OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 4 MAY 1971[1]

Mr President,
Members of the Court,

The proceedings on which I am today delivering my opinion concern a claim based on Article 73 of the Staff Regulations of Officials of the European Communities. More particularly, it is concerned with a claim for the payment of a capital sum based on the annual basic salary which is said to be payable when an official dies in an accident. The relevant facts which are of importance in the case may be summarized as follows:

The husband of the applicant was an official in the Secretariat of the Council of Ministers of the European Communities and was resident in Brussels. At the beginning of 1969 he was on sick leave which he was spending with his parents in Lyon. The applicant cannot give further details about this because she last saw her husband in the Christmas holidays of 1968 and at the beginning of January 1969. All that may be gleaned from her statements is that her husband entered a neurological clinic in Lyon for examination from the time from 17 to 20 February 1969. On the evening of 20 February 1969 he apparently left the house of his parents to go and buy some medicines. From this time on he was missing. His body was taken from the Rhône in Lyon on 1 April 1969. According to the findings of the police and an official medical certificate death was caused by drowning.

In reliance on this fact Mrs Duraffour made an application on behalf of herself and her five infant children on 15 January 1970 to the General Secretary of the Council of Ministers for the capital sum provided in the case of fatal accident to her husband in Article 73 (2)(a) of the Staff Regulations. However her application was unsuccessful. In a letter from the Secretary-General of the Council of Ministers of 10 April 1970 she was informed that the insurance companies with which the Council of Ministers had entered into a contract to cover the risks set out in Article 73 of the Staff Regulations, had refused to pay compensation. In view of the declaration made by the brother of the deceased on 3 April 1970, they were sure that it was not a case of accident but rather a case of suicide which was not covered by the insurance policy. According to the Secretary-General this was in accordance with the basic principle governing such cases whereby the person claiming benefit under Article 73 of the Staff Regulations had to prove the existence of an accident to the institution, as employer and policyholder, and also to the insurer. The application had to be rejected for lack of such proof.

Consequently on 14 May an action was brought before the Court of Justice. In her application Mrs Duraffour formulated the following claims:

(1) for the annulment of the decision of the Council of Ministers rejecting the claim by implication after the lapse of the two months since the claim was lodged and in so far as was necessary also for the annulment of the express decision of 10 April 1970;
(2) for a declaration that she and her children had a right to payment of the sum mentioned in Article 73 (2)(a) of the Staff Regulations;
(3) for an order that the Council of Ministers pay this sum and the corresponding interest.

The defendant Council of Ministers regards the application as admissible but without foundation.

Let us now examine what opinion we should give in view of the facts as they now stand in a case that is certainly one of the most delicate staff cases.

I should like to begin my examination by citing the basis of the claim, that is

1 — Translated from the German.

Article 73 of the Staff Regulations. The relevant provisions are as follows:

'1. An official is, from the date of his entry into the service, insured against the risk of occupational disease or accidents in the manner provided for in rules drawn up by common agreement of the Institutions of the Communities after consulting the Staff Regulations Committee. He shall contribute to the cost of insuring against non-occupational risks up to 0.1% of his basic salary.

. . .

2. The benefits payable shall be as follows:

(a) In the event of death:

Payment to the persons listed below of a lump sum equal to five times the deceased's annual basic salary calculated by reference to the amounts of salary received during the twelve months before the accident:

— to the deceased official's spouse and children in accordance with the law of succession governing the official's estate; the amount payable to the spouse shall not, however, be less than 25% of the lump sum;

. . .'

In addition I should here point out that this provision is incomplete, in so far as the rules mentioned in the first subparagraph have not yet been issued for lack of agreement between the relevant institutions. The Council, in common with the other Community institutions, has solely concluded contracts through an insurance broker established in Antwerp with insurance companies in Member States and in third countries in order to cover the risks mentioned and on the expiry of the contract has renewed it several times. In the course of these renewals there were certain alterations in the consortium of insurers in that certain insurers left the consortium and other companies joined it and also the percentages accepted by the individual companies.

