OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 6 July 2000 *

I. Introduction

1. In order to answer the present question, referred for a preliminary ruling by the Pretura Circondariale di Torino (District Magistrates' Court, Turin) under Article 177 of the EC Treaty (now Article 234 EC), the Court must interpret the provisions of Community law applicable to the conditions of employment of local staff of the European Communities in the event that a Community entity refuses to renew their contracts of employment upon expiry of the contract term.

2. The proceedings before the national court are between Mr Roberto Vitari ('the applicant') and the European Training Foundation ('the Foundation'), the European Community body for which he worked, being employed initially as a member of the auxiliary staff and subsequently as a member of the local staff. The Foundation was established by Council Regulation (EEC) No 1360/90, [1] under Article 235 of the EC Treaty (now Article 308 EC), and its objective is to contribute to the development of the vocational training systems of the countries of Central and Eastern Europe. It has its seat in Turin. [2]

II. The facts of the main proceedings and the Italian legislation

3. According to the information set out in the order for reference, the applicant was recruited by the Foundation as a member of the auxiliary staff with a fixed-term contract running from 16 October 1995 to 31 December 1995. That contract was renewed for a second term from 1 January 1996 to 29 February 1996.

4. On the expiry of the second term, the applicant signed a new contract with the Foundation, this time as a member of the local staff with a fixed-term contract from 1 March 1996 to 31 December 1996,

* Original language: Spanish.

1 — Council Regulation (EEC) No 1360/90 of 7 May 1990 establishing a European Training Foundation (OJ 1990 L 131, p. 1).

2 — Article 1(b) of the Decision of 29 October 1993 taken by common Agreement between the Representatives of the Governments of the Member States, meeting at Head of State and Government level, on the location of the seats of certain bodies and departments of the European Communities and of Europol (OJ 1993 C 323, p. 1).

which was subsequently renewed until 30 June 1997, the date on which the Foundation deemed its employment relationship with the applicant to have ceased.

5. Mr Vitari then lodged an application at the Pretura Circondariale di Torino, since, in his view, the Foundation did not have the right to terminate the employment relationship. While not denying the relevance of Community law in this matter, he submitted that Italian law applied, in particular Law No 230/62 of 18 April 1962 [3] on the rules governing fixed-term employment contracts.

6. Having laid down a presumption that employment contracts are entered into for an indefinite period, Article 1 of Law No 230/62 states that, a fixed-term contract may nevertheless be entered into in the cases set out therein. [4]

Under Article 2 of the same Law, a fixed-term contract may, exceptionally and with the employee's prior consent, be extended once for a period not exceeding the duration of the initial contract, provided that the extension is necessary due to contingent and unforeseeable circumstances and that it relates to performance of the same activity. In the event that the employment relationship continues beyond the time-limit provided, the contract will be deemed to run for an indefinite period from the date on which the initial fixed-term contract was signed. [5]

7. Relying on the aforementioned Italian statute, the applicant seeks a declaration from the Turin court that an employment relationship of indeterminate duration existed with effect from 1 March 1996, the date on which he was first engaged as a member of the local staff. [6]

8. For its part, the Foundation asserts that the provisions of Regulation (EEC, Euratom, ECSC) No 259/68, [7] as subsequently

3 — GURI, 17 May 1962, No 125.

4 — These cases are as follows:
(a) where it is required by the particular nature of the work, owing to its seasonal character;
(b) where the purpose of the contract is to provide a temporary replacement for an absent employee who has the right to return to his or her post, provided that the contract states the name of the absent employee and the reason why a temporary replacement is required;
(c) where the purpose of the contract is to perform, within the contract term, a particular, specified job or service, the nature of which is unusual or occasional;
(d) where work is carried out in consecutive phases and requires different expertise from normal, provided that the contract is limited to the complementary or constituent phases in respect of which there is no continuity of employment within the business;
(e) where staff are engaged to produce certain shows or radio or television programmes (Law No 266/77 of 23 May 1977). In addition, Law No 84/86 of 25 March 1986 incorporated the additional case of staff who are employed by airlines or airport management companies.

5 — Article 12 of Law No 196/97 of 24 June 1997 made certain clarifications to this provision. Since the national court has made no reference to this Law, it must be deemed to be inapplicable to the main proceedings.

6 — It has not been explained, either in the order for reference or in the observations submitted to the Court, whether the applicant's claim is based on a breach of Article 1 of Law No 230/62 or on the operation of Article 2 the same Law.

7 — Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission (OJ, English Special Edition 1968 (I), p. 30).

amended, laying down the rules governing the employment relationship between the institutions of the European Community and their officials and other staff, should apply to its own staff. It states that, consequently, the national rules of the Member State where the employment relationship existed are not relevant and that instead Community law alone should apply.

