administration, a national or international organization or an undertaking, is intended to confer upon them a right which they may freely exercise. All the Member States are therefore bound to adopt the measures necessary in order to give effect to that provision, by laying down rules for the transfer of pension rights which will allow officials of the Communities to exercise the option granted to them by the Staff Regulations.

3. Whilst the conclusion of an agreement between the Community and pension body to which the official belonged before entering the service of the Community, as the contractual basis for the transfer of pension rights to the Community scheme, may be envisaged where the official comes from the administration of a third party *vis-à-vis* the Community, such as international organizations which are not subject to Community law, that is neither necessary nor justified where the official's former employer is a Member State which is subject to the rules laid down by Community institutions acting within the scope of their powers. The same holds true for a public or private body whose pension scheme is subject to the legislation or rules made by a public authority of that State.

In Case 137/80

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Principal Legal Adviser, Raymond Baeyens, acting as Agent, with an address for service in Luxembourg at the office of its Legal Adviser, Mario Cervino, Jean Monnet Building, Kirchberg,

applicant,

v

KINGDOM OF BELGIUM, represented by the Minister of Foreign Affairs, whose offices are at 2 Rue Quatre-Bras, 1000 Brussels, and having appointed as Agent Robert Hoebaer, Director at the Ministry of Foreign Affairs, External Trade and Development Cooperation, with an address for service in Luxembourg at the Belgian Embassy, 4 Rue des Girondins, Résidence Champagne,

defendant,

APPLICATION for a declaration under the second paragraph of Article 169 of the EEC Treaty that the Kingdom of Belgium has failed to fulfil its

obligations under the provisions of Article 11 (2) of Annex VIII to the Staff Regulations of Officials of the European Communities inasmuch as it refuses in principle to lay down the detailed rules for transferring to the Community pension scheme sums due to be paid under Belgian pension schemes or the actuarial equivalent of former pension rights acquired thereunder,

THE COURT,

composed of: J. Mertens de Wilmars, President, G. Bosco, A. Touffait, O. Due, Presidents of Chambers, P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe, T. Koopmans and A. Chloros, Judges,

Advocate General: F. Capotorti
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Summary of the facts

1. Article 11 (2) of Annex VIII to the Staff Regulations allows Community officials to transfer to their pension scheme rights acquired in the service of Member States, of other international bodies or of private undertakings. It provides as follows:

"(2). An official 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."

That option corresponds to the right of officials under Article 11 (1) of Annex VIII to the Staff Regulations to transfer pension rights acquired in the employment of the Communities to the pension schemes of national administrations and international bodies with which the Communities have concluded an agreement.

On 2 July 1969 the Commission adopted general provisions for the application of Article 11 (1) and (2) of Annex VIII to the Staff Regulations of Officials and in November 1978 the Commission's departments were able to announce that for the application of the provisions in question agreement in principle on the transfer of former pension rights had been reached with all the Member States except the Netherlands and Belgium.

The detailed technical rules for transfers under Article 11 (2) of Annex VIII to the Staff Regulations have been adopted and put into effect by Denmark, the United Kingdom, Italy, Ireland and Luxembourg.

Since 15 July 1970 the Commission has on several occasions brought to the attention of the Belgian Government its obligation to adopt measures which would allow the provision in question to be applied.

Since no specific action was taken by the Belgian Government in order to comply with the wishes of the Commission and since, in particular, no reply was received to the Commission's letter of 12 May 1977, in which it drew attention to the possibility of its bringing an action against Belgium under Article 169 of the EEC Treaty if that Member State did not adopt a position which would enable the problem to be resolved, the Commission, by letter of 19 December 1977, initiated the procedure under Article 169 of the EEC Treaty by inviting the Belgian Government to present within one month its observations on its failure to fulfil its obligations under Article 11 (2) of Annex VIII to the Staff Regulations.