1. In this case, the first question to be asked is whether in the case of an accident there exists, as the applicant maintains, a direct claim for benefits against the Council of Ministers as employer or whether the rules at present in existence solely give rights against the insurance companies. This question was not clearly put at the beginning of the case. However in the second pleading of the Council of Ministers great stress was laid on it. In this pleading it is stated that the applicant at most has a claim for payment against the the insurance company but not in respect of the Council of Ministers. Similar arguments were also presented in the oral proceedings.

To answer this question correctly we must analyse carefully the text and the scheme of Articlie 73, make comparisons with provisions which were previously in force and also examine the principles of national law. Thus it is clear that it is of no great significance that the German text of Article 73 speaks of *Sicherung* (protection) of officials. More precise conclusions can be made from the French text which uses the word 'couvert' (covered). The word is also used in Article 72 of the Staff Regulations in respect of compensation for expenses incurred in case of sickness, that is, in respect of claims which are certainly directed against the competent institution itself. This permits one to conclude that Article 73 also refers to a direct claim against an institution. This becomes even clearer from the text of Article 73 (2) which states that benefits are 'payable' ('garantiert'), in the event of death a lump sum is to be 'paid' (zahlen), and that 'an annuity may be substituted for the *payments* provided for above' and also 'the *benefits* listed above may be *paid* (gewährt) in addition to the benefits provided for in Chapter 3'. This all points to the existence of a direct claim against the institution as

also do the rules relating to reimbursement in paragraph 3 which ought to be regarded as part of a coherent system. Moreover comparison with Article 23 of the earlier Staff Regulations of the European Coal and Steel Community brings support for this theory and argues against the view that direct claims only exist against the insurance companies. In that Article it is in fact clearly provided that the official is *insured* (versichert), reference is made to *insurance protection* (Versicherungsschutz), to risks not covered by the *insurance* (Versicherung) as provided by the general conditions of the *insurance contract* (Versicherungsvertrages) and of the benefits provided by the *insurance* (Versicherung). As a different formulation was chosen in Article 73 of the present Staff Regulations, the conclusion may certainly be drawn that not solely insurance claims were intended. In addition to these arguments drawn from the wording there are also considerations relating to the sense of the provisions which are certainly of some force. It appears to me important that Article 73 of the Staff Regulations does not differentiate between cover against occupational disease and accident and cover against non-accidental accidents. Further it is not to be expected that the rules to be adopted by the institutions will make great changes with regard to the essential problems of rights and obligations. If one considers the principles of national law relating to public officials[1] in respect of occupational accident and sickness, it becomes clear that the view that there is no direct right against the employer and that officials and those deriving rights through them can be referred only to private insurance companies is untenable. In view of this, and also in view of the fact that as mentioned above Article 73 makes no distinction, the conclusion may indeed be drawn that non-occupational accidents are to be regarded according to the same principles. In addition reference should be made to the requirement of equality of treatment which is an important principle in the law relating to public officials. It would be difficult to reconcile rules which vary from institution to institution with this principle. Such a situation could be produced if the consequences of accidents could be governed (so long as the common implementing rules provided for by Article 73 are not yet formulated) by reference to the insurance contracts concluded by each institution which may vary considerably. Finally the employer's welfare obligations (Fürsorgepflicht) which is largely a German legal concept, must not be forgotten. In my opinion this is hardly to be reconciled with the fact that officials, for whom the Staff Regulations provide for *compulsory cover of non-occupational accident risks* and who are also under an *obligation to make contributions* to their employer in this respect, could be referred, for the purposes of dealing with the results of an accident, to a group of insurance companies established in different states whose composition is changing and who are not jointly and severally liable and be bound by an arbitration clause whereby, as provided in the insurance policy, recourse to the courts of law is excluded.

