2. In providing that an official, his spouse and his dependants are insured against sickness up to 80% of the expenditure incurred subject to rules drawn up by agreement between the institutions of the Communities, and that that ceiling is increased to 85% for certain services, Article 72(1) of the Staff Regulations establishes the maximum rate of reimbursement to which those covered by the Joint Sickness Scheme are entitled. For the remainder, that provision leaves it to the institutions to fix the reimbursement ceilings by agreement between them in the context of those rules, without prescribing any minimum thresholds.

3. In an appeal, a plea in law directed against a superabundant ground of a judgment of the Court of First Instance, the operative part of which is sufficiently based on other grounds, must be rejected.

REPORT FOR THE HEARING
in Case C-244/91 P *

I — Facts and procedure before the Court of First Instance

It follows from the judgment of the Court of First Instance of 12 July 1991 in Case T-110/89 *Giorgio Pincherle* v *Commission* [1991] ECR II-635 that:

'1 The applicant, Giorgio Pincherle, is Head of the "Staff Regulations" Division of Directorate-General IX, "Personnel and Administration", of the Commission of the European Communities. As an official of the Commission, Mr Pincherle is affiliated to the Joint Sickness Insurance Scheme for officials of the European Communities (hereinafter "the Joint Scheme"). His wife and children are covered by the same scheme. Mr Pincherle's place of employment is Brussels. For some time his children have been pursuing their studies in Italy where, for that reason, his wife goes to live for certain periods of time. In those circumstances, medical expenses are incurred in Italy, especially by members of his family.

2 In 1988 the applicant submitted to the office responsible for settling claims ("Claims Office") at Brussels various applications for reimbursement of medical expenses incurred in Italy in respect of services provided to members of his family. In reply, the applicant received three statements of payment dated respectively 8 June 1988,

* Language of the case: Italian.

10 August 1988 and 23 August 1988, as follows:

— Statement No 71 of 8 June 1988 concerns the reimbursement of expenses relating to the medical services provided on eight occasions and paid for in Italian lire; in six cases the expenses were reimbursed at a rate of 85%; in two other cases (two consultations with medical specialists) they were reimbursed to the extent of BFR 1 072 which, at the time, was the maximum amount of reimbursement laid down in Section I, "surgery visits and home calls", of Annex I to the Rules on Sickness Insurance for Officials of the European Communities (hereinafter "Insurance Rules"). In the last two cases the amount reimbursed represented 63% and 38% respectively of the expenses actually incurred;

— Statement No 72 of 10 August 1988 concerns the reimbursement of expenses relating to medical services provided on 12 occasions. The fees for eight of those provisions of services were paid in Italian lire. Eight reimbursements were made at a rate of 85%; another was made at the rate of 80%; two consultations with Italian specialists were reimbursed within the limit then prescribed in Annex I to the Insurance Rules, namely BFR 1 072, representing 29% of the expenses incurred; lastly, a reimbursement in respect of a home call by an Italian specialist was made within the maximum limit prescribed in the aforesaid Annex I, namely BFR 1 470, representing 43% of the expenses incurred;

— Statement No 73 of 23 August 1988 concerns reimbursement of expenses of LIT 1 500 000, incurred for dental treatment, and LIT 100 000, for materials used for the purposes of that treatment. ... In respect of the dental treatment the applicant was reimbursed BFR 19 203, representing 79.73% of the accepted amount of LIT 850 000 and, for the materials used, BFR 1 866, representing 66.55% of the LIT 100 000 which he had paid.

3 By memorandum of 13 October 1988, registered on 19 October 1988, Mr Pincherle submitted a complaint under Article 90(2) of the Staff Regulations of Officials of the European Communities (the "Staff Regulations") in which he drew attention to the rates of reimbursement which he considered led to results which were unfair and discriminatory.

4 On 23 February 1989 the Management Committee of the Joint Scheme, ... issued Opinion No 1/89 concerning Mr Pincherle's complaint in which it confirmed the decisions taken by the Claims Office.

...

5 On 23 February 1989, the Management Committee also issued Opinion No 3/89 ... proposing a revision of the Insurance Rules.