On 22 March 1978 Belgium's Permanent Representative stated that a detailed reply would be given on the basis of the conclusions drawn from a study of the problem undertaken by the Belgian Government but did not give a reply which would constitute a step in the procedure initiated by the Commission under Article 169.

Under cover of a letter dated 24 July 1979 the Commission delivered a reasoned opinion dated 18 July 1979 pursuant to the first paragraph of Article 169 of the EEC Treaty, requesting Belgium to comply with that opinion within the following two months by putting an end to its uncooperative behaviour which constituted a failure to fulfil an obligation within the meaning of Article 169.

By a letter dated 27 September 1979 the Kingdom of Belgium requested that the period for replying to the Commission's reasoned opinion be extended by one month. That extension was granted by telex message on 17 October 1979. On 27 November 1979 the Belgian Government stated that it did not consider itself bound to comply with the Commission's reasoned opinion and that it did not accept the interpretation placed on the article in question or the consequences arising from the Commission's interpretation. Consequently, on 23 January 1980 Mr Tugendhat, a Member of the Commission, notified the

defendant of the Commission's intention to continue with the procedure under Article 169 and bring the matter before the Court of Justice, the period accorded by the opinion of 18 July 1979 and extended at the request of the Belgian Government having already expired by the date on which the latter's letter of 27 November 1979 was received.

II — Written procedure

By an application lodged at the Court Registry on 9 June 1980 the Commission brought before the Court, pursuant to the second paragraph of Article 169 of the EEC Treaty, the matter of the alleged failure of the Kingdom of Belgium to fulfil one of its obligations under the Treaty.

The written procedure took its normal course.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

III — Conclusions of the parties

1. The Commission claims that the Court should:

— Declare that the Kingdom of Belgium has failed to fulfil its obligations under Article 11 (2) of Annex VIII to the Staff Regulations of Officials of the European Communities, laid down by Regulation (EEC, Euratom, ECSC), No 259/68 of the Council of 29 February 1968 in application of the second subparagraph of Article 24 (1) of the Merger Treaty of 18 April 1965, in so far as that State refuses in principle any transfer to the pension scheme for officials of the Communities of sums due to be repaid under pension schemes in Belgium or the actuarial equivalent of former pension rights acquired thereunder.

— Order the Kingdom of Belgium to pay the costs.

2. The Kingdom of Belgium contends that the Court should:

— Declare the Commission's application unfounded;

— Order the Commission to pay the costs.

IV — Submissions and arguments of the parties

1. The Commission submits that Belgium's refusal to give effect to the right conferred on officials of the European Communities to have transferred to the Community pension scheme either sums due to be repaid under national schemes or the actuarial equivalent of retirement pension rights previously acquired thereunder, is based essentially on a denial that Article 11 (2) of Annex VIII to the Staff Regulations of Officials, the present text of which was laid down by Regulation No 259/68 of the Council of 29 February 1968, has any binding effect on the ground that such a transfer, which is of an optional nature, is not applicable to the pension schemes in the public and private sectors as organized under Belgian law.

The provision in question is binding on the Member States inasmuch as it is intended to guarantee officials a pension scheme which takes account of all the service completed in the course of their national or international careers as well as their careers with the European Communities.

The Staff Regulations of Officials, laid down by a Council regulation, are binding in their entirety and are directly applicable in all Member States under the third paragraph of Article 189 of the EEC Treaty.

Consequently, Article 11 (2) of Annex VIII to the Staff Regulations constitutes a mandatory provision, a legal requirement directly applicable to the Member States, even though it is not also immediately applicable inasmuch as it requires the adoption of specific practical measures by the Member States in order to be put into effect. In the Commission's view, the provision must therefore be interpreted and put into effect throughout the Community without regard to the disparities between national contexts or even between schemes existing within the same national context.

The Commission considers that the difference between the wording of paragraphs (1) and (2) of Article 11 of Annex VIII to the Staff Regulations may be explained by the fact that the two provisions are not concomitant in origin and that their meanings are quite different.

