OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 13 September 2001 [1]

Introduction

1. The Commission is appealing against the judgment of the Court of First Instance of 14 July 2000, [2] which annulled a decision refusing an official permission to publish an article.

The central legal problem lies in the definition of the criterion which an institution must adopt in order to prevent legitimately the publication by one of its officials of a text which relates to the activities of the Community and which could prejudice the latter's interests. The institution's margin of discretion and, inversely, the rigour of any judicial review of legality must be considered in the light of the fundamental right to freedom of expression.

1 — Original language: Spanish.

2 — Case T-82/99 *Cwik* v *Commission* [2000] ECR-SC I-A-155 and II-713.

The facts

2. The facts giving rise to the present dispute are set out in the contested judgment and can be summarised as follows.

3. Mr Michael Cwik, an economist by training, began working for the Commission in 1970. During the period in question, his role involved receiving visiting groups and giving lectures on the euro, on economic and monetary union and on the range of work carried out by the Directorate-General for Economic and Financial Affairs (DG II), to which he was attached.

4. In March 1997, Mr Cwik was invited to give a lecture in Cordoba, Spain, as part of the Fifth International Congress on Economic Culture. The following October, Mr Cwik, or the respondent as he is now, requested from his superior, Director-General Mr Ravasio, permission to give the lecture, which was entitled 'The need for economic fine-tuning at the local and

regional level in the Monetary Union of the European Union'. [3] Mr Cwik attached to his request a summary and a detailed outline of his speech, together with an annex.

5. On 26 October 1997, Mr Ravasio granted permission but noted: 'This doesn't have much to do with economics. More classic presentation please. Pay attention to the risks of fine-tuning.'

6. On 30 October 1997, Mr Cwik gave his lecture.

7. In February 1998, the conference organisers requested the text of his lecture so that it could be published together with those of the other speakers.

8. The respondent wrote up the speech and requested permission to publish it from the Director-General, in accordance with the second paragraph of Article 17 of the Staff Regulations of Officials of the European Communities.

9. After consulting several colleagues, Mr Ravasio informed the respondent on 20 April 1998 that it would be inappropriate to publish his article.

10. Mr Cwik then amended his article in accordance with some of the criticisms made about the first version by one of the people consulted, and he applied again for approval on 5 June 1998.

11. After further consultation, on 10 July 1998 the Director-General again refused permission on the ground that the article presented 'a point of view which is not that of the Commission, even though the latter has not adopted an official policy on the matter.' He added:

'I recognise the importance of engaging in internal discussions reflecting the variety of economic policy options. However, when we go outside the institution, it would be better to present a united front....

I am afraid that the interests of the Community could be prejudiced where the Commission and its officials put forward different points of view. In addition, those of my colleagues who have read your article have expressed some doubts as to

3 — Footnote not relevant in English.

its quality. For those reasons, I am refusing permission for its publication.'

12. On 25 August 1998, Mr Cwik lodged a complaint under Article 90(2) of the Staff Regulations in respect of that decision.

13. The complaint was dismissed in the following terms by a ruling dated 5 January 1999:

'... possible conflicts of interest between an official and his institution over a publication are not confined to cases in which the official publicly dissents from a policy of the institution, since the latter may have an interest in preserving some room for manœuvre before it adopts a definitive view. Obviously, the fact that the complainant expressed a clear view in writing on the question [as to whether economic and monetary union called for territorial differentiation as regards fiscal and wage policies ("fine-tuning")] may have the effect, precisely, of restricting that room for manœuvre. Even if he were to make clear that his view is purely a personal one, the reader might nevertheless, in spite of that caveat, associate the view of an official working in that sector with that of his institution, precisely because the latter does not have a view.

Under no circumstances is a one-page summary comparable to an article of over 20 pages. Permission given on the basis of the former can certainly not entail permission for the latter. That principle is all the more relevant in the present case, where there are significant discrepancies between the summary of the lecture and the text of the article.'

14. On 20 April 2000, Mr Cwik brought an action for annulment of that decision.

The contested judgment

15. The contested judgment upholds the claim for annulment on the ground that the second paragraph of Article 17 of the Staff Regulations had been wrongly interpreted and wrongly applied.

16. As regards the decision adopted by the Director-General, the Court of First Instance held that merely establishing that there is a difference in the opinions of an official and his institution does not justify a finding that the interests of the Community have been prejudiced. On the contrary, freedom of expression requires that people must be permitted to hold opinions which differ from the official line. Furthermore, the Director-General's interpretation would render nugatory the second paragraph of

Article 17 of the Staff Regulations, which provides that a mere difference of opinions will not suffice and that permission may be refused only where the publication prejudices the interests of the Community.