In that Opinion it argued that, because of a growing imbalance between contributions and expenditure under the Sickness Scheme, an operating loss had arisen within the last few accounting years, and that forecasts suggested that the scheme risked largely exhausting its accumulated surpluses by the end of 1991. It stressed the consequential necessity to restore the balance between contributions and expenditure and to that end it proposed *inter alia* increasing the contributions by members from 1.35 to 1.80% and by the institutions from 2.70 to 3.60%. At the same time it suggested various amendments to the Insurance Rules (in particular, the insertion in Annex III, to be renamed "Scale of Reimbursement for Dental Treatment and Prostheses", of two Sections, A and B, concerned respectively with dental treatment and fixed prostheses) and various adjustments to the provisions for the interpretation of those Rules:

— as regards the interpretation provisions in Annex I ("Rules governing the Reimbursement of Medical Expenses"), Section I(1) and (2), the Management Committee proposed that "fees for those services (surgery visits and home calls by general practitioners and specialists), expressed in Italian lire, should be subject to a rate based on and limited to a coefficient of 2";

— as regards the interpretation provisions in Annex III, Section A, it proposed that fees for services expressed in Italian lire should be subject to a rate based on and limited to a coefficient of 1.8 or else higher ceilings should be fixed for reimbursing those services.

6 On 20 December 1990, the Management Committee issued a new Opinion, No 35/90 on the revision of the Insurance Rules. It considered that it was necessary to increase the maximum amounts of reimbursement for certain services and that, as far as possible, the amounts should be fixed in such a way that at least 90% of medical and hospital services provided to members and their dependants could be covered at the rates of 80% and 85% laid down in Article 72 of the Staff Regulations and in the Insurance Rules. The Management Committee noted that the average rate of reimbursement of services (except those for which the Rules laid down a reimbursement rate of 100%) in 1989 was: 80.01% for the Brussels Claims Office; 80.79% for the Luxembourg Claims Office; 72.73% for the Ispra Claims Office. It was of the opinion that in order to comply with the principle of equal treatment the administrations of the institutions should, in so far as necessary, lay down, pursuant to Article 8 of the Insurance Rules, coefficients for countries in which the cost of medical treatment was particularly high.'

It was in those circumstances that *Mr Pincherle* lodged an action whereby he claimed that the Court of First Instance should:

(1) declare that the maximum rates of reimbursement laid down in the Annex to the Rules of the Joint Sickness Insurance Scheme for medical expenses in respect of visits, consultations and dental treatment — having regard to the treatment provided in States in which costs are found to be high — were unlawful;

(2) annul the decisions reimbursing the applicant's expenses in respect of the medical services at issue, as set out in Statement No 72 of 10 August 1988 and Statement No 73 of 23 August 1988 drawn up by the Claims Office;

(3) order the defendant to pay the costs.

The *Commission* contended that the Court should:

(1) dismiss the application;

(2) make an appropriate order as to costs.

In support of his action before the Court, Mr Pincherle put forward two pleas in law based on infringement of Article 72 of the Staff Regulations and breach of the general principle of non-discrimination inherent, according to Mr Pincherle, in the provisions of Title V of the Staff Regulations.

In regard to the *first plea in law*, the Court observed:

'...

20 The applicant does not deny that Article 72 of the Staff Regulations fixes the upper limit of reimbursement to which an official and members of his family covered by the Joint Scheme are entitled, nor that Article 72 provides for the detailed implementing rules to be established in the Insurance Rules drawn up by agreement between the institutions. However, in his opinion, it is incontestable that cover for medical expenses must, at the very least, aim at ensuring reimbursement of 80% or 85% of the expenses incurred, even if it has to be accepted that the implementing provisions have to lay down quantitative criteria.

...

25 The Court considers that it is not possible to deduce from the terms of Article 72 of the Staff Regulations that it confers on persons entitled to benefit under the Joint Scheme the right to obtain reimbursement of 80% or 85% of the expenses incurred, according to the type of services provided. Those rates fix the maximum reimbursable limit. They are not minimum rates and therefore do not imply any obligation to reimburse members and insured persons to the extent of 80% or 85% in all cases.

26 The Court considers that fixing upper limits for reimbursement in the implementing provisions is in conformity with the Staff Regulations, all the more so because the scheme's resources are limited to the contributions from members and institutions and the scheme's financial balance has to be safeguarded.

27 As regards the applicant's argument to the effect that the reimbursement ceilings fixed by the implementing provisions are unlawful inasmuch as, as in the case of the reimbursements which he contests, they are far removed from the rates of 80% and 85% adopted in Article 72 of the Staff Regulations, the Court considers that, in the absence of upper reimbursement limits laid down in the Staff Regulations, the institutions are authorized to fix appropriate ceilings while observing the principle of social insurance cover which underlies Article 72 of the Staff Regulations. In the present case it should be noted that the reimbursements appearing on Statements of payment Nos 71 and 72, referred to above, were mostly (in 15 out of 20 cases) effected at a rate of 80% or 85%, with only a limited number of reimbursements not reaching that level. ... Accordingly, the circumstances of the present case do not permit the upper limits fixed by agreement between the institutions to be characterized as unlawful or unjust.