The term "right" contained in the wording of paragraph (2) does not signify that freedom to take action is granted to the Member States but rather that a right is conferred upon the European official which he is free to exercise.

Consequently, the official's option of exercising the right thus conferred upon him to make the transfer provided for by Article 11 (2) entails for the various national pension schemes an obligation in principle to give effect to that transfer in accordance with the technical or practical arrangements laid down by the legislation of each Member State. The Commission states that the exercise of this personal right conferred upon Community officials does not seem at all "external" to the internal legal order of the Kingdom of Belgium and that it may perfectly well be accepted and treated as a detail of the arrangements for the operation of the social security scheme or schemes in force in that Member State. The Commission emphasizes in that regard that if the Member States were to make conditional upon the state of their own legislation the right of Community officials to have account taken of the successive periods of service which they have performed outside the employment of the Communities and to have the pension rights thus acquired transferred to the Community scheme, the provision in question would be deprived of any effect.

In that regard the Commission cites by way of example Regulation (EEC) No 1408/71 of the Council of 14 June 1971 and Regulation (EEC) No 574/72 of the Council of 21 March 1972 on the application of social security schemes to employed persons and their families moving within the Community (codified version, Official Journal 1980, C 138) which was specifically intended to reduce and even eliminate the adverse effects of not taking account of periods of work performed under the laws of various States, and particularly in relation to the award of pensions.

Moreover, the Commission observes that the adoption of measures for the application of Article 11 (2) by other Member States has in practice not involved changing the basis of their pension schemes from a "distributive" system to one of "accumulation". In order to determine the value of retirement pension rights already acquired, it is sufficient to establish the

nature and period of work and to calculate the years of pensionable service under the various Belgian pension schemes. The Commission points out that if the Kingdom of Belgium does not adopt measures to that effect, there is no guarantee that a European official who does not have a sufficient number of years' service for the award of a normal retirement pension will be entitled to receive a supplementary pension in Belgium corresponding to the years of work which he completed before entering the service of the Communities.

Finally, the Commission submits that the situation resulting from Belgium's refusal to lay down the detailed technical rules necessary for transferring pension rights acquired under its national schemes when the other Member States have discharged that obligation or are in the process of doing so causes officials of the European Communities to be treated with manifest inequality on account of their nationality, and is not to be considered, as Belgium claims, as an exceptional situation which privileges the European official.

2. The Kingdom of Belgium puts forward a series of arguments relating to the Belgian pension system, the legal effect of the provision in question and the consequences of accepting the interpretation placed on it by the Commission.

It observes first that under the Belgian pension scheme a pension is one of the benefits conferred by the State in the exercise of its sovereign power and that consequently both the principle of the award itself and the detailed rules relating thereto are subject to the will of the national authorities.

Furthermore, the right to a pension is a right the exercise of which is subject to the fulfilment of a number of conditions, which vary according to the particular pension scheme, including age, cessation of all work subject to exceptions laid down by law, a minimum period of service and the waiver of certain social advantages. After it has been established that the conditions required for acquiring the right of a pension are fulfilled, the pension is awarded by an administrative or a judicial decision. The pension system in the public sector has hitherto been financed entirely by the State whereas the schemes for employed persons and for self-employed persons are financed by contributions made by the individual, to which are added contributions by the State and, in the case of the scheme for employed persons, contributions by the employer. There is no connection between the amount of the pension and that of the contribution. The principle applicable is that of distribution and not of accumulation, the recipients being persons other than the contributors.

Consequently, concludes the Belgian Government, a person who ceases work in Belgium in order to enter the service of the Communities has no acquired right the transfer of which he may require in the form of the actuarial equivalent or sums due to be repaid. The right to a pension is merely a future right which is contingent and revocable and becomes enforceable only if the conditions laid down by law for the award of the pension are fulfilled, in which case alone the amount of the pension may be determined.