17. The Court of First Instance observed that the ruling dismissing the complaint included a further ground for refusal, namely that the risk of an official's opinion being mistaken for that of the institution for which he works could restrict the latter's room for manœuvre when it came to adopt a position on fine-tuning. The Court of First Instance considered this assessment to be manifestly unfounded on the grounds that the Commission, despite its claim not to have an official position, had already stated publicly and clearly its views on the contentious issue in rather negative terms; that the author, who was acting in a personal capacity, did not hold a managerial post; and that the article was aimed at a readership consisting of specialists who were in all probability well-informed about the Commission's views.

18. The Court of First Instance held that there had been a manifest error of assessment and annulled the contested decision without examining the other pleas in law.

The grounds of appeal

19. The Commission has put forward two grounds of appeal.

20. First, it alleges that there was an incorrect interpretation of the second paragraph of Article 17 of the Staff Regulations, in that the contested judgment fails to take account of the administrative authority's discretion when considering the risk of damage to Community interests.

21. Second, the Commission complains that the grounds on which the judgment of the Court of First Instance is based are insufficient.

Examination of the appeal

First plea in law: the second paragraph of Article 17 of the Staff Regulations was interpreted incorrectly

22. In the appellant's submission, the Court of First Instance exceeded the limits of its power of review and gave an unduly restrictive interpretation of the second paragraph of Article 17 of the Staff Regulations.

This plea in law is supported by several arguments, three of which I have singled out for analysis below.

23. First of all, it is claimed that, in paragraphs 52, 56, 57 and 66 of the contested judgment, the Court of First Instance failed to take into account the preventive function of the prior authorisation procedure, even though it had in fact recognised this function in *Connolly* v *Commission*. [4] According to that judgment, 'the second paragraph of Article 17 of the Staff Regulations is a preventive measure designed on the one hand, to ensure that the Communities' interests are not jeopardised, and, on the other,... to make it unnecessary for the institution concerned, after publication of material prejudicing the Communities' interests, to take disciplinary measures against an official who has exercised his right of expression in a way that is incompatible with his duties.' [5]

24. In the appellant's opinion, to require the administrative authority to demonstrate, where permission is to be refused, that publication of the text would pose a definite risk to the interests of the Community could result in institutions having to grant permission in cases where such a risk is impossible to prove and then taking disciplinary action against the author once the damage has materialised.

25. I should like to make two preliminary observations. It is by no means clear either that the Court of First Instance did express, in the general terms claimed by the appellant, an opinion about the nature of the risk which may be relied on, or that the Court of Justice confirmed on appeal in *Connolly* v *Commission* [6] the argument regarding the preventive function of the second paragraph of Article 17 of the Staff Regulations.

26. On the matter of the Director-General's decision, the Court of First Instance confined itself to criticising the inadequacy of the reasons on which the refusal of permission was based, namely the finding that there might be a difference between the opinions of the official and the institution for which he worked.

27. Having said that, it is my view that, when an administrative authority exercises its discretion in such a way as to prohibit publication of a text, it is not that the damage must be real and imminent but that there must at least be a definite risk of serious harm. This interpretation is supported by the wording of the second paragraph of Article 17 of the Staff Regulations which provides that permission may be refused only in exceptional cases — which, in practice, does not sit easily with a claim based merely on an abstract or hypothetical risk —, read in conjunction with the necessary limitations set out in Article 10(2) of the European Convention on Human Rights ('the Convention'). [7]

4 — Joined Cases T-34/96 and T-163/96 [1999] ECR-SC I-A-87 and II-463.

5 — Paragraph 153.

6 — Case C-274/99 P [2001] ECR I-1611 ('*Connolly*').

7 — Which must always be interpreted restrictively (judgment in *Connolly*, paragraph 41).

28. According to the Court of Human Rights, the adjective 'necessary' involves, for the purposes of Article 10(2), a 'pressing social need' and, although '[t]he contracting States have a certain margin of appreciation in assessing whether such a need exists', the interference must be 'proportionate to the legitimate aim pursued' and 'the reasons adduced by the national authorities to justify it' must be 'relevant and sufficient'. [8]

29. It is true that the Court of Human Rights, which does not consider prior restraint procedures to be contrary to the Convention, [9] also believes that a purely abstract risk of harm may justify limitation of the right to freedom of expression. Accordingly, in *Worm* v *Austria*, [10] when analysing whether it was compatible with the Convention to impose a penalty on a journalist for infringing legislation providing for the punishment of those who seek to influence the outcome of proceedings that are *sub judice*, the European Court of Human Rights accepted that the Austrian courts were not required to establish that there was more than an abstract risk of harm in order to impose a penalty.