III. The question referred for a preliminary ruling

9. The national court states that it is accepted by the parties that the general Community rules, contained in Regulation No 259/68, as subsequently amended, are applicable to this case, in view of the supranational nature of the European Training Foundation as a Community entity.

10. However, the national court indicates that, in the applicant's view, there is a discrepancy between the applicable provisions of Community law and Law No 230/62, which lists exhaustively those cases in which a fixed-term contract may be imposed, setting out specific penalties in the event that the legislation is infringed or circumvented, in particular providing for a fixed-term relationship to be transformed *ex tunc* into a relationship for an indefinite period. Therefore, the national court decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Must Article 79 of Regulation (EEC) No 259/68, as subsequently amended, be construed as meaning that the European institution is permitted to depart from national legislation with the consequence that rules of Community origin are alone applicable, or does it, in contrast, impose compliance with national legislation, particularly if that national legislation is mandatory and binding in nature?'

IV. Community law

11. The rules governing local staff of Community institutions are set out in the 'Conditions of Employment of Other Servants' ('the Conditions'). [8]

12. Under Article 1 of the Conditions:

'The conditions of employment shall apply to servants engaged under contract by the Communities. Such servants shall be:

8 — The Conditions are contained in Regulation No 259/68, cited in footnote 7 above.

— temporary staff,

— auxiliary staff,

— local staff.'[9]

13. Article 4 of the Conditions provides:

'For the purposes of these conditions of employment, "local staff" means staff engaged according to local practice for manual or service duties, assigned to a post not included in the list of posts appended to the section of the budget relating to each institution and paid from the total appropriations for the purpose under that section of the budget...'.

14. The provisions relating to local staff are set out in Title IV of the Conditions (Articles 79 to 81).

15. Article 79 states:

'Subject to the provisions of this Title, the conditions of employment of local staff, in particular:

(a) the manner of their engagement and termination of their contract,

(b) their leave, and

(c) their remuneration

shall be determined by each institution in accordance with current rules and practice in the place where they are to perform their duties.'

16. According to Article 80:

'As regards social security, the institution shall be responsible for the employer's share of the social security contributions under current regulations in the place where the servant is to perform his duties.'

9 — In Council Regulation (ECSC, EEC, Euratom) No 2615/76 of 21 October 1976 amending Regulation (EEC, Euratom, ECSC) No 259/68 as regards the conditions of employment of other servants of the European Communities (OJ 1976 L 299, p. 1).

17. Finally, Article 81(1) states:

'Any dispute between the institution and a member of the local staff serving in a Member State shall be submitted to the competent court in accordance with the laws in force in the place where the servant performs his duties.' [10]

18. With regard to Foundation staff, Article 14 of the aforementioned Regulation No 1360/90, as amended by Council Regulation No 2063/94, [11] provides:

'Staff rules

The staff of the Foundation shall be governed by the rules and regulations applicable to the officials and other servants of the European Communities.

The Foundation shall exercise over its staff the powers devolved to the appointing authority.

The governing board shall, in agreement with the Commission, adopt the appropriate implementing rules.'

19. As the order for reference indicates, the Foundation has not adopted specific rules for its own local staff, instead referring in full to the rules governing the conditions of employment applicable to local staff at the offices representing the European Commission in Rome and Milan ('the Rules').

20. Article 3 of the Rules stipulates that contracts of employment may be concluded for an indefinite or a fixed term but, in the latter case, only on condition that the circumstances or the nature of the work require that a fixed term be specified.

10 — In Council Regulation (EEC, Euratom, ECSC) No 3947/92 of 21 December 1992 amending the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities (OJ 1992 L 404, p. 1).

11 — Council Regulation (EC) No 2063/94 of 27 July 1994 amending Regulation (EEC) No 1360/90 establishing a European Training Foundation (OJ 1994 L 216, p. 9).

21. The Rules also govern, *inter alia*, the classification of local staff, their rights and obligations, their conditions of employment, remuneration, promotion to a higher grade, social security benefits, disciplinary action, appeal procedures and, in Article 26, termination of the contract. Under Article 26(1), a fixed-term contract comes to an end on expiry of the term stipulated therein.

V. Procedure before the Court Of Justice

22. The applicant in the main proceedings, the Foundation and the Commission submitted written observations within the period prescribed for that purpose by Article 20 of the EC Statute of the Court of Justice.

