JUDGMENT OF THE COURT

13 December 2001 *

In Case C-340/00 P,

Commission of the European Communities, represented by J. Currall, acting as Agent, and D. Waelbroeck, avocat, with an address for service in Luxembourg,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Fourth Chamber) of 14 July 2000 in Case T-82/99 *Cwik* v *Commission* [2000] ECR-SC I-A-155 and II-713, seeking to have that judgment set aside,

the other party to the proceedings being:

Michael Cwik, an official of the Commission of the European Communities, residing in Brussels (Belgium), represented by N. Lhoëst, avocat, with an address for service in Luxembourg,

applicant at first instance,

* Language of the case: French.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P. Jann, F. Macken, N. Colneric and S. von Bahr (Presidents of Chambers), A. La Pergola, J.-P. Puissochet, L. Sevón, M. Wathelet (Rapporteur), R. Schintgen and V. Skouris, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 3 July 2001,

after hearing the Opinion of the Advocate General at the sitting on 13 September 2001,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 15 September 2000, the Commission brought an appeal, pursuant to Article 49 of the EC Statute of the Court of Justice and the corresponding provisions of the ECSC and

Euratom Statutes of the Court of Justice, against the judgment of the Court of First Instance of 14 July 2000 in Case T-82/99 *Cwik* v *Commission* [2000] ECR-SC I-A-155 and II-713 ('the judgment under appeal'), in which the Court of First Instance annulled the Commission's decision of 10 July 1998 refusing Mr Cwik permission to publish the text of a lecture that he had given on 30 October 1997 ('the contested decision').

Legal framework

2 The second paragraph of Article 17 of the Staff Regulations of Officials of the European Communities ('the Staff Regulations') provides:

'An official shall not, whether alone or together with others, publish or cause to be published without the permission of the appointing authority, any matter dealing with the work of the Communities. Permission shall be refused only where the proposed publication is liable to prejudice the interests of the Communities.'

Background

3 The facts giving rise to the dispute are set out in the judgment under appeal as follows:

'3 The applicant, an economist by training, began working for the Commission in 1970. At the time when proceedings were commenced, he was attached to

Unit 5 "Information, publications and economic documentation", directly attached to the Deputy Director-General responsible for Directorates B, C and E in the Directorate-General for Economic and Financial Affairs (DG II). His role was to receive visiting groups and give lectures on the euro, economic and monetary union and on all the activities and programmes for which the Directorate-General was responsible.

4 By letter of 12 March 1997, the applicant was invited by the provincial government of Cordoba (Spain) to give a lecture at the Fifth International Congress on Economic Culture.

5 On 20 October 1997, the applicant applied to his immediate superior, Mr Ravasio, for permission to give his lecture on 30 October 1997. The application stated that the lecture would be entitled "The need for economic fine-tuning at the local and regional level in the monetary union of the European Union". He included an outline and a detailed plan of his lecture with an annex.

6 On 26 October 1997, Mr Ravasio granted Mr Cwik permission, stating, however:

"This doesn't have much to do with economics. More classic presentation please. Pay attention to the risks of 'fine-tuning'".

7 On 27 October 1997, the applicant was given a mission order without costs for a trip to Cordoba between 29 October and 2 November 1997, and he delivered his lecture on 30 October 1997.

8 In February 1998, the organisers of the congress asked him to send them the text of his lecture so that it might be published with those of the other speakers.

9 The applicant then prepared the text and, in accordance with the second paragraph of Article 17 of the Staff Regulations, applied for permission to publish it from Mr Ravasio in his capacity as the appointing authority.

10 Mr Ravasio consulted Mr Östberg, an economist seconded to DG II by the Swedish Central Bank, as to whether such publication was appropriate.