It is equally true, however, that the Convention acts as the lowest common denominator as to the substance of fundamental rights [11] and that there is nothing to preclude the European Union, like the parties to the Convention, from providing itself with a higher level of protection.

30. A study of the methodology used by the administrative authority to decide whether it would be appropriate to refuse permission under the second paragraph of Article 17 of the Staff Regulations reveals two conceptual stages. The first stage consists in choosing the criteria by reference to which the circumstances of each particular case must be considered, while the second entails considering the circumstances themselves.

31. I repeat that the applicable criteria, or test if preferred, is, generally speaking, that there must be a real risk of serious harm. Accordingly, it is not sufficient to include any type of possible or remote risk. In other words, the free expression of ideas and information by citizens, which is one of the fundamental values in a democratic society, would be sacrificed for the sake of an unqualified fear of harm to the public interest. This situation would be intolerable and incompatible with the essence of the principle of proportionality. The use of the adjective 'fundamental' to describe a right implies that it bears the principal assets of a

8 — See, in particular, *Vogt* v *Germany*, judgment of 26 September 1995, Series A No 323, paragraph 52.

9 — They do, however, call for careful scrutiny. See *Observer and Guardian* v *United Kingdom*, judgment of 26 November 1991, Series A No 216, paragraph 60, and *Wingrove* v *United Kingdom*, judgment of 25 November 1996, *Reports of Judgments and Decisions* 1996-V, paragraph 58 in fine.

10 — *Reports of Judgments and Decisions* 1997-V.

11 — Under Article 53 of the Convention, 'Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.'

legal system. In an advanced democracy, this personal patrimony may yield only in the face of an overriding public interest, which cannot merely consist of an insubstantial rational perception or have as its purpose the protection of an unspecified legitimate interest; rather, it must concern the predominance of one of the paramount interests of the Community legal system. In my opinion, in order to refuse permission the institution must conclude that publication of a text would entail a definite risk of significant harm, and it must draw this conclusion by reference to objective factors.

32. I now arrive at the second of the hypothetical stages outlined above. Whether there is a definite risk of significant harm may be assessed only by reference to factors which are equally definite and sufficiently objective in nature. This requirement, which follows from the actual definition of the notion of definite risk, also demonstrates the need for every decision of an administrative authority to be amenable to judicial review. An effective judicial review cannot take place if the factors on which the administration based the reasons for its decision are unknown. Those factors must be objective if a third party is to be able to express an opinion about them.

In addition, as regards the evidence used to assess the legality of a decision, the objective factors in question must be expressly set out in the written decision or, at the very least, be common knowledge.

33. This interpretation leaves the preventive function of the prior authorisation procedure intact. The author of a text the publication of which is not, by reference to objective factors, regarded as liable to place the Community at the risk of serious harm will not be disciplined. Otherwise, officials would be disciplined for having caused damage which, objectively speaking, was unforeseeable. It does however place a greater duty on the administrative authority to examine the details of each particular request for authorisation.

34. The Court of Justice has held that the purpose of the prior authorisation procedure is to allow the institution to keep itself informed of the views which its officials or other employees are proposing to express in writing about the work of the Communities so as to satisfy itself that they are conducting themselves with the interests of the Communities in mind and not in a way that would adversely reflect on their position. [12] Disloyal criticisms and statements which seek to insult or offend do not meet these requirements and break the relationship of trust which must exist between employer and employee.

35. Turning to the case before the Court, the Director-General refused permission to publish solely on the ground that when the Commission's services present themselves to the outside world they are required to express a uniform point of view.

12 — Judgment in *Connolly*, cited above, paragraph 54.

36. The Court of First Instance correctly held that a difference in the opinions of an official and the Commission cannot justify restricting freedom of expression.

In other words, the Court of First Instance considered that the reasons put forward by the Director-General were immaterial or, likewise, that he had failed to apply the correct criteria, namely that there must be a real risk of serious harm to the Community's interests.

