OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 5 December 1989 *

Mr President,
Members of the Court,

1. The admissibility of the actions brought by Mr Maurissen and the European Public Service Union ('the Union') against two measures adopted by the Court of Auditors on 17 and 31 March 1987 was dealt with in the Court's judgment of 11 May 1989. The Court then declared the application lodged by the Court of Auditors' employee admissible in its entirety and the application lodged by the Union only partly admissible, in so far as it is directed against the decision of 31 March 1987.

2. It would be inappropriate to describe once more the background to the dispute, which was set out in the Report for the Hearing. I shall merely refer to the substance of the difficulties raised by these actions:

the Court will first have to say whether the Court of Auditors was entitled, by its decision of 17 March 1987, to discontinue distribution of trade union communications by the internal messenger service of the institution;

it will then have to assess the lawfulness of the measure of 31 March 1987 refusing to give time off work to trade union representatives to take part in meetings with the Commission in connection with salaries, the crisis levy and amendments to the Staff Regulations of Officials.

3. Two submissions are made in that regard against the contested decisions:

(i) infringement of Article 24a of the Staff Regulations and breach of the duty to safeguard the interests of officials,

(ii) breach of the principle of equal treatment.

4. I shall make two observations before examining those submissions.

5. In the first place, the partial inadmissibility of the Union's application is of little practical importance since the arguments which it advances against the measure of 17 March are exactly the same as those put forward by Mr Maurissen.

6. In the second place, the second submission, although ostensibly relating without distinction to both measures, in fact relates, in the applicants' pleadings, only to the decision of 31 March 1987.

A — Infringement of Article 24a of the Staff Regulations and breach of the duty to safeguard officials' interests

7. Again I shall confine myself to recalling the substance of the arguments put to the

* Original language French.

Court, referring for the rest to the Report for the Hearing.

8. The applicants claim that trade unions have been given the right to engage in any lawful activity to defend the interests of their members as employees, the right to enter into agreements, the right to challenge the administration and the right to criticize measures adopted by the institutions. Accordingly, the institutions are not entitled to take refuge in a passive attitude since the duty to safeguard officials' interests requires them to guarantee freedom of expression. The contested decision, it is claimed, prevents the staff from being kept informed of the action taken to defend their interests and of any infringements of the Staff Regulations on the part of the authorities. The distribution of trade union leaflets by the internal messenger services constitutes in any event a fundamental and inalienable right, which existed prior to the conclusion of any 'framework agreement' within the institution.

9. Moreover, referring to the Court's judgment in *Abrias*[1] and the Council Decision of 22 and 23 June 1981 establishing a consultation procedure, the applicants state that trade unions are entitled and obliged to represent staff in the 'political consultation' meetings organized by the institutions. By refusing to grant time off work, the Court of Auditors is depriving the trade unions of the facilities required for them to discharge the duties thus entrusted to them.

10. The Court of Auditors contends in the first place that freedom of expression is respected since trade union communications may be freely distributed within the institutions under arrangements made by union members.

11. In general terms, it considers itself unable to grant the facilities in question in the absence of any relevant provisions and having regard to the budgetary consequences of such a course of action. Moreover, reliance cannot properly be placed on the duty to safeguard officials' interests since it presupposes that the institution is able to make a choice, and in this case it is not so able because of its legal situation. Finally, the facilities granted by other institutions involve the conclusion of *ad hoc* agreements, similar to collective agreements under the laws of the Member States. That fact shows that the claim that there are pre-existing rights in that area is unfounded.

12. The applicants observe that the Court of Auditors should have determined and criticized the illegality of the grant facilities by other institutions since it contends, in support of its own refusal, that they are improper.

13. Let me say straight away that, in so far as it is directed against the measures of 17 March, the first submission must, it seems to me, be dismissed.