The Belgian Government points out that the position of a Belgian national who enters the service of the European

Communities is as follows: if he is subject to the scheme for self-employed persons, at the age of retirement he will receive a pension the amount of which will depend on the number of years' actual work as an employed or self-employed person. If the person concerned is a servant of the State, the legislation relating to officials who enter the service of an international organization will be applied to him. That legislation expressly provides for the maintenance of the link between the administration and its servant who will consequently remain subject to the provisions of national law relating to the award and calculation of retirement pensions (Royal Decree No 33 of 20 July 1967, as amended by the Law of 3 June 1971, Articles 3 and 4 (1°) and (2°)); Finally, where a servant resigns from the public service his former public employer is obliged to pay into the private pension scheme the contributions required by law for that scheme. Consequently, the person concerned is deemed to have been subject to the scheme for employed persons throughout his employment in the public sector and a public servant who enters the service of the European Communities after resigning from the public service is deemed to have worked as an employed person.

Consequently, a Belgian national who enters the service of the Communities remains subject to the Belgian pension scheme and retains his status as a potential beneficiary under that scheme in so far as he fulfils the legal conditions prescribed by the scheme on his retirement. In response to the fear expressed by the Commission that there is no guarantee that a European official will have the number of years' service required for the award of a normal retirement pension, the Belgian Government states that, to the contrary, the Belgian pension system ensures that on entering the service of the Community workers, whether they belong to the Belgian public or private sector, receive treatment similar to that reserved for workers who change sectors within Belgium or enter the service of another international organization. Their years of work completed in Belgium will qualify them, when the conditions for the acquisition of the right of a pension are fulfilled, for the award of the benefits provided for by the pension scheme to which they were affiliated before entering the service of the Communities.

Secondly, with regard to the legal scope of Article 11 (2), the Belgian Government claims that the Commission has confused that provision's formal nature as a regulation with its scope. In the defendant's view, what is at issue is neither the binding character of the provision nor the direct effect of the regulation but rather its particular scope. The provision in question is an integral part of the Staff Regulations of Officials laid down in the form of a regulation. Like any other similar provision, it therefore has binding force, but according to the Belgian Government it is still necessary to identify the persons subject to that binding force. It takes the view that the Staff Regulations, being rules for the functioning of an organization, can concern only legal relations arising within a public body and that their sole purpose as staff regulations of officials is to lay down rules governing the legal relations between the employer and its servants, who are the sole parties concerned. By reason of their very subject-matter the Staff Regulations

cannot contain provisions binding on third parties, such as the former employer of a Community official, whether it be a private firm, a State or an international organization.

The Staff Regulations, based on Article 24 of the Treaty establishing a Single Council and a Single Commission of the European Communities, have specific and limited scope and cannot be intended to harmonize the social security schemes of the Member States. By creating a specific legal relationship (transfer of funds) between the employer and its servant, Article 11 (2) cannot govern retroactively a prior legal relationship, in this case the pension scheme set up by a Member State in favour of its own servants.

The Belgian Government claims that the effect of accepting the argument put forward by the Commission would be to ascribe to the concept of staff regulations a scope wider than that recognized by the general law.

The Staff Regulations of Officials of the European Communities govern relations between servants and their institutions but are inapplicable to relations created within the internal legal systems of the Member States, in this case the detailed rules for the functioning of national social security schemes. The fact that other Member States have undertaken the transfer does not mean that in doing so they considered that they were fulfilling a legal obligation under the provision in question.

Furthermore, the Belgian Government maintains that the fact that the provision of the Staff Regulations in question does not have binding force is clear from an analysis of its wording and from the general scheme of Article 11 of Annex VIII into which it was inserted.

Indeed, in the defendant's view a reading of the provision shows that it merely confers a right on the Community official to request that the payment be made to the Communities which, as his employer, undertake to accept that payment, consisting either of the actuarial equivalent of pension rights acquired or of sums due to be repaid. That operation presupposes the existence of a right *vis-à-vis* the national institution and such a right can arise only from the employment which the official held before entering the service of the Communities.

