OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 21 November 1989 *

Mr President,
Members of the Court,

1. Following the inauguration of the Court of First Instance, the action brought on 16 May 1988 by Mrs Schneemann and several hundred of her colleagues against the Commission, on which I am giving my Opinion today, is one of the last staff cases that the Court will have to consider on matters of fact as well as of law. I do not feel, however, that our task will be particularly arduous. The problems raised by the applicants for consideration by the Court are essentially matters of law. Moreover, the facts of the case are well known since they were largely the subject of two other actions which the Court has already disposed of: Case 137/80 *Commission* v *Belgium*[1] and Case 383/85 *Commission* v *Belgium.*[2]

2. Accordingly, I propose to consider the respective positions of the parties immediately without setting out the facts, for which I refer you to the Report for the Hearing.

3. The applicants maintain that the Commission has failed in its duty to safeguard their interests by refusing to grant them the technical and financial assistance which they requested in order to bring proceedings before the Belgian courts and, if necessary, before this Court in order to resolve the problem of the transfer of pension rights acquired under the Belgian scheme to the Community scheme.

4. The defendant contests that claim and contends, essentially, that it has discharged its obligations deriving from its duty to safeguard the interests of its officials.

5. The dispute once again originates from the failure of Belgium to fulfil the obligation incumbent on all the Member States to give effect to Article 11(2) of Annex VIII of the Staff Regulations, enabling pension rights acquired by Community officials before entering the service of the Communities to be transferred. Having had the opportunity to give my views on the illegality of that failure in my Opinion delivered on 20 September 1989 in the second action brought by the Commission against Belgium (Case 383/85), it is unnecessary for me to cover the same ground again — particularly since the issue in this case is the conduct of the Commission, not that of Belgium.

6. However, two clarifications are required at the outset.

7. In the first place, I do not consider that the question whether, as a matter of

* Original language: Italian.

1 — Judgment of 20 October 1981 [1981] ECR 2393.

2 — Judgment of 3 October 1989 [1989] ECR 3069.

principle, the measures requested by the applicants fall within the scope of Article 24 of the Staff Regulations, is the point at issue in this case. The Commission itself expressly stated in its reply to the applicants' complaint:

'Elle ne conteste pas que l'article 24 du statut soit invoqué à bon escient en l'espèce, car la portée de cette disposition va au-delà des cas qu'elle énumère à titre d'exemples, d'une part, et, d'autre part, la demande formulée trouve son origine, comme le requiert cet article, dans la qualité de fonctionnaire des réclamants.'

Two conclusions can therefore be drawn:

(i) the Commission recognizes that the duty of providing assistance under Article 24 of the Staff Regulations is relevant to the present case,

(ii) but it contends — and this aspect will be considered in greater detail later — that in the present case it has satisfied the obligation imposed on it by that article; that view is, however, contested by the applicants.

The dispute thus relates to the limits of the duty to provide assistance or protection.

8. In the second place, the Commission has been at pains to emphasize, in both its written and oral submissions, that the obligation to provide assistance is, by virtue of its nature and scope, an obligation to use all due diligence and not an obligation to achieve specific results. From that premiss, to which I have no difficulty in subscribing, the Commission draws a conclusion which I am unable to share, in that it contends that the result sought by the applicants, namely the adoption of a formal law which allows transfer to the Communities of the pension rights previously acquired, is one which falls outside the scope of the Commission's powers.

In that regard, I must point out that the applicants' conclusions make no reference to the adoption of a formal law. Indeed, the option of recourse to the national courts starts from precisely the opposite premise: in the absence of a formal law of the Belgian State, any prospect of securing compliance with the provisions of the Staff Regulations would depend on an action being brought before the courts (the power, and the duty, of the national courts to apply the Staff Regulations). The report for the Hearing states clearly in that regard (p. I-373, paragraph 3): 'The Belgian courts . . . could not be frustrated in the discharge of their duties by inaction on the part of the legislature.'