11 Mr Östberg produced an extremely critical opinion of the text at issue but, before handing his opinion over to Mr Ravasio, he submitted it to his immediate superiors, Mr Kröger, the head of Unit 3 "Monetary Union: Exchange Rate and Domestic Monetary Policies" in Directorate D of DG II, "Monetary Matters", and Mr H. Carré, the head of that Directorate. The former initialled the opinion without making any comment and the latter wrote that "publication of the text at issue would be inappropriate". For his part, Mr Ravasio also consulted Mr Schutz, head of the unit "Budget Resources; Economic Information and Documentation; Relations with the European Parliament, the Economic and Social Committee and the Committee of the Regions", who was directly attached to the Director-General of DG II and who initialled the text at issue without making any comment on it.

12 In view of those circumstances, Mr Ravasio told the applicant on 20 April 1998 that "publication [was] inappropriate".

13 On 5 June 1998, the applicant submitted a further version of the text to Mr Ravasio for approval. It had been amended on the basis of the criticisms made by Mr Östberg. Mr Ravasio asked Mr Schmidt, Director of Directorate B of DG II "Economic Service", who was responsible *inter alia* for evaluating the economic impact of Community policies, to let him have his opinion on the reworked text. Mr Schmidt made certain criticisms and concluded:

"DG II has so far had a very prudent, almost negative, position towards the usefulness of discretionary fiscal policy. This article seems to advocate its full use referring to fine-tuning."

14 The applicant, on his own initiative, sent the second version of the text to Mr Östberg, asking him whether he continued to stand by the criticisms he had made in respect of the earlier version, but Mr Östberg refused to review the text on the ground that he could not express an opinion without having received specific instructions to do so from Mr Ravasio.

15 By letter of 10 July 1998, Mr Ravasio informed the applicant that he was refusing to grant permission to publish the text at issue on the ground that "it

put forward 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 its quality. For those reasons, I am refusing permission for its publication."

16 On 25 August 1998, the applicant lodged a complaint under Article 90(2) of the Staff Regulations in respect of the decision.

17 That complaint was rejected by decision of 5 January 1999.'

4 In its decision rejecting the complaint, the Commission made the following points in particular:

'... 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.'

5 On 12 April 1999, Mr Cwik brought proceedings before the Court of First Instance for annulment of the decision rejecting his complaint.

The judgment under appeal

6 In support of his appeal, Mr Cwik claimed *inter alia* that the second paragraph of Article 17 of the Staff Regulations had been wrongly interpreted and wrongly applied.

7 The Court of First Instance accepted that plea for the following reasons:

'56 The Court finds that in the contested decision the appointing authority confined itself to stating that the interests of the Communities could be prejudiced where the Commission and its staff publicly express different points of view. The decision does not explain why, in the present case, such a risk exists.

57 In a democratic society founded on respect for fundamental rights, the fact that an official publicly expresses a point of view different from that of the institution for which he works cannot, in itself, be regarded as liable to prejudice the interests of the Communities.

58 Clearly, the purpose of freedom of expression is precisely to enable expression to be given to opinions which differ from those held at an official level. To accept that freedom of expression could be restricted merely because the opinion at issue differs from the position adopted by the institutions would be to negate the purpose of that fundamental right.

59 Likewise, the second paragraph of Article 17 of the Staff Regulations would be rendered nugatory, since, as is apparent from its wording, it clearly lays down the principle on which permission for publication is granted, specifically providing that such permission is to be refused only where the proposed publication is liable to prejudice the interests of the Communities.

60 Consequently, the fact that there is a difference of opinion between the applicant and the Commission does not justify restricting the right to

freedom of expression, inasmuch as it has not been established that making that difference public would be liable, in the circumstances of the present case, to prejudice the interests of the Communities.'

8 The Court of First Instance also held:

'66 ... it is clear from the documents before the Court that, at the material time, the Commission had already publicly and clearly expressed its view on "fine-tuning" in, *inter alia*, official documents and that, unless there were exceptional circumstances, it entertained doubts as to the usefulness of measures of that kind and about the use, even at Member State level, of discretionary budgetary policies. Furthermore, the text at issue was written by an official who did not have any management responsibilities and who was expressing a personal view. Moreover, the text concerns an area on which the Commission states that it does not have an official policy. In any event, since the text is to be published in a collection of speeches made at the congress in question, it is intended for a readership consisting of specialists who are likely to be well informed about the Commission's views.

