are afforded the minimum guarantee represented by the right to rely on the provisions thereof before the national courts cannot release the Member States from the obligation to adopt appropriate national measures to ensure the full and complete implementation of such provisions where that proves necessary.

OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 3 December 1985*

Mr President,
Members of the Court,

1. The Commission of the European Communities has brought an action under Article 169 of the EEC Treaty for a declaration that the Kingdom of the Netherlands has failed to take the necessary measures to ensure the implementation of Article 11 (2) of Annex VIII to the Staff Regulations of Officials and has therefore failed to fulfil its obligations under the provisions of the Treaty and of Regulation No 259/68 of the Council of 29 February 1968 (Official Journal, English Special Edition 1968 (I), p. 30), which lays down those regulations. Under that provision, Community officials who before their recruitment worked for a Government administration or an international organization or an undertaking may transfer, by means of a payment to the Community, the actuarial equivalent of retirement pension rights acquired by them in their previous employment or sums due to be repaid to them from their employer's pension fund on termination of their employment.

2. Towards the end of 1977 the Commission ascertained that Belgium and the Netherlands had not yet adopted measures enabling officials who wished to transfer the rights in question to do so. It therefore decided to take action against the two States. In the case of Belgium, the proceedings initiated in the summer of 1979 were concluded by delivery of the judgment of 20 October 1981 (Case 137/80 [1981] ECR 2393), in which the Court declared that that State had failed to fulfil its obligations. In the case of the Netherlands, the pre-litigation procedure, which had been suspended pending delivery of that judgment, was resumed on 12 October 1983 by a letter in which the Commission invited the Netherlands Government to submit, having regard to the principles laid down by the Court, written observations concerning its persistent refusal to fulfil the obligations provided for in the Staff Regulations of Officials. On 21 November 1983 the Government informed the Commission that in order to implement Article 11 (2) it was necessary to amend the national legislation on civil pensions, that that amendment could be effected only by means of a law and that the adoption of that law, a draft of which moreover already existed, would take about two years.

The Commission was not satisfied with that reply and considered in particular that the

* Translated from the Italian.

proposed delay was unacceptable. On 14 August 1984 it therefore delivered a reasoned opinion in which it requested the Netherlands to adopt the necessary measures within two months. On 12 October, the Netherlands Government, whilst acknowledging its Community obligations, replied once again that it was not in a position to give immediate effect to the principle laid down in the judgment of 20 October 1981 because of the protracted procedure required for the adoption of a law. On 8 March 1985 the Commission brought the matter before the Court.

3. The interpretation of the Community rule at issue and the nature and scope of the obligations which it imposes on the Member States are clear from the 1981 judgment. I do not therefore think that any further discussion is necessary in that respect. However, it is in any case worth noting that the issue in this action is not the right of the individuals concerned to rely directly on Article 11 (2), which is not contested, but the conduct of the Member State regarding the implementation of that provision. The Commission points out that the rule is laid down in a regulation (the Staff Regulations were adopted by the Council in the form of a regulation) and requires the adoption of national implementing measures. Thus, in accordance with Article 5 of the EEC Treaty, the Member States are under a duty to take the most appropriate measures for its implementation. On the other hand, it is well established that a Member State cannot plead internal difficulties in order to justify failure to comply with its Community obligations or the time-limits relating thereto.

The Netherlands Government does not contest those statements but contends that it has no power to issue regulations to deal with a matter for which a law is required. However, it claims to have ensured that the obligations imposed by Article 11 (2) will be implemented by asking the Algemeen Burgerlijk Pensioen-fonds [General Civil Pension Fund] to deal with applications for transfers of the pension rights submitted by Netherlands nationals in the service of the Communities in accordance with the rules laid down in the above-mentioned draft law. It states that 'the governing board of the Pension Fund has agreed to comply with that request and has already begun considering certain applications which had previously been rejected'.

4. Those, and only those, are the terms of the dispute. I do not intend to consider the question whether in this case it is really necessary for the Netherlands to adopt a law, as its Government has always maintained. I shall merely draw attention to the 1981 judgment in which the Court stated that, in order to comply with the obligation imposed in Article 11 (2), 'the . . . State 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'. The absence of '*rules for the transfer* of pension rights would have the effect of depriving officials of the Community of the very right to exercise the option granted to them by the Staff Regulations' (the emphasis is mine).

The fundamental question is therefore as follows: are any 'specific measures' referred to in the Court's decision available to Netherlands officials of the Communities? The Netherlands Government considers that it is able to answer that question in the affirmative, as I have just shown. However, I note that the instructions which it gave to

the Pension Fund in no way constitute a *set of rules* capable of ensuring the effective transfer of pension rights to the Community scheme. On the contrary, in my view, those instructions merely refer to the normal tasks of any public body, which is of course bound to examine any requests submitted by individuals in connection with a right which is specific to them.

In other words those instructions do not compel the body to which they were addressed actually to effect the transfer of rights and they do not establish binding criteria which it must observe. Indeed, the Netherlands Government itself acknowledged at the hearing that it was not able to give such specific instructions to the governing board of the Pension Fund, and that clearly explains why so far *not a single* transfer within the meaning of Article 11 (2) has taken place.

An obligation was imposed upon the Netherlands to introduce rules giving effect to the rights granted by Article 11 (2) of Annex VIII to the Staff Regulations. It has not done so and that fact provides sufficient grounds for a finding that it has failed to fulfil its Community obligations.

5. For those reasons, I propose that the Court should uphold the action brought on 8 March 1985 by the Commission of the European Communities against the Kingdom of the Netherlands and declare that, by failing to take the measures necessary to implement Article 11 (2) of Annex VIII to the Staff Regulations of Officials, that State has failed to fulfil its obligations under the EEC Treaty.

The Netherlands should therefore be ordered to pay the costs of the proceedings in accordance with Article 69 (2) of the Rules of Procedure.