

JUDGMENT OF THE COURT  
OF 11 MARCH 1975 <sup>1</sup>

**Porrini and others v the European Atomic Energy Community and  
Comont S.p.A. and Bellintani and others v the  
European Atomic Energy Community and Cemi S.p.A.  
(preliminary ruling requested by the Giudice del Lavoro, Varese)**

Case 65/74

**S u m m a r y**

1. *Officials — Disputes with the administration — Persons claiming the status of officials or of servants other than local staff — Jurisdiction of the Court (EAEC Treaty, Article 152)*
  2. *Officials — Service relationship with the Community — Creation — Decision of the national court — Cannot produce such an effect*
- 
1. Article 152 of the EAEC Treaty must be interpreted as meaning that it applies not only to persons who have the status of officials or of servants other than local staff but also to persons claiming that status.
  2. The basis of the service relationship between the Community and officials or servants other than local staff cannot reside in a decision of a national court.

In Case 65/74

Reference to the Court of Justice under Article 150 of the EAEC Treaty by the Giudice del Lavoro (Labour Commissioner) at the Tribunale di Varese for a preliminary ruling in the actions pending before that court between

PORRINI AND OTHERS

and

THE EUROPEAN ATOMIC ENERGY COMMUNITY AND COMONT S.P.A.

<sup>1</sup> — Language of the Case: Italian.

and, in the second action,

between

BELLINTANI AND OTHERS

and

THE EUROPEAN ATOMIC ENERGY COMMUNITY AND CEMI S.p.A. on the interpretation of Article 152 of the EAEC Treaty and its application to persons who are not officials of the European Communities,

THE COURT

composed of: R. Lecourt, President, J. Mertens de Wilmars and A. J. Mackenzie Stuart, Presidents of Chambers, A. M. Donner, R. Monaco, P. Pescatore, H. Kutscher, M. Sørensen and A. O'Keefe (Rapporteur),  
Judges,

Advocate-General: G. Reischl

Registrar: A. Van Houtte

gives the following

## JUDGMENT

The judgment making the reference and the written observations submitted under Article 21 (2) of the Statute of the Court of Justice of the EAEC may be summarized as follows:

### I — Facts

1. The maintenance and cleaning of buildings and installations on the premises of the Joint Nuclear Research

Centre of Euratom (JRC) are, under a contract for services, in part entrusted to local firms.

2. Article 33 of Annex F to the Agreement between Euratom and the Italian Government for the establishment of the Ispra centre places the Commission under an obligation to ensure that, in contracts with firms for works or services, the staff employed by the contractor concerned shall receive

rates of pay, social security benefits and working conditions as favourable as those applied for work of the same nature in industries in the region concerned.

3. Italian Law No 1369 of 1960, promulgated after the conclusion of the said Agreement, prohibits such contracts when they are for the provision of labour only in which the contractor employs capital, machinery and equipment provided by the party which awarded the contract. In the case, however, of contracts which are not for the provision of labour only the Law provides that the party awarding the contract and the contractor shall be under a joint and several obligation to pay workers employed by the latter at rates which are as favourable as those enjoyed by staff employed by the employer awarding the contract.

4. When the Law came into force, it caused a union dispute at the Ispra establishment. The workers in the Cemi and Comont firms maintained that the Law applied to the JRC; that the contracts for services between their employers and Euratom were for the provision of labour only; that the capital, machinery and equipment were the property of Euratom; and even that, as the workers were in fact part of the administrative structure of the JRC, these contracts were fictitious.

The Commission rejected this contention and announced that it intended to engage the said staff by stages.

5. In May 1973, 43 employees of the abovementioned firms brought their respective employers and Euratom before the Tribunale di Varese claiming that the court should:

(a) declare that by reason of Law No 1369 they were officials of Euratom in Categories C2 and C3, with all the consequences which that implies, from the time when they started work;

(b) in the alternative, declare them to be establishment staff of Euratom in Class A, Group 2, Step 3;

(c) in the further alternative, and should the contracts for services not be held to be illegal, order Euratom and, jointly with it, the firms under contract to it, to pay to the plaintiffs, with retroactive effect, pursuant to the above-cited Law, the salary and emoluments equal to those received by officials or, alternatively, by the establishment staff in the categories mentioned;

(d) in the further alternative, declare that they are local staff.

