on those grounds,

THE COURT (Second Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders each party to bear its own costs.**

Mackenzie Stuart Kutscher Sørensen

Delivered in open court in Luxembourg on 21 November 1974.

A. Van Houtte
Registrar

Mackenzie Stuart
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 10 OCTOBER 1974 [1]

Mr President,
Members of the Court,

Mr Moulijn, a former principal adminstrator at the Commission of the European Economic Community, retired on 1 March 1973. He is therefore entitled to a Community retirement pension and in addition a national retirement pension, since he had also been an official of the Dutch State.

Mr Moulijn has been divorced since 1965. The Dutch court which granted the divorce ordered him to pay his former wife monthly maintenance of Fl. 700, which was increased to Fl. 784 in 1968.

Under Article 2 (4) of Annex VII to the Staff Regulations it is stated that:

'Any person whom the official has a legal responsibility to maintain and whose maintenance involves heavy expenditure may, exceptionally, be treated as if he were a dependent child by special reasoned decision of the appointing authority, based on supporting documents.'

Mr Moulijn requested the Commission to treat his former wife as a dependent

1 — Translated from the French.

child within the meaning of this provision of the Regulations.

After having suffered several refusals, he finally obtained satisfaction in 1969, with retrospective effect as from December 1965, the date of the divorce.

In 1973 however, after a new examination of the question, the Commission terminated the dependent child allowance and in so doing relied on the first paragraph of Article 1 (4) of the provisions issued to implement Article 2 (4) of Annex VII to the Regulations, which implementing provision provides that: 'The official must provide evidence that he devotes a sum equal to not less than 20 % of the taxable amount of his salary, increased, where appropriate, by the net amount of any other income he may have, to the maintenance of the person for whom he is responsible.'

The Commission, in its letter of 18 April 1973 which represents the decision challenged, first of all listed Mr Moulijn's resources in comparison with the legal liability for maintenance due to his former wife.

It found that the taxable amount of the Community retirement pension which the applicant enjoyed was BF 24 053; the applicant had an additional income, arising from his Dutch pension of some Fl. 14 000 per month, that is BF 19 334.

It stated also that the maintenance paid by the applicant amounted to 784 florins, that is BF 10 827.

It infers from these findings that the said maintenance does not amount to not less than 20 % of the income to be taken into account for the payment of the dependent person allowance.

On 25 June 1973 — within the period provided by the Regulations — the applicant lodged a complaint against this decision, to which the Commission has not replied.

Mr Moulijn therefore appeals to you both against the decision by which the Commission refused to continue the dependent person allowance and against the implied decision rejecting his complaint, which rejection the Commission moreover expressly confirmed on 14 February 1974.

Since no objection on the grounds of inadmissibility has been made to the application, I shall straight away consider the merits and before doing so mention that the respective positions of the applicant and the Commission have been set out only in the written procedure. Mr Moulijn was not represented at the oral procedure and in these circumstances the Commission considered it unnecessary to be heard.

Mr Moulijn asks you not only to annul the implied decision rejecting his complaint, but also to decide that he fulfils the conditions provided for by the Staff Regulations of the European Communities for receiving the dependent person allowance, as being liable to his former wife for maintenance determined by a Dutch court; he asks you moreover to decide that the sum which he claims to be due to him from the Commission should be increased by 8 % per annum or such other rate as the Court decides as from 1 March 1973 until the effective date of payment. In fact he is asking for the allowance to carry interest as from the date he was refused.

Let me say immediately that no argument arises on the concept of 'dependent person' since the divorced wife of Mr Moulijn is indeed entitled to maintenance which her former husband has been ordered to pay by a decision of a Dutch court which is *res judicata*.

We are thus within the scope of the provision of the Regulations in question.

The sole objective of the proceedings is the interpretation of the first paragraph of Article 1 (4) of the general implementing provisions of Article 2 (4) of Annex VII to the Regulation which I cited at the beginning of my opinion.

In precise terms it is a question of whether there should be taken into consideration the *whole* amount of the income of any kind which the applicant has, including that from a source other

than his Community retirement pension, in deciding the proportion which the maintenance payable to the former spouse represents. If this maintenance is less than 20 % of the total income, the dependent person allowance cannot be claimed, according to the Commission. Mr Moulijn, of course, takes the opposite view. In his view, his income other than the Community pension should be taken into account only to the extent of 20 % of its amount.

It is right to mention first of all that to treat a person in respect of whom an official is liable for maintenance as a dependent child is a provision of an exceptional nature for which a 'special reasoned decision of the appointing authority, based on supporting documents' is necessary, which implies, as the Court has expressly stated in Case 46/71 (Second Chamber) *Brandau v Council*, Rec. 1972, p. 373, that the competent institution has a certain discretion in applying this provision in each particular case.

In other words, such a provision of the Regulations must be interpreted strictly; in the second place, the Administration has a certain discretion.

These considerations are reinforced by the fact that the Community legislator has considered it necessary to make the benefit of such treatment dependent on the maintenance of the peron involving the official or the former official in 'heavy expenditure'.

It is thus with the benefit of these preliminary but important indications, which arise both from the wording of the Regulation and from your case law, that I shall examine the question which is succinctly put to you in the present case.

Recourse to a purely grammatical analysis of the wording in question is of no help: not only does the relevant limit of 20 % relate, depending on the language version, according to the rules of grammar and punctuation, sometimes to the Community salary and sometimes to the sum devoted to the maintenance of the dependant, but this ambiguity occurs again even within the various language versions, according to whether one or more dependants are involved. (Article 1(5)).

It is therefore mainly on the general scheme of Article 1 of the so-called implementing provisions adopted by the Commission that I think I must base my opinion.

It is clear that to treat a person in respect of whom an official is liable for maintenance as a dependent child is a benefit, albeit just, but the official in question has no unconditional right to it.

It is necessary that the maintenance should involve sufficiently 'heavy' expenditure, as is required by the Regulations.

To avoid complete discretion, or even arbitrariness, it was proper to fix a certain limit above which this expenditure should give rise to such treatment and the grant of the dependent person allowance.

This is what the Commission has done by requiring that the sum devoted to the maintenance of the dependent should be not less than 20 %, not only of the Community salary or pension, but of the whole income of whatever nature which the official concerned has, that is the aggregate amount of his Community income and his other income, if any.

In other words, if the official has a private income, or income in addition to his Community salary, it is logical to take it wholly into account, for to the extent that these resources, no matter where they come from — income from property, a portfolio of stocks and shares or public or private pensions-alleviate this responsibility for maintenance, there is no reason why the Commission should itself assist the official with his responsiblity, which after all has no connection with the relations between the official — whether active or retired — and the Community institution.

But the interpretation which I think I must uphold leads in this case to giving satisfaction to the applicant. It is

established — in any event it is not disputed by the Commission — that the total income of Mr Moulijn is BF 43 387, made up of the taxable amount of his Community pension of BF 24 053 and his Dutch pension of BF 19 334.

It is not disputed either that the maintenance which he has to pay to his former spouse is, as I have already said, BF 10 827. The amount of this maintenance is therefore more than 20 % of the actual total income of the person concerned.

In these circumstances and without it being necessary to consider the other pleas in the application I think that it is proper to accede to the application by Mr Moulijn.

In short, my opinion is:

— the decision contained in the letter of the Commission dated 18 April 1973 and the decision impliedly rejecting the applicant's complaint should be annulled;

— the applicant should receive the dependent person allowance in view of the maintenance which he has to pay his former wife;

— finally, the Commission should bear the costs.