OPINION OF MR ADVOCATE GENERAL LENZ DELIVERED ON 25 OCTOBER 1984 [1]

Mr President,
Members of the Court,

The applicant in these proceedings has been drawing an invalidity pension since 1 December 1979 on the ground of total incapacity for work. This action concerns claims which he advances on the basis of Article 73 of the Staff Regulations and the Rules on the Insurance of Officials against the Risk of Accident and of Occupational Disease (hereinafter referred to as "the Rules"), adopted in pursuance of that article, in connection with the consequences of an assault of which he was the victim in May 1977, while in the service of the Communities, and in the course of which he sustained injuries to the head and the left knee.

As those events have already been the subject of proceedings before the Court (Case 186/80 [2]), it is not necessary to cite all the details of the case. It is sufficient to note the following points.

On 25 May 1979 the doctor appointed by the Commission submitted a report on the sequelae of the accident. According to that report the permanent partial invalidity rate for the various injuries was as follows: 25% for the eye injuries, 10% for the head injury and 2.25% for the knee injury (those figures give an aggregate partial invalidity rate of 34% under the Balthazar rule, which was explained to the Court in the oral procedure and under which the individual degrees of invalidity are not simply added together).

On that basis, in accordance with Article 21 of the above-mentioned Rules, the Commission sent the applicant a draft decision dated 24 July 1979, in which it was stated that it could be concluded from the medical findings resulting from the examination of the applicant on 18 May 1979 that the injuries resulting from the accident had at that stage consolidated. In addition it was proposed that — on the basis of an invalidity rate of 34% — a lump sum, pursuant to Article 73 (2) (c) of the Staff Regulations, of BFR 3 187 129 should be awarded.

The draft could not become a final decision within the meaning of the third paragraph of Article 21 of the Rules because the applicant requested within the prescribed period (on 7 September 1979) that a Medical Committee should reexamine his case pursuant to Article 23 of the Rules. He did so because he considered that, in the light of the findings of other doctors, the invalidity rate mentioned in the draft was too low in various respects (it failed to take into account any disfigurement and was based on a different assessment of the invalidity resulting from the knee injury). At the same time the applicant asked to be paid the lump sum mentioned in the draft decision as a *provisional allowance* in accordance with Article 20 of the Rules (a provisional allowance may be granted where the degree of invalidity cannot be defined after medical treatment is terminated and where the undisputed proportion of the invalidity rate is at least 20%).

That request was refused by the Commission on 22 October 1979 on the ground that although agreement had been reached with regard to the eye injury, the degree of invalidity was still a matter for dispute in two respects and was therefore to be determined by the Medical Committee which the applicant

1 — Translated from the German.

2 — Judgment of 14. 7. 1981 in Case 186/80, *Benoît Suss v Commission of the European Communities*, [1981] ECR 2041.

had asked to be constituted. The Commission ordered that payment was to be made only in respect of an invalidity rate of 25% (a sum of BFR 2 343 478). That position was reaffirmed in a latter dated 30 January 1980 (in which, moreover, it was acknowledged that the aggregate invalidity rate should not be calculated by means of the Balthazar rule, but by making a simple addition of the various degrees of invalidity, as the applicant had claimed in a letter dated 24 September 1979).

Following the rejection of his complaint of 12 February 1980, the applicant brought an action concerning the composition of the Medical Committee and the refusal to pay him an additional lump sum corresponding to an invalidity rate of 12% as a provisional allowance pursuant to the third paragraph of Article 20 of the Rules (Case 186/80, [1] to which I have already referred). The case dealt with the question whether the Commission could appoint to the Medical Committee the doctor who had already submitted the report of May 1979 and who was the medical officer for the Commission's insurers. The case also concerned the question whether the applicant was entitled to an additional provisional allowance under Article 20 of the Rules corresponding to an invalidity rate of 12% and the question whether interest was payable as from the date of the consolidation of the injuries.

In the course of those proceedings the Commission paid the applicant the additional amount requested, and the Court stated in its judgment (paragraph 23) that that issue had been settled. The applicant's remaining claims were dismissed.

The Medical Committee requested by the applicant met on 13 July 1982. At that meeting a fourth doctor was called in for consultation. After the committee had examined the applicant and considered all the medical documents which had been submitted (listed on pages 4 and 5 of the Medical Committee's report of 13 July 1982), it came to the unanimous conclusion that the applicant's permanent partial invalidity was to be assessed as 25% in relation to the eye injury, 8% in relation to the injury to left knee, and 1% in relation to the disfigurement, which resulted in an aggregate partial invalidity of 34%. The committee also expressed the view that further treatment was not necessary and that 1 April 1979 was to be taken as the date by which the injuries had consolidated (an earlier date than that proposed in May 1979 by the doctor appointed by the Commission).