...

30 ... In that regard, the Court notes that Article 8(5) of the Insurance Rules makes every request for special reimbursement subject to a prior request and to compliance with a particular procedure:

...

In the present case, the applicant did not seek the benefit of the provisions of Article 8(1) of the Insurance Rules before bringing the present proceedings. In proceedings brought under Article 91 of the Staff Regulations the Court has jurisdiction only to review the lawfulness of an act adversely affecting an official and is not entitled, in the absence of an individual implementing measure, to rule in the abstract on the lawfulness of a provision of a general nature. It follows in the present case that, in the absence of an individual decision on the application of Article 8(1) of the Insurance Rules, it is not open to the applicant and the interveners to plead the unlawfulness of that provision.

31 However the Court considers it appropriate to point out that neither the wording of the Staff Regulations nor of Article 8(1) of the Insurance Rules allow the conclusion that Community countries are excluded from the scope of the provisions of Article 8(1). The use of the expression "in principle" in the interpretation provisions relating to it enables the application of Article 8(1) to be extended to the Member States of the Community. The Court notes, moreover, that the new interpretation provisions which entered into force on 1 January 1991 take account of the situation of Member States in which the cost of medical treatment is particularly high. As has already been indicated (see paragraph 19), the new interpretation provisions have established, for the purpose of implementing Article 8(1) of the Insurance Rules, higher weightings for reimbursements in respect of medical services, where the fees are expressed in Italian lire or pounds sterling, and in respect of dental services where the fees are expressed in Italian lire. Article 8(1) of the

Insurance Rules has thus been applied to the Member States of the Community.'

As regards the *second* plea in law, the Court of First Instance observed:

'...

39 The Court of First Instance considers that, faced with a situation involving inequality between members and their dependants covered by the Joint Scheme, who pay higher medical costs in some Member States of the Community, the institutions were under an obligation to take steps to provide a remedy. It is therefore necessary to define the nature and scope of that obligation in the form of an answer to the question whether the defendant was under a duty to bring the inequality to an end forthwith by immediately increasing the reimbursements allowed to the officials concerned or whether, on the other hand, its obligation was limited to acting in concert with the other institutions for the purpose of making appropriate adjustments to the scheme.

40 The Court of First Instance considers that the first approach cannot be accepted in the context of a scheme whose resources are limited to contributions from members and the institutions and whose financial equilibrium must as a matter of necessity be safeguarded. That being so, the applicant's arguments can be upheld only if it can be established that the measures adopted by the defendant were belated or unlawful.

41 In that regard, the Court finds that the Management Committee of the Joint Scheme, in Opinion No 3/89 of 23 February 1989 (see paragraph 5 above), proposed introducing correcting mechanisms for certain services where the fees were expressed in Italian lire. That opinion was the result of work begun by the committee two years previously for the purpose of revising the Insurance Rules. On 20 December 1990, the Management Committee proposed in its Opinion No 35/90 (see paragraph 6) that, in order to comply with the principle of equal treatment, the institutions should lay down, in so far as necessary, coefficients for the countries in which the cost of medical services was particularly high. Lastly, since 1 January 1991, the Insurance Rules have been revised as mentioned above (see paragraph 19). The Court notes that, with the entry in force of the new Insurance Rules, special measures for ensuring equal treatment between all members and their dependants covered by the Sickness Scheme have been inserted in the new provisions for the interpretation of Sickness Insurance Rules, in order to resolve the problem created by the imbalance in the matter of fees charged by doctors and dentists in the different places of employment or residence of Community officials and the members of their families.

42 In the face of that body of measures whose clear purpose is to put an end to the inequality adversely affecting members and their dependants who have to pay higher medical fees in some Community Member States, the Court considers that the institutions, in particular the Commission, have demonstrated the necessary diligence in

achieving a revision of the rules at issue regarding doctors' and dentists' fees which takes account of the reimbursement requirements in each Member State of the Community, and have also complied with the stages and procedures prescribed by the rules in force and adopted the appropriate financial measures for safeguarding the equilibrium of the scheme.