What the applicants seek from the Commission is technical and financial assistance in order to bring the matter before the national courts. Far from being an attempt to put the obligation to provide assistance to improper use, that request seems to me to fall within the natural bounds of the provision of ways and means of attaining a specified objective. It is true — and here I concur entirely with the Commission — that the ultimate objective pursued falls outside the Commission's control, although the question might perhaps be asked why the Commission, which is a party to a bilateral contract with the officials entitled to the transfer of rights, did not consider itself under a duty, by virtue of its obligation to safeguard its officials' interests, to pay the pensions as if Belgium had already fulfilled its obligations, reserving the right to obtain reimbursement by recourse to amounts owed to the Belgian

Government. But the situation which I have described, regarding the means necessary to achieve an aim which falls outside the powers of the giver of the assistance, is common to other cases that come within the scope of Article 24. For example, the Commission certainly cannot guarantee a priori that there will be a finding against the defendant or that compensation will be awarded in the case of injury to or defamation of an official to whom assistance is given under Article 24.

9. Having made those preliminary remarks, I shall now consider the present case. The question that the Court must answer is essentially whether or not the Commission has discharged its duty of assistance towards the applicants. I would point out that in an earlier decision the Court developed a concept of the general obligation to provide assistance which goes beyond the bounds set by Article 24 (judgment of 11 July 1974 in Case 53/72 *Guillot* [1974] ECR 791), emphasizing in particular that there must be a *balance* between the rights and obligations of officials. In the same way, it has been pointed out that that obligation is the result of the *natural balance* between officials' obligation of loyalty and the institutions' obligation to provide protection (see in particular Rogalla, *Fonction publique européenne*, 1982, p. 253).

10. I should like to add a few words to give a better idea — in general terms — of the scope of the institutions' duty to provide assistance to officials and safeguard their interests. It is common ground that that obligation is an obligation to use all due diligence and that in choosing how to do so the institutions enjoy a degree of discretion — although the exercise of that discretion may be reviewed by the Court. It also seems to me to be clear that the scope of the duty to provide assistance and to safeguard interests differs according to the seriousness and the nature of the injury to which the official has been exposed.

Let me explain. The Court has consistently held that a duty to provide assistance arises in the case of a dispute between officials in consequence of which the institution is called on to carry out an inquiry and take the requisite measures. However, it seems undeniable that in such circumstances the duty of care and protection is more tenuous than in other, more serious cases. That applies particularly since the intervention of the institution is necessary not only in order to discharge the duty of assistance but also — perhaps to a greater degree — to uphold the interests of the service and to ensure sound administration (see in particular, judgment of 14 June 1979 in Case 18/78 *Mrs V.* v *Commission* [1979] ECR 2093 and my Opinion in Case 224/87 *Koutchoumoff* [1989] ECR 99, 104, judgment of 26 January 1989).

The position is different where the injury comes from outside, in which case the duty to safeguard interests, which, as we have seen, is the quid pro quo for the official's loyalty, goes further.

The situation is different again, it seems to me, in a case like the one at issue here. I do not think the fact can be overlooked that the default on the part of the Member State has endured for more than 20 years and the illegality of its conduct has been formally recorded in two adverse judgments of this Court. In such circumstances it seems obvious to me that in view of the gravity,

the extent and the duration of the injury suffered by the officials, which is reflected in the utter negation of an essential entitlement, the scope of the institution's duty to provide assistance is much greater than in other cases where the unlawfulness of the conduct of which the official considers himself a victim must first be assessed and, above all, proved.

11. In resisting the claims made by the applicants, the Commission refers in the first place to the proceedings instituted by it under Articles 169 and 171 of the Treaty. I cannot agree with this first defence submission. In deciding whether or not, in the present case, the defendant has discharged its duty of assistance and protection, I do not think that account can be taken of actions brought by the Commission on the basis, first, of Article 169 and then of Article 171 of the Treaty. The action before the Court under Article 169 constitutes one of the Commission's institutional prerogatives and is associated with its general task under Article 155. The case-law of the Court in that regard has highlighted the discretion enjoyed by the Commission in choosing when to bring an action, and also the fact that the remedy is objective in character. Likewise, the Court has repeatedly stated that Commission officials cannot institute proceedings against the Commission to make it take action under Article 169 of the Treaty in order to bring to an end alleged infringements of Community law (see judgment of 1 March 1966 in Case 48/65 *Lüttike* v *Commission* [1966] ECR 19, and the Opinion of Mr Advocate General VerLoren van Themaat in Case 28/83 *Forcheri* v *Commission* [1984] ECR 1425, judgment of 15 May 1984).