Consequently, if an official acquired no such right on the basis of the employment which he held before entering the service of the Communities, he may not demand the transfer for the simple reason that he has no right to do so. The Belgian Government observes that if the Community legislature had intended to impose an obligation on the former employers of officials, it would have expressly stated that the obligation was binding om them but would have excluded international bodies which cannot be bound by a mandatory provision of Community law.

Accordingly, in the defendant's view the lack of any express provision in Article 11 (2) is proof that the Community legislature did not intend that third parties, including the Member States, should be bound in this matter by the provisions of the Staff Regulations and the interpretation placed by the Commission on that provision goes beyond the limits permitted by a logical and legally coherent reading of the wording of the Staff Regulations.

In that regard, the Belgian Government considers the applicant's reference to Regulation No 1408/71 of the Council to be inapposite because that is a basic regulation laying down provisions which are binding on the Member States and consequently has nothing in common with Article 11 (2) of Annex VIII, a provision of the Staff Regulations whose purpose, scope and subject-matter are radically different. Article 11 (2) of Annex VIII to the Staff Regulations deals with the transfer of benefits, whereas Article 44 et seq. of Regulation No 1408/71 concern not a transfer but detailed rules for the award of benefits taking account of periods of insurance completed under the legislation of other Member States. It would moreover be paradoxical, states the Belgian Government, to infer from staff regulations of European officials an obligation to transfer benefits when the Community regulations on freedom of movement of workers merely places on the Member States an obligation to take account of periods of insurance.

The Belgian Government claims in addition that the insertion of paragraph (2) into the text of Article 11 confirms that analysis. It was done only out of concern for reciprocity because the Staff Regulations of the ECSC contained only the first paragraph.

The two paragraphs have similar scope and form a comprehensive system for transferring benefits from and to the Communities involving an undertaking on the part of the Community employer and a right for the Community official.

The Belgian Government stresses that in both cases the exercise of that right presupposes an act of free will on the part of the new or former employer, as stated in paragraph (1) of Article 11 ("which has concluded an agreement with the Communities").

Consequently, the defendant submits that any obligation which may exist in the matter is incumbent only on the Communities which undertake to grant officials a right which may be exercised in so far as this is made possible by the regulations of international bodies, the internal rules of private firms or the legislation of the Member States. Were it not for the provisions of Article 11 (2), servants of the Community would enjoy no right, nor would the Community as employer be subject to any obligation. The Belgian Government takes the view that that interpretation does not underestimate the scope of the provision and its refusal to accept the Commission's interpretation does not have the effect of depriving it of any real meaning, as claimed by the Commission. The defendant contends that a similar provision is to be found in the pension regulations of coordinated organizations but it cannot be claimed that that provision is devoid of meaning because the transfer may be effected only in so far as it is permitted by national law. A provision which is meaningful in the regulations of coordinated organizations must also be meaningful in the Staff Regulations of European officials.

Finally, the Belgian Government seeks to refute the Commission's arguments by considering the possible consequences of accepting them.

In reply to the argument that it is necessary for all the Member States to adapt their pension schemes to allow for the transfers provided for by Article 11 in order to avoid the unequal treatment of European officials on account of their nationality, the Belgian Government submits that such unequal treatment is in any event an established and inevitable fact. It claims that the inequality is due either to the continuing nature of the

factors to be taken into consideration, such as the differences between the amounts of the pensions in the Member States and the differences between the various exchange rates when sums accumulated in national currency are transferred to the Community scheme.

In the light of that situation, not only would the adoption of national measures permitting the application of Article 11 (2) be pointless but under Belgian internal law it would also have unacceptable consequences because the Belgian Government would either have to apply to officials entering the service of the Communities a scheme which derogated from the general pension scheme or would have to amend *erga omnes* the principles and detailed rules of the Belgian pension scheme.