14. All Mr Maurissen's statements concerning the function of trade unions and their powers are, it is true, not open to discussion. Moreover, the defendant does not dispute the principle of freedom of expression for trade unions. But the fact is that that principle does not appear to have been infringed by the contested decision. It is common ground that it did not in any way impede the distribution of trade union leaflets by union members or officials. In my

1 — Judgment of 3 July 1985 in Case 3/83 [1985] ECR 1995.

opinion, freedom of expression is unaffected provided that the trade union is able to make its views known, without restriction, to all the staff.

15. Moreover, according to the information available to me, no similar obligation is imposed on any administration by the laws of any Member State. What is involved in the present case is not the transmission of correspondence between union members but rather the distribution of union communications to all the staff. And while communications between members are the subject of regulations in some instances, distribution to staff does not appear to be required by national laws relating to the civil service.

16. In the present case, the existence is claimed of a general obligation which is 'fundamental and inalienable', adjectives which appear without doubt to apply to freedom of expression itself but not to distribution, by internal messenger services, of trade union communications.

17. I should point out however that, contrary to the views expressed by the Court of Auditors, the absence of specific provisions certainly does not make it illegal to have trade union leaflets distributed by the internal messenger service. It seems to me that the distribution by the Court of Auditors messenger service of the document produced in the proceedings clearly illustrates that the use of such facilities is a matter of choice for the institution concerned.

18. It is for that reason that I consider that the Court of Auditors cannot claim to have no choice in order to counter the allegation of breach of its duty to safeguard officials' interests. On that subject, its arguments seem to me to lack substance since it appears in fact to allow itself considerable latitude regarding the use of internal messenger services for the distribution of mail. I should also like to emphasize that that latitude must, in all circumstances, respect the neutrality of the public service and I have serious doubts as to whether internal services can really be regarded as 'letter boxes' in which anyone can place philosophical, commercial or political documents of his choice.

19. Accordingly, I do not think that the Court can criticize the contested measure for breach of the duty to safeguard officials' interests. That duty, confirmed by decisions of this Court, reflects:

'the balance of the reciprocal rights and obligations established by the Staff Regulations in the relationship between the official authority and the civil servants'. [2]

The circumstances in which the Court found that that duty had not been discharged relate to situations in which, by applying the rules in a fastidious or excessively inflexible manner, the administration failed to respect that special link between itself and its employees. However, it seems to me inappropriate to refer to such 'benevolent concern' with respect to relations which come within the sphere of trade union rights, which are thus *collective*, even though, in the present case, the applicant is an individual official.

20. In that connection, I think it is appropriate to go back to the German law by which the duty to safeguard officials'

2 — Judgments of 23 October 1986 in Case 321/85 *Schwiering* [1986] ECR 3199, paragraph 18, of 28 May 1980 in Joined Cases 33 and 75/79 *Kuhner* [1980] ECR 1677, of 9 December 1982 in Case 191/81 *Plug* [1982] ECR 4229 and of 4 February 1987 in Case 417/85 *Maurissen* [1987] ECR 551

interests was inspired. It is very clear from decisions of the Constitutional Court, Karlsruhe, that that duty is imposed on the administration 'alongside the traditional principle of the official's duty of loyalty'.[3] That interdependence, which is closely associated with the official's subordinate position in the hierarchy, is, by its nature, far removed from the relations between an institution and trade unions.

21. A last observation. The possibility cannot be ruled out that a practice adopted regularly and uninterruptedly by an institution might in this area, provided that it does not prove to be *contra legem*, in fact have legal force. It must be noted that no allegation has been made in the present case to prove that such a situation exists.

22. Consequently, in the absence of an express provision and in so far as freedom of expression is assured, I propose that the Court dismiss the first submission in so far as it is directed against the decision of 17 March 1987.

23. That is not, on the other hand, what I propose with regard to the measure of 31 March 1987.

24. In the first place, it is undeniable that the Court's judgment in *Abrias* confirmed the importance of negotiations between institutions and unions. In that case, officials brought an action against the Commission, which was supported *inter alia* by the Council and the union which is an applicant in the present proceedings, in order to have the 'exceptional crisis levy' discontinued.

