OPINION OF ADVOCATE GENERAL ALBER

delivered on 6 June 2000 *

I — Introduction

1. The Council has brought the present appeal to challenge the annulment by the Court of First Instance [1] of certain decisions adopted by the Court of Auditors in its capacity as appointing authority for Silvio Busacca and others (the applicants at first instance, hereinafter 'the applicants'). By those decisions the Court of Auditors rejected the applicants' requests that their names be entered on the list of persons having manifested an interest in their service being terminated (early), as made possible by Council Regulation (EC, Euratom, ECSC) No 2688/95 of 17 November 1995 introducing special measures to terminate the service of officials of the European Communities as a result of the accession of Austria, Finland and Sweden [2] ('the Regulation'). However, this regulation authorises such measures to be adopted only in respect of officials of the European Parliament.

2. In the present case, the facts and the arguments of the parties are set out only in so far as they differ from the submissions of the parties in *Council* v *Chvatal and Others*. [3] In other respects reference should be made to the Opinion of the same date in those joined cases.

3. The essential difference compared with *Council* v *Chvatal and Others* is that in the present case the Council, which is bringing the appeal, did not intervene in support of the Court of Auditors at first instance. The applicants take the view that consequently the Council is also unable to bring an appeal.

II — Legal background

4. Article 49 of the EC Statute of the Court of Justice of the European Communities states:

'An appeal may be brought before the Court of Justice ... against final decisions of the Court of First Instance ...

* Original language: German.

1 — Judgment of 30 September 1998 in Case T-164/97 *Busacca and Others* v *Court of Auditors* [1998] ECR-SC I-A-565 and II-1699.

2 — OJ 1995 L 280, p. 1.

3 — Joined Cases C-432/98 P and C-433/98 P (pending before the Court).

Such an appeal may be brought by any party which has been unsuccessful, in whole or in part, in its submissions. However, interveners other than the Member States and the Community institutions may bring such an appeal only where the decision of the Court of First Instance directly affects them.

With the exception of cases relating to disputes between the Community and its servants, an appeal may also be brought by Member States and Community institutions which did not intervene in the proceedings before the Court of First Instance. ...'

III — Forms of order sought by the parties

5. The Council claims that the Court of Justice should:

— set aside the judgment of the Court of First Instance of 30 September 1998 in Case T-164/97 *Busacca and Others* v *Court of Auditors*;

— in its discretion, make an appropriate order as to the costs of the proceedings before the Court of Justice.

6. The applicants contend that the Court of Justice should:

— declare inadmissible the appeal brought by the Council of the European Union seeking the setting aside of the judgment of the Court of First Instance of 30 September 1998 in Case T-164/97 *Busacca and Others* v *Court of Auditors*;

— rule as appropriate on the procedural objection;

— order the appellant to pay the costs.

7. The Court of Auditors makes no application as to the substance but at the hearing asked the Court of Justice to order that it bear only its own costs.

IV — Legal appraisal

Arguments of the parties

8. The Council takes the view that the restriction on the right of appeal laid down in the third paragraph of Article 49 of the EC Statute relates only to actions of an individual nature brought by servants and does not apply to actions which concern the validity of measures of general application and in particular of regulations. The rationale underlying this provision is that institutions or Member States generally have no legitimate interest in review of the treatment at first instance of the internal disputes of other institutions. The contested judgment, however, concerns a general measure adopted by the Council. The judgment is an important one for many reasons, in particular from an institutional perspective, even though it relates to a staff case. Furthermore, the lack of validity of the Council regulation is practically the only object of the original action.

9. Finally, the Council refers to *Council* v *Chvatal and Others* which concerns the same questions. Since the Council intervened in those joined cases at first instance, its appeals there are in any event admissible. The interests of legal clarity would be served if uniform judgments were given in all three cases rather than possibly allowing one judgment of the Court of First Instance to become final and setting aside the other two.