The Belgian Government claims that to give effect to the first alternative would lead to discrimination in favour of national officials who enter the service of the Communities owing to the fact that for the same service the future European servant would enjoy an exceptional and privileged position. Such a privilege would be contrary to the principle of the equality of citizens in the field of social security and the public service. Indeed, the Belgian Government maintains that contrary to what the Commission says the difficulties relating to the transfer are not merely confined to a technical accounting problem: the transfer to the Communities derogates from Belgian legislation and entails discrimination.

With regard to the derogation from Belgian legislation, the Belgian Government maintains that in the case of a transfer to the Communities the legislation in force at present must be applied whereas under the Belgian pension system a person can claim a pension only in accordance with the legislative provisions in force at the time when he actually acquires the right to a pension. A servant has no acquired rights to a given pension during his career. Consequently, the transfer to the Communities derogates from a fundamental principle of the Belgian pension system and it would be aberrant to evaluate rights of a person who is pursuing his career when those rights are nor acquired until the end of his career. The Belgian Government next claims that that solution would lead to discrimination entailing a privilege. The capital sum to be paid by way of the actuarial equivalent of a notional pension determined in accordance with the provisions of the public sector scheme is appreciably higher than the sums to be paid to the pension scheme for employed persons where an official resigns and enters the service of a body other than the European Communities. Thus, a Belgian official who resigns and enters the service of the EEC costs the Belgian State nearly three times more than if he enters the service of another employer, be it an international organization such as NATO, OECD, or Eurocontrol. Moreover, the discrimination manifests itself in the benefits which are subsequently granted to the persons concerned on the basis of those payments since in the case of an official who resigns and enters the service of the Communities the sums paid are converted into years of service qualifying the European official for a pension calculated on the basis of the final salary which he obtains in the service of the EEC, whereas in the case of an official who resigns and enters another organization the sums paid to the social security

scheme will provide the servant with a pension related to the salaries on which his social security contributions are based, which will clearly be lower since they were earned at the start of his career.

Consequently, that difference represents an extra expense for the State and a privilege for the European official and it is not logical that two servants who leave the Belgian public sector after the same length of service should obtain pension benefits which are substantially different.

The Belgian Government claims that to rely, as the Commission is doing, on the provision of the Staff Regulations in question in order to oblige a State to introduce such discrimination amounts in law to a misinterpretation of the precise scope of the provision and in terms of social reality to a failure to recognize the legitimate reasons justifying the Belgian Government's refusal to allow, by way of derogation, a privileged scheme at a time when restrictive measures relating to social benefits, and pensions in particular, are required.

As regards giving effect to the second alternative, the Belgian Government observes that it entails a fundamental change in the principles and workings of the Belgian pension scheme. The effect would be that a right the exercise of which is conditional would become immediately enforceable and that the so-called "distributive" system of financing would be replaced by that of "accumulation". In that regard the Belgian Government observes that it is necessary to examine whether or not under the legislation of the various Member States the application of Article 11 (2) may simply take the form of a measure of a technical nature without requiring any amendment of the fundamental scheme of the State, as would be the case in Belgium.

Finally, the defendant maintains that the interpretation adopted by the Commission does not meet the requirements of the principle that the legal rules for the attainment of an objective should be proportionate to the objective pursued.

In view of the fact that the Treaty of Rome lays down specific procedures in order to ensure the harmonization of the laws of the Member States, the use of provisions of the Staff Regulations of Officials to make Member States undertake such fundamental changes in their national legal order constitutes a misuse of the law comparable to a misuse of powers. The national legislative measures which must be taken are totally disproportionate to the objective which the Commission seeks to attain for the application of Article 11 (2) of Annex VIII to the Staff Regulations of Officials.

V — Oral procedure

The Commission, represented by its Principal Legal Adviser, Raymond Baeyens, acting as Agent, accompanied by Wolfgang Elsner, an administrator acting in the capacity of expert, and the Kingdom of Belgium, represented by R. Hoebaer, Director at the Ministry of Foreign Affairs, acting as Agent, presented oral argument at the sitting on 13 May 1981.

The Advocate General delivered his opinion at the sitting on 24 June 1981.