For all these reasons, the question raised should be answered to the effect that, contrary to the opinion of the Council of Ministers and in accordance with the opinion of learned writers,[2] Article 73 of the Staff Regulations gives officials and their survivors a direct right against the competent community authority. We can here leave open the question whether there are also additional claims against insurance companies, possibly on the basis of a contract under private law in favour of a third party, since the applicant has expressly and exclusively relied on Article 73 of the Staff Regulations.

1 — Plog-Wiedow, Kommentar zum Bundesbeamtengesetz, Note 2, par. 151. Plantey, Traité pratique de la fonction publique, No 1883.
2 — Cf. for example, Holtz, Handbuch des europäischen Dienstrechts, page 451.

2. It becomes clear from reading Article 73 of the Staff Regulations that it does not contain very comprehensive rules in respect of claims for benefit and their details. For this reason provision was made for the adoption of implementing rules. Since these provisions have not yet been adopted and since, as we have mentioned, it appears unacceptable to refer those who have rights to the insurance companies and thus to exclude any claim on the basis of Article 73 there remain only two means of dealing with the problem caused by Article 73's being incomplete. One possibility would be, for an interim period, to give each institution the power to adopt its own rules, a power which could be used where appropriate by entering into an insurance contract which would be deemed to be implementing rules for the purposes of Article 73 once the contents of the policy had been notified to those with rights under that Article. The other possibility would be to refer to the general legal principles drawn from the laws of the individual Member States in order to fill the gaps which have become apparent.

I must straight away state that in my opinion the first mentioned possibility must be excluded. It is unacceptable not only in view of the time that has elapsed since the adoption of the Staff Regulations and because of the non-observance of the procedural requirements set out in Article 73; above all it cannot be considered because it takes no account of an essential principle of the law relating to public servants, that is, equality of treatment. The second possibility is all the more suitable as it corresponds with a quite customary method of finding the legal principles applicable in a given situation ('Rechtsfindung') in the Communities, a method which is for example expressly stipulated in the second paragraph of Article 215 of the EEC Treaty relating to an area of law which has not been without its problems, that is the non-contractual liability of the Community institutions for acts carried out in the performance of their duties. In the present case at least, there can be no doubts about adopting this solution, because only two problems have appeared from the arguments relating to Article 73: first, the question of the concept of 'accident' and on the other hand that of the burden of proof. Examination will show that the solution does not present insurmountable difficulties if this method is used. I shall not look at the matter in greater detail.

(a) My comments as regards the concept of accident, which is relevant because the applicant bases her claim on the existence of a non-occupational fatal accident, may be comparatively short. Although it is true that, contrary to the view of the applicant, who refers to Littré, it is not enough to elicit the meaning of the concept according to customary usage, it is, however, no less true that unanimity may be achieved if reference is made to the criteria of insurance law. Thus for example in paragraph 2 of the German General Accident Insurance Conditions, which were drafted in cooperation with the State, contains the following provision: 'An accident exists if the insured involuntarily suffers physical harm caused by the action upon his body of a sudden external event'.[1] This corresponds to a large extent to the definitions adopted by the legislation of the other Member States. In this respect I refer to Sicot-Margeat, Précis de la loi sur le contrat d'assurance, Fourth Edition, 1962, No 605; Fredericq, Traité de droit commercial belge, 1947, Volume III, pages 362 to 364; Molengraaff, Leidraad bij de beoefening van het nederlandse Handelsrecht, 1955, Volume III, page 727, and Novissimo digesto italiano, assicurazione contro le danni, No 72, 73. These make it clear that for an accident to exist there must be an external, fortuitous, involuntary,

1 — Cf. also Plog-Wiedow, loc. cit. Note 4 to paragraph 135.

and unintentional effect on the health of a person and that suicide cannot be regarded as an accident (this is also made clear by articles 1 and 4 of the insurance policy taken out by the Council).