43 It must, furthermore, be pointed out that amending a body of rules necessarily implies that the date on which the amended rules take effect must be determined. The principle of legal certainty requires that the date from which a provision takes effect must be determined with precision. Since the new Insurance Rules entered into force on 1 January 1991, they cannot, in the absence of a provision to the contrary, be applied retroactively to reimbursements made before that date. In those circumstances, the fact that similar cases have been treated differently, before and after the entry into force of the revised Rules, cannot be regarded as discriminatory.'

II — Subject-matter of and forms of order sought in the appeal

By a document lodged at the Registry of the Court of Justice on 20 September 1991 Mr Pincherle brought an appeal against the abovementioned judgment of the Court of First Instance, which had been served on him on 19 July 1991, on the ground that the judgment had been adopted in breach of Community law.

Mr Pincherle claims that the Court of Justice should:

(1) set aside the judgment of the Court of First Instance of the European Communities of 12 July 1991 in Case T-110/89;

(2) grant the forms of order sought by the appellant at first instance;

(3) order the Commission to pay the costs of these proceedings and the proceedings at first instance.

The *Commission* contends that the Court should:

(1) dismiss the appeal as inadmissible or, in the alternative, dismiss the appeal as unfounded;

(2) order the appellant to pay the costs of the proceedings on the basis of Article 69(2) in conjunction with Article 70 and the second paragraph of Article 122 of the Rules of Procedure of the Court of Justice.

In its rejoinder the Commission also asked the Court to exclude the Unione Sindicale Euratom Ispra, the Sindacato Ricerca della Confederazione Generale Italiana del Lavoro, the Sindacato Ricerca dell'Unione Italiana del Lavoro and the Sindacato Ricerca della Confederazione Italiana Sindacati Liberi from the appeal procedure or, in the

alternative, to rule on the application for leave to intervene submitted by them in their alleged 'response'.

The *Unione Sindicale Euratom Ispra*, the *Sindacato Ricerca della Confederazione Generale Italiana del Lavoro*, the *Sindacato Ricerca dell'Unione Italiana del Lavoro* and the *Sindacato Ricerca della Confederazione Italiana Sindacati Liberi* ask the Court to set aside the judgment appealed against.

III — Legal framework

A — *The Staff Regulations*

Article 72 of the Staff Regulations of Officials of the European Communities provides:

'An official, his spouse, where such spouse is not eligible for benefits of the same nature and of the same level by virtue of any other legal provision or regulations, his children and other dependants within the meaning of Article 2 of Annex VII are insured against sickness up to 80% of the expenditure incurred subject to rules drawn up by agreement between the institutions of the Communities after consulting the Staff Regulations Committee. This rate shall be increased to 85% for the following services: consultations and visits, surgical operations, hospitalization, pharmaceutical products, radiology, analyses, laboratory tests and prostheses on medical prescription with the exception of dental prostheses ...'.

B — *The Insurance Rules*

1. *Article 8*

Article 8 of the Rules on Sickness Insurance for Officials of the European Communities (the 'Insurance Rules') provides:

'1. When the expenses incurred are for treatment of the member or of a person covered by his insurance in a country where the cost of medical treatment is particularly high and the portion of expenses not reimbursed by the scheme places a heavy financial burden on the member, special reimbursement may be granted, on the basis of the opinion of the Medical Officer of the office responsible for settling claims, who shall assess the cost of medical treatment, either by decision of the appointing authority of the institution to which the member belongs or by decision of that office if the requisite powers have been delegated to it by the said authority.

2. When the non-reimbursed portion of the expenses covered by the scales annexed to these Rules which are incurred by a member in respect of himself and in respect of persons covered by his insurance exceeds during any 12-month period half the average basic monthly salary or pension or, in the case of the members referred to in Article 2, points 3, 5, 6, 7, 8 and 12 of the Rules, half the average allowance received during the said

period, the special reimbursement provided for in Article 72(3) of the Staff Regulations shall be determined as follows:

The non-reimbursed portion of the actual expenses which is in excess of half the average basic monthly salary, pension or allowance shall be reimbursed at the following rates:

— 90% in the case of a member by whose insurance no other person is covered;

— 100% in other cases.

The office responsible for settling claims shall deliver an opinion on the application for special reimbursement on the basis of general criteria adopted by the Management Committee after consulting the Medical Council for determining whether the expenses incurred are excessive. The appointing authority shall take its decision in the light of the Opinion of the office responsible for settling claims.

...