6. Euratom, for its part:

— objected that the Italian court had no jurisdiction in respect of claims (a) and (b) which it contended fell within that of the Court of Justice since engagement as an official must be based on an instrument of appointment, for which no judicial decision may be substituted;

— raised a preliminary objection as to the substance, stating that Law No 1369 was not applicable to it since it related only to contractors and since neither the Community nor the JRC answered to this description in view of the fact that it was a non-profit-making body and, consequently, lacked an essential element in the activities carried out by an undertaking;

— as regards claim (c), invoked the Agreement between Euratom and the Italian Government providing for exemption from Law No 1369, and

— as regards claim (d), alleged want of any substantial interest on the part of the plaintiffs, since, in fact, the latter already received the emoluments applicable to local servants under the abovementioned Agreement.

7. If and in so far as they were concerned, the Cemi and Comont firms supported the conclusions of Euratom.

8. After joining the two cases the Labour Commissioner of the Tribunale di Varese delivered a judgment on 18 March 1974 in which he:

- dismissed claim (c) as unfounded on the ground that on the one hand Law No 1369 did not apply to Euratom, which was an institution which was not an undertaking, and on the other hand because the said Agreement contained a provision creating an exception to Law No 1369;
- dismissed claim (d) as unfounded as the applicants had not proved any substantial interest;
- ruled that, notwithstanding that Law No 1369 did not apply to Euratom, this did not render claim (a) and (b) inadmissible if account were taken of the general principles governing misrepresentation under which a simulated and fictitious situation must be ignored in favour of the real situation which it conceals.

9. The said court judged it necessary to seek a preliminary ruling under Article 150 of the EAEC Treaty from the Court of Justice on the following questions:

- (a) Is Article 152 of the Treaty to be interpreted as meaning that disputes between the Community and persons who, not being its servants, nevertheless claim to be such, fall within the jurisdiction of the Court of Justice?
- (b) Must the service relationship between the Community and officials and servants be invariably based on an instrument of appointment, or may that instrument be replaced by a decision of a judicial authority that a specific service relationship exists *de facto*?
- (c) Finally, if the answer to the previous question is in the affirmative, is the Court, under the rules and general principles of the Treaty establishing the European Atomic Energy

Community and of the Staff Regulations of Officials and Servants of the Community, entitled, on the basis of recognition that a service relationship in fact exists, to establish a direct service relationship between the Community and persons who, though apparently employed by firms of contractors to the Community, work on the latter's premises and, according to what the plaintiffs in these proceedings have asserted and propose to prove, use materials supplied by the Community for their work and act under the direction of its officials? The judge making the reference has asked the Court, in connexion with this last question, not to overlook the fact that, in the present case, one further result is that workers who may have different qualifications but who in practice work side by side in the same establishment, and are employed on the same or comparable duties, are remunerated differently according to whether they are directly employed by Euratom as officials or establishment staff, or by undertakings who are contractors to the EAEC.

10. After this judgment was delivered and in accordance with its declared intention, the Commission completed the process of engaging the workers concerned with the result that all the plaintiffs in the main action are now local staff. This does not deprive the proceedings of their purpose, since the main claims are concerned with obtaining, retroactively, the status of officials or establishment staff.

## II — Procedure

The judgment making the reference was received at the Court Registry on 12 September 1974.

Pursuant to Article 21 (2) of the Statute of the Court of Justice of the EAEC,

written observations were lodged on behalf of the Commission of the European Communities by G. P. Alessi, a member of its legal department, acting as Agent, and for the plaintiffs in the main action, by A. Ulgheri of the Milan Bar and A. Merlo of the Varese Bar.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate-General the Court decided that there was no need for any preparatory inquiry.

III — Summary of written observations submitted under Article 21 (2) of the Statute of the Court of Justice of the EAEC

1. *The observations of the Commission*

(a) Admissibility and interpretation of the questions referred

— *The first question*

As an answer that Article 152 is inapplicable would not necessarily mean recognition that the national court had jurisdiction, the Commission takes the view that it is of more importance to consider whether the national court has jurisdiction.

— *The second question*

The Commission believes that this question should be answered only if, in the answer to the first question, the court making the reference is recognized as having jurisdiction. Otherwise, the question whether a judicial decision can take the place of the instrument of appointment cannot, by definition, be decisive in the proceedings before the court making the reference since the judicial decision in question can, should the need arise, only be given by the Court of Justice of the Communities. It

is true that the tendency of the case-law of the Court is to leave it to the national court to determine the relevance of the questions referred. But, under Article 150, a request to the Court of Justice for a preliminary ruling is made expressly subject to the condition that the interpretation of Community law which the Court has been requested to give is necessary to enable the court referring the matter to give judgment. It necessarily follows that if, under Community law, the latter has no jurisdiction, it cannot give a decision on the substance of the case nor, consequently, can there be a reference to the Court for a preliminary ruling on the substance. Otherwise the Court would be giving a preliminary ruling in advance of a judgment which, in exercise of its exclusive jurisdiction, it might later be called upon to pronounce.