Even if Article 73 of the Staff Regulations does not make the same distinctions, it is not sufficient, in order to establish a claim, to prove death by drowning, that is, by the external effect of the water (as the applicant undoubtedly has shown); it is necessary in addition to show whether the event giving rise to the damage was brought about voluntarily or involuntarily. It is clear from the conflicting arguments of the parties that this is the centre of dispute in the proceedings. I shall not examine the factors which they relied upon in this respect but, within the scope of the legal examination in the form which I indicated earlier, I will first examine the problem, which is also one of substantive law, of who suffers from a *non liquet* in the question whether the drowning was voluntary, thus who bears the burden of proof on this point. From our examination it should become apparent whether this is the applicant, and whether therefore—in accordance with Article 8 of the insurance policy—it is for her to establish the involuntary nature of the drowning or whether the Council must prove that the drowning was deliberate.

(b) Clearly the examination from the point of view of comparative law as regards this question is not as simple as that in respect of the concept of accident. The legal situation is not uniform, but rather, as we have seen in the proceedings, the Community is, as it were, divided into two camps. One of them comprises French, Belgian and Luxembourg law while in the other the German, Dutch and Italian legal systems are to be found.

We shall begin with German law. The situation is here quite clear, since by paragraph 180(a) of the Law relating to contracts of insurance of 30 June 1967, a provision which tolerates no departure from it by agreement, the involuntary nature of the event is presumed in the absence of the proof to the contrary and therefore the *insurer* must prove the voluntary nature of an accident.[1] A similar situation exists in the Netherlands where the involuntary nature of the event is regarded as normal and as the rule in the absence of facts which give cause for doubting it.[2] The same apparently applies in Italy on the basis of article 1900 of the 'codice civile'.[3]

On the other side are the French, Belgian and Luxembourg rules under which it is in principle the insured who has to prove the existence of an accident and the absence of any intent to bring it about.[4] This is important even though it must not be overlooked that the principle is not always applied in its full rigour. In fact, certain, direct and rigorous proof, which is frequently impossible, is not required and the courts accept, although to varying degrees, the establishment of a certain degree of probability, with presumptions (présomptions graves, précis et concordantes') which may be based on all the circumstances of the case (the character, behaviour, beliefs, legal and financial situation of the person entitled) and which may be rebutted by the other side by evidence to the contrary.[5]

In this situation we are faced with the difficult question of which solution is to be regarded as the correct one in the present case. Indeed it would be conceivable to adopt a method whereby from the point of view of the person entitled, Community law would be determined by the lowest common denominator of the legal systems of the Member

1 — Prölls-Martin, Versicherungsvertragsgesetz, 18th Edition, 1970, Note 3 to paragraph 182.
2 — Molengraaff, loc. cit., p. 728.
3 — Donati, Trattato del diritto delle assicurazioni private, Vol. II, No. 312, 2, a).
4 — See, for example, Sicot-Margeat, loc. cit., No 141, 60, b; De Page, Traité élémentaire de droit civil belge, 2nd Edition, 1942, Vol. III, p. 710 et seq.
5 — Sicot-Margeat, loc. cit., No 606; Fredericq, loc. cit., p. 367 et seq.; De Page, loc. cit., p. 712.

States. However, even though the differences between the various national legal systems are probably in fact not very great, this method cannot be accepted. It is continually stressed in the writings of legal authors (relating to Article 215 of the EEC Treaty and to the well-known problem of fundamental rights in the Communities) that when the law to be applied is sought (Rechtsfindung) by means of an examination in comparative law, one should proceed on *a critical* (wertende) basis and one should consider the characteristics peculiar to the matter in question, the system which they constitute and their development.

Above all in this respect it is important to note that in the question of rules relating to the burden of proof, all the legal systems mentioned show signs of certain developments. Departing from the strict rules of proof (whereby the person making a claim has to prove the necessary preconditions) it gradually becomes more relaxed, particularly in recognition of the existing difficulties and the particular characteristics of insurance which require the interpretation of insurance contracts against the insurer. Some legal systems have gone no further than admitting circumstantial evidence and presumptions in favour of the person entitled whilst others (as the German legal system in particular shows) not only take a generous line and accept *prima facie* evidence but have also gone so far as to lay down legal presumptions and reversal of the burden of proof in favour of the person entitled. In my opinion this fact is of particular importance for the basically progressive European Community law. Furthermore, in the context of the European law relating to public servants, there are certain features peculiar to the matters in question which call for attention. As the applicant rightly says, this law is characterized in the present context by the fact that it also provides for benefits in the case of *non-occupational* accidents. This strongly demonstrates the existence of a concern for the welfare of public servants (Fürsorgegedanken). In this case it is only logical to apply the same principles to the rules relating to the burden of proof and thus to adopt an equally generous approach in favour of the person entitled.

