to the period during which the applicant was employed by the German Mutual Insurance Fund for Workers in Steel Foundries and Rolling-Mills (Hütten- und Walzwerksberufsgenossenschaft) represents the retention of the applicant's pension rights based on the payment of 16 voluntary contributions which he made to the Federal Insurance Office for Clerical Staff (Bundesversicherungsanstalt für Angestellte) after the termination of his employment with the Berufsgenossenschaft;

2. Orders the parties to bear their own costs.

Koopmans O'Keeffe Bosco

Delivered in open court in Luxembourg on 7 May 1981.

J. A. Pompe
Deputy Registrar

T. Koopmans
President of the First Chamber

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 2 APRIL 1981 [1]

Mr President,
Members of the Court,

The present staff case concerns the application of Article 102 (2) of the Staff Regulations of the European Coal and Steel Community of 1 January 1962, subparagraphs (a) and (b) of which correspond in substance to Article 107 (1) and (2) of the Staff Regulations at present in force. These provisions, which were expressly maintained in force by the third paragraph of Article 2 of Regulation No 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of Officials of the European Communities (Official Journal, English Special Edition 1968 (I), p. 30) for those officials who had already been employed during the validity of the ECSC Staff Regulations of 1956, reads as follows in the version amended by Regulation No 1473/72 of 30 June 1972 (Official Journal, English Special Edition 1972 (III), p. 703):

"(2) The following provisions shall apply to officials to whom Article 108 of

1 — Translated from the German.

the former general regulations of the ECSC could not be applied:

(a) An official to whom these Staff Regulations have been applied in accordance with these transitional provisions and who furnishes evidence of having been obliged by reason of his entering the service of the Community to forfeit in whole or in part the pension rights which have accrued to him in his country of origin and of being unable to obtain the actuarial equivalent of such rights shall be credited, for the purposes of his retirement pension in the Community and without payment of arrears of contributions, with annual contributions corresponding to the number of years of pensionable service accrued in his country of origin.

(b) The number of years of pensionable service thus credited shall be determined by the appointing authority of the institution to which the official belongs after receiving the opinion of the Staff Regulations Committee provided for in Article 10. It shall not exceed:

— ...

— Half the number of years of service which upon his attaining the age of 65 years would be required for him to complete 35 years of pensionable service.

(c) ..."

On 2 July 1969 the Commission of the European Communities laid down general implementing provisions which covered the above points amongst others and which were published in Staff Courier No 77 of 29 July 1969, p. 601 et seq.

Following this publication the applicant, who was born in 1915 and was appointed by the High Authority of the ECSC on 15 October 1956 as an official on probation in Grade A 4 and remained till his recent retirement continuously in the service of the High Authority or the Commission as the case may be, applied on 10 November 1969 for compensation for lost pension rights.

By a decision dated 11 December 1978 the appointing authority informed the applicant that the said provisions had been applied to him and that on the basis of the following calculation he would be credited with three years, one month and fifteen days of pensionable service in addition to his pension rights with the Communities: the applicant's last employment before his entry into the service of the High Authority was with the mutual insurance fund for workers in steel foundries and rolling mills (Hütten- und Walzwerks-Berufsgenossenschaft, hereinafter referred to as "the Berufsgenossenschaft") a body incorporated under public law with pension rules in accordance with the provisions of the Federal Civil Service Law. From 1 March 1951 to 31 May 1953 he was a clerical employee within the meaning of the Clerical Staff Insurance Law and thereafter until 31 October 1956 he was employed as a technical supervisor under the conditions of the staff rules of the Berufsgenossenschaft in accordance with the principles of the law applying to officials, that is to say pursuant to the provisions of the Federal Civil Service Law.

During his time as a clerical employee he was not required to contribute to the statutory pension insurance scheme since his yearly remuneration exceeded the level up to which insurance was compulsory at that time. In consequence the Berufsgenossenschaft was not required to make any contributions for that period to the Federal Insurance Office for Clerical Staff (Bundesversicherungsanstalt für Angestellte, hereinafter referred to as "the Clerical Insurance Office"). The applicant did however pay a total of 17 voluntary contributions for that period.

