OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 23 FEBRUARY 1984 [1]

Mr President,
Members of the Court,

1. The dispute and its background

In the present case Mr Forcheri requests the Court to:

(a) order the Commission to take all the necessary steps to have the convertibility of his remuneration paid in convertible Belgian francs restored to 100% with retroactive effect from 1 February 1982; and

(b) annul the Commission's implied decision rejecting his complaint of 29 July 1982 and, so far as is necessary, annul the Commission's implied decision rejecting his request for assistance of 8 February 1982.

As the Court is aware, the background to this action is the dual system of exchange-rates in Belgium where there is a regulated exchange market as well as a free market. The fact that the exchange rate on the regulated exchange market was generally higher than the rate prevailing on the free market made "arbitrage" transactions financially attractive at such times for holders of funds in special convertible accounts (depending on the rates prevailing on the regulated market). Foreign currency was purchased on the regulated market where the rate for the Belgian franc was high and then resold on the free market for a larger amount of Belgian francs. In order to stop such improper use of special convertible accounts, on 21 December 1981 the Institut Belgo-Luxembourgeois des Changes [Belgo-Luxembourg Currency Exchange Institute, hereinafter referred to as "the Exchange Institute"] amended the facilities available until then to officials of the European Communities who were not Belgian or Luxembourg nationals. The effect of that amendment was that only 25% of payments to those officials could thenceforth be converted into foreign currency on the regulated market without special authorization. That unquestionably restricted the freedom of those officials to spend their salary outside the territory of the Union Economique Belgo-Luxembourgeoise [Belgo-Luxembourg Economic Union, hereinafter referred to as "the Economic Union"] using the regulated market. Owing to the numerous requests for assistance and complaints received in connection with that measure, the Community institutions made representations to the Exchange Institute to secure the restoration of the facility for officials of other than Belgian and Luxembourg nationality to have all their salary and other emoluments credited to a special convertible account. On 1 June 1982 the Exchange Institute issued a circular which did indeed restore that facility for those officials but on condition that the institution concerned countersigned a declaration in which the account-holder acknowledged that he was aware that he was "obliged to

1 — Translated from the Dutch.

receive his remuneration either in a convertible account or in foreign currency which must be sold within eight days to an approved bank operating on the regulated market". The account-holder also had to undertake to refrain *inter alia* from carrying out "any transactions designed to circumvent those provisions, such as arbitrage transactions, that is to say, buying foreign currency on the regulated market or transferring funds to convertible foreign accounts with the aim of procuring the means of payment to cover current expenditure within the territory of the Belgo-Luxembourg Economic Union".

On 8 February 1982 Mr Forcheri submitted to the Commission, pursuant to Article 24 of the Staff Regulations, a request for assistance with regard to the measure adopted by the Exchange Institute on 21 December 1981. He received no reply.

On 29 July 1982, considering that the Exchange Institute's proposal of 1 June 1982 was also unacceptable, he lodged a complaint with the Commission pursuant to Article 90 (2) of the Staff Regulations on the ground that it had not responded satisfactorily to his earlier request for assistance. As the Commission did not reply to that complaint either, on 23 February 1983 Mr Forcheri lodged the application originating these proceedings. As regards the interventions in support of the respective parties to the proceedings, I will merely refer at this stage to the report for the hearing. The Belgian Government in particular, with its intervention in support of the Commission, has contributed greatly to clarifying the Belgo-Luxembourg exchange-rate system and the background to the special measures adopted in that context in respect of officials of the European Communities.

2. The applicant's submission

In support of his claims set out above the applicant advances a single submission concerning a failure to take account or breach of:

(a) the EEC Treaty, in particular Articles 67 and 169 thereof;

(b) the Protocol on the Privileges and Immunities of the European Communities (hereinafter referred to as "the Protocol") (in particular Article 12 (c) thereof);

(c) the First Directive for the implementation of Article 67 of the Treaty (Council Directive of 11 May 1960, Official Journal, English Special Edition, 1959-1962, p. 49), as amended by the Second Council Directive, of 18 December 1962 (Official Journal, English Special Edition 1963-1964, p. 5), in particular Article 1 thereof;

(d) the Staff Regulations of Officials of the European Communities, in particular Article 24 thereof, and Article 17 of Annex VII thereto; and

(e) general legal principles, in particular the principles of equality and of distributive justice, and the duty to assist officials.

In my view, points (a) and (c) of that submission do not require close consideration. The Belgian authorities are clearly responsible for the adoption of the measures concerned. It is clear from the Court's decisions (see Case 48/65 *Lütticke* v *Hauptzollamt Saarlouis*, [1966] ECR 205) that officials cannot in law require the Commission to make use of its power under Article 169 of the Treaty to take action against breaches of Community law. At the hearing the applicant in fact rightly stated that essentially only points (b) and (c) are of

decisive importance. *Points (a) and (c) of the submission should therefore be rejected and there is no need to examine the question whether the applicant has in fact proved the existence of breaches of the Treaty as alleged in those points of his submission.*

3. Admissibility of the application

The Commission does not question the admissibility of the application, although it correctly points out that it will not be possible to give effect to the first claim since Community law does not provide for the granting of such an order by the Court against the Commission. *The first claim should therefore be rejected.*