The Court pointed out in the first place that 'the legislative framework' in question was

'the result of an agreement arrived at after *long negotiations* between *the* institutions and the most representative *trade union organizations* of the staff of the Communities'.[4]

The Court then drew attention to the role which the unions were able to play in defining the contested measure. Thus, in rejecting the submission based on breach of the principle of 'parallelism' provided for in the second subparagraph of Article 65(1) of the Staff Regulations, the Court stated that:

'The *agreement* of the most representative trade union organizations to bear some of the consequences of the particular difficulties of the economic and social situation that had emerged in the Community, by accepting an exceptional and single measure affecting remuneration, was counterbalanced by the adoption of a method of adjusting remuneration which preserved the principle of parallelism'.[5]

In particular, adjudicating on the allegation of breach of the principle of the protection of legitimate expectations of officials relied on by the applicants, who considered that the amendment in question went 'to the root of the employment relationship between officials and institutions', the Court clearly stated that:

'The staff trade union organizations were *closely involved* in the discussions which culminated in the implementation of both the new method of adjustment and the exceptional levy'.[6]

3 — Bundesverfassungsgericht, 15 December 1976, Entscheidungen des Bundesverfassungsgericht, p. 165.

4 — Case 3/83, *supra*, paragraph 10, emphasis added.

5 — Case 3/83, *supra*, paragraph 21, emphasis added.

6 — Case 3/83, *supra*, paragraph 26, emphasis added.

25. I do not think I am prejudging the Court's decision by drawing the following conclusion: the participation of the unions in negotiations with the institutions ensures that the interests of the staff are taken into account when the provisions of the Staff Regulations are defined. Moreover, approval of legislation by trade union organizations is not without importance as regards its legality, with respect in particular to observance of the principle of protection of the legitimate expectations of officials. Admittedly, recourse to any type of 'contractualization' in that regard would be hazardous since the provisions of the Staff Regulations are regulatory in character, but it must nevertheless be stated that the very terms of the Court's judgment show that it attaches to the approval of the trade unions undeniable legal consequences with respect to *the staff as a whole.*

26. Significant guidance is also given by the law relating to Staff Regulations. I have in mind the Council Decision of 21 and 22 June 1981 establishing a consultation procedure involving a committee on which it is provided that the *staff representatives are to be the trade union organizations.*[7] Moreover, it must be emphasized that the Consultation Committee gives its views exclusively on Commission proposals concerning amendments to the Staff Regulations, the application of the Staff Regulations or of the conditions concerning remuneration or pensions.[8] Finally, the Council provided that 'in the course of their work the members of the Committee shall endeavour to the greatest possible extent to align their position and thus to permit the submission of a report to the Council setting out common positions'.[9]

7 — Paragraph I.1 of the decision.

8 — Paragraph I.3 of the decision.

9 — Paragraph I.8 of the decision.

27. Admittedly, by the contested measure, the Court of Auditors refuses *all* time off work for trade union representatives and allows only members of the staff committee the possibility of time off. However, despite the general nature of that position, it has rejected an application for time off work exclusively for meetings with the Commission.

28. The Court of Auditors' analysis is perfectly clear: it pleads that it is legally impossible for it to grant any time off work in the absence of any provision in the Staff Regulations providing for such a possibility.

29. In that regard, it must be pointed out that, after the contested measure was adopted, the defendant granted time off for meetings of the Consultation Committee even though the Council decision does not contain any express provision in that regard. In other words, it has itself admitted that the consultation procedure established by the Council involved the need to grant time off work.