For the period of his employment in accordance with the law applying to officials contributions to the statutory pension scheme under Article 11 (1) of the German Clerical Staff Insurance Law were optional because the applicant could expect to receive a pension as such an official. Since however the applicant left the employment of the Berufsgenossenschaft before completion of the qualifying period of ten years's service then provided for in the Federal Civil Service Law, he was not entitled to any pension as an official and the Berufsgenossenschaft was therefore required by Article 9 of the Clerical Staff Insurance Law to insure him retroactively for the period from 1 June 1953 to 31 October 1956.

After 1 June 1953 the applicant made 29 voluntary contributions to the Clerical Insurance Office, 13 during his employment with the Berufsgenossenschaft and 16 after terminating that employment. These contributions are deemed, as retroactive insurance by his former employer, to be supplementary insurance contributions pursuant to Article 2 (15) of the Clerical Staff Pension Reform Law of 23 February 1957 (Bundesgesetzblatt I, p. 88).

The Commission based its calculation on the years of pensionable service which the applicant had actually performed with the Berufsgenossenschaft, that is to say five years seven months and fifteen days.

In this respect the calculation of the rights *retained* with the Clerical Insurance Office was founded on a fictitious calculation made by the Office on 26 August 1976 on the basis that the sum of all contributions made by the Office for the applicant's benefit during the period in question amounted to 976.17 units which had been acquired in 58 months. This gave a percentage of 201.57 % of the general basis of calculation valid for 1957, namely DM 4 281. Pursuant to the applicable provisions of insurance law 1.5 % of the basic pension calculation computed in this way was awarded for every allowable year of insurance as a yearly pension, which finally gave a yearly amount of approximately DM 625, increased by about DM 330 in respect of the supplementary insurance. According to this calculation the monthly pension amounted to DM 79.57, of which DM 27.56 came from the supplementary insurance.

On the other hand the calculation of the *lost* rights was based on the hypothesis that the pension for a minimum of ten years' pensionable service would have amounted to 35 % of the pensionable salary with the Berufsgenossenschaft that is to say DM 397.60 in the form of a monthly pension.

The comparison of this amount with the retained pension of DM 79.57 gave the proportion lost as 83.32 % for the period from 1 March 1951 to 31 October 1956 or, expressed in years of pensionable service, four years eight months and five days.

A conversion coefficient was then applied to this proportion so as to arrive at the actuarial equivalent taking into account the age and sex of the applicant. This calculation gave the allowable figure already mentioned of three years, one month and fifteen days with which the applicant was in the opinion of the Commission entitled to be credited pursuant to Article 102 of the ECSC Staff Regulations.

By letter dated 25 June 1979 the applicant complained *inter alia* about the

failure to include "reckonable periods prior to entry into service" in the lost years of pensionable service and about the inclusion of voluntary insurance contributions in the calculation of the lost pension rights to be made good. The Head of the Individual Rights and Privileges Division of the Directorate General for Personnel and Administration of the Commission maintained the calculation unchanged by letter dated 13 August 1979 and the applicant thereupon made on 6 November 1979 a complaint through official channels within the meaning of Article 90 (2) of the Staff Regulations of Officials.

The Commission failed to answer the complaint within the period laid down in that article and the applicant brought the matter before the Court on 30 May 1980. After the action was brought the Commission finally rejected the complaint expressly by letter dated 4 September 1980.

In his application the applicant originally claimed that the Court should:

1. Declare the implied rejection of his complaint of 1979 unlawful and annul it;

2. Rule that the defendant should also credit the applicant with "study periods";

3. Further, confirm that the Commission has no claim to payment of sums arising from voluntary insurance contributions;

4. Alternatively, confirm that the implementing provisions are incompatible with Articles 102 and 107 of the Staff Regulations and therefore inapplicable; accordingly, declare them unlawful in so far as they may empower the authorities to claim payment of sums arising from voluntary insurance contributions;

5. Refer the matter back to the Commission for a fresh calculation of the plaintiff's entitlement.

I — Before going into the details of the application, whose admissibility does not give rise to any doubts, I consider it appropriate in view of the claimant's submissions during the oral procedure to preface my remarks with a fundamental observation on the applicability to the present case of Article 102 (2) of the ECSC Staff Regulations of 1 January 1962.