As regards the second claim, I myself can see no reason for suggesting that the Court should of its own motion declare the application inadmissible. The applicant's interests were undoubtedly harmed by the restrictions imposed by the decision of 21 December 1981 on the free conversion of amounts received into foreign currency on the regulated foreign exchange market. He could therefore consider himself harmed by what he alleges was the implied rejection of his request for assistance made pursuant to article 24 of the Staff Regulations. Whether his interests could also have been harmed by the tacit rejection of his complaint about the new arrangements laid down in the circular of 1 June 1982 is more doubtful; that point can, if necessary, only be clarified by examining the substance. Moreover, in the final analysis the complaint must be considered the continuation, envisaged by the Staff Regulations, of his request for assistance of 8 February 1982 which has to be regarded as admissible. Finally, the application makes it sufficiently clear with which particular Commission decisions, within the meaning of Articles 90 and 91 of the Staff Regulations, it is concerned. Those decisions concern the alleged rejection of his request for assistance under Article 24 of the Staff Regulations and of his subsequent complaint under Article 90 (2) of the Staff Regulations.

I shall therefore now proceed to examine the substance of points (b), (d) and (e) of the submission which are closely interconnected.

4. Examination of the substance

4.1. The duty of assistance imposed by Article 24 of the Staff Regulations

Since, as I have pointed out, the applicant complains in particular that the Commission did not provide him with the assistance he requested, some preliminary observations may usefully be made on the nature and extent of the Commission's duty of assistance.

At the Hearing the applicant rightly pointed out again that when privileges and immunities accorded under the Protocol are in dispute, the second paragraph of Article 23 of the Staff Regulations requires the officials concerned to inform the appointing authority immediately. From that obligation as well as from the position of Article 24 immediately after Article 23 and the wording of Article 23 it must be inferred that the duty to provide assistance laid down in Article 24 concerns *inter alia* breaches of the Protocol by a Member State. In determining the extent of that duty, however, account must also be taken of the first sentence of Article 23 in which it is once against stressed that the "privileges and immunities enjoyed by officials are accorded solely in the interests of the Communities" (which is also clear from Article 18 of the Protocol

itself). From that provision I would immediately infer that the Commission is not bound to give its officials assistance in respect of restrictions on their freedom to carry out arbitrage transactions. Such restrictions cannot be regarded as adversely affecting the interests of the Communities. *In so far as the action also concerns the obligation to abstain from such arbitrage transactions, it must, therefore, be rejected.* The interests of the Communities do not require such freedom for its officials.

In the second place it is clear that the duty to provide assistance obliges the institutions only to assist officials in legal disputes, either by intervening with the national authorities concerned on behalf of all officials in the same situation or by assisting them in individual actions. In this case it is not disputed that, following the introduction of the measures of 21 December 1981, the Commission (acting together with the other institutions) adopted the first course which led to the introduction of the new measures on 1 June 1982.

Thirdly, it is clear to me from the wording of Article 24 that the duty to provide assistance cannot in itself entail any obligation to initiate the procedure under Article 169 of the Treaty against the Member State concerned. What is involved here is clearly an alternative course which, where proceedings are brought before the national court, may indeed lead to the national court's submitting questions to the Court for a preliminary ruling and thus to that extent may also lead to a judgment by the Court on the compatibility of certain national measures with the Protocol and with any other principles of Community law. Since the applicant has not commenced proceedings before the competent national court following one of the possible courses mentioned during the hearing, this point need not be examined in this case.

Lastly, the Commission has also rightly pointed out that an obligation to achieve a certain result cannot possibly be read into Article 24 of the Staff Regulations. In point of fact the assistance provided cannot possibly guarantee a specific result.

So far as necessary I shall examine separately the question how far some of the measure introduced on 1 June 1982 may also harm the interests of the Community so that the duty to provide assistance is to that extent applicable.

4.2. The significance of Article 12 (c) of the Protocol

There is no case-law on Article 12 (c) of the Protocol and apparently no clearly uniform State practice either. Nevertheless, in my view its meaning can be established by having regard to its wording and also to Article 18 of the Protocol mentioned above. Article 18 provides that: "Privileges, immunities and facilities shall be accorded to officials and other servants of the Communities solely in the interests of the Communities."

Inasmuch as Article 12 (c) refers to "the same facilities as customarily accorded to officials of international organizations" in respect of currency or exchange regulations, I would agree with the applicant's subsidiary argument, that in principle that criterion cannot relate

solely to the customs of the Member State concerned. The Member State concerned might have introduced restrictive rules applying to *all* international organizations established in its territory that could seriously impair the proper functioning of those organizations and would be a clear departure from international custom. Like the Commission I further consider it probable that provisions of this kind, which have become customary since the Second World War, are aimed in particular at quantitative restrictions on the transfer abroad of salaries and other payments (or measures having the same effect) which would seriously curtail the ability of such an organization to recruit officials having a nationality other than that of the country in which it is established. I also share the Commission's view that the provision does not constitute any form of exchange-rate guarantee. The applicant has also been unable to produce sufficient evidence of any clear international practice in that regard suggesting a different state of affairs. In particular, his contention that officials of international organizations are customarily treated in the same way as diplomats is of no avail to him here. The fact that his contention is not supported by the text of the relevant provision is in itself no bar to applying such a criterion if it were proved that such an international custom does exist. However, in my view the presumption of such equal treatment is rebutted by a decisive argument which is that, as the Commission rightly points out, foreign diplomatic representations are *not* obliged to pay staff salaries in the currency of the country in which the official concerned performs his duties whereas the Community institutions are (see the first paragraph of Article 63 of the Staff Regulations and Article 17 (1) of Annex VII to the Staff Regulations).