— *The third question*

As the court making the reference seems to take for granted that the dispute is within the jurisdiction of the Court of Justice and ignores the essential purpose of a reference for a preliminary ruling, the way in which this question is phrased also amounts to asking the Court to pronounce judgment in advance in disregard of the channels provided for a direct application to the Court and before the right of appeal through official channels has been exhausted. Moreover, the question seems to require application of Community law to a specific case rather than its interpretation in abstract terms. It is therefore important to make the admissibility of the question dependent on whether the answer to the first question recognizes the court making the reference as having jurisdiction; to make it clear that any judicial decision which may be intended to take the place of an instrument of appointment is not in any case a decision of the Court of Justice but that of the national court; and to separate the genuine questions of interpretation of Community law from

the references to the concrete aspects of the case.

(b) Substance

— *The first question*

This question concerns the applicability of Article 152 of the EAEC Treaty to disputes between the Community and persons claiming to be officials or establishment staff (the court making the reference dismissed as unfounded the claim to the status of local staff) and raises the question whether the national court does or does not have jurisdiction. The answer should be in the negative, because international organizations have always withdrawn disputes arising out of employment from the jurisdiction of the national court and, depending on the degree to which they have been institutionalized, provided for them to be dealt with by special judicial bodies such as the administrative courts of the United Nations or of the International Labour Office, or by *ad hoc* internal committees, as in the case of the Council of Europe, with the object of preventing any interference, however indirect, in their internal organization by the Member States. The absence of *ad hoc* bodies does not mean that the jurisdiction of the national courts, which is excluded by the immunity granted to the organizations, is restored to them but that any disputes are submitted to review by the administrative authority of the institution either by means of an appeal to a superior officer or to the author of the act complained of.

As far as the public service is concerned, the EEC and EAEC Treaties provided separate and comprehensive judicial protection the responsibility for which was reserved to the jurisdiction of the Court. Article 152 of the EAEC Treaty applies to disputes between the Community and its servants, namely officials, other servants, (excluding local staff), former officials (on questions such as pension arrangements), other persons affected by these arrangements and,

according to the case-law of the Court, candidates in an external competition. But only at the cost of a very strained interpretation would it be possible to regard individuals who have no formal connexion with the Community, such as the plaintiffs in the main action, as 'servants' or 'persons to whom these Staff Regulations apply'. In any case, the Court has jurisdiction under the third paragraph of Article 148 of the EAEC Treaty, which lays down the general basis, as regards cases of failure to act, for supervision by the Court of the Community's administrative actions, since the persons concerned can ask the Court to censure the Commission's attitude for having failed to take a decision appointing them as officials. The Commission submits that, if the Court regards the difficulty presented by the wording of Article 152 as insurmountable it should, on the basis of general law, under the third paragraph of Article 148 of the said Treaty, affirm its own jurisdiction in the type of dispute referred to by the Varese court; the Commission accordingly takes the view that the answer to the first question should be in the affirmative. It takes the liberty, moreover, of recalling that, if, on the ground that Article 148 applies, the answer should be in the negative, it would appear to be necessary to state that, under Community law, the national court has no jurisdiction in disputes of this kind.

— *The second question*

The answer on the subject of officials must be in the negative. Only persons who have been the subject of an appointment can be regarded as officials, which excludes any *de facto* employment capable of being legally validated by a decision of a court. The idea of the *de facto* status of official, developed by administrative law, consists in recognizing, within well-defined limits, the validity of actions carried out in that capacity but has no legal effect on the relationships between the administration

and those concerned. The application of this principle to officials is embodied in the case-law of the Court.

As regards establishment staff, however, they are generally engaged on contract. They are established after a probationary period (Article 90 of the Conditions of Employment of other servants of the Communities). But the effect of Articles 87, 91, 92, 93 and 97 of the Conditions of Employment, which refer to the corresponding articles applicable in the case of officials, is that, despite the fact that the relationship is based on a contract, the concept of establishment staff is, so far as its legal effects are concerned, assimilated to that of officials and does not therefore fall under private law. Establishment can take place only as a result of an administrative act of the Community; consequently, the contract does not seem able in itself to create an unqualified appointment. The real significance of this contract under the regulations governing the relationship is therefore unclear. If it were of decisive importance, it would, under private international law and, in particular, on the basis of association with the place where the contract was concluded and was to be performed, necessarily lead to the application, as an alternative, of different national legal systems depending on the staff concerned and, consequently, to an absence of uniform rules governing the relationship, but as the said staff must always fill posts provided for in the Community's detailed list of posts, this would be unacceptable.

