OPINION OF ADVOCATE GENERAL MANCINI
delivered on 9 March 1988 *

Mr President,
Members of the Court,

1. Pursuant to Article 11 (2) of Annex VIII to the Staff Regulations, a person who 'enters the service of the Communities after leaving the service of a government administration or of a national or international organization or of an undertaking shall have the right on becoming established with that Community to pay to it either:

the actuarial equivalent of retirement pension rights acquired by him in the government administration, national or international organization or undertaking; or

the sums repaid to him from the pension fund of the government administration, organization or undertaking at the date of his leaving its service'.

In any such case, the provision continues, 'the institution in which the official serves shall, taking into account his grade on establishment, determine the number of years of pensionable service with which he shall be credited under its own pension scheme in respect of the former period of service, on the basis of the amount of the actuarial equivalent or sums repaid as aforesaid'.

2. In 1980 Mr Fernand Watgen, a Luxembourg national employed by the European Parliament, asked the Luxembourg Caisse de pension des employés privés to transfer to the Community pension scheme the actuarial equivalent of the rights which he had acquired up to that time. He received no reply for four years, since the Caisse de pension had decided to await the outcome of a dispute between it and another Luxembourg official of the European Parliament regarding the same matter (see in that connection the preliminary ruling of this Court of 18 March 1982 in Case 212/81 *Caisse de pensions des employés privés* v *Bodson* [1982] ECR 1019, which was followed by the judgment of the Luxembourg Cour de cassation of 28 October 1982); when a decision was finally given, Mr Watgen was dissatisfied with it.

The Caisse de pension did in fact grant him the transfer; however, it calculated the amount on the basis of the sums repayable from the pension scheme, as — it contended — it was required to do by Article 18 of the Law of 16 December 1963. That provision, in the amended text of 14 March 1979, states that 'where a person withdraws from a Luxembourg contributory pension scheme and becomes affiliated to a pension scheme of an international organization which makes provision for the repayment of pension rights acquired during periods of employment prior to his establishment, the contributions paid to the Luxembourg scheme shall be transferred at the request of the person concerned to the pension scheme of the international organization, together with compound interest at the rate of 4% per annum as from 31 December of each year of affiliation'.

* Translated from the Italian.

Mr Watgen immediately challenged the Caisse's decision before the Conseil arbitral des assurances sociales and then appealed to the Conseil supérieur. The latter, 'in view of the disagreement between the parties, which is the result of a considerable difference between the principles accepted in Community law, on the one hand, and in Luxembourg law, on the other', asked the Court under the third paragraph of Article 177 of the EEC Treaty:

(a) whether the rules laid down by Article 18 (3) of the Law of 16 December 1963 were compatible with the right of election provided for Community officials by Article 11 (2) of Annex VIII to the Staff Regulations of the European Communities; and

(b) whether that right of election might be exercised even if the alternative chosen by the official either was not provided for by the national law to which the national social security institution was subject or was incompatible with the system which that institution had to apply.

Written observations were submitted by the parties to the main proceedings, the Commission of the European Communities, the United Kingdom and the Luxembourg and French Governments. Only the latter failed to present its observations at the hearing.

3. Let me say right away that in this case an exposition of the arguments of the parties and consideration of their merits would be otiose. The central issue raised in the two questions — whether Article 11 confers upon EEC officials a genuine right of election between the two types of transfer for which it provides — was recently dealt with by the Court in its judgment of 17 December 1987 in Case 315/85 (*Commission* v *Grand Duchy of Luxembourg* [1987] ECR 5391), in which I was the Advocate General. In its application, the Commission alleged that the Grand Duchy had failed to fulfil its obligations under Article 11 in so far as its social security legislation — and in particular Article 18 of the Law of 16 December 1963 to which I referred earlier — did not grant nationals who leave private employment and become Community officials the right to opt for the transfer of the actuarial equivalent of pension rights.

With respect to that allegation the Court stated in the first place that neither the text nor the purpose of the Community provision made it possible to infer 'une priorité en faveur d'une des deux méthodes de calcul. En effet, ... l'objectif de l'article 11, paragraphe 2, ... est de garantir le passage d'un système d'assurance nationale au système communautaire sous l'une des deux formes qu'il mentionne'. As a result 'les Etats membres ... ne sont pas obligés d'accorder aux fonctionnaires *la faculté de choisir* entre le transfert de l'équivalent actuariel et du forfait de rachat' (paragraphs 20 and 22, emphasis added).

As regards the Luxembourg legislation, the Court held (even though no proof of that fact had been furnished by the defendant

government) that it 'ne prévoit, en aucun cas, la possibilité pour les personnes affiliées à un régime contributif de transférer l'équivalent actuariel . . . vers un autre régime luxembourgeois. Dans ce contexte, le fait que le forfait de rachat tel que prévu par les dispositions nationales ne tient pas compte des contributions versées part l'Etat est sans pertinence' as regards the provision of the Staff Regulations at issue (paragraph 25).

4. In the light of those statements I suggest that the Court should give the following answer to the questions submitted by order of 1 March 1985 by the Conseil supérieur des assurances sociales in the proceedings by Fernand Watgen against the Caisse de pension des employés privés, Luxembourg:

'Article 11 (2) of Annex VIII to the Staff Regulations of Officials of the European Communities is intended to safeguard the possibility of changing from a national social security system to the Community system in accordance with either of the two procedures for which it provides, namely payment of the actuarial equivalent of retirement pension rights or of the sums repaid from the pension fund concerned. That provision must therefore be interpreted as meaning that the Member States are not under any obligation to grant their nationals who enter the service of the Communities the right to choose between the two alternatives, regardless of the fact that such a right may be provided for by national law.'