10. At the hearing the representative of the Council asked the Court of Justice, with reference to case-law, to develop the right of appeal by creative interpretation following the example of the Parliament's power to bring an action. [4]

11. The Kingdom of Spain, which has intervened in support of the Council, supports this line of argument and considers that a correspondingly strict interpretation of the third paragraph of Article 49 of the EC Statute is necessary. Exclusion of the right of appeal of the institutions and Member States is justified only as regards questions of lesser importance which relate merely to individual disputes. At the hearing the representative of the Spanish Government pointed out that exceptions to general principles must be interpreted strictly. In the present case the general principle is the unlimited right of the Council to bring an appeal, whereas the restriction of this power in staff cases constitutes an exception.

12. Furthermore, the Council and the Kingdom of Spain make comprehensive submis-

4 — Case C-70/88 *Parliament* v *Council* [1990] ECR I-2041.

sions on the merits of the appeal. In that respect I refer again to the Opinion in *Council* v *Chvatal and Others.*

13. The applicants, on the other hand, maintain that the appeal is inadmissible and reserve their submissions on the merits thereof for the event that the Court of Justice decides otherwise.

14. They point out that the Council could, after all, have participated in the original action and thus preserved its rights. The third paragraph of Article 49 of the EC Statute does not provide for any counter-exception to the restriction on the right of appeal — a right otherwise granted to the privileged parties without the need for intervention in the original action — where staff cases concern the validity of measures of general application or have budgetary consequences. Moreover, such legal disputes occur frequently.

15. In their view, the right of the institutions and Member States to appeal outside the narrow field of staff cases is already unreasonable as it is not appropriate for a third party to contest a judgment which is accepted by all the parties to the proceedings. In that respect they rely on the Council's initial working documents on the rules concerning the right of appeal and the views of the Commission and the Parliament as set out in the legal literature. [5] This double privilege cannot be allowed to be extended further by means of interpretation.

16. Moreover, the Council's submissions regarding the delimitation of its special right of appeal in staff cases in which it has not participated at least as an intervener would, in the view of the applicants, adversely affect legal certainty and protection of legitimate expectations. On the one hand, it is unclear who is intended to enjoy this right of appeal. On the other, all staff cases concern at least one act of general application, that is to say the Staff Regulations.

17. The applicants accuse the Council of putting forward its arguments merely to avoid the consequences of its own negligence. The Council must have been aware of the original action since the applicants had requested access to the documents on measures concerning termination of service

5 — They refer to E. Van Ginderachter, CDE 1989, 62 (90 et seq.) and F. Picod 'Cour de Justice (Procédure)' No 138 in *Encyclopédie Dalloz, Droit communautaire*, vol. 2.

as a result of the accession of Austria, Sweden and Finland.

18. As regards the need for consistency with *Council* v *Chvatal and Others*, the applicants consider that even judgments in which measures of general application are implicitly found to be invalid can have legal force only between the parties involved. Others cannot rely directly on such findings.

19. As for the remainder, the applicants observe that the Council is contesting not only the Court of First Instance's findings on the validity of the Regulation, but even its findings on the admissibility of the action.

20. At a later juncture in the proceedings the applicants claimed that the Council and the Kingdom of Spain were delaying proceedings wherever possible to prevent implementation of the judgment at first instance. Both the appeal and Spain's intervention constituted an abuse of rights as it would be practically impossible to enforce the applicants' rights on account of the passage of time.

Appraisal

21. The wording of the third paragraph of Article 49 of the EC Statute clearly rules out any power of the Council to bring an appeal. The present case concerns 'a dispute between the Community and its servants' in which the Council did not intervene at first instance.

22. It is true that the Council and the Kingdom of Spain emphasise that the case is an atypical staff case — to a certain extent a concealed direct action against the Regulation — since it relates to the validity of a measure of general application and not merely to its application in a specific instance. However, it must be pointed out, as the applicants do, that staff actions can always potentially concern the validity of measures of general application.