5. Decisions on requests for special reimbursement shall be taken by:

— either the appointing authority of the applicant's institution, on the basis of an opinion delivered by the office responsible for settling claims in accordance with general criteria adopted by the Management Committee after consulting the Medical Council for determining whether the expenses incurred are excessive;

— or the office responsible for settling claims, on the basis of the same criteria, where it has been empowered by the appointing authority to do so.'

As regards Article 8(1), the Interpretation Sickness Insurance Rules provide as follows:

'Article 8(1) is not "in principle" applicable in Community countries.

The countries where the cost of medical treatment is particularly high have been determined by the administrative heads of the institutions. At present they are in the USA, Canada, Chile, Uruguay, Japan and Venezuela.

...'.

2. *The annexes*

Section 1 of Annex I lays down maximum limits of reimbursement for surgery visits to and home calls by doctors.

When the rules were revised in 1991 the provisions for the interpretation of that provision were revised. They now provide as follows:

'A weighting of 2 will be applied to the maximum reimbursement of the fees for surgery visits and home calls by general practitioners and specialists billed in Italian lire or pounds sterling pursuant to Article 8(1) of the Rules.'

Annex 3 lays down maximum limits for the reimbursement of the cost of dental treatment and dental prostheses.

As revised with effect from 1 January 1991, the interpretation provisions provide for various increased weightings for the reimbursement of dental treatment and certain fixed prostheses where the price and fees are expressed in Italian lire.

IV — Summary of the pleas in law and arguments of the parties

A — *The appeal*

1. *First plea in law: misinterpretation of Article 72 of the Staff Regulations and Article 8 of the Insurance Rules in the present case; infringement of Article 72*

This plea in law consists of two parts, one concerning Article 72 of the Staff Regulations and the other concerning Article 8 of the Insurance Rules.

(a) Article 72 of the Staff Regulations

The Court of First Instance settled points which were not raised before it

It will be recalled that in paragraph 27 of the judgment the Court of First Instance considered that the upper limits fixed in the annexes to the Insurance Rules could not be considered unlawful or unjust because 'the reimbursements appearing on Statements of payment Nos 71 and 72 ... were mostly (in 15 out of 20 cases) effected at a rate of 80% or 85%'.

Mr Pincherle considers that in making that finding the Court of First Instance settled a point which was not raised before it. In order to determine whether the upper limits in issue were compatible with Article 72 of the Staff Regulations the Court took into consideration reimbursements other than those challenged by the appellant, which were limited to a surgery visit to a specialist reimbursed at the rate of 38%, a home visit by a specialist reimbursed at the rate of 43%, two surgery visits to a specialist reimbursed at the rate of 29% and dental treatment reimbursed at the rate of 58%. The other reimbursements taken into account by the Court appeared by chance in the statements of payment produced before it.

The *Commission* considers that that plea is inadmissible. Contrary to what the appellant would have the Court believe, the criticism does not relate to a procedural defect but seeks to reopen the examination of the facts carried out by the Court of First Instance.

In the alternative, the Commission considers that the plea is unfounded. By finding that in fact the application of the statutory maximum rates resulted in reimbursements lower than the maximum limit provided for in

Article 72 in only five cases out of 20 the Court of First Instance did not settle a point which was not raised before it. In that regard, the Commission observes that in paragraph 22 of the judgment the Court stated that 'the reimbursements contested in the present case ... range from 29% to 66% of the expenses incurred'. That statement clearly shows that the Court had in mind only the reimbursements contested by Mr Pincherle.

The Court of First Instance did not comply with Article 72 of the Staff Regulations

As strictly concerns the reimbursements contested in his application, *Mr Pincherle* considers that the findings of the Court of First Instance are not compatible with Article 72 of the Staff Regulations: the application of maximum rates which lead to reimbursements of 29%, 38%, 43%, 63% and 66% cannot be regarded as consistent with the principle of social insurance cover set forth in Article 72 of the Staff Regulations.

The *Commission* considers that this plea, too, is inadmissible. In that line of argument, the appellant does not dispute the Court of First Instance's interpretation of Article 72 or the lawfulness of the implementing provisions adopted by the institutions: in reality he is asking the Court of Justice to reconsider whether the rates of reimbursement in question are compatible with Article 72. Since this plea relates not to point of law but to the Court of First Instance's assessment of the facts, it cannot be examined in the context of this appeal.

Furthermore, the Commission observes in its rejoinder that Statement No 71 of 8 June 1988, on which appears the reimbursement obtained at the rate of 38%, was excluded from the proceedings before the Court of First Instance. That fact provides a second reason for declaring the plea inadmissible in so far as it refers to that reimbursement.

