In Case 212/81

REFERENCE to the Court under Article 177 of the EEC Treaty by the Cour de Cassation [Court of Cassation] of the Grand Duchy of Luxembourg for a preliminary ruling in the case pending before that court between

CAISSE DE PENSION EMPLOYÉS PRIVÉS [Pension Fund for Clerical Staff in the Private Sector]

and

LÉON BODSON

on the interpretation of Article 11 (2) of Annex VIII to the Staff Regulations of Officials of the European Communities on the transfer to the pension scheme of the European Communities of pension rights acquired under the pension funds of a Member State,

THE COURT (Second Chamber)

composed of: O. Due, President of Chamber, A. Chloros and F. Grévisse, Judges,

Advocate General: F. Capotorti
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted in pursuance of Article 20 of the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

Léon Bodson, an official of the European Parliament, submitted a

request to the Caisse de Pension des Employés Privés (hereinafter referred to as "the Fund"), Luxembourg, for the payment to the pension scheme of the Communities of the actuarial equivalent of the pension rights corresponding to the periods of insurance which he had completed under the pension scheme for employees in the private sector in the Grand Duchy of Luxembourg.

By decision of 22 February 1977 the Fund's Management Committee refused to comply with that request.

An action brought against that decision before the Conseil Arbitral des Assurances Sociales [Arbitral Council of Social Insurance] was in turn rejected on 1 July 1977 on the grounds that the Luxembourg Law of 29 August 1951 (Articles 10 and 64 to 68) did not provide for the payment of an actuarial equivalent and that the provisions of Annex VIII to the Staff Regulations of Officials of the European Communities were not relevant to the matter because they governed solely the pension arrangements for European officials, without prejudice to those relating to national pension schemes to which officials were previously subject.

On 1 July 1977 Mr Bodson appealed to the Conseil Supérieur des Assurances Sociales [Supreme Council of Social Insurance] which, by decision of 1 December 1977, held that he was entitled to the requested transfer, the effecting of which was a matter solely for the choice of the person concerned, and remitted the matter to the Fund for a calculation of the actuarial equivalent of his rights.

On 23 February 1978 the Fund lodged an appeal in cassation against that judgment, but by a judgment of 23 November 1978 it was declared that the Fund had "forfeited its right of appeal".

Subsequently, by decision of 17 July 1979, the Fund's Management Committee determined the amount of the acquired pension rights to be transferred by Mr Bodson in accordance with Article 18 of the Law of 16 December 1963 on the coordination of pension schemes, as amended by the law of 14 March 1979.

Mr Bodson brought the matter before the Conseil Arbitral des Assurances Sociales which, by a judgment of 28 November 1979, quashed the decision of the Fund's Management Committee on the ground that it was contrary to the judgment of the Conseil Supérieur des Assurances Sociales of 1 December 1977, which required the transfer of the actuarial equivalent of the pension rights acquired in accordance with the election made by the person concerned. The appeal lodged by the Fund was dismissed on points of substance by the Conseil Supérieur des Assurances Sociales by a judgment of 17 July 1980.

Against that judgment the Fund lodged an appeal in cassation.

By judgment of 25 June 1981 the Cour de Cassation, Luxembourg, declared the appeal to be admissible and, reserving judgment, referred to the Court of Justice for a preliminary ruling on the following question:

"Is Article 11 (2) of Annex VIII to the Staff Regulations of Officials of the European Communities to be interpreted as meaning that either the actuarial equivalent of retirement pension rights acquired or the sums repaid from the pension fund may be made up of the amount of the contributions (partly those of the employer and partly those of the insured person) actually paid to a national pension scheme (contributory scheme) and/or notionally calculated

(non-contributory scheme), together with interest calculated at the rate of 4 % per annum from 31 December of each year of affiliation?"

The judgment making the reference was lodged at the Court Registry on 20 July 1981. An application to intervene in support of the conclusions of Mr Bodson was dismissed by the Court by order of 11 November 1981.

By order of 9 December 1981 the Court, finding that no Member State or institution which was a party to the proceedings had requested that the case be decided in plenary session, assigned the case to the Second Chamber pursuant to Article 95 (1) and (2) of the Rules of Procedure.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by Mr Bodson, represented by V. Biel of the Luxembourg Bar, the Luxembourg Government, represented by J. Weyland, Director of International Economic Relations at the Ministry of Foreign Affairs, and by the Commission of the European Communities, represented by R. Baeyens, Principal Legal Adviser, acting as Agent.

