a university: indeed, a proportion of university staff devotes its time exclusively to research, and research constitutes an

12 — Judgment of 2 February 1988 in Case 24/86 *Blaizot* [1988] ECR 379, at paragraph 20.

essential element in the work of most university teachers and of some students.

On that premise, and in view of the absence of any express reservation as regards scientific research, the Court thus came to the conclusion in relation to the Erasmus programme that 'at least some of the initiatives planned are aimed at the spheres of both research and vocational training' [13] and that consequently Article 235 of the Treaty was required as a basis for its adoption.

10. Such a conclusion cannot be applied to the Comett II programme. Unlike the Erasmus programme, Comett II, as I have already stated, concerns the development of relations between universities and industry in the field of vocational training. It follows that teachers and researchers who benefit from the programme do so in their capacity as teachers and not as researchers. Moreover, the transnational exchanges between universities and industry provided for in Point 4(B) of the annex are at most indicative of the fact that the programme is restricted, with regard to its effects, to the exploitation and dissemination of the results of scientific research, and does not itself encompass research activities.

Although it is true that Article 130g(c) of the Treaty provides for the 'dissemination and optimization of the results of activities in *Community* research, technological development, and demonstration', it is also clear, indeed it follows from the very wording of the provision, that it concerns Community research programmes and that its essential purpose is to ensure that all businesses which may be concerned have access to the results of research financed by the Community.

A programme such as Comett II, on the other hand, concerns the organization of vocational training as such and thus does not in itself involve specific research or development activities which fall within the scope of the powers which are the subject-matter of Title VI of the Treaty.

As I have already stated, the dissemination and optimization of research activities resulting from the application of the Comett II programme constitute merely the natural consequence, if not the necessary complement, of any vocational training initiative in the field of advanced technology.

11. It follows from all the foregoing considerations that the Council was correct to base itself on Article 128 alone in adopting the contested decision.

I therefore propose that the Court dismiss the applications and order the applicants to pay the costs, including those of the interveners.

13 — *Erasmus* judgment, Case 242/87, at paragraph 36.