The committee's conclusions were communicated to the applicant in a letter dated 3 February 1983 in which it was explained that the appointing authority had taken its decision in accordance with those conclusions. Moreover, it was stated in that letter that because the applicant had received a provisional allowance which was too high according to the findings of the Medical Committee, he would have to repay the difference between the two amounts, namely BFR 281 218. It was also stated that since his treatment after 1 April 1979 (the date by which the Medical Committee considered his injuries to have consolidated) could not be regarded as resulting from the accident, reimbursement at 100% under Article 73 of the Staff Regulations was not justified and therefore it would be necessary to make an adjustment of BFR 24 992 in

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processing future claims for the reimbursement of medical costs.

On 22 April 1983 the applicant addressed a formal complaint to the appointing authority in respect of that letter. In that complaint he criticized the Medical Committee's report (as regards the invalidity rate established therein, the date for the consolidation of the injuries and the necessity for further treatment). He requested the appointing authority to set aside the report and to annul the decision of 3 February 1983 based on it. He also asked that the invalidity rate and the date for the consolidation of the injuries be fixed in accordance with the views of a doctor consulted by the applicant, as set out in a report of 4 May 1982.

No decision was taken on that complaint within the time-limit laid down in Article 90 (2) of the Staff Regulations. The complaint was not expressly rejected until 3 October 1983. It was explained that the applicant had failed to show that the composition and the proceedings of the Medical Committee were irregular, and that, further, there did not appear to be any grounds for suggesting that the Medical Committee, which has a wide discretion, made an incorrect assessment of the applicant's case.

As a result Mr Suss brought an action before the Court on 26 November 1983. In his application he claimed that the Court should:

Declare the Medical Committee's report void;

Annul the decision of 3 February 1983 and the rejection of the complaint;

Declare that the applicant is entitled to an invalidity benefit calculated at a rate of 56%;

Fix as the date of consolidation 1 April 1979 in respect of the neurological sequelae and the eye injury and 5 April 1982 in respect of the knee injury;

In any event, declare the degree of invalidity fixed for the payment of the provisional allowance definitive and order a new expert opinion in respect of the sequelae which are still disputed;

Declare that thermal cures are necessary for the applicant.

In addition the applicant claimed in his reply that the Court should:

Order the Commission to pay BFR 50 000 under Article 73 of the Rules of Procedure and, because of the delay in dealing with his case, award the applicant interest on the allowance to which he is entitled.

The Commission considers those claims to be inadmissible in part, and in any case unfounded. Accordingly it asks the Court to dismiss the application.

My view on this case is as follows.

1. In the first place, in support of his claims, the applicant submits that the *Medical Committee's report* on which the decision of 3 February 1983 is based was *accepted and signed by four doctors,* that is to say, even by the doctor whom the committee consulted and to whom it entrusted the examination of the applicant's locomotor system. The fact

that a fourth doctor participated in drawing up the report and thus became a member of the Medical Committee constitutes an infringement of Article 23 of the Rules, according to which the Medical Committee is to consist of *three* doctors and only those doctors are to submit a report. The report was therefore not produced in accordance with the correct procedure and consequently a new expert opinion must be ordered.

I agree with the Commission that that view is incorrect. There was in fact no irregularity in the constitution and functioning of the committee (within the definition given in the judgment in Case 156/80, page 1374, paragraph 20 of the decision [1]).

An important consideration in that respect is that the Medical Committee cannot be compared to a court of law and that consequently the strict rules which operate in respect of the composition of judicial bodies are not applicable to it. That is clear from the decisions of this Court, in which it has been held that an official who is to be examined is not entitled to reject one of the doctors appointed by the appointing authority and that a doctor who has already acted for the appointing authority in an earlier stage of the procedure may be appointed to the committee (see the judgments in Cases 156/80 [1] and 186/80 [2]).