As the applicant has correctly pointed out this provision, according to its wording, applies only to those officials to whom Article 108 of the former general Staff Regulations of the ECSC did not apply. On the other hand an official who was in a position to benefit from Article 108 of the former general regulations when the previous Staff Regualtions of the ECSC came into force retains his rights under that article as appears from Article 102 (1).

If we look at Article 108 of the general regulations of the Community of 29 March 1956 which came into force on 1 July 1956, at the same time as the ECSC Staff Regulations, it is clear that contrary to the applicant's point of view the advantages of this transitional provision contained in Chapter IV could not be granted to him. A prior condition for the application of this provision, according to which officials or local staff who at the time of their entry into the service of the Community had not yet attained the age of 57 might be credited for the purposes of calculating their number of years of pensionable service, without payment of arrears of contributions, with six-tenths of the number of years of service which they could not complete up to the age of 60 was that those

concerned should have been appointed as officials within the meaning of the Staff Regulations pursuant to the transitional provisions. The applicant however entered the service of the Community only on 15 October 1956, in other words after the coming into force of the said ECSC Staff Regulations on 15 July 1956 with the result that the transitional provisions laid down therein do not apply to him and hence that he cannot enjoy the benefits of Article 108 of the general regulations based on Article 50 of those Staff Regulations. Consequently the defendant was correct in applying Article 102 of the ECSC Staff Regulation of 1 January 1962 in calculating the applicant's pension rights.

In any event it should be pointed out in conclusion on this issue that the applicant did not assert either in the exchange of correspondence which took place after his pension rights had been determined or in the complaints procedure or even during the written procedure that it was not Article 102 (2) of the ECSC Regulations but Article 108 of the former regulations which applied to him. His submissions in this respect would therefore be rejected as out of time pursuant to Article 42 (2) of the Rules of Procedure even if they were well founded.

II — It therefore remains to be considered whether Article 102 (2) of the ECSC Staff Regulations of 1 January 1962 was correctly applied in calculating the applicant's pension rights. In that connexion there are two questions which should be distinguished and which I shall also deal with separately below, that is to say the question of how much the applicant's lost prospects of a German official's pension were worth and the second question whether the applicant's voluntary contributions to the statutory pension scheme may be taken into account to his disadvantage in calculating his pension under the article in question.

1. On the first point it should be stated at the outset that the Commission correctly determined pursuant to the second indent of Article 102 (2) (b) that the maximum number of years of pensionable service to be credited was five years, five months and three days. The applicant expressly admitted this limit in his reply and limited the subject-matter in dispute to this maximum. We must hence examine whether the applicant should not be credited by the Commission with a further two years and two months pensionable service up to the amount of the maximum mentioned by including so-called pre-employment periods and study periods in relation to his lost pension rights from the Insurance Fund for Workers in Steel Foundries and Rolling Mills.

Both parties correctly start from the basis that the lost pension rights to be taken into account pursuant to Article 102 (2) are to be assessed in accordance with the provisions of German civil service law. Different views exist however on the question which legal situation is to be taken into account: that which existed at the time of the applicant's entry into the service of the Community in October 1956 — which is the Commission's view point; or, as the applicant considers, that which applied on the day of his retirement.

In my opinion this question can only be answered in accordance with the Commission's view to the effect that the pension rights which accrued to the

applicant in respect of his previous employer are to be assessed, irrespective of the actual time when the calculation is made, according to the provisions which were in force when the applicant was obliged to forfeit them by reason of his entry into the service of the Community. This results simply from the wording of the provisions in question, which refers to the *years of pensionable service* accrued before forfeiture in the country of origin.

This interpretation is also supported by the purpose of the transitional provisions in question, which were intended to ensure that an official who was already in service in 1962 and could not complete the maximum number of years of pensionable service should nevertheless receive an appropriate pension without being required to make additional contributions. It is in accordance with this intention that any later developments in the legal situation which were more favourable for the applicant should no longer be taken into account since the applicant had already given up his status as a German official at this time and had instead acquired pension rights in the Community. Consequently Article 7 (1) of the general implementing provisions which were issued later and put these rules into concrete terms correctly take as the point of departure for the calculation of the credit the national pension scheme which applied to the official at the time when he was obliged to forfeit his rights.