If the decision to institute proceedings under Article 169 is an institutional prerogative reserved to the Commission and, as such, is not open to review by the Court — and likewise the reasons underlying such a decision — it must perforce be stated that, *by definition*, the matter does not fall within Article 24 of the Staff Regulations. As we have already seen, the manner in which the Commission's discretion under Article 24 is exercised must be open to challenge before the Court.

12. Another argument raised at the hearing seems to me to militate against the attempt to bring actions by the Commission under Article 169 within the scope of fulfilment of the duty to provide assistance. Any other Community institutions requested by their officials to provide assistance in connection with an infringement by a Member State of the duties imposed on it by the Staff Regulations would not enjoy equality with the Commission since recourse to Article 169 is not available to them. Moreover, that has become apparent in the present proceedings. We know that the Council, in order to fulfil its duty under Article 24 of the Staff Regulations, has decided to grant the technical and financial assistance requested of it by its officials who seek the transfer of their pension rights.

13. We must therefore consider whether, apart from its use of the procedure under Article 169, the Commission has discharged its duties under Article 24 of the Staff Regulations.

14. As the Commission itself acknowledged at the hearing, although it has a discretion as to the means to be applied in discharging its duty of assistance, it is for the Court to

decide whether, in choosing such means, the institution erred in such a manner as to vitiate its decision, for example by making a manifest error or by stepping outside the limits of its discretionary powers.

15. The Commission has put forward three arguments to justify its refusal to provide assistance.

16. In the first place it contends that its recourse to the procedure under Articles 169 and 171 makes the provision of the requested assistance superfluous. For the reasons I have given earlier (parts 11 and 12) I do not consider that argument acceptable.

17. In the second place, the Commission states that, having already given technical assistance to an official, it considered it unnecessary to grant assistance to the applicants.

18. This brings us to the nub of the problem.

The applicants maintain that, without technical assistance from the Commission to quantify such claim as they might make before the national courts, they are absolutely precluded from ultimately enforcing their rights.

19. In reply, the defendant contends, in general terms, that notwithstanding its refusal to provide technical assistance, it remained within the 'reasonable limits' which the Court has laid down for the duty to provide assistance.

20. At the hearing, the applicants placed emphasis on their absolute need to be assisted by the administration. Since, in order to bring a proper action before the national court, they are obliged to indicate in their statement of claim the amount of the accrued pension rights under the Belgian scheme which they wish to be transferred to the Community scheme, they claim that the relevant calculations, which are of a complex actuarial nature, called for the cooperation of the Commission's staff, which was denied them.

21. I must observe that, despite the request for clarification made three times at the hearing, the Commission has confined itself to repeating the argument which forms the main premiss of its reasoning, namely that recourse to fresh proceedings, different from those instituted by Mr Michel, would not have yielded any new result or, to use the Commission's words, 'would not have changed the general landscape'.

22. I consider that argument unacceptable. The Commission virtually refused to take a position — beyond engaging in *petitio principii* — before this Court as to whether the applicants' view that the actuarial calculations are beyond the capabilities of individual plaintiffs and call for the cooperation of the Commission's staff was well founded. Thus, the Court is prevented from carrying out its review of the reasons which guided the defendant in the exercise of its discretionary power.