Once again I agree with the applicant that the international context in which the expression "customary facilities" must in principle be interpreted does not exclude having regard in the first resort to the customs of the Member State concerned. However, it is not disputed that Belgium applies the same rules to other international organizations established in its territory. The applicant's argument to the effect that prior to 21 December 1981 Belgium applied different rules to officials of international organizations is not relevant, in my view. Article 12 (c) cannot be interpreted as preventing Member States from adjusting their monetary or foreign exchange regulations to take account of changed circumstances or other new facts.

Nor do I consider acceptable the applicant's further argument on point (e) of his submission in so far as that point must be regarded as elaborating his allegation of a breach of Article 12 (c) of the Protocol. There can be no question of a breach of the principle of equality in that sense since the applicant has not proved that the international practice regarding other international organizations is that in similar circumstances (in particular where a comparable dual exchange-rate system applies and a comparable policy exists regarding the payment of salaries) the officials

concerned are completely at liberty to transfer funds via the regulated foreign exchange market.

4.3. The duty of assistance with regard to the disputed measures

Having made the foregoing general observations on Article 24 of the Staff Regulations and Article 12 (c) of the Protocol, I shall now consider the question how far the applicant is right in claiming that the Commission failed to fulfil its duty to assist him.

It is clear from the documents submitted to the Court that in view of the numerous complaints and requests for assistance concerning the measures of 21 December 1981, the Commission took the steps desired in order to have those measures adjusted. In essence all that the applicant contends in this regard is that the measures introduced on 1 June 1982, which were the result of the Commission's steps, are still unsatisfactory.

I have already pointed out that neither Article 12 (c) of the Protocol nor the Staff Regulations protect officials of the Community against monetary or currency regulations which may harm, at most, their individual interests but not those of the Community institutions. Therefore the Commission's duty to provide assistance in no case requires it to help to restore the possibility of carrying out the arbitrage transactions described above.

The points still outstanding are:

(a) the requirement that the official must acknowledge that he is obliged " to receive his remuneration either in a convertible account or in foreign currency which must be sold within eight days to an approved bank operating on the regulated market" and

(b) the undertaking in very general terms that must be given by the official to obstain from "any transactions designed to circumvent" the provisions concerned.

As regards point (a), the Commission has rightly pointed out, referring to the above-mentioned passage in Article 63 of the Staff Regulations, that it does not pay any salaries in foreign currencies to its officials employed in Belgium or Luxembourg. That part of the undertaking therefore has no practical significance as far as the applicant is concerned. The remaining obligation to receive the salary in a convertible account cannot, by its very nature, be claimed to affect adversely officials and the Communities.

As regards point (b), it appears from a special issue of Infor-rapide of 22 June 1982, produced by the applicant at the hearing, that a letter from the Belgian Minister for Finance and Foreign Trade of 30 March 1982 and a letter from the Exchange Institute of 1 June 1982, both cited in that issue, together show that the words used, which are indeed very general, are in fact intended to refer only to the arbitrage transactions which I have mentioned. In my view the description of those arbitrage transactions contained in the letter from the Belgian minister concerned is sufficiently clear to relieve the Commission of the duty under Article 24 of the Staff Regulations to make any further protest against the proposed measures. In its judgment the Court could take formal notice of those authoritative interpretations. A different

view could be taken in this regard only if the Belgian or Luxembourg authorities, contrary to the expectations raised, still attempted in specific cases to impose obligations on the officials concerned which might indirectly prejudice the proper functioning of the Community institutions. It is not disputed that the Commission has not yet received any specific complaints of such a nature. The applicant fails to expound his other allegation in point (d) of his submission of breach of Article 17 of Annex VII to the Staff Regulations in a way which makes clear to me the specific breaches with which he charges the Commission in this regard. In its intervention the Belgian Government has correctly pointed out that in any case part (a) of the declaration which officials are required to sign has no effect whatsoever on the transfer facilities mentioned in Article 17 of Annex VII to the Staff Regulations

Point (d) and in conjunction therewith points (b) and (e) of the single submission must therefore be rejected as well.

5. Conclusion

On the basis of my analysis of the substance of the various parts of the applicant's claim and his single submission (for the first part of his claim, see part 3 of this opinion; for points (a) and (c) of his submission, see part 2; and for points (b), (d) and (e) of his submission, see part 4; my conclusions on those heads appear in italics) I am of the opinion that:

5.1. The application should be dismissed;

5.2. The parties and the interveners should be ordered to bear their own costs.