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

II — Written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

1. Mr *Bodson* observes first that since the judgment of 1 December 1977 of the Conseil Supérieur des Assurances Sociales, Luxembourg, there is no longer any doubt concerning the right of an official to choose either the actuarial equivalent or the sums repaid in respect of pension rights. Consequently, the question referred to the Court concerns the question whether the method of calculating the amounts to be paid to Mr Bodson constitutes the actuarial equivalent.

He maintains in that regard that the Cour de Cassation should have expanded its question by whether, if necessary, a compromise between two concepts of special sums repaid and of normal sums repaid might be permissible. However, in the absence of a question which he describes as "intermediate", he makes his observations taking account of the two alternatives contained in the question referred to the Court.

If it is a question of sums repaid, he accepts the Fund's argument that the transfer of the whole of the contributions of the employer and of the person affiliated does not constitute the sums repaid, as the term has been defined and applied previously by social insurance institutions.

If it is a question of the actuarial equivalent, he maintains that the subject-matter and definition of that concept are well-known to Luxembourg social security legislation. The Fund's claim to the contrary cannot be accepted.

Mr Bodson observes, moreover, that a definition of the "actuarial equivalent" is given by Article 8 of Annex VIII to the Staff Regulations of Officials and that, consequently, the calculation thereof as

performed by the Fund, that is to say the contributions of the employer and of the person affiliated, together with interest thereon at 4%, does not correspond to that definition and in fact constitutes merely a reimbursement of contributions. The contributions are not updated, as would have to be the case if it had really been intended to apply a procedure involving the actuarial equivalent.

In reply to the Fund's argument that the law of 14 March 1979 had laid down a solution based on standard amounts, he maintains that the necessary corollary of that proposition is to conclude that that solution is based neither on sums repaid, as previously defined in Luxembourg social insurance legislation, nor on the actuarial equivalent, but on a makeshift and hybrid compromise, that is to say a special and *ad hoc* concept of sums repaid.

Consequently, Mr Bodson concludes that the Luxembourg law, as amended in 1979, is incompatible with Article 11 (2) of Annex VIII to the Staff Regulations, in so far as it does not permit officials to be given the actuarial equivalent for which they are entitled to opt.

2. The *Luxembourg Government* considers that Article 11 (2) of Annex VIII to the Staff Regulations of Officials does not confer upon officials direct rights against a Member State or its insurance institutions. In its opinion, it is a provision of the Staff Regulations which governs relations between the official and the Community institution which employs him and the person concerned is not entitled by virtue thereof to impose on the insurance institution of his State of origin his choice that the amount to be transferred be paid in a particular form. In the absence of any provisions of the domestic law of the Member State permitting such a transfer, the right conferred by Article 11 (2) of the Staff Regulations cannot be exercised.

However, by the law of 14 March 1979 the Luxembourg legislature created a legal atmosphere which would allow the persons concerned to exercise their rights, although within the context of the pension schemes concerned. Owing to the systems of financing employed by the Luxembourg schemes, it is consequently not possible to opt for a transfer based on the actuarial equivalent.

The Luxembourg Government maintains, moreover, that the concept of "actuarial values", to which reference is made in the judgment of 18 July 1980 of the Conseil Supérieur des Assurances Sociales, is used in a very restricted context concerning only the actuarial value of the rights which are in the process of being acquired by the recipient of a pension. Consequently, it cannot give rise to the general existence of the concept of "actuarial equivalent" in the Luxembourg legislation concerning the pension rights of an insured person who is still working.

Moreover, the system of financing applicable in Luxembourg does not provide for the creation of legal reserves. Only at the date of the materialization of the risk are the reserves necessary for financing the benefits created with the assistance of contributions received during that year. Consequently, it is unthinkable that the present value of the rights which an insured person who is still working is in the process of acquiring should be refunded to him.

It follows that only the transfer of sums repaid is possible under Luxembourg legislation, which, following a recent amendment, permits the transfer of the whole of the contributions paid together with interest thereon at 4%; previously that was not the case. In conclusion, the Luxembourg Government states that the same arrangements also apply in the case of non-contributory pension schemes.

3. The *Commission* first of all examines the provisions of the Staff Regulations of Officials which employ the expression "actuarial equivalent" of retirement pension rights. In the Commission's view, it emerges from the whole of those provisions that in the context of the Community pension scheme all pension rights are calculated on an actuarial and not a distributive basis.