VI. Consideration of the question referred for a preliminary ruling

23. As I stated above, the national judge has explained that the reference for a preliminary ruling arises from the fact that, in the applicant's view, there is a discrepancy between Article 3 of the Rules and Italian Law No 230/62. However, both the applicant and the Foundation have denied in the observations they submitted to the Court that any such discrepancy exists. [12]

24. In the applicant's view, Article 3 of the Rules and Article 1 of Law No 230/62 are identical, in that they both restrict the cases in which a fixed-term contract may be concluded. Consequently, this case does not involve giving Community law priority over national law, or vice versa, but rather the application of both in such a way that they complement one another, as provided for by Article 79 of the Conditions.

25. The Foundation asserts that the question referred by the national court is irrelevant. In its opinion, it makes no sense in the present case to consider whether or not Article 79 of the Conditions authorises Community institutions to dispense with national legislation, since the rules applicable to local staff in Italy comply with the national rules governing fixed-term contracts of employment. The Foundation, in

12 — The Commission did not cover this point in its observations.

effect, takes the view that the national court has erred in restricting its analysis to Law No 230/62 and failing to take into account the subsequent development of Italian rules which have 'liberalised' the use of this type of contract to the extent that Community rules now impose stricter limits on fixed-term contracts than those prescribed by national law.

26. It is settled case-law that, in the procedure provided for by Article 177 of the EC Treaty providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to determine the case before it. [13]

27. In the present case, it is clear, in my opinion, that Article 3 of the Rules and Law No 230/62 reflect the same legislative option, namely the favouring of contracts for an indefinite term and the restricting of cases in which fixed-term contracts may be concluded.

13 — See, for example, Case C-334/95 *Krüger* [1997] ECR I-4517, paragraph 22 of the judgment.

28. In the circumstances, I believe that a general answer to the question referred, in its current form, would not assist in resolving this dispute. [14] The question must, therefore, be re-worded to clarify those aspects of Community law which the Piedmont court should take into consideration when reaching its decision on the substantive issue.

29. By its question, the national court seems to ascertain, first, which provisions should be taken into consideration when examining the validity of a fixed-term contract with a worker engaged as a member of the local staff and, second, in the event that the said contract must be deemed to be invalid, whether Community law precludes a penalty which creates an employment relationship between the parties for an indefinite period.

14 — I will point out, however, that, in my opinion, the answer to this question could be in the affirmative pursuant to the case-law of the Court, in particular Case 232/84 *Commission v Tordeur and Others* [1985] ECR 3223, which I shall discuss later, and Case 50/74 *Asmussen v Commission and Council* [1975] ECR 1003. In the latter case, on the subject of the former Article 94 of the Conditions, under which the Council had to determine the remuneration of establishment staff 'taking into account local practice', the Court held that '"local practice" need amount to no more than a motivation, that is to say, a simple guide-line which in no way excludes the taking into consideration of other factors' and that: 'Thus, Article 94 confers on the competent institutions a wide discretionary power to adapt the conditions relating to remuneration of the local staff and of the establishment staff to the particular local circumstances of each of the establishments in question, taking into account the requirements which arise both from the internal working conditions of these establishments and from the considerations resulting from the economic and social situation within which the staff are placed' (paragraphs 33 and 34 of the judgment).

30. Relying on the provisions cited in the order for reference, the contract could be considered to be invalid in two cases. The first, contained in both Article 3 of the Rules and Article 1 of Law No 230/62, would be if the circumstances giving rise to the employment relationship between the parties were deemed not to justify the election of a fixed-term contract by the Foundation.

31. In order to rule on this point, the national court must refer to Article 3 of the Rules which provides that there is a presumption that local staff in Italy are engaged under contracts for an indefinite period, except where the circumstances or the nature of the work require that a fixed term be specified.

32. It is the responsibility of the Italian court, rather than this Court, to determine whether the circumstances or the nature of the work carried out by the applicant justified his engagement under a fixed-term contract since, under Article 81 of the Conditions, disputes between the institution and a member of the local staff serving in a Member State are submitted to the competent court in accordance with the laws in force in the place where the servant performs his duties. In any event, the order for reference contains no information which would enable the Court to ascertain whether the conditions laid down in the aforementioned provision of the Rules have been satisfied.

33. The second case in which the contract might be deemed to be invalid, in accordance with Article 2 of Law No 230/62, would be if the employment relationship had continued beyond the expiry of the term stipulated in the initial contract, or into the first extension thereof.

34. As I have already indicated, the applicant was initially employed by the Foundation as a member of the auxiliary staff, with a fixed-term contract which was renewed once, and subsequently as a member of the local staff, also with a fixed-term contract which was likewise renewed once.

35. It should be emphasised that the Conditions lay down a clear distinction between the contracts of members of auxiliary staff and those of member of local staff. In particular, the contracts of members of the auxiliary staff are governed exclusively by Community law, [15] and disputes between such staff and the institutions for which they work fall within the jurisdiction of the Court of Justice, as stipulated in Article 73 of the Conditions which refers, for these purposes, to Title VII of the Staff Regulations. In short, any disagreement which might arise between the parties to the main proceedings concerning the previous contract, under which the applicant was employed as a member of the auxiliary staff, must be settled by the Court of Justice.