I would add that those calculations, which constitute the substance of the technical assistance requested, would have served another purpose: that of enabling each of the individual applicants to decide, in full knowledge of the facts, whether or not it would be appropriate to bring an action before the national courts. The wording of

the application also makes it apparent that the applicants even contemplated the possibility of an action before this Court to secure a condemnation of, for example, the Commission's refusal to remedy Belgium's omission by 'prematurely' applying the provisions of Article 11 as if Belgium had in fact already fulfilled its obligations.

23. On the basis of the foregoing considerations, I am of the opinion that the Commission did not sufficiently explain to the Court its reasons for refusing to provide technical assistance. It is clear that where an institution enjoys discretionary powers, the authority which exercises them must be in a position to explain to the Court the circumstances and the reasons which inspired its exercise thereof. It is only compliance with that obligation that renders possible the essential *actio finium regundorum* between the legitimate exercise of a discretionary power and an abuse thereof for which a penalty may be imposed.

24. The Commission's explanation for its refusal is unacceptable, in my opinion, for a further reason. The action brought before the Belgian courts by Mr Michel, with technical and financial assistance from the Commission, would, if upheld, be of benefit only to him because the judgment would not take effect *erga omnes*. It follows that the applicants in the present case have a clear interest in bringing legal proceedings irrespective of the outcome of the action brought by Mr Michel. It is thus inappropriate for the Commission to contend that its provision of assistance in one individual case entirely discharges its obligation to provide assistance to its officials.

That is so because either, in making that statement, the Commission is referring not to the *legal effect* but to the *pressure* that that legal action would bring to bear on the Belgian Government, in which case it is going against plain common sense since the pressure brought to bear by 500 actions is greater than that brought to bear by one action; or else it is referring to the *legal effects* which might derive from the action, and in that case it is contradicting its general line of defence which is precisely that proceedings before the Belgian courts are ineffective.

25. Before examining the third argument put forward by the Commission I think it is appropriate to gather the threads of the considerations developed so far.

26. It has become apparent in the first place that the decision whether the duty to provide assistance and protection has been discharged in this case must:

(i) disregard the Commission's recourse to its institutional right of action under Articles 169 and 171; and

(ii) take account of the seriousness of the unlawful conduct on the part of the Belgian Government in failing to fulfil its obligations under the Staff Regulations.

27. We have also seen that in order to enable the officials concerned to assess the advisability of bringing an action before the national courts or before this court and to obtain information enabling them to determine the amount of their claim, the Commission should have provided the technical assistance requested of it.

That conclusion follows from the Commission's inability to state its reasons for refusing to assist its officials.

At this stage, the Commission's exercise of the discretionary power vested in it thus appears vitiated by an *inadequate statement of reasons* (failure to explain its refusal) and *by an error* (the contention that the grant of technical assistance to one official releases it from any further provision of assistance, even though individual actions are involved in all cases).

28. We now come to the third argument relied on by the Commission, which is essentially that proceedings before the national court would be ineffective.

29. That argument raises problems of two kinds. One, which I shall consider first, is that of the *consistency* of the defendant's reasoning. The other is a *methodological* problem.

30. I must say that I am extremely confused when I hear the Commission state, on the one hand, that it has discharged its duty to safeguard the interests of its officials by providing the requested assistance to Mr Michel and, on the other, that the similar actions planned by the other officials are pointless because Article 11(2) of Annex VIII to the Staff Regulations is not 'self-sufficient'.

I do not wish to dwell over-long on the explanation which the Commission gave at the hearing and which I consider to be inappropriate. When it contends that at the present time, that is to say in October and November 1989, the situation is different from that which prevailed when technical and financial assistance was given to Mr Michel, it is forgetting that the failure to act of which it is accused dates back to 1987 and cannot be appraised on the basis of what is happening today.

What seems to me to be of greater importance is the contradictory nature of the reasons given by the Commission.

It cannot have it both ways:

(i) either the Commission is right in saying that proceedings before the national courts are pointless because they are manifestly bound to fail — but if that is the case the Commission has not in any way fulfilled its duty to provide assistance; the grant of assistance to Mr Michel only *formally* meets the obligation to provide assistance. From the *substantive* point of view, the Commission knowingly made available to its officials a weapon which it knew to be blunt from the outset. And, if that is the case, the very rationale of Article 24 (the balance between the obligation of loyalty and the duty of protection) has been disregarded; or

(ii) the Commission is misusing that argument solely for the purposes of these proceedings and the refusal to provide the applicants with assistance is vitiated by contradictory reasoning.