With regard to the question raised, the Commission maintains that Article 11 (2) of Annex VIII to the Staff Regulations confers upon the official a choice as to whether or not to transfer pension rights acquired before entering the service of the Community, but that it is difficult to interpret the provision as granting him a right to opt for one of the two methods of calculation. The alternatives provided for by that article must be attributed to the diversity, between and within the Member States, of the social security schemes governed by their own particular laws. According to the Commission, it is the national system which ultimately determines whether an official has acquired pension rights and whether he is entitled to transfer either the sums repaid or the actuarial equivalent.

In conclusion, it proposes that the following reply should be given to the question raised:

"The sum of the contributions (partly national and partly those of the insured person) actually paid to a national pension scheme (contributory scheme) together with interest calculated at the rate of 4% from 31 December of each year of affiliation, as provided for by Article 7 (1) of the law of 14 March 1979 supplementing Article 18 of the amended law of 16 December 1963, may constitute the sums repaid from the pension fund within the meaning of the second indent of the first subparagraph of Article 11 (2) of Annex VIII to the Staff Regulations of Officials of the European Communities.

On the other hand, the sum of the contributions notionally calculated under a non-contributory scheme may constitute an actuarial equivalent of retirement pension rights acquired under a national pension scheme within the meaning of the first indent of the first subparagraph of Article 11 (2) of Annex VIII, in so far as the calculation is actually performed on the basis of actuarial tables, in particular with reference to the age of the person affiliated, and not on the basis of standard amounts which do not take account of the personal circumstances of that person."

III — Oral procedure

At the sitting on 21 January 1982 answers were given to questions put by the Court and oral argument was presented by the following: P. Beghin of the Luxembourg Bar, acting as Agent, for the Fund; V. Biel of the Luxembourg Bar, acting as Agent, for Mr Bodson; and P. Baeyens, Legal Adviser to the

Commission of the European Communities, acting as Agent and accompanied by Mr Capograssi, a technical expert, for the Commission.

The Agent for the Commission stated at the sitting that following the judgment of the Court of 20 October 1981 in Case 137/80, *Commission* v *Belgium*, it would not pursue its written observations in their entirety. It therefore proposed that the second portion of its suggested reply to the question referred to the Court should be completely struck out and that its observations should be amended so as to read: "In the Commission's view the official must seek within the national system to exercise his right to transfer his pension rights, by means either of the sums repaid or of the actuarial equivalent, in so far as the sums repaid relate to a period of affiliation kept within reasonable bounds." The Court took note of that statement.

The Advocate General delivered his opinion at the sitting held on 18 February 1982.

Decision

1 By judgment of 25 June 1981, received at the Court on 20 July 1981 the Cour de Cassation of the Grand Duchy of Luxembourg referred to the Court for a preliminary ruling in pursuance of Article 177 of the EEC Treaty a question relating to the interpretation of Article 11 (2) of Annex VIII to the Staff Regulations of Officials of the European Communities asking whether the amount of the contributions (those of the employer and those of the insured person) actually paid to a national pension scheme (contributory scheme) or notionally calculated (non-contributory scheme) or both, together with interest calculated at the rate of 4% per annum from 31 December of each year of affiliation can constitute, within the meaning of the above-mentioned provision, either the actuarial equivalent of retirement pension rights acquired in the organization to which he belonged or the sums to be repaid by the pension fund of that organization at the date of his departure.

2 That question was raised in the course of a dispute between the Caisse de Pension des Employés Privés [Pension Fund for Clerical Staff in the Private Sector], Luxembourg, hereinafter referred to as "the Fund", and Léon Bodson who, after being engaged in the private sector as a clerk in Luxembourg, became an official of the European Parliament and requested the

Fund to transfer to the Community pension scheme the actuarial equivalent of his retirement pension rights acquired under the national insurance scheme.

3 The Fund refused and Mr Bodson then brought the matter before the Conseil Arbitral des Assurances Sociales [Arbitral Council of Social Insurance], hereinafter referred to as "the Arbitral Council", which also rejected his application. Mr Bodson thereupon appealed to the Conseil Supérieur des Assurances Sociales [Supreme Council of Social Insurance], hereinafter referred to as "the Supreme Council", which, by a decision of 1 December 1977, recognized his right to the transfer of the actuarial equivalent which he had requested, on the ground that it was for the person concerned to exercise the choice made available to him by Article 11 (2) of Annex VIII to the Staff Regulations of Officials.