67 In those circumstances, the Court finds manifestly unfounded the defendant's argument that publication of the text at issue might entail a significant risk of the public mistaking the applicant's opinion for that of the institution, which could restrict the Commission's room for manœuvre in the relevant area and thereby prejudice the interests of the Communities.

68 Furthermore, although the difference between a lecture and publication of the text thereof may be of some significance, that difference is not such, in the circumstances of the present case, to justify the concern that the Commission's room for manœuvre might be restricted. In that regard,... the text at issue sets out the same arguments as those put forward by the applicant in his lecture, which was even entitled "The need for local and

regional economic fine-tuning in the monetary union of the European Union". Additionally, the fact that permission for the lecture was given by the appointing authority is a further indication that there was no risk of the applicant's opinion being mistaken for that of the Commission. In those circumstances, the defendant can have no grounds for contending that it had a reasonable concern that its room for manœuvre would be restricted by publication of the text at issue.

69 It follows that, in refusing to permit publication of the text at issue on the ground that it was liable to prejudice the interests of the Communities, the defendant made a manifest error of assessment.'

9 Consequently, the Court of First Instance annulled the decision at issue.

The appeal

10 The Commission claims that the Court should:

— declare the appeal to be admissible and well founded;

— set aside the judgment under appeal;

— dismiss, in consequence, the applicant's action or, in the alternative, refer the case back to the Court of First Instance;

— order the applicant to bear the costs.

11 Mr Cwik contends that the Court should:

— dismiss the appeal as inadmissible or, at the very least, unfounded;

— order the Commission to pay all the costs of the appeal.

12 In its appeal, the Commission relies on two pleas in law concerning (i) an error of interpretation as regards the second paragraph of Article 17 of the Staff Regulations and (ii) the failure of the judgment under appeal properly to state the grounds on which it is based.

The first ground of appeal

13 By its first ground of appeal, the Commission complains that the Court of First Instance, specifically in paragraphs 52, 56, 57 and 66 of the judgment under appeal, exceeded the bounds of its power to review the acts of the appointing authority and put an unduly restrictive construction on the second paragraph of Article 17 of the Staff Regulations.

14 The Court of First Instance failed, first, to have regard to the preventive function of that provision (recognised in Joined Cases T-34/96 et T-163/96 *Connolly* v *Commission* [1999] ECR-SC IA-87 and II-463, paragraph 153) when it ruled that the Commission had to provide factual evidence of prejudice to its interests and held that it had failed to establish, in the circumstances of the case, that the public expression of dissent between itself and the official concerned was liable to prejudice the interests of the Communities.

15 Second, the Court of First Instance did not take account of the appointing authority's discretion in respect of the technical aspects of the text of Mr Cwik's lecture and the risk of prejudice to the interests of the Communities. The Commission describes in that connection how the appointing authority consulted several specialists prior to adopting the contested decision, the economic and political climate in which economic and monetary union was being put in place and its need to reserve its official position in a very sensitive area. It claims that those factors prove that the appointing authority did not make a manifest error of assessment.

16 In its review of the way in which the second paragraph of Article 17 of the Staff Regulations had been applied, the Court of First Instance took three factors into consideration, namely the fact that Mr Cwik had no management responsibilities, the fact that the text concerned was intended for a specialist readership and the fact that at that time the institution had not, in any event, expressed a definitive opinion on the matter concerned. In doing so, the Court's appreciation of the appointing authority's discretion was clearly misconceived, since it attached to the second paragraph of Article 17 of the Staff Regulations conditions that are not found therein.

17 It should also be observed in that regard that the Court held in Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611, paragraph 53, that the second paragraph of Article 17 of the Staff Regulations clearly provides that, in principle, permission is to be granted and may be refused only in exceptional cases.