Article 106 of the Federal Civil Service Law of 14 July 1953 (BGBl. I, p. 551), which was valid at this time and until 1970 required that the official should "normally" have completed a period of service of at least ten years in order to be entitled to a pension. Only after the expiry of this waiting period which had to be completed by service actually performed, did an official acquire a contingent right to a pension.

The applicant had however not completed the waiting period at the time of terminating his service with his former employer, the Insurance Fund for Workers in Steel Foundries and Rolling Mills, and had therefore not acquired any contingent right to a pension under civil service law. In compensation for the lost prospects of such a pension, his former employer therefore took out retroactive insurance under the statutory pension scheme in accordance with the Clerical Staff Insurance Law.

The Commission for its part did not take into account the fact of the retroactive insurance in calculating the value of the applicant's lost prospects of a civil service pension, but rather took as a basis the years of pensionable service actually performed, five years, seven months and fifteen days. The Commission then evaluated the prospect of a pension related to this waiting period at 35 % of total salary, although this percentage in principle could only be reached after ten years of actual service.

The applicant now submits that certain periods prior to employment, in particular periods of study, are to be taken into account in calculating the number of years of pensionable service pursuant to Article 116a of the Federal Civil Service Law, which was added by Article 139 of the Civil Service Outline Law of 1 July 1957 (BGBl. I, p. 667) retroactively to 1 September 1953. He claims that because of the retroactive effect of this provision the Law applied to him.

Together with the Commission I would first point out on this submission that a distinction is to be made under Article 116 (1) (3) of the German Federal Civil Service Law, between periods during which an official after attaining the age

of eighteen and before his appointment as an official has acquired special qualifications in particular areas which are a necessary condition for the exercise of his office on the one hand and periods of study which may be taken into account as years of pensionable service pursuant to Article 116a of the Federal Civil Service Law on the other hand. Clearly what the applicant claims is that he should be credited with the period of his professional activity prior to his entry into the service of the Berufsgenossenschaft from 1941 until 1951 as reckonable periods prior to entry into service within the meaning of Article 116 (1) (3) of the Federal Civil Service Law and furthermore that he should be credited with periods of study from 1936 to 1941 pursuant to Article 116a of that Law.

However, both periods must be left out of consideration for the calculation of the waiting periods which give rise to the contingent right to a civil service pension within the meaning of Article 106 of the Federal Civil Service Law, since they are not mentioned as years of pensionable service in that article. As the Commission rightly points out those periods can only be credited if the condition precedent of an entitlement to a civil service pension within the meaning of Article 106 of the Federal Civil Service Law is already satisfied without their inclusion.

The applicant on the other hand demands to be treated for the purposes of the compensation to be granted under Article 102 (2) of the ECSC Staff Regulations as if his employment under German civil service law had not been terminated in October 1956 but as if he had continued in the service of his German employer. It would only be on this premise that he would have acquired a vested or contingent right to a pension in the hypothetical event of invalidity or completion of the ten year waiting period.

The scheme of compensation under Article 102 (2) of the ECSC Staff Regulations is not however based on the vested or contingent pension rights which might perhaps have accrued in the country of origin under one premise or another if there had been continuity of employment, but quite clearly only provides for *"accrued"* pension rights in the country of origin to be taken into account.

Accordingly the applicant was obliged to forfeit only the number of five years seven months and fifteen days' actual service by reason of his entering the service of the Community and hence can at best receive compensation under Article 102 (2) of the ECSC Staff Regulations for the forfeiture only of those years of service.

In any event, as appears from the calculations enclosed with the letter of the Federal Insurance Office for Clerical Staff dated 26 August 1976, the applicant is fully covered by payment of contributions to the statutory pension scheme for the period of prior employment in question with the consequence that there is no deficiency in his cover in this respect and that if the periods of prior employment were credited under Article 102 (2) this would lead to overlapping of benefits.