As regards the substance of the plea, the Commission supports the reasoning of the Court of First Instance according to which the rates of 80% and 85% mentioned in Article 72 of the Staff Regulations, only fix maximum limits for reimbursement (paragraph 25) and the fixing of upper limits in the implementing provisions is justified by the need to safeguard the scheme's financial balance (paragraph 26). In regard to the first of these points, the Commission further states that the Court of First Instance's interpretation was already apparent from the judgment in Case 155/83 *Ooms* v *Commission* [1984] ECR 2613.

(b) Article 8 of the Insurance Rules

In paragraph 30 of the judgment the Court of First Instance held that 'it (was) not open to the applicant ... to plead the unlawfulness of' Article 8 of the Insurance Rules because 'the applicant (had) not (sought) the benefit of the provisions of Article 8'.

In the alternative, the Court of First Instance considered in paragraph 31 that Article 8(1) was applicable to Member States of the Community.

In order to challenge that part of the decision, *Mr Pincherle* observes first of all that he never asked the Court of First Instance to declare that Article 8(1) of the Insurance Rules was unlawful. His sole intention in invoking that provision was to state that it did not allow him to be granted a special reimbursement to supplement the

maximum levels which he requested the Court of First Instance to declare inadequate.

Mr Pincherle goes on to challenge two aspects of the Court of First Instance's interpretation of Article 8(1).

First, he considers that the countries of Europe are excluded from the scope of that provision. While he concedes that the provisions for the interpretation of Article 8 provide only that those countries are to be excluded 'in principle', he states that the subsequent list of the various countries in which medical services can lead to a special reimbursement does not mention any European country.

In Mr Pincherle's view his proposed interpretation is corroborated by the fact that Article 8(1) has never been applied in respect of medical fees incurred in Europe. In that regard, he maintains that, contrary to what the Court of First Instance asserts in paragraph 31 of the judgment, the revaluation of the upper limits on 1 January 1991 is a measure of general scope which has no connection with individual decisions adopted in pursuance of Article 8 of the Insurance Rules.

Secondly, Mr Pincherle disputes the Court of First Instance's finding that the application of Article 8(1) of the Insurance Rules is conditional upon a request by the person concerned. In support of his position, Mr Pincherle claims that the special reimbursements provided for in Article 8(2) are effected by the Commission on its own initiative where it considers that the subjective conditions laid down by that provision are met.

The *Commission* asks the Court to declare the plea inadmissible on the ground that it seeks to obtain a declaration that a provision which, by his own admission, can be of no assistance to him is inapplicable. In other words, by this plea the appellant is challenging the decision of the Court of First Instance on a point which does not adversely affect his interests.

In the alternative, the Commission approves the Court of First Instance's interpretation of Article 8(1) of the Insurance Rules. It agrees with that Court that the application of Article 8(1) may be extended to the countries of Europe but that it is conditional upon a request being submitted by the individual concerned.

On the first point, the Commission objects first of all that Mr Pincherle has not established that Article 8(1) had never been applied in respect of services provided in Europe and that even if he had done so that would not confirm his interpretation of Article 8.

The Commission then claims that in any event such an argument must be rejected in the context of the present appeal because it relates to elements of fact and not to the interpretation of Article 8.

Similarly, the Commission states, in relation to the second point, that the appellant has not shown that the Commission had effected the special reimbursements provided for in Article 8(2) on its own initiative, and notes

that in any event the wording of Article 8(5) clearly makes the reimbursement of the services conditional on a request by the person concerned.

2. *Second plea in law: irrelevance of the adaptations effected subsequent to the facts at issue in the present case; failure to take account of essential evidence; breach of the principle of non-discrimination*

Referring to the opinions of the Management Committee of the Joint Scheme of 23 February 1989 and 20 December 1990 and also to the revision of the rules which came into effect on 1 January 1991 (paragraph 41 of the judgment), the Court of First Instance considered that 'the institutions ... [had] demonstrated the necessary diligence' (paragraph 42).

On that point, *Mr Pincherle* criticizes the Court of First Instance, first for having taken into consideration factors extraneous to the case and, secondly, for not taking into account evidence which he had supplied. Those procedural defects might be sanctioned by the Court called upon to determine only points of law.

(a) The Court of First Instance took into consideration factors extraneous to the case

Mr Pincherle observes that the revision of the rules, which entered into force on 1 January 1991, or two years after the services in issue, does not concern the present case.