37. To accept the reasoning put forward by the Director-General would be to strike at the very heart of the freedom of expression to which officials and other employees of the European Communities are entitled, [13] even in areas falling within the scope of the activities of the Community institutions. [14] While the expression of opinions might be permitted, it would be subject to the guidelines laid down by the system or the hierarchy; in other words, it would lack freedom. As early as 1794, Immanuel Kant warned that officials must also be accorded the right publicly to exercise their intelligence because, as members of civic society, they have an unlimited right to serve their reason, to speak as individuals and to make proposals which would improve the running of the state. [15] Even in relation to the law, there is no risk involved in permitting officials, like other subjects, publicly to exercise their reason and to express before everyone — including by way of frank criticism — ideas which are aimed at drawing up better legislation. [16]

38. The reasons behind the Director-General's decision are thus deeply troubling, in that they amount to denying a fundamental right in an area where the individual is assumed to be most able to exercise it. Therefore, it is vital that the Court of Justice strikes out this decision.

39. The decision in which the complaint procedure culminated cited another reason justifying the refusal of permission, namely, that publication of the article would limit the Commission's room for manœuvre when it came to adopt an official position on the contentious issue. The Court of First Instance analysed several factors and concluded that it was not reasonable for the Commission to fear that its room for manœuvre might be limited.

In this instance, although, hypothetically speaking, perception of the risk is regarded

13 — Judgment in Case C-100/88 *Oyowe and Traore* v *Commission* [1989] ECR 4285, paragraph 16.

14 — Judgment in *Connolly*, cited above, paragraph 43.

15 — Kant, I., *What is Enlightenment?* Advocate General F. Mancini quoted a similar extract at point 5 of his Opinion in Case 338/82 *Albertini and Montagini* v *Commission* [1984] ECR 2123.

16 — Ibid.

as material — in the sense that a definite risk of restricting the latitude necessary for adopting a politically significant stance could justify refusal —, the evidence which supports it is deemed insufficient; the administrative authority's reasoning is not based on the necessary objective factors.

40. The reasoning put forward in the contested judgment complies in all respects with the requirements of a democratic society. Accordingly, the first argument should not be accepted.

41. By its second argument in support of the first plea in law, the Commission complains that the judgment at first instance failed to recognise the administrative authority's discretion, particularly in relation to the technical content of the disputed text and to the risk of prejudicing the Community's interests.

In this instance, the administrative authority had decided that publication would be inappropriate on account of the economic and political context of monetary union and of the content of the article, in which Mr Cwik expressed his views about a very sensitive subject in relation to which the Commission had expressly decided to reserve its position.

42. The appellant has, to a certain extent, distorted the terms in which permission was refused. The contested judgment and points 11 and 13 above both indicate that publication was prohibited on the grounds that the point of view expressed differed from that of the Commission's services and that the article was liable to reduce the institution's room for manœuvre when it came to adopt a definite position. Nothing has been said about the political and economic circumstances prevailing at the time, or about the highly sensitive nature of the matter dealt with.

43. As to the terms themselves, suffice it to recall that the first reason was held to be immaterial and the second insufficient. It is perhaps worth examining the administrative authority's discretion in relation to the latter reason alone. It was for the authority to prove that publication might limit the room for manœuvre which the Commission required in order to adopt a definite position on a specific matter, and not for the court considering the legality of the decision to prove the contrary. A mere assertion that such a risk existed is manifestly insufficient and the Court of First Instance was entitled to confine itself to stating as much. Since the administrative authority failed to base its assertion on objective factors which proved satisfactorily that there was a definite risk, the issue of its discretion does not even arise. The administration cannot complain that its discretion was restricted when it failed to exercise that discretion or did so in a manifestly unsatisfactory manner, as is the case here.

44. Finally, the appellant appears to claim to have a certain amount of scope to assess the technical content of an article for which permission to publish has been requested. Suffice it to say that the second paragraph of Article 17 of the Staff Regulations does not grant the administration any powers whatsoever to examine the quality of a work with a view to deciding whether or not it is suitable for publication. Any qualitative judgment about a work which is to be published by an individual in a personal capacity is wholly immaterial for these purposes. [17]

45. The second argument must therefore be dismissed.

46. The Commission goes on to challenge the factors which the Court of First Instance examined at paragraph 66 of the contested judgment before ruling inadmissible the fear that publication of the article would reduce the institution's room for manœuvre, namely that the Commission, despite allegedly having not adopted an official position, had already expressed an opinion about the contentious issue; that the author of the article did not hold a managerial post; and that the article was addressed to a specialist readership. In the appellant's opinion, those factors are not decisive and they insert additional conditions into the second paragraph of Article 17 of the Staff Regulations.