30. The applicants seem to me wholly convincing when they say that the Consultation Committee meetings do not necessarily constitute the essential feature of the consultation process. Negotiations with the Commission mark a decisive stage in the drafting of rules relating to staff in the broad sense. Indeed, it is that institution which is responsible for drafting the proposals submitted to the authority responsible for the Staff Regulations, which are also studied within the Consultation Committee. And it is clear that the effectiveness of the proceedings of that committee will be singularly increased if the Commission's proposals have already been approved by the trade unions. The definition of a common position, which as we

have seen is an objective laid down in the Council decision, will certainly thereby be made considerably easier.

31. An elementary knowledge of the negotiation process between trade unions and the administration is enough to show the need for detailed discussions and efforts to secure compromises. As I said earlier, the Court's judgment in *Abrias* also attached great importance to such dialogue.

32. Against that background, meetings between the trade unions and the Commission, which are at the centre of the present dispute, not only precede the consultation but form part of the consultation itself: I therefore consider that the 'useful effect' of consultation must lead to the conclusion that consultation exists as a 'unitary process'. The necessary *corollary* of that analysis is that unions should have the facilities to enable them to discharge their duties as representatives of the staff.

33. Moreover, it seems to me that the *principle* of granting time off work for the purposes of that process must be applied by the institutions. Otherwise, there would be a clear contradiction. On the one hand, the trade unions are established as exclusive representatives of the staff, and that situation gives rise to legal consequences, according to the decisions of this Court. On the other hand, the facilities for fulfilling that role might be refused them because of an over-legalistic approach.

34. I should also point out that the laws of the Member States coincide to a considerable extent in granting unions the facilities to discharge their duties, in the form of time off work. With the exception of Luxembourg law, which places emphasis on internal staff representation structures — to which German law and Netherlands law appear, but to a lesser extent, also to reserve most of the facilities in question — time off work is granted, often on a very broad and flexible basis (annual allowances of hours off, for example) for trade union activities and, in particular, for participation in meetings in which the interests of staff must be considered — which is precisely what is at issue in the present proceedings.

35. Of course, it is not for the Court to lay down detailed arrangements for granting time off work, that being a matter to be decided independently by each institution. But the difficulties involved, to which the Court of Auditors draws attention, in no way undermine the principle which it must observe.

36. I consider that the request to which the contested measure constituted a reply related to meetings with the Commission concerning salaries, the crisis levy and amendments to the Staff Regulations, which are all matters which unquestionably come within the field in which, by virtue of paragraph I.3 of the Council decision, the Commission proposals are the exclusive subject-matter of the proceedings of the Consultation Committee. Therefore the only question on which the Court must now give a decision is whether the Court of Auditors is under an obligation to grant time off work for the purposes of consultation, as defined earlier. The Court's decision will not extend to circumstances other than those of the present case.

37. I therefore invite the Court to annul the decision of 31 March 1987. It will be for the Court of Auditors to adopt the measures necessary to give effect to the Court's judgment, which will state, if it adopts my

analysis, that the institutions are required to ensure that trade union rights may be effectively exercised within the framework of the 'unitary consultation process'. Of course, detailed arrangements for that purpose are a matter to be freely determined by the defendant institution, which must take account of the requirements of the service referred to in its observations.

B — Breach of the principle of non-discrimination

38. In view of the foregoing observations, I do not think it is relevant to consider in great detail the second submission — which in fact, I would remind you, is directed only against the measure of 31 March — which the Court need only examine if it considers the first submission not to be well founded.

39. If that is the case, the Court will reject the argument that, having regard to the approach taken by institutions other than the Court of Auditors, the employees of the latter are the victims of unlawful discrimination.

40. In the first place, it is clear that such an approach might in practice give rise to a sort of 'most helpful institution clause', the implementation of which would certainly give rise to regrettable inflexibility and insoluble problems.