The possibility of taking account of the periods of study within the meaning of Article 116a of the Federal Civil Service Law in applying Article 102 (2) of the ECSC Staff Regulations is also non-existent for a further reason, as the defendant rightly stresses. As we have seen, this provision was introduced into the Civil Service Law by Article 139 (1) and (2) of the Civil Service Outline Law of 1 July 1957 with effect from 1 September 1953, and made no provision for compensation for periods prior to the coming into force of the Law on 1 September 1957, as appears from Article 139 (4) of the Outline Law.

Contrary to the applicant's submission however, only those persons who fall within the *scope* of this scheme are affected by its retroactive effect. These are however in principle only those officials in service at the time of its coming into force on 1 September 1957 and recipients of pensions on the basis of an event giving rise to a pension which occurred after 1 September 1953. The applicant, whose employment as an official with the Insurance Fund for Workers in Steel Foundries and Rolling Mills was terminated with effect from 31 October 1956 cannot therefore derive any rights from this amendment. In particular he cannot rely on the exception contained in Article 139 (3) of the Outline Law since his employment was not terminated on his reaching the age-limit nor had he completed the ten-year waiting period provided for in Article 106 of the Civil Service Law. Let me say finally on this point that since the applicant was not entitled to a credit for the period of his studies at the time of his entering the service of the Community, the possibility of such a credit could not be regarded by him either, when he entered the service of the Community, as a pension right which he was obliged to forfeit by reason of his entering the service of the Community.

Thus the applicant's claim for his periods prior to employment and study periods to be taken into account in the application of Article 102 (2) of the ECSC Staff Regulations proves to be unfounded.

2. I shall now go on to deal with the question of the account to be taken of voluntary supplementary insurance payments.

The applicant has clearly abandoned his original claim for a declaration that the Commission is not entitled to have assigned to it the claimant's rights arising from voluntary insurance contributions following the defendant's objection in its defence that no such pretension had ever been made.

He now agrees with the defendant that the only question to be answered is whether the Commission was entitled when applying Article 102 (2) of the ECSC Staff Regulations to take account of the retained pension rights of an official after his entering the service of the Community when calculating the value of the lost rights which are to be made good in accordance with these provisions even when the retained rights derive partially from voluntary contributions.

The applicant, who considers that his voluntary contributions to supplementary insurance will in the final analysis result in a reduction in the number of years to be credited, would like a negative answer to this question. In his view the scheme for crediting years of pensionable service has nothing to do with the payment of voluntary contributions, since voluntary insurance cannot be equated with a pension scheme. As the applicant sees it the calculation carried out by the Commission is also an infringement of the principle of equality in so far as he will be in a worse position than officials who have not paid any voluntary contributions.

The Commission on the other hand considers that it was entitled to take account of the voluntary contributions when calculating the loss of pension rights and quotes as authority the wording and the intention of the scheme of Article 102 (2) of the ECSC Staff Regulations.

This latter view of the law should in my view be endorsed for the following reasons:

The defendant correctly points out that in Community law relating to officials the only possibilities in principle are those provided for in Article 11 (2) of Annex VIII to the Staff Regulations of Officials and to the ECSC Staff Regulations, namely payment of the actuarial equivalent or of sums repaid in respect of pension rights or expectancies to an official who enters the Community, in connexion with a previous service or employment. If no such possibility exists, for instance because vested or contingent rights to pension or insurance benefits are extinguished when an official leaves his previous service of employment to enter the service of the Community, there accrue to the official, in accordance with the provisions of the Staff Regulations of Officials and of the ECSC Staff Regulations — apart from the provisions of Article 107 of the Staff Regulations and of Article 102 of the ECSC Staff Regulations — only such pension rights as are attributable to his years of service with the Community.

The latter two provisions simply contain a scheme which is an exception, and to that extent anomalous, for the benefit of those officials who were already in the service of one of the Communities when the Community pension scheme was introduced and who by reason of their age on entering the service can no longer complete the maximum number of years of pensionable service laid down in the Staff Regulations. The purpose is to compensate them for pension rights which they have lost by reason of their entering the service of one of the Communites so that they may nevertheless be entitled to an appropriate retirement pension within the framework of the Community pension scheme. It is therefore a condition precedent for this compensation that the officials in question should have forfeited in whole or in part the pension rights which have accrued to them in their country of origin by reason of their entering the service of the Community and have not been able to obtain the actuarial equivalent of such rights.