18 In so far as the provision enables institutions to refuse permission to publish, and thus potentially interfere to a serious extent with freedom of expression, one of the fundamental pillars of a democratic society, it must be interpreted restrictively, in such a way that permission to publish is refused only where publication is liable to cause serious harm to the Communities' interests (Case C-274/99 P *Connolly* v *Commission*, paragraph 53).

19 When it applies the second paragraph of Article 17 of the Staff Regulations, the appointing authority must balance the various interests at stake, taking account, first, of the freedom that an official has to express, orally or in writing, opinions that dissent from or conflict with those held by the employing institution — that freedom arising from the fundamental right of the individual to express himself freely — and, second, of the gravity of the potential prejudice to the interests of the Communities to which publication of the relevant text might give rise (Case C-274/99 P *Connolly* v *Commission*, paragraphs 43 and 57). In that connection, only where there is a real risk of serious prejudice to the interests of the Communities, established on the basis of specific, objective evidence, may the risk be taken into consideration for the purpose of applying the second paragraph of Article 17 of the Staff Regulations.

20 In order to enable the Community courts to exercise their power of review as regards the legality of a decision refusing permission to publish and to provide the official concerned with sufficient information to enable him to understand the reasons for the decision, the official must be given such information with the decision refusing permission or, at the very latest, with the decision rejecting his complaint.

21 In this instance, the Court of First Instance held, at paragraph 69 of the judgment under appeal, that, in refusing to permit publication of the text at issue on the ground that it was liable to prejudice the interests of the Communities, the Commission had made a manifest error of assessment.

22 First, the Court of First Instance found, in paragraph 56 of the judgment under appeal, that the Commission had confined itself in the contested decision to stating that the interests of the Communities could be prejudiced where the Commission and its staff publicly express different points of view, without having given reasons why that risk existed in the instant case. By definition — as the Court points out in paragraph 58 of its judgment — freedom of expression 'enable[s] expression to be given to opinions which differ from those held at an official level'.

23 It is clear that, contrary to the Commission's submission, the Court of First Instance did not fail to have regard to the preventive function of the second paragraph of Article 17 of the Staff Regulations — whose legality vis-à-vis the fundamental right to freedom of expression was recognised by the Court of Justice in paragraphs 52 to 55 of *Connolly*. The Court of First Instance simply criticised the reasons relied on by the appointing authority to substantiate the contested decision: those reasons merely stated that there was a risk that the interests of the Communities would be prejudiced where an official's opinion was different from the view expressed by the institution employing him. As has been pointed out at paragraph 19 above, only where there is a real risk of serious prejudice to the interests of the Communities, established on the basis of specific, objective factors, can a refusal of permission to publish be warranted.

24 Second, the Court of First Instance reviewed, at paragraphs 62 to 68 of the judgment under appeal, the reasons set out in the decision rejecting the complaint which complemented the statement of reasons in the contested decision.

25 In its decision rejecting the complaint, the Commission cited its need to preserve its room for manœuvre prior to taking up a definitive stance on the question as to whether economic and monetary union called for territorial differentiation as regards wage and fiscal policies ('fine-tuning'). It claimed that its room for manœuvre would have been jeopardised by the publication in point, since there was a risk that the relevant official's opinion would be mistaken for that of the institution employing him.

26 At paragraphs 66 and 67 of the judgment under appeal, the Court of First Instance ruled that such an assessment was clearly unfounded on the basis, first, that the Commission had already publicly and clearly expressed its view on the question, second, that the text of the lecture given by Mr Cwik had been written by an official with no management responsibilities who was expressing a personal view and, finally, that the text was intended for a readership consisting of specialists who were likely to be well informed about the views held by the Commission — which, moreover, claimed that it did not have an official policy on the matter.

27 It is apparent from settled case-law that such findings, which concern purely matters of fact, cannot be reviewed by the Court of Justice in the context of an appeal, except where the clear sense of the evidence submitted to the Court of First Instance has been distorted (Case C-191/98 P *Tzoanos* v *Commission* [1999] ECR I-8223, paragraph 23; and Case C-315/99 P *Ismeri Europa* v *Court of Auditors* [2001] ECR I-5281, paragraph 48). In that regard, the Commission has neither shown, nor even contended, that the Court of First Instance's findings were inconsistent or substantively inaccurate as regards the documents before it. In any event, it must be held that the findings of fact, which the Court of First Instance alone had jurisdiction to make and which the Commission challenges, evince no manifest error of assessment.