41. Then, I seriously doubt whether the principle of non-discrimination can be properly relied on as a basis for criticizing the approach adopted by two or more institutions. I consider that that principle prohibits the *same* authority from treating differently two identical situations or treating two different situations in the same way. However, it seems to me to be unrelated to a case where the practice of two or more institutions is criticized. Without doubt, the objection might be raised that the applicability of the same Staff Regulations requires the same treatment. But, in my opinion, the scope of that argument must be defined. Either the law requires all the institutions to observe one and the same principle, and it is inappropriate to invoke the principle of non-discrimination, since the application of the relevant provisions of the Staff Regulations suffices to ensure its implementation. Or else the matter comes within the freedom of each institution to make its own arrangements for internal organization and then, *ex hypothesi*, this takes us beyond the sphere of the Staff Regulations: possible differences of circumstances do not affect their unity.

42. Consequently, if the Court takes the view, contrary to what I propose, that the principle whereby trade unions must be granted time off work as part of the 'unitary process of consultation', it will then decide that what are involved are straightforward internal organizational arrangements, the comparison of which with those adopted by other institutions cannot give rise to *legal consequences* without undermining the independence of each institution.

43. Finally, I shall comment on the second limb of the second submission, concerning the different manner in which the Court of Auditors is said to treat its employees responsible for defending its interests by comparison with the trade union representatives. The defendant raises an objection of inadmissibility in that regard concerning Mr Maurissen's application, in which the initial complaint does not mention that argument, which must be regarded as new and therefore inadmissible.

44. The Court has held that

'an official may not submit to the Court conclusions with a subject-matter other than those raised in the complaint or put forward heads of claim based on matters other than those relied on in the complaint. The submissions and arguments made to the Court in support of those heads of claim need not necessarily appear in the complaint but must be closely linked to it'. [10]

45. It is doubtful in my opinion whether the allegedly unequal treatment accorded to the trade union representatives by comparison with that accorded to employees representing the Court of Auditors is closely linked with the submission alleging discrimination resulting from a refusal to make available the facilities granted by other institutions to unions, referred to in the complaint. Admittedly, the allegation is the same, but it would be difficult to reach the conclusion that the legal cause underlying the two limbs of the submission is the same. I am therefore inclined to adopt, in that respect, the analysis made by the Court of Auditors.

46. However, that observation appears to be devoid of practical effect. The argument in question is also relied upon by the European Public Service Union, and its application obviously cannot be declared inadmissible on that point because its action is based on Article 173 of the Treaty. But in any event, the Court will dismiss that limb of the second submission, since the Court of Auditors stated in its defence, without subsequently being contradicted, that its employees participate only in those meetings for which it also grants time off work to trade union representatives.

47. Accordingly, the alleged difference of treatment — if it were to be assumed that a comparison between employees acting for the institution and trade union representatives were relevant — has not even been established.

48. The question of costs remains to be considered. Mr Maurissen abandoned one of his three initial heads of claim. I propose that the Court uphold one of the two of two heads of claim which he maintained. I therefore think it is justified to suggest that the Court of Auditors be ordered to pay one third of the applicant's costs. As regards the action brought by the Public Service Union, which was declared partly inadmissible but which I propose should be upheld in so far as it is directed against the measure of 31 March 1987, I propose that the Court order the parties to bear their own costs. Finally, as regards the costs of the intervener, the same approach should be adopted as that I which I propose with respect to the Public Service Union's action, which was supported by the intervener.

49. Consequently I propose that the Court:

(i) annul the measure adopted by the President of the Court of Auditors on 31 March 1987 refusing to grant time off to trade union representatives in order

10 — Judgment of 20 May 1987 in Case 242/85 *Geist* [1987] ECR 2181, paragraph 9; see also the judgment of 7 May 1986 in Case 52/85 *Rihoux* [1986] ECR 1555, paragraph 13.

to participate in meetings with the Commission of the European Communities concerning salaries, the crisis levy and amendments to the Staff Regulations of Officials;

(ii) dismiss Mr Maurissen's remaining claims;

(iii) order the Court of Auditors to pay one-third of Mr Maurissen's costs and, for the rest, order the parties, including the intervener, to bear their own costs.