Local staff provide evidence *a contrario* in support of this argument, for they are not intended to fill posts included in the Community's detailed list of posts; their relationship, a contractual one, with the Community, is governed by the relevant national legislation, and disputes arising therefrom are a matter for the national courts (Articles 79 to 81 of the Conditions of Employment.)

It is not possible, therefore, for such a court to create a public service relationship by substituting for the contracting parties a rule of its own as sometimes occurs in private law. As in the case of officials, the engagement of a member of the establishment staff, which is characterized by the conclusion of a contract and by the instrument of establishment, is within the exclusive province of the administrative authority. The Commission accordingly submits that if the Court sees fit to rule on this question, its answer should be in the negative.

— *The third question*

In view of the nature of the replies which it has suggested that the Court should give to the first two questions, the Commission regards the third question as pointless. Nevertheless, the Commission feels bound to express doubt whether there is any general principle common to all legal systems which, according to the national court, renders void the relevant contracts for services and makes it necessary for the court to create a direct relationship in law between the party awarding the contract and the workers employed by the contractor on the ground that the said contracts involved a legal fiction or, to be more precise, that they introduced a fictitious intermediary; this principle was simply adopted without any substantial variation by Italian Law. Contracts of this type are in force in all Member States with the exception of Italy (and perhaps in Italy, too, except when Law No 1369 applies.)

In any case, proof has not been forthcoming that the duties performed by the plaintiffs in the main action correspond to those carried out by officials or by establishment staff, and the fact that they were recently engaged as local staff may indicate the contrary.

2. *Observations of the plaintiffs in the main action*

For many years the staff of undertakings providing services have been paid at a substantially lower level for the same work than staff directly employed by the Community organization. The defendant firms formed purely fictitious bodies to act as an unnecessary and illegal intermediary between their employees and Euratom, which is their real employer.

On the question of jurisdiction, it is expressly provided under Article 32 of Annex F to Law No 906 of 1 August 1960 that: 'Any dispute arising out of the relationship of master and servant shall be settled in accordance with the relevant provisions of Italian Law'. The present case is not, as Euratom contends, concerned with creating a *de jure* relationship but with securing specifically for the said workers an economic and legal status equal to that enjoyed by staff directly employed by the Community and doing the same work.

Even if this came within the jurisdiction of the Court of Justice, it would have to apply Italian legislation because Euratom is in fact regarded as an undertaking within the meaning of Law No 1369.

— First question

Article 152 of the EAEC Treaty, which provides that the Court of Justice shall have jurisdiction in any dispute between the Community and its servants, lays down that this jurisdiction shall be exercised 'within the limits and under the conditions laid down in the Staff Regulations or the Conditions of Employment'. It follows that when, under a particular convention, such as

that between the Italian Government and Euratom (Article 32 cited above), the local courts are made responsible for settling disputes arising out of the service relationship, it is before them alone that proceedings may be brought. The fact that the administration does not recognize the workers as servants or officials is irrelevant.

— Second question

There may in certain cases be *de facto* service relationships. If the Commission refuses to grant the right to the title claimed by someone who showed that he fulfilled all the necessary conditions for it, it could be conferred on him by a judicial decision in the same way and on the same grounds as those available to an individual in defending his rights against the State.

— The third question

The Court of Justice must not be denied jurisdiction to establish whether the conditions necessary for the enjoyment of the rights prescribed for the purpose of performing certain duties are fulfilled. But the Italian courts must rule on the right of the plaintiffs in the main action to be given a new classification, to receive arrears of remuneration and to have a direct relationship with the Community established for them.

The oral observations of the plaintiffs in the main action, represented by A. Ulgheri, of the Milan Bar, and of the Commission, represented by its Agent G. P. Alessi, were made at the hearing on 6 February, 1975.

The Advocate-General delivered his opinion at the hearing on 25 February 1975.