A reasonable evaluation of the results of the comparative legal examination leads to the conclusion that the rules relating to the burden of proof in Article 73 of the Staff Regulations should rather be based on the example of the German, Netherlands, and Italian law than that of the French, Belgian and Luxembourg law. Therefore the burden of proving the existence of suicide would lie on the defendant Council of Ministers. However the examination we carried out made it clear that it may rely on circumstantial evidence, typical courses of events, presumptions, *prima facie* evidence, etc., in other words, that it does not have to bring a strict degree of proof.

3. Finally let us attempt to apply these results to the present situation, that is to try to decide whether we can regard it as proved that the death of the applicant's husband was caused by suicide.

As you know the defendant Council of Ministers brought many arguments in favour of the suicide theory. It referred to the statement made by the brother of the deceased to the police where he speaks of nervous depression and also that the brother was probably 'a victim of an irrational impulse'. It further stated that the applicant's husband had been ill for a long time, that he had undergone examination in a neurological clinic and that his relatives had endeavoured never to leave him alone. The applicant on the other hand disputes the contention that her husband was never left alone and states that the contrary is clear from the fact that in January 1969 he made a journey to Poitiers on his own and that on the evening of 20 February 1969 he left the house of his parents on his own. Further the applicant emphasized that her husband had only spent three days in a neurological

clinic, in the past no bills for neurological treatment of any substance had been submitted for reimbursement, only a light sedative was found in the pocket of the deceased (which argues against serious illness) and her husband had left no message behind which would lead to the conclusion of an intention to commit suicide. Further arguments against such an intention are the fact that the applicant's husband was an excellent swimmer and that before his disappearance he had asked for the evening meal to be prepared. Finally there is another circumstance in favour of the accident theory that at the relevant time the banks of the Rhône were covered with ice (which the applicant shows by the meteorological records of the airport at Lyon-Bron).

What conclusions can be drawn from all this? In my opinion the first is that there cannot be accepted to be sufficient substantial evidence in favour of the theory advocated by the Council of Ministers and that the existence of suicide cannot be regarded as proven. On the other hand I also can see no grounds for accepting the applicant's claim at this stage since as we have seen there are still disputed points of some importance which need to be cleared up. Moreover it is perhaps possible that a further measure of inquiry would throw more light on certain circumstances (for example, the state of the applicant's husband before his disappearance, in particular his alleged nervous depressions and the details of the medical treatment).

Further in my opinion there are no procedural obstacles in the way of such a clarification. It is true that the parties have so far only made general offers of proof; however it should be possible to make them retrospectively more specific. Article 42 (1) of the Rules of Procedure of this Court only provide that *reasons* should be given for the delay in indicating further evidence and in the present case the novel and uncertain legal situation can certainly be regarded as a suitable explanation for the fact that evidence was not offered at an earlier stage. In addition in public law cases like the present one, the Court plainly has the power to order measures of inquiry of its own motion. This accords with the principle that in proceedings of this nature there is strictly speaking no individual burden of proof but rather an obligation, in fact on *both* parties, to co-operate effectively to discover the facts.

4. In these circumstances and because I believe that the legal principles relating to Article 73 of the Staff Regulations which we have deduced can hardly be adapted for an interim judgment I cannot formulate an opinion with a suggested judgment as I do in other cases. I merely stress my view that the case must be regarded as one in need of further clarification, and therefore recommend that the parties should be required to submit offers of proof for the justification of their arguments. When these are received an order may be made stipulating the exact points which the parties are required to prove.