47. The Court of First Instance did not include any additional requirements for refusing publication; rather, it examined, as it had a duty to do, [18] the specific circumstances of the case. Strictly speaking, the appellant's complaints could be held to be inadmissible on the ground that, even if they were accepted, the manifestly insufficient assertion that publication of the article would prejudice the Commission's room for manœuvre when it came to adopt a definite position would not be upheld. In any event, the complaints do not reveal any manifest error of assessment by the Court of First Instance, for which reason, factually speaking, they cannot be used as a ground to set aside the judgment.

48. By way of a final point, the Commission claims that, contrary to the statement made at paragraph 57 of the contested judgment, the public expression by an official of points of view which differ from those of the institution for which he works *can* and, in cases such as the one before the

17 — In *Albertini and Montagini*, cited in footnote 15, the Court accepted the contrary argument. However, it should be noted that in that case the Court's judgment concerned the special rules for publication applicable to officials attached to the Communities' scientific and technical services (Article 94 of the Staff Regulations), and it appears that it was understood that the authors were expressing their views in an official capacity. In addition, the dispute was not analysed in the light of the fundamental right to freedom of expression. In any event, that case must now be regarded as superseded.

18 — In fact, the Court of First Instance went further than it was required to do, since, as I have already explained, it could have just confined itself to stating that the reasons advanced by the Commission lacked sufficient foundation.

Court, *should* be regarded as liable to prejudice the Community's interests.

49. The Court of Justice has ruled that the freedom of expression enjoyed by officials and other employees of the European Communities 'extends to the expression, orally or in writing, of opinions that dissent from or conflict with those held by the employing institution.' [19] No further comment is necessary.

50. Accordingly, the first plea in law must be dismissed.

Second plea in law: alleged lack of reasoning

51. In the Commission's opinion, the reasoning in the contested judgment is inadequate in that it fails to consider important arguments which were put forward in the pleadings and at the hearing at first instance, and which are also set out at paragraph 43 of the contested judgment. Specifically, no response was made to the argument that it was necessary to analyse the contested decision in the light of the sensitive economic and political situation in which it was adopted, namely the implementation of economic and monetary union, to which many people were opposed and as a result of which it was reasonable to believe that there might be a risk of the personal opinion of an official being mistaken for that of the institution for which he worked.

52. The factor to which the Commission refers was relied on at first instance in support of the argument that when the decision was adopted it was reasonable to fear that the public would attribute the views of one of the Commission's officials to the Commission itself. That argument was expressly rejected by the Court of First Instance at paragraph 67 of the contested judgment on the ground that it was manifestly unfounded. In that regard, the Court of First Instance, being the final arbiter of fact, listed a series of reasons and, during that exercise, it decided not to consider this particular factual allegation which, in addition to the fact that it did not appear in the contested decision or in the ruling settling the complaint, were it even true, would not necessarily have had any impact on the outcome of the analysis of the plea.

53. Consequently, the alleged lack of reasoning, which would only have been material to the *argumentum iuris*, did not occur; nor was there a manifest error of assessment as to the facts. This ground of appeal must therefore be dismissed.

54. The appellant seeks to identify two other instances of lack of reasoning in the

19 — Judgment in *Connolly* v *Commission*, cited above, paragraph 43 in fine.

contested judgment. First of all, it claims that the Court of First Instance failed to indicate why the fact that permission had been given for the speech to be made at the conference meant that any reasonable fears regarding publication of the text of that speech had been dispelled; and second, it claims that the Court of First Instance did not explain the reasons why it disregarded the preventive function of the second paragraph of Article 17 of the Staff Regulations.

55. This twofold argument is wholly unfounded. The Court of First Instance states at paragraph 68 of the contested judgment that, for the purposes of preventing damage to the interests of the Community, the difference between the oral and written versions of a speech, assuming that there is one, is not sufficient to substantiate the risk which the Commission claimed to foresee. There has been no allegation of a manifest error of assessment, and nor do I believe that one took place, but in any event the Court of First Instance did not err in making this statement.

As to the claim that the preventive function of the authorisation procedure was not taken into account, I refer to my observations at point 33 above.

56. The second plea in law is therefore manifestly unfounded.

Costs

57. Under Article 69(2) of the Rules of Procedure, which is applicable to appeals in accordance with Article 118 thereof, the unsuccessful party must be ordered to pay the costs. Accordingly, if, as I propose, the Court dismisses the appellant's pleas, then the appellant must be ordered to pay the costs of the proceedings.

Conclusion

58. In view of the foregoing considerations, I propose that the Court of Justice should dismiss this appeal and order the appellant to pay the costs.