23. Nor is any other conclusion possible on interpreting the third paragraph of Article 49 of the EC Statute. The rule on the right of appeal in staff cases must not be regarded as an exception to a general principle that the institutions and Member States have an unlimited right of appeal, needing to be interpreted strictly. Instead, the legislative context suggests a quite different general principle to which the unlimited right of the institutions and Member States to appeal outside staff cases

is in turn an exception. That is because under the second paragraph of Article 49 of the EC Statute only parties and interveners directly affected by a judgment can, in principle, bring an appeal. The very right of appeal granted therein to institutions and Member States which are interveners but not directly affected by the judgment of the Court of First Instance constitutes an alien element in the law governing appeals. The ability to appeal without intervening provided for in the third paragraph of Article 49 of the EC Statute goes one step further. This 'granting of a double privilege' — to use the applicants' words — is in turn limited by the exception in respect of staff cases. The question remains whether the general principle that exceptions must be interpreted strictly can be applied at all to this particularly complex situation involving principle, exception and counter-exception. In principle even a strict interpretation must be bound by the wording.

24. However, the Council and the Kingdom of Spain correctly point out that the spirit and purpose of the extended right of appeal of institutions and Member States support the view that this right is likewise unlimited in staff cases of considerable legal significance. After all, the aim of the extended right of appeal is to enable privileged appellants, as 'guardians of the law', to safeguard the consistency of case-law by bringing a case before the Court of Justice even where the parties to the proceedings before the Court of First Instance accept the judgment.[6] The extended power of Member States, the Council and the Commission to bring an action under the second paragraph of Article 173 of the EC Treaty (now, after amendment, Article 230 EC) reflects that task.

25. However, as regards staff cases the legislature expressly chose not to safeguard that function by granting the institutions and the Member States a double privilege, but instead limited their ability to bring an action to the single privilege granted in the second paragraph of Article 49 of the EC Statute. The Court of Justice cannot reverse this express rule by means of a teleological interpretation merely on the basis of the circumstances of a single case.

26. Finally, as regards the request for a creative interpretation of the law, this in principle requires a gap in the law contrary to the legislative scheme.[7] In this case, however, there is a specific rule. Nor is it evident that this rule has lost its justifica-

6 — H. Jung in Groeben/Thiesing/Ehlermann, *Kommentar zum EU-/EG-Vertrag*, fifth edition, 1997, Article 168a, paragraph 174, also describes the exception as inconsistent in that respect.

7 — See Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 27; Joined Cases 7/56 and 3/57 to 7/57 *Algera* v *Common Assembly* [1957] ECR 39.

tion as a result of changes to the system of legal protection or the institutional balance of the European Community. Rather, it is the case that under Article 168a(2) of the EC Treaty (now Article 225(2) EC) it was and is the Council itself which has ultimately to decide, in its legislative role, as to the scope of its privileged right of appeal. In such a situation, creative judicial interpretation of the law is inconsistent with the institutional balance and the resulting responsibility of the Council in its role as legislator.

27. Furthermore, the applicants correctly point out that the Council must have been aware that the case was pending before the Court of First Instance. Consequently, it could have easily secured its right of appeal — as it did in *Council* v *Chvatal and Others* — if it had also intervened in *Busacca*. The Council has given no reason which would justify its failure to do so in the present case.

28. Accordingly, there is no cause to regard the appeal of the Council as admissible contrary to the wording of the third paragraph of Article 49 of the EC Statute.

V — Costs

29. Under Article 122 of the Rules of Procedure of the Court of Justice, the Court must make a decision as to costs where the appeal is unfounded. In the present case the Council is the unsuccessful party and the applicants have asked for it to be ordered to pay the costs. Pursuant to the first paragraph of Article 69(2) of the Rules of Procedure, that request must be complied with. These costs are limited to the appeal. The Court of First Instance's judgment as to costs must apply to the costs of the original action. Under the first paragraph of Article 69(4) of the Rules of Procedure, the Member States which have intervened in the proceedings must bear their own costs. Since the Court of Auditors asks to bear its own costs, this request must be complied with.

VI — Conclusion

30. I therefore propose that the Court should rule as follows:

(1) The appeal is dismissed as inadmissible.

(2) The Council shall pay the costs of the appeal. The Kingdom of Spain and the Court of Auditors shall bear their own costs.