Another important consideration is that the Medical Committee is clearly entitled, in the interest of making an accurate assessment, to consult a specialist on a particular problem and to rely on his opinion. If it does so and then — as in this case — *unanimously* reaches a specific conclusion, there is no reason why the specialist's stated agreement with that conclusion should be regarded as an infringement of an essential procedural requirement which could be relied upon by the official examined. It is clear that even without the specialist's signature the Medical Committee's decision would not have been any different. The circumstance to which the applicant objects, namely the fact that the main conclusions in the report were endorsed jointly by four doctors, cannot therefore adversely affect the applicant's interests; on the contrary — as the Commission suggests — it is to be regarded as an additional guarantee of the justness of the Committee's findings.

2. The applicant relies in the second place on the fact that he was granted a provisional allowance, paid in two amounts corresponding to invalidity rates of 25% and 12% respectively. Inasmuch as the third paragraph of Article 20 provides for such payments only in respect of the *undisputed* proportion of the invalidity rate, the payment of that allowance fixed the undisputed proportion at 37%, that is to say the sum of the partial rates determined in May 1979 by the doctor appointed by the Commission. That rate was binding on the appointing authority and on the Medical Committee. Therefore the only issue which could be considered at any subsequent stage in the procedure was that of the proportion of the invalidity rate which was still a matter for dispute (in other words the questions whether the knee injury should be estimated at more than 2% and whether it was also necessary to take into account the

1 — Judgment of 21. 5. 1981 in Case 156/80, *Giorgio Morbelli* v *Commission of the European Communities*, [1981] ECR 1357.

2 — Judgment of 14. 7. 1981 in Case 186/80, *Benoît Suss* v *Commission of the European Communities*, [1981] ECR 2041.

disfigurement, which was not referred to in the report of 25 May 1979). It was therefore not permissible to decide that after the Medical Committee's intervention the applicant's permanent partial invalidity rate was only 34%. On the contrary, if account is taken of those elements of the Medical Committee's report in relation to which the Committee was still entitled to reach a conclusion, (in other words the assessment of the knee injury at 8% invalidity and the disfigurement at 1%), the applicant qualifies for compensation on the basis of an invalidity rate of at least 44% (25% for the eye injury, 10% for the head injuries, 8% for the knee injury and 1% for the disfigurement).

The Commission has emphatically rejected that view. It stresses that in principle under Article 20 of the Rules the payment of a provisional allowance is considered only if the degree of invalidity cannot be definitively determined, and therefore before the sequelae have consolidated. That was not the case in this instance, since the applicant's injuries had already consolidated in May 1979 — as is clear from the Commission's draft decision —, and it was only because that draft decision was rejected and because the matter was referred to a Medical Committee that the procedure had not yet reached a conclusion. Moreover, it takes the view that in any case the undisputed invalidity rate was only 25%. That is clear from its letters dated 22 October 1979 and 30 January 1980, in which it was expressly stated that any further degree of invalidity would have to be confirmed by the Medical Committee. Therefore the allowance awarded during the proceedings in Case 186/80 [1] must not be taken into account. It was in fact paid not on the basis of Article 20 of the Rules; it was intended as a gesture of conciliation, and moreover was made expressly "sans aucune reconnaissance préjudiciable" and "sous toutes réserves généralement quelconques, et singulièrement sous réserve de l'avis qui sera émis par la Commission médicale et de la décision qui sera prise par l'AIPN au vu de cet avis". On that basis, and because the Medical Committee was not bound by the findings of the medical examination in 1979 but was free to make its own assessment, there are therefore no grounds for challenging its conclusion that the definitive invalidity rate was only 34%.

I find it difficult to accept the Commission's position on that point.

In the first place, I do not find convincing the view that the third paragraph of Article 20 applies only where the injuries have not yet definitively consolidated. It seems to me entirely reasonable to grant a provisional allowance in respect of the undisputed proportion of the invalidity rate even where there is a dispute as to the total invalidity rate, and where the final figure is to be determined by a Medical Committee, which may take considerable time. In any case it is impossible to escape the fact that the Commission actually applied the third paragraph of Article 20 of the Rules in this instance. It

1 — Judgment of 14. 7. 1981 in Case 186/80, *Benoît Suss* v *Commission of the European Communities*, [1981] ECR 2041.

must therefore abide by its decision and must accept that the consequences of the application of that provision may be used against it.