Decision

1 By application received at the Court on 9 June 1980, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that the Kingdom of Belgium had failed to fulfil one of its obligations under the Treaty by omitting to lay down the detailed rules for transferring to the Community pension scheme sums due to be repaid under Belgian pension schemes or the actuarial equivalent of pension rights acquired thereunder, as provided for by Article 11 (2) of Annex VIII to the Staff Regulations of Officials (Regulation (EEC Euratom, ECSC) No 259/68 of the Council of 29 February 1968, Official Journal, English Special Edition 1968 (I), p. 30).

2 That provision provides as follows:

"An official 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 such cases the institution in which the official serves shall, taking account of his grade on establishment, determine the number of years of pensionable service with which be 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."

3 The Commission takes the view that Article 11 (2) constitutes a mandatory provision intended to ensure that officials have a pension scheme which takes account of the whole of the service which they have performed during their careers in national, international or Community employment and must therefore be interpreted and put into effect throughout the Community without regard to the disparities between national contexts or between schemes existing within the same national contexts. It follows, according to the Commission, that the provision places an obligation on each Member State to make the transfer possible and to carry it out when requested to do so by an official.

4 That interpretation is contested by the Belgian Government which puts forward a set of arguments based on the one hand on the general characteristics of the Staff Regulations and on the other on the wording, subject-matter and context of the provision in question.

5 In the opinion of the Belgian Government, the Staff Regulations of Officials do not have the effect of imposing obligations on Member States as the former employers of certain officials. The Staff Regulations, like any such regulations of a national or international body, it is claimed, are a set of rules within an institution which govern solely the legal position of the employer and its servants, in this case the Communities and their officials. As such, they cannot place legal obligations on third parties who are not privy to that relationship.

6 Moreover, the Belgian Government claims that to accept the contrary view would be to ascribe to the provision in question "a scope wider than that recognized by the general law" inasmuch as it would govern with retroactive effect a prior legal relationship unrelated to the legal relations created by the Staff Regulations.

7 As the Commission emphasized, the Staff Regulations of Officials were laid down by Regulation No 259/68 of the Council of 29 February 1968 which possesses all the characteristics set out in the second paragraph of Article 189 of the EEC Treaty under which a regulation has general application. It is binding in its entirety and is directly applicable in all Member States.

8 It follows that the Staff Regulations, in addition to having effects in the internal order of the Community administration, are binding on Member States in so far as their cooperation is necessary in order to give effect to those regulations.

9 Consequently, where a provision of the Staff Regulations requires national measures for its application, the Member States are bound under Article 5 of the EEC Treaty to adopt all appropriate measures, whether they be general or particular.

10 The Belgian Government also claims that its interpretation of the Staff Regulations is confirmed by the very wording of Article 11 (2). The fact that according to that provision an official has a right to the transfer indicates, according to the Belgian Government, that the sole obligation which can arise from that right is that of the European Communities to accept the payment in their capacity as the employer of the person concerned where such a payment is permitted by the legislation of the State concerned.

11 It must be stated in reply to that argument that Article 11 (2), by establishing for the benefit of officials a system for the transfer of pension rights, was intended to facilitate movement from national employment, whether public or private, to the Community administration and thus ensure that the Communities have the best possible chance of being able to choose qualified staff who already possess suitable experience.

12 Article 11 (2) of Annex VIII to the Staff Regulations, which is intended to enable the Community scheme to be coordinated with the national schemes, seeks, moreover, to ensure that Community officials may retain the rights which they have acquired in their own State even though they may be limited, or even conditional or future, or insufficient to give rise to the immediate award of a pension, and also to ensure that account may be taken of those rights by the pension scheme to which the persons concerned are affiliated at the end of their careers, in this case the Community scheme.

13 For those reasons it is clear that the "right" mentioned in Article 11 (2) of Annex VIII to the Staff Regulations is intended to confer upon officials a right which they may freely exercise. The exercise of that right would be jeopardized if, as the Belgian Government maintains, the Member States were to retain the right to refrain from adopting the measures necessary in order to give effect to the provision. Indeed, the refusal of a Member State to lay down rules for the transfer of pension rights would have the effect of depriving officials of the Communities of the very right to exercise the option granted to them by the Staff Regulations.