15 — Title III of the Conditions, Articles 51 to 78.

36. It follows from the above that the case brought before the Turin court concerns only the period during which the applicant was employed by the Foundation as a member of the local staff which cannot, under any circumstances, be deemed to be an extension of the previous contract under which he was employed as a member of the auxiliary staff.

37. Therefore, in reply to the first part of the question in its re-worded form, I believe that the answer to be given to the referring court should be that, in order to assess the validity of a fixed-term contract under which the European Training Foundation engages a worker as a member of the local staff, a national court, before which a dispute under Article 81 of the Conditions of Employment of Other Servants has been brought, must ascertain, pursuant to Article 3 of the rules governing the conditions of employment of local staff in the offices representing the European Commission in Rome and Milan, whether the circumstances or the nature of the work required that a fixed term be specified.

38. The second point I mentioned concerns the penalty which may be imposed on the Foundation in the event that the national court holds that the contract is invalid.

39. Community rules do not prescribe any penalties to cover this situation. As far as Italian law is concerned, the only provision cited by the national court in the order for reference is Law No 230/62 which provides that, in such a case, the contract will be deemed to have been entered into for an indefinite period with effect from the date on which it was signed.

40. In this context, one should refer to the Court's decision in *Tordeur*,[16] as the Commission has correctly done.

41. In *Tordeur*, the Cour du Travail (Higher Labour Court), Brussels, asked the Court whether, where Community institutions enter into fixed-term contracts with temporary workers, Community law precludes the application to the said institutions of provisions of national law which, in the event of infringement of other provisions of employment law, impose as a penalty a contract of employment of indefinite duration between the worker and the user of his services.

42. The Court noted that, first, under Article 6 of the Conditions, it is for each institution to determine who is authorised

16 — Case cited in footnote 14 above.

to engage servants under contract, whether they be temporary staff, auxiliary staff, local staff or special advisers.

43. The Court went on to state that, while it is true that a temporary member cannot be denied social protection solely on the ground that he has been placed at the disposal of a Community institution, such protection cannot be provided by means which would encroach upon the autonomy of the Community institutions. Consequently, it is not possible for a contract of employment with a Community institution, *a fortiori* where the contract is of indeterminate duration, to come into being as a result not of a decision of the designated competent authority but of the fact, even where it is supported by a decision of a national court, that certain statutory provisions of the Member State in which that institution is situated which relate to temporary work have not been complied with.

44. The Court held that:

'... Article 6 of the Conditions of Employment of Other Servants of the European Communities precludes the application to the Community institutions of provisions of national law which, in the event of non-compliance with certain national rules relating to temporary work, create a contract of employment of indeterminate duration between the temporary worker and the user of his services.' [17]

45. Although *Tordeur* concerned a fixed-term contract with a temporary worker and not, as in the present proceedings, a fixed-term contract with a member of the local staff, the Court's reasoning can, in my view, be applied in its entirety to the dispute between Mr Vitari and the Foundation.

46. Neither a rule of national law nor a judgment from a national court can oblige a Community institution or body to engage a local agent under a contract of indeterminate duration. Therefore, if the referring court should find that there has been an infringement of Article 3 of the Rules, and that it is appropriate to impose a penalty, it cannot order the Foundation to declare that the fixed-term contract which it entered into with a former member of its local staff has been transformed into an employment relationship for an indefinite period. [18]

17 — Paragraph 29, ibid.

18 — In the Opinion he delivered in *Tordeur*, Advocate General VerLoren van Themaat went further and stated that 'the national judge may only order the Community institution to pay adequate compensation'.

VII. Conclusion

47. In the light of the foregoing considerations, I propose that the Court of Justice give the following answer to the question referred for a preliminary ruling by the Pretura Circondariale di Torino:

(1) In order to asses whether a fixed term contract of employment of a member of the local staff, concluded by the European Training Foundation, is valid, the national court, before which proceedings have been brought under Article 81 of the Conditions of Employment of Other Servants, must ascertain, pursuant to Article 3 of the rules governing the conditions of employment of local staff at the offices representing the European Commission in Rome and Milan, whether the circumstances or the nature of the work required that a fixed term be specified.

(2) If the national court should find that the European Training Foundation has infringed Article 3 of the aforementioned Rules, it may impose on the Community body which employed the worker whatever penalty it considers appropriate under national law. However, Article 6 of the Conditions of Employment of Other Servants precludes as a penalty the imposition of an employment relationship for an indefinite term between the local agent and the Community entity.