31. The second problem raised by the Commission's defence is methodological in character.

32. In response to the applicants' claim that recourse to the Belgian courts would make it possible to rectify the situation by securing enforcement of the obligations imposed by the Staff Regulations, the Commission contended that:

'under Belgian constitutional law, national pension authorities and indeed national courts cannot act in the stead of the legislature',

casting doubt, as I have pointed out, on the utility of the course of action chosen by the applicants in order to safeguard their rights. In its written replies to questions put by the Court the Commission stated even more explicitly:

'It is entirely speculative to consider that a Belgian court might, in the stead of the legislature, apply specific measures making it possible to exercise the power to transfer rights acquired under the national scheme to the Community pension scheme.'

33. Discussion of that point seems to me to be inappropriate and largely irrelevant. It is certainly not the task of this Court to engage in a debate which is to take place before the national courts, deciding in the abstract what might be the outcome of proceedings before the national court, considering whether the view taken by one court might remain an isolated case or be followed by similar pronouncements, or whether successive decisions might evolve. What seems to me to be more important is that that debate, which may be theoretically fascinating, does not have much bearing on the problem before us. If the Commission is obliged under Article 24 to provide assistance and protection for its officials, that problem is not greatly affected by the question of the outcome, favourable or otherwise — on conclusion of the proceedings — of a legal action brought by officials with the support of the Commission. The same situation arises in other cases. Take for example the case of a Commission official who is insulted or defamed, in a non-member country for instance, because of his status as a Community official. If the Commission refused to assist him in bringing an action to protect his interests, on the ground that it considered the possibilities of success to be minimal, it is doubtful whether the obligation under Article 24 would thereby be satisfied. Except in cases in which the decision to commence a legal action is so eccentric as to render the action vexatious I do not think that the institutions' obligation to protect their officials disappears because of the uncertainty inherent in any recourse to legal proceedings. In the present case, the fact that the Commission itself considered that it should give technical and financial assistance to Mr Michel and the fact that the Council agreed to give technical and financial assistance to all the officials who requested it, provided that they were over 50 years of age, shows that proceedings before the national court have a chance of succeeding and that the Commission itself has assessed that chance correctly, as in the Michel case.

But that is not all. The Commission itself, in the case of an official who sought to enforce before the national (French) court the right provided by Article

11(2) — judgment of 14 June 1990 in Case C-37/89 *Weiser* v *CNBF* [1990] ECR I-2395 — did not fail to emphasize the '*direct* applicability of Article 11(2) of Annex VIII to the Staff Regulations'. In that way, the Commission, far from denouncing actions before the national courts as ineffective, shared the view that it was appropriate and useful to bring such actions, agreeing, *inter alia*, on the merits of the case, even though it was not involved from the technical and financial point of view.

34. To conclude this examination of the three arguments put forward by the Commission to justify its refusal to grant assistance, I must therefore state that none of them stands up to critical analysis. In those circumstances, since it is not disputed that the applicants were right to invoke Article 24 of the Staff Regulations, that there is an objective need for technical assistance to enable the applicants to decide whether it is advisable to bring an action before the national courts or before this Court, and, if it is, whether in fact to do so, and that the Commission has not explained to the Court its reasons for its refusal, the conclusion seems inevitable that the Commission's conduct has been improper. It must therefore be found that the defendant has not fulfilled its obligation to provide assistance to its officials.

As I do not think that it would be acceptable for the Commission to discriminate as between its officials, I consider that both technical and financial assistance should be provided, like that provided by the Council in fact.

I therefore propose that the Commission's refusal to grant the technical and financial assistance requested of it by the applicants be annulled. The Commission, which should be ordered to pay the costs, must take the action which compliance with the judgment entails.