14 The Belgian Government's argument based on a comparison of paragraphs (1) and (2) of Article 11 must also be rejected. First, the different wording of the two provisions is in itself an indication of their different scope. Furthermore, the fact that the transfer is compulsory in one instance but is not in the other is justified by the fact that in the case of Article 11 (1), where funds representing pension rights acquired under the Communities' scheme are transferred to another body, it is essential to ensure the valid transfer of those rights by securing the agreement of that body. On the other hand, in the case of Article 11 (2) the effects of the transfer to be made to the Communities' pension scheme may be determined by the Communities alone both in their own interests and in those of their officials.

15 The conclusion of agreements providing the contractual basis for the transfer to the Community scheme may be envisaged only where officials come from the administrations of third parties *vis-à-vis* the Community, such as international organizations which are not subject to Community law. That is neither necessary nor justified where the official's former employer is a Member State which is subject to the rules laid down by Community institutions acting within the scope of their powers. More generally, the same holds true for a public or private body whose pension scheme is subject to the legislation or rules made by a public authority of that State.

16 Finally, the Belgian Government pleads difficulties of a technical nature which make the calculation of pension rights acquired under the national scheme impossible in practice before the person concerned finally retires.

17 In that regard, the difficulties which a Member State is said to have to surmount in adopting the measures necessary in order to enable Article 11 (2) of Annex VIII to the Staff Regulations to be put into effect, and in particular those of a technical nature, such as the alleged impossibility of determining the value of the rights acquired by officials in the various branches of the public service before the date on which they finally retire or the fact that the pensions to which they are entitled are liable to increases or reductions decided upon by the legislature, cannot expunge the failure to fulfil an obligation with which the State is charged. According to well-established case-law, a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with obligations resulting from a Community regulation.

18 In this case the Belgian Government is bound to select and put into effect specific measures which will make possible the exercise of the right granted to officials to transfer rights acquired in national employment to the Communities' pension scheme. It should, moreover, be observed that Belgian legislation in its present state prevents neither the transfer of pension rights where State officials move to private-sector employment nor, more generally, transfers from one pension scheme to another within Belgium itself.

19 The Belgian Government's refusal to allow the transfer of pension rights to the Community scheme when other Member States have already done so destroys the equality of Community officials from other Member States with those from Belgium by introducing discrimination against the latter. That refusal might also impede the recruitment by the Community of Belgian officials with a certain length of service since movement from the national administration to that of the Community would entail the loss of pension rights to which they would be entitled if they had not accepted employment with the Community.

20 It is clear from the foregoing that the Kingdom of Belgium has failed to fulfil its obligations under the EEC Treaty by refusing to adopt the measures necessary for the transfer to the Community pension scheme of sums due to be repaid in respect of or the actuarial equivalent of retirement pension rights

acquired under the Belgian pension scheme, as provided for by Article 11 (2) of Annex VIII to the Staff Regulations of Officials of the European Communities.

Costs

Article 69 (2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs. Since the Kingdom of Belgium has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Declares that the Kingdom of Belgium, by refusing to adopt the measures necessary for the transfer to the Community pension scheme of sums due to be repaid under the Belgian pension scheme or the actuarial equivalent of retirement pension rights acquired thereunder, as provided for by Article 11 (2) of Annex VIII to the Staff Regulations of Officials of the European Communities, has failed to fulfil its obligations under the EEC Treaty;**

2. **Orders the Kingdom of Belgium to pay the costs.**

Mertens de Wilmars Bosco Touffait Due Pescatore

Mackenzie Stuart O'Keeffe Koopmans Chloros

Delivered in open court in Luxembourg on 20 October 1981.

J. A. Pompe
Deputy Registrar

J. Mertens de Wilmars
President