The crediting of years of pensionable service provided for in Article 102 (2) of the ECSC Staff Regulations is therefore based on the principle that a comparison should be made between rights which the official has had to forfeit on leaving the national civil service and rights which he has been able to retain. The Commission made such a comparison in the calculations attached to the letter to the applicant dated 11 September 1978. It calculated the retained monthly pension rights including the rights arising from voluntary supplementary insurance at DM 79.57. As against these retained rights there are lost rights amounting to DM 397.60 per month which gives the proportion lost as 83.32 %.

In connexion with this comparison Article 102 (2) does not on its wording require that a distinction should be made between rights acquired by voluntary or by compulsory insurance contributions. The conditions for giving compensation is rather only the fact that the pension rights had to be forfeited without the receipt of an equivalent so that a deficiency in the official's pension has arisen as a result of his entering the service of the Community. On his own admission however, the applicant made the voluntary contributions in order to make up a deficiency in his pension arrangements which he was conscious of *before* entering the service of the Community and which was quite independent of his entering that service.

Since he was not obliged to forfeit his pension rights arising therefrom by reason of his entering the Community, it is difficult to see what is the deficiency which requires to be made up under Article 102 (2) of the ECSC Staff Regulations. In particular it would not be in accordance with the purpose of the scheme in question as I have described it, which is to grant compensation for a pension deficiency which cannot be made good in any other way, if benefits are granted on the basis of this scheme for a non-existent deficiency.

There is yet another reason why voluntary contributions to the statutory pension scheme should not be left out of the calculation which is to be made under the provision in question. It is quite clear from almost all the authentic texts of the provisions in question in all languages that the benefits provided are granted only for such rights as the official furnishes evidence of "having been *obliged* .... to forfeit". "To be obliged to forfeit" presupposes, however, as the Commission rightly points out, that in principle the loss of rights is unavoidable. Such a loss is however avoidable by voluntary contributions to the statutory pension scheme in the country of origin of the official. It follows in general that a deficiency which is made good by an official by taking advantage of the opportunity of voluntary payment of contributions does not need to be made good by the scheme for compensation in Community law and that hence voluntary payments of contributions are to be taken into account in connexion with the calculation of this compensation.

This legal consequence which is to be drawn from the provisions of the Staff Regulations themselves is simply put in concrete terms by the general implementing provisions which were adopted later and which the applicant contests. The implementing provisions provide that retained pension rights arising from voluntary contributions are to be taken into account in calculating the lost pension rights to be made good.

Finally the provisions in question interpreted in the way I have advocated do not infringe the general principle of equality as the applicant thinks. As we have seen, they constitute an exception from the general Community law relating to pensions so that they can only be justified by this narrow interpretation which takes account of their purpose, which I have already mentioned. There is no infringement of the principle of equality of treatment compared to those officials who have not paid any voluntary insurance contributions, if only for the reason that they retain no pension rights like the applicant. Apart from that, payments to private insurance systems, which, as we heard, are not taken into account in the calculation of compensation, are not comparable with payments to the statutory pension scheme in which, corresponding to the Community pension scheme, there is a close connexion between the employment and the pension scheme.

Since the Commission was therefore entitled, when applying Article 102 (2) of the ECSC Staff Regulations in calculating the value of lost rights to be made good in accordance with this provision, to take into account the applicant's pension rights retained after he entered the service of the Community even though they were based in part on voluntary contributions the application must be rejected as unfounded in this respect also.

3. Contrary to the submission of the applicant I also see no reason to justify an order for costs against the Commission on the grounds of the breach of its duty to provide for the applicant. It appears from the files that since 1970 the Commission has been attempting in close co-operation with the applicant to ascertain the basis for calculating his pension rights. The applicant had in particular the opportunity of answering the provisional pension decision and the defendant dealt with his arguments in a voluminous memorandum without its ever having been required of him that he should "assign" anything from his future pension from the Clerical Insurance Office.

III — I therefore propose that the application should be dismissed and that each party should be ordered to bear its own costs pursuant to Article 70 of the Rules of Procedure.