Supported by the *interveners*, he further observes that that revision, in so far as it provides for a revaluation of the maximum rates fixed for surgery visits to specialists and dental treatment, proves that he is right: if the maximum rates were amended in 1991, it follows that prior to that date they were not consistent with the principle of non-discrimination.

Once again, the *Commission* considers that this plea is inadmissible. Since it does not relate to the Court of First Instance's analysis in paragraphs 35 to 40 of the judgment, it must be regarded as relating solely to the facts.

In the alternative, the Commission states that it agrees with the Court of First Instance's analysis in the abovementioned paragraphs of the judgment and asks that this plea be held to be unfounded.

(b) The Court of First Instance did not take account of evidence adduced by the applicant

Mr Pincherle observes that, in assessing the diligence with which the Commission had acted, the Court of First Instance omitted to consider a number of documents which he had supplied to it: two reports of the Management Committee of the Sickness Fund of 30 June 1987 and 30 June 1988 and a report of the Local Staff Committee at Ispra of 3 June 1983.

The first two documents show that in 1987 the situation was one of total disparity. To take only one example, it follows from the tables attached to the first report that the impugned maximum rates compensated for specialist consultation fees in 321 cases out of 1 000 in Italy compared with 693 in

Belgium, 962 in Germany and 983 in Luxembourg. Given the urgency of the situation, the period of four years required to revise the rules must be regarded as excessive.

As regards the report of the Ispra Local Staff Committee, it already showed, on the basis of evidence gathered in 1982, and therefore 10 years before the rules were revised, that the reimbursements granted for services provided in Italy had not been adapted and criticized the resulting discrimination for members of the staff of the Community institutions. That report was produced, at the request of the Court of First Instance, at the close of the oral procedure before that Court.

Lastly, Mr Pincherle observes that in Case 158/79 *Roumengous Carpentier* v *Commission* [1982] ECR 4379 and [1985] ECR 39 the Court of Justice has already sanctioned the Commission's delay in adjusting pecuniary benefits. In that case the time-lag before the administration acted was not as long as in the present case.

Mr Pincherle further observes that in Case 7/87 *Commission* v *Council* [1988] ECR 3401 the Court of Justice also required that regulations establishing weightings, based as in the present case on previous inquiries and by the principle of equality of treatment, be made retroactive.

The *Commission* asks the Court to declare the plea inadmissible. The appellant does not dispute either the analysis or the reasoning of the Court of First Instance in paragraphs 39, 40 and 41, but attempts, by relying on facts which he considers more useful in his case, to reopen the discussion concerning the figures and the way in which they were used.

The Commission considers, in the alternative, that the plea is unfounded.

First of all, it states that the report of the Ispra Local Staff Committee on which the appellant relies was not issued by the institution in question and that it was produced for the first time at the hearing, without any warning to the Commission or any justification for the delay. Since, given its date, it does not take account of the amendments of the maximum rates between 1983 and 1987 it cannot be taken into account for the purpose of assessing the appellant's position.

The Commission refers to Opinions Nos 3/83 and 35/90, which show that the revision of the maximum rates of reimbursement in 1983 had eliminated any discrimination in the rates of reimbursement and that it was only in 1988 and 1990 that differences reappeared.

The Commission further states that even if it were decided that the administration reacted too late, Mr Pincherle could not obtain compensation for the damage sustained since he did not request the application of the Insurance Rules. On that point the Commission refers to the judgment of the Court of First Instance in Case T-42/90 *Barassi* v *Commission* [1992] ECR II-181.

The Commission then agrees with the Court of First Instance's assessment that in adapting the maximum rates it was necessary to proceed in stages in order to guarantee the financial balance of the scheme and also to increase the contributions paid by officials and the institutions. The need to act progressively was again illustrated recently by the adoption by all the institutions of new amendments of the Rules of the Joint Sickness Insurance Schemes. Those amendments, which are at the draft stage, are annexed to the Commission's submissions to the Court.

Lastly, the Commission agrees with the Court of First Instance that the revision which came into force on 1 January 1991 cannot have retroactive effect. In that regard, it argues that the case-law cited by Mr Pincherle concerns another situation, namely the application of weightings to the remuneration of officials provided for in Articles 64 and 65 of the Staff Regulations. Those provisions seek to establish equivalence of purchasing power for officials irrespective of the place to which they are posted and is therefore based on the principle of retroactivity.