The payment of an additional provisional allowance representing a 12% invalidity rate in the course of the proceedings in Case 186/80 [1] was made in connection with a claim asking the Court to order the Commission to pay such a provisional allowance and the Commission itself stated in its defence that "le chef de la demande du requérant relative à cette indemnité complémentaire *devient ainsi sans objet*". On the other hand the Commission did indeed make that payment subject to the above-mentioned reservations. There is clearly a contradiction here. However, in my view the Court resolved the problem when it stated in paragraph 23 of the decision in Case 186/80 [1] that *the issue had been settled* by the payment of an additional provisional allowance. That can only mean that the reservations expressed by the Commission were regarded as irrelevant or that they were in any case not construed as meaning that it would be possible to reconsider the matter and arrive at a decision less favourable to the applicant. The settlement of the issue does not mean that the question was solved on a purely *temporary* basis, as the Commission believes. On the contrary it implies that the applicant obtained satisfaction. However, since there is no other legal basis for the Commission's payment, the fact that he obtained satisfaction must mean that the payment was made in respect of the undisputed proportion of the invalidity rate within the meaning of Article 20 of the Rules and therefore the proportion which the administration may not subsequently revise.

At the same time, therefore, the invalidity rate of 37% acquired binding effect. (Moreover, the principle prohibiting *reformatio in peius* is also relevant, since Article 22 of the Rules and the wording of the provision on expenses in Article 23, which clearly do not envisage that the findings of the Medical Committee may be *less favourable* than those of the doctor appointed by the appointing authority, both suggest that that principle applies in respect of the Medical Committee). Because when the payment was made the appointing authority could rely only on the medical report of 25 May 1979, and because its letter of 15 October 1980 expressly referred to the fact that the doctor in question had been consulted, that means also that there could no longer be any dispute as regards the invalidity rates established by him, namely 25% in respect of the eye injury, 10% for the head injuries and 2% for the knee injury. Indeed the only questions which were still a matter for dispute were that of how the disfigurement resulting from the accident was to be assessed and whether the knee injury could be assessed at more than 2 % invalidity. The Medical Committee should have been given a correspondingly *limited brief.*

It follows that the Medical Committee's findings in relation to the neurological sequelae must be disregarded because they lack any legal basis. If it is assumed that in other respects the Medical Committee's report cannot be challenged and that therefore there is no need to repeat that procedure (I will return to

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that matter below), then its findings concerning the degree of invalidity arising from the knee injury (8%) and that to be attributed in respect of the disfigurement (1%) must be retained. However, that would mean that the applicant is entitled to compensation in respect of permanent partial invalidity of at least 44%. In the special circumstances of this case I have no doubt whatsoever that even though the Court cannot normally make findings of a medical character, that percentage should be specified in the judgment (whether that is sufficient will not become clear until all the submissions have been considered).

3. The plaintiff also claims that the Medical Committee's report is erroneous, and is therefore not applicable, in so far as it states in relation to the knee injuries and their consolidation that further treatment in the form of thermal cures does not seem indicated.

He maintains that the Medical Committee undertook only a superficial examination lasting half an hour (the details appear on page 11 of the application). He refers to reports of other doctors whom he consulted and who — in contrast to the Medical Committee, which only acknowledged sequelae of the accident in relation to the applicant's *left* knee, — assessed the degree of invalidity for *both* knees together at 20% (as is clear from Dr Schmitt's report of 22. 12. 1981 and Dr Chaumont's report of 4. 5. 1982). Finally, the applicant draws attention to the fact that on an invalidity card issued by the Luxembourg Ministry of the Interior his invalidity is stated to be at least 50%. On that basis he considers that he is justified in claiming compensation corresponding to 56% invalidity or, at least, in asking the Court to order a fresh examination by a Medical Committee.

(a) That claim, which requires the Court to make a medical assessment, forms the principal basis of the Commission's objection of inadmissibility. It relies on statements made in the judgment in Case 156/80 [1]. It was stressed in that case that the rules provide for all medical assessments to be subject to two examinations by medical experts. That is evidence of the desire to settle *definitively* all questions of a medical nature (paragraphs 18 and 19 of the decision). It is also emphasized that the Court's review cannot extend to medical appraisals properly so-called, which must be considered *definitive;* its review must be limited to questions concerning the constitution and the proper functioning of the Medical Committee (paragraph 20 of the decision).

That would seem correct, and all that might be added is that the Court — and the Commission also takes this view — may possibly consider the question of whether there has been a *manifest error* in the medical appraisal.

(b) In those circumstances it is difficult to see how it is possible to challenge the *nature of the examination* carried out by the Medical Committee.