28 As regards (i) the complaint alleging that the judgment under appeal unlawfully restricted the appointing authority's room for manœuvre so far as the technical aspects of the text of Mr Cwik's lecture were concerned and (ii) the risk of prejudice to the interests of the Communities, particularly in a sensitive area such as economic and monetary union, it is sufficient to refer to paragraphs 22 to 25 of this judgment. It is clear from those paragraphs that the reasons which might have provided grounds for refusing to allow publication of the text of Mr Cwik's lecture were duly considered in the judgment under appeal. In that connection, a mere reference to the political and economic climate at the time of the contested decision and to the sensitive nature of the issue concerned, or even to the quality of the text of the lecture — factors which, in any event, as the Advocate General has pointed out at point 42 of his Opinion, were not mentioned either in the contested decision or in the decision rejecting the complaint — is not sufficient

to establish that there was a real risk of serious prejudice to the interests of the Communities, such as to justify restricting the fundamental right of an official to freedom of expression.

29 In view of the foregoing, the first ground of appeal must be rejected.

The second ground of appeal

30 By its second ground of appeal, the Commission complains that the Court of First Instance failed to respond to arguments of substance raised by it during the written and oral procedure before that Court and was thereby in breach of its obligation to state the grounds on which the judgment was based.

31 First, the Court of First Instance did not respond to the argument that it was appropriate for the Commission to consider the request to publish in the light of the sensitive economic and political climate in which the request was made, namely the introduction of economic and monetary union, and in which the Commission had, of its own accord, refrained from expressing a definitive view on various controversial subjects, including the one dealt with in Mr Cwik's lecture.

32 Second, the Court of First Instance gave no reason for its finding in paragraph 68 of the judgment under appeal that the fact that permission for the lecture was given by the appointing authority was a further indication that there was no risk of the applicant's opinion being mistaken for that of the Commission, although the latter had contended during the proceedings before the Court of First Instance that there was a fundamental difference between giving a speech at a congress (which is transitory) and publishing a text (which is permanent).

33 It is appropriate to point out that the argument put forward for the first time before the Court of First Instance about the political and economic climate in which the contested decision was adopted was advanced by the Commission in support of its proposition that it had a reasonable concern that the public might attribute the opinion of an official to the institution to which he was attached. However, in paragraph 66 of the judgment under appeal, the Court of First Instance specifically stated the grounds on which that proposition should be refuted and, as has already been pointed out at paragraph 27 of this judgment, those grounds are matters in respect of which it alone has jurisdiction.

34 The Court of First Instance specifically expressed the view — in paragraph 68 of the judgment under appeal — that the difference between delivering a lecture at a congress and publishing the text of the lecture is not such as to prove that there was a risk (as the decision rejecting the complaint alleged) of the opinion of the official concerned being mistaken for the view of the Commission.

35 Consequently, the second ground of appeal, concerning a failure to state the grounds, must also be rejected.

36 It follows that the appeal must be dismissed in its entirety.

Costs

37 Under Article 69(2) of the Rules of Procedure, which apply to the appeals procedure pursuant to Article 118, any unsuccessful party is to be ordered to pay the costs, if they are applied for in the successful party's pleadings. Since Mr Cwik applied for costs against the Commission and the latter has been unsuccessful, the Commission must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Dismisses the appeal;**

2. **Orders the Commission of the European Communities to pay the costs.**

Rodríguez Iglesias	Jann	Macken
Colneric	von Bahr	La Pergola
Puissochet	Sevón	Wathelet
Schintgen		Skouris

Delivered in open court in Luxembourg on 13 December 2001.

R. Grass — Registrar

G.C. Rodríguez Iglesias — President