Lastly, *the interveners* claim that various officials of the Commission serving in Italy have lodged administrative complaints against various reimbursements of medical expenses incurred in that country. From the time this action was brought, those officials were requested not to bring judicial proceedings and the Commission undertook to apply the Pincherle judgment to them.

B — *The intervention*

In the present case the Unione Sindicale Euratom Ispra, the Sindacato Ricerca della Confederazione Generale Italiana del Lavoro, the Sindacato Ricerca dell'Unione Italiana del Lavoro and the Sindacato Ricerca della Confederazione Italiana Sindacati Liberi lodged a response before the Court.

The Commission infers from the fact that the Registry accepted that response that it interpreted Article 115(1) of the Rules of Procedure, which provides that '[a] ny party to the proceedings before the Court of First Instance may lodge a response within two months after service on him of notice of the appeal', as applying to the interveners before the Court of First Instance. It follows that the interveners automatically become parties to the appeal and that they can submit both a response and a rejoinder to the Court.

The *Commission* disputes that interpretation and asks the Court to exclude the abovementioned trade unions from the appeal procedure or, in the alternative, to rule on the application for leave to intervene implicit in the response.

That position is based on three grounds. First of all, the interpretation in question is not well-founded in law. Secondly, its application would lead to results which were not adapted to the situation of individuals who

have intervened at first instance. Finally, it leaves the parties in the main proceedings open to unjustified intervention.

1. *The interpretation is not well founded in law*

According to the Commission, the disputed interpretation of Article 115(1) of the Rules of Procedure might well lead to situations contrary to Article 37 of the Protocol on the Statute of the Court of Justice, a superior rule of law which requires that an intervener must establish an interest in the result of the case. The fact that an individual was allowed to intervene before the Court of First Instance does not mean that he necessarily has an interest in intervening before the Court of Justice. It may be that an interest found to exist by the Court of First Instance concerned only questions of fact, which are not susceptible to review by the Court of Justice, or aspects of the case which do not form the subject-matter of the appeal.

The Commission observes that that risk could easily be eliminated.

First of all, Article 115(1) should be interpreted as applying only to the main parties to the proceedings before the Court of First Instance. The use in that provision of the expression 'any party' rather than 'the opposing party' would then be justified by the fact that those drafting the Rules of Procedure intended that, where the appeal is lodged by the intervener at first instance in accordance with the second paragraph of Article 49 of the Statute both the applicant and the defendant at first instance would be allowed to lodge a response before the Court.

Secondly, Article 123 of the Rules of Procedure might be interpreted as also applying to third parties who intervened at first instance. According to that provision, '[a] n application to intervene made to the Court in appeal proceedings shall be lodged before the expiry of a period of three months running from the date on which the appeal was lodged. The Court shall, after hearing the Advocate-General, give its decision in the form of an order on whether or not the intervention is allowed'.

2. *The broad interpretation of Article 115(1) would lead to results which were not adapted to the situation of individuals who intervened at first instance*

The Commission considers that the broad interpretation of Article 115(1) adopted by the Registry has the effect of distorting the procedural rules on intervention: a third party intervening at first instance would automatically be allowed to intervene before the Court of Justice although he would have to show a special interest in order to bring an appeal against the judgment of the Court of First Instance. It will be recalled that the second paragraph of Article 49 of the Protocol on the Statute of the Court of Justice provides that interveners other than the Member States and the Community institutions may bring an appeal only where the decision of the Court of First Instance directly affects them.

Another consequence of the contested interpretation is that an intervener would be able to present both a response and a rejoinder before the Court of Justice although, accord-

ing to Article 93(4) and (5) of the Rules of Procedure, an intervener must accept the case as he finds it at the time of his intervention and can present only a single statement in writing in support of the submissions of one of the parties. That exchange of statements would create an artificial dialogue between the appellant and the intervener, even if the intervener has intervened in support of the appellant. The situation would be particularly paradoxical where they are both represented by the same lawyer.

3. *The contested interpretation leaves the parties in the main proceedings open to unjustified intervention*

If the interveners at first instance were automatically allowed to intervene before the Court of Justice, the main parties would be subjected to unwarranted, or even vexatious, intervention without being able to object and without the Court being able to ascertain the existence of an interest in intervening. The interveners might thus present arguments susceptible of influencing the final decision to the detriment of one of the main parties. What is more, if that party should be unsuccessful it might in appropriate circumstances be ordered to pay the intervener's costs.

R. Joliet
Judge-Rapporteur