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In that respect I may refer to Case 156/80 [1] in which it was stated that the Medical Committee was entitled to determine the nature and length of the personal examination of the applicant (paragraph 27 of the decision), which means that in principle such matters are medical matters in which the Court has no power to intervene. Moreover, the Commission has expressly stated that the examination by the Medical Committee was thorough and conscientious, and there is nothing in the plaintiff's submissions which indicated that a thorough examination of the point is necessary.

(c) In addition — as regards the *substance* of the Medical Committee's report — there is nothing to suggest that a manifest error was made in the assessment of the applicant's case.

It is clearly not enough that an invalidity card issued by the Luxembourg authorities — for entirely different purposes — states that the applicant's invalidity is at least 50%. Nor is it sufficient that two of the doctors consulted by the applicant (whose reports were, moreover, submitted to the Medical Committee and examined by it, as is clear from pages 4 and 5 of the Medical Committee's report) reached a different conclusion with regard to the knee injuries sustained, in respect of the degree of invalidity and the date of consolidation. There is nothing there which proves that the medical opinion reached unanimously by the Medical Committee (including the doctor appointed by the applicant) is not tenable.

(d) It may therefore be noted — the applicant has nothing special to say concerning the need for further treatment — that in so far as the Medical Committee's report is relevant to the submission under discussion it cannot be called in question and there are no grounds for suggesting that it cannot constitute a valid basis for the appointing authority's decision. I consider that there are no grounds whatsoever on which the Court might find that the invalidity rate is more than 44%, that another date should be taken as that of the consolidation of the injuries or that the applicant requires further medical treatment.

4. Let us now consider the additional claims submitted in the reply. The Court is asked to order the Commission to pay BFR 50 000 in accordance with Article 73 of the Rules of Procedure and to award interest on the additional lump sum owed to the applicant.

(a) I can be very brief in connection with the first claim which, since Article 73 of the Rules of Procedure concerns the recoverable costs of a party, refers to the Court's decision as to costs.

When delivering judgment the Court must give a decision as to the costs. That decision in principle states only who has to bear the costs of the proceedings, and, if necessary, whether a party has to pay a part (and which part) of the costs incurred in the proceedings by the other party. I will say how I think the costs should be awarded at the end of this opinion. However, it seems in no way appropriate to name a specific sum. The

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Court can do that only where a dispute arises between the parties as to the amount of costs which may be recovered under the basic decision as to costs set out in the judgment and where that dispute must be resolved by the competent Chamber pursuant to Article 74 (1) of the Rules of Procedure.

(b) Since the second claim is closely linked to the conclusions set out in the application (I refer to what the Court said in Case 186/80 [1]), I have no hesitation in considering it, although it was first raised in the reply.

In the first place the applicant's claim for interest on the additional lump sum to which in my view he is entitled in the light of the Medical Committee's report does not appear to be wholly unfounded. After all, a year elapsed between the delivery of the Court's judgment in Case 186/80 (on 14 July 1981 [1]) — at which point it became clear how the Medical Committee could be constituted — and the submission of the Committee's report (in July 1982), and then again more than six months passed before the administration drew its conclusions from the report — admittedly, as we have seen, incorrectly. The applicant may justifiably claim that there has been unreasonable delay within the meaning of the judgment in Case 156/80 [2] (paragraph 34 of the decision). However, since we do not know what is the explanation for the delay in producing the report and since some time must be allowed for the completion of administrative formalities after it had been drawn up (in view of the fact that it was during the summer holidays), interest can be claimed only as from 1 September 1982, at the earliest, at a rate which the Court must determine at its discretion.

5. My views may be summarized as follows.

The Court should:

(a) Declare that the Medical Committee's report is erroneous in so far as it fixes a lower degree of invalidity than that which the Commission had previously recognized as undisputed by granting the allowance;

(b) Annul the decision of 3 February 1982 in so far as it is based on an invalidity rate of 34% and requires the applicant to reimburse the amount representing the difference between the lump sum corresponding to that invalidity rate and the sum which was paid by the Commission as a provisional allowance;

(c) Declare that in the light of the Commission's conduct and on the basis of the findings of the Medical Committee the applicant is entitled to compensation corresponding to an invalidity rate of 44%;

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(d) Award interest on the additional lump sum payable to the applicant, which corresponds to an invalidity rate of 7%, as from 1 September 1982 at a rate to be fixed by the Court, and

(e) Dismiss the remaining claims.

If that is the outcome of the proceedings, I consider it appropriate to order the Commission to pay a third of the costs incurred by the applicant in the proceedings.