## Law

- 1 By judgment of 18 March 1974, which arrived at the Court Registry on 12 September 1974, the Labour Commissioner of the Tribunale di Varese applied to the Court for a preliminary ruling on the interpretation of Article 152 of the Treaty establishing the EAEC and on its application to persons who do not have the status of officials or servants of the European Communities.
- 2 These questions were raised in the context of disputes relating to the according of recognition as Euratom officials or servants to employees of local maintenance and cleaning firms which had concluded contracts for services with the Joint Nuclear Research Centre established at Ispra.
- 3 It appears from the judgment making the reference that these workers, who are the plaintiffs in the main action, have protested against the fact that for many years, although doing the same work, they have not received the same treatment as staff directly employed by the Community, and that in their applications they have claimed the status of officials in Grade C3 or Grade C2 or of establishment staff in Class A Group 2 Step 3 with retroactive effect from the time when they started work.
- 4 The defendant in the main action has raised the objection that this claim is not within the jurisdiction of the national court because, in its view, it is a matter for the Court of Justice since engagement as an official must at all times be based on an instrument of appointment for which no decision of a court can be substituted.
- 5 The first question is whether, in these circumstances, Article 152 of the EAEC Treaty must be taken as meaning that disputes between the Community and individuals who, though not its servants, nevertheless claim to be so, come within the jurisdiction of the Court of Justice.
- 6 Article 152 provides as follows: 'The Court of Justice shall have jurisdiction in any dispute between the Community and its servants within the limits and

under the conditions laid down in the Staff Regulations or the Conditions of Employment.’

- 7 The Staff Regulations cover ‘officials’ appointed under the conditions provided for therein.
- 8 The Conditions of Employment also apply on the one hand to ‘temporary and auxiliary staff’ whose rights, which are similar to those of officials they define, and to ‘local staff’ (Title IV of the Conditions of Employment) whose conditions of employment are, under Article 79 (a), (b) and (c) determined ‘in accordance with current rules and practice in the place where they are to perform their duties’.
- 9 Under the provisions of Title VII of the Staff Regulations, the Court has jurisdiction in any dispute in which officials are involved.
- 10 Under Articles 46, 73, 83 and 97 of the Conditions of Employment the provisions of Title VII of the Staff Regulations shall apply by analogy to servants other than local staff.
- 11 As the conditions of employment of officials and servants other than local staff are determined by the Staff Regulations or by the Conditions of Employment, disputes arising over these conditions are, under Article 152 of the EAEC Treaty, placed within the jurisdiction of the Court, whereas the conditions of employment of local staff are laid down in accordance with national law and may be the subject of proceedings before the national courts.
- 12 In the present case, the national court has already exercised jurisdiction as regards the plaintiffs’ application to be recognized as local staff, and submits to the Court only a request for interpretation in respect of the plaintiffs’ claim to be granted the rights reserved to officials and servants other than local staff.

- 13 In these circumstances, as the rights in question are those recognized by the Staff Regulations, Article 152 of the EAEC Treaty must be interpreted as meaning that it applies not only to persons who have the status of officials or of servants other than local staff but also to persons who lay claim to this status.
- 14 The question has also been asked whether the basis of the service relationship between the Community and its officials or servants must at all times and invariably reside in an instrument of appointment or whether for this instrument there may be substituted a judicial decision, finding that on the facts there exists a particular service relationship.
- 15 In view of the answer to the first question, the reply to the second must be that the basis of the service relationship between the Community and its officials or servants other than local staff cannot reside in a decision of a national court.
- 16 In view of the answer to the second question, there is no need to consider the third.

#### C o s t s

- 17 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable.

As these proceedings are, in so far as the parties to the main action are concerned, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Labour Commissioner of the Tribunale di Varese by his judgment of 18 March 1974 hereby rules:

1. Article 152 of the EAEC Treaty must be interpreted as meaning that it applies not only to persons who have the status of officials or of servants other than local staff but also to persons claiming that status;
2. The basis of the service relationship between the Community and officials or servants other than local staff cannot reside in a decision of a national court.

Lecourt	Mertens de Wilmars	Mackenzie Stuart	Donner	Monaco
Pescatore	Kutscher	Sørensen	O'Keefe	

Delivered in open court in Luxembourg on 11 March 1975.

A. Van Houtte

Registrar

R. Lecourt

President

OPINION OF MR ADVOCATE-GENERAL REISCHL  
DELIVERED ON 25 FEBRUARY 1975 <sup>1</sup>

*Mr President,  
Members of the Court,*

There are two cases pending before the Labour Commissioner at the Tribunale di Varese in which the main relief sought is a declaration that a number of persons

ought to be regarded as Euratom officials or as establishment staff and should receive the appropriate remuneration.

These persons — meanwhile they have all become local staff within the meaning of Article 79 to 81 of the Conditions of

<sup>1</sup> — Translated from the German.