4 By a decision of 17 July 1979 the Fund determined the amount of the acquired pension rights to be transferred, applying the system laid down by Article 18 of the Luxembourg law of 19 December 1963 on the coordination of pension schemes, as amended by the law of 14 March 1979, which provides that Community and international officials may transfer an amount corresponding to the sum of contributions paid by both the person insured and the employer, plus interest of 4% per annum from 31 December of each year of affiliation, the concept of "actuarial equivalent of retirement pension rights" being unknown to Luxembourg legislation.

5 That decision was quashed by the Arbitral Council by judgment of 28 November 1979, upon application by Mr Bodson, on the ground that it was contrary to the judgment of the Supreme Council of 1 December 1977. Subsequently, by judgment of 17 July 1980, the Supreme Council dismissed an appeal by the Fund, which then appealed to the Cour de Cassation.

6 Those were the circumstances in which the Cour de Cassation referred the following question to the Court of Justice:

"Is Article 11 (2) of Annex VIII to the Staff Regulations of Officials of the European Communities to be interpreted as meaning that either the actuarial equivalent of retirement pension rights acquired or the sums repaid from the pension fund may be made up of the amount of the contributions (partly those of the employer and partly those of the insured person) actually paid to a national pension scheme (contributory scheme) and/or notionally calculated (non-contributory scheme) together with interest calculated at the rate of 4% per annum from 31 December of each year of affiliation?"

7 The purpose of calculating the actuarial equivalent in pursuance of Article 11 (2) of Annex VIII to the Staff Regulations of Officials for the transfer of pension rights acquired under national schemes is to capitalize the value of a future contingent periodic benefit. The calculation is therefore based on a calculation of the capital corresponding to the pension to which the person concerned will be entitled at national level by the application of a discount rate by reason of the anticipated nature of the payment as compared with the due date, together with a reduction coefficient proportionate to the risk of the death of the recipient before the due date, determined as a function of the age of the insured and of death rates, both factors being calculated on the basis of the time due to elapse between the date of the award of the actuarial equivalent and that of the grant of the pension.

8 The calculation of the sums repaid on the other hand may be effected in contributory insurance schemes by adding up the contributions paid by the insured person, together, where appropriate, with those paid by his employer; interest may be added to these contributions.

9 It follows that the national scheme described in the question put by the court of reference, which is characterized by the lack of any provision for calculating the pension to be paid when it falls legally due or by the lack of any provision for capitalizing the pension itself in the circumstances described above, cannot constitute a system for calculating the actuarial equivalent of the rights to retirement pension acquired by the person concerned under the national scheme.

10 On the other hand the national scheme described above may be described as a system for calculating the sums repaid.

11 The question raised by the Cour de Cassation of the Grand Duchy of Luxembourg should therefore be answered as follows:

The sum of the contributions paid by an insured worker and by his employer to a national pension scheme, together with interest calculated at the rate of 4% per annum, does not constitute the actuarial equivalent of the retirement pension rights acquired by that worker within the meaning of Article 11 (2) of Annex VIII to the Staff Regulations of Officials of the European Communities. That amount may constitute the sums repaid for the purposes of that provision.

Costs

12 The costs incurred by the Government of Luxembourg and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber),

in answer to the questions referred to it by the Cour de Cassation of the Grand Duchy of Luxembourg by judgment of 25 June 1981, hereby rules:

The sum of the contributions paid by an insured worker and by his employer to a national pension scheme, together with interest calculated at the rate of 4% per annum, does not constitute the actuarial equivalent of the retirement pension rights acquired by that worker within the meaning of Article 11 (2) of Annex VIII to the Staff Regulations of

Officials of the European Communities. That amount may constitute the sums repaid for the purposes of that provision.

Due Chloros Grévisse

Delivered in open court in Luxembourg on 18 March 1982.

The Registrar
by order

H. A. Rühl

Principal Administrator

O. Due

President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 18 FEBRUARY 1982 [1]

Mr President,
Members of the Court,

1. In these proceedings for a preliminary ruling the Court is called upon to resolve a further problem concerning the interpretation of Article 11 (2) of Annex VIII to the Staff Regulations of Officials, that is to say a provision which the Court recently had occasion to consider in its judgment of 20 October 1981 in Case 137/80 *Commission* v *Kingdom of Belgium* [1981] ECR 2393. The provision in question confers on an official who enters the service of the Communities after leaving other employment the right to pay to the Communities 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."

The Cour de Cassation [Court of Cassation] of the Grand Duchy of Luxembourg has referred the following question to the Court of Justice in the course of proceedings instituted by the Caisse de Pension des Employés Privés [Pension Fund for Clerical Staff in the Private Sector], hereinafter referred to as "the Fund", against Léon Bodson:

1 — Translated from the Italian.