OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 7 July 1987 *

Mr President,
Members of the Court,

1. By application lodged at the Court Registry on 22 October 1985, the Commission of the European Communities requested the Court to declare that, by applying Article 11 (2) of Annex VIII to the Staff Regulations of Officials only in part, the Grand Duchy of Luxembourg has failed to fulfil its obligations under the EEC Treaty.

As the Court is aware, that provision reads as follows: 'An official who enters the service of the Communities after leaving the service of a government administration or of a national or international organization or of an undertaking shall have the right, on becoming established with [the] Community to pay to it either:

(i) the actuarial equivalent of retirement pension rights acquired by him in the government administration, national or international organization or undertaking; or

(ii) the sums repaid to him from the pension fund of the government administration, organization or undertaking at the date of his leaving its service.

In such [a] case the institution in which the official serves shall, taking into account his grade on establishment, determine the number of years of pensionable service with which he shall be credited under its own pension scheme in respect of the former period of service, on the basis of the amount of the actuarial equivalent or sums repaid as aforesaid'.

2. I would recall that in Luxembourg there are two social security schemes which differ substantially with regard to the conditions governing entitlement to a pension, the financing procedures and the authorities responsible for administering them: the 'non-contributory' scheme, which in practice is restricted to civil servants, and the 'contributory' scheme for employees in the private sector. In the light of that situation and in order to enable the right conferred by Article 11 (2) of Annex VIII to be exercised, the Luxembourg legislature enacted two distinct provisions.

More precisely, Article 8 (2) of the Luxembourg Law of 27 August 1977 offered an official leaving the civil service the possibility of opting 'for the application of either the provisions of paragraph (1) (reaffiliation to the Luxembourg scheme by payment of the refunded contributions in order to restore pension rights) or the provisions of the pension scheme of the international institution whose service he entered and which are directly applicable in the Grand Duchy of Luxembourg . . .'. Instead, as far as employees in the private sector are concerned, Article 18 of the Luxembourg Law of 16 December 1963, as amended by the Law of 14 March 1979,

* Translated from the Italian.

provides that 'where a person moves from a Luxembourg contributory pension scheme to a pension scheme of an institution which provides for the buying-in of pension rights acquired during periods of employment prior to his establishment, the contributions paid to the Luxembourg pension scheme shall be transferred upon request by the person concerned to the pension scheme of the international institution, together with interest at 4% per annum as from 31 December of each year of affiliation'.

In substance, in the case of the second category of employees, the transfer of pension rights to the Community scheme must be carried out on the basis of the sums repaid alone. Instead, in the case of civil servants, it is the actuarial equivalent that is transferred.

The Commission considers that the restriction imposed on employees in the private sector is incompatible with the Staff Regulations. In its view, the purpose of Article 11 (2) of Annex VIII is to guarantee a person who enters the European public service the right to opt for the transfer of the actuarial equivalent *in any event* and, consequently, even where that method of calculation is not available under the pension scheme to which that person formerly contributed. That is why the Commission set in motion the procedure provided for in the first paragraph of Article 169 of the EEC Treaty and, following Luxembourg's refusal to comply with the Commission's reasoned opinion, brought the action now before the Court.

3. France and the United Kingdom have intervened in the proceedings in support of the Grand Duchy of Luxembourg. All three governments contend that Article 11 (2) confers on Community officials the right to choose between maintaining their pension rights under the provisions of national law applicable to them and transferring those rights to the Community scheme. However, they consider that Article 11 (2) does not authorize Community officials to select the method of transfer, which must be carried out in accordance with the criteria laid down by each Member State in connection with the pension scheme to which the official concerned was affiliated.

Let me say at once that I am not swayed by the applicant's interpretation. It is based on the premise that, from the point of view of the Staff Regulations, the transfer of the actuarial equivalent is the normal procedure, whilst the transfer of the sums repaid constitutes 'a safety net where there is a transition from one scheme to another' and is therefore of a residual nature.

The Commission, however, does not explain the reasons why the Community legislature regards the second method of transfer as ancillary to the first, nor does it state the circumstances in which officials may have recourse to it. The Commission maintains in its application that the transfer of the actuarial equivalent is the only method which ensures that persons who are already entitled to a pension are certain not to lose the years of pensionable service acquired under the national scheme when they move

to the Community scheme. At the hearing, however, the applicant stated that, where national law makes provision for both of the methods of transfer specified in Annex VIII, the person entitled to the pension may, if he considers it more advantageous to do so, opt for the second method. Clearly, that contention makes the Commission's argument a good deal less forceful. Apart from that contradiction, however, the fact remains that the argument to the effect that the transfer of the actuarial equivalent is the rule and the transfer of the sums repaid is the exception is not substantiated either by the wording or by the objectives of Article 11 (2).

I would recall, in the first place, that 'Article 11 (2), by establishing ... a system for the transfer of pension rights, was intended to facilitate movement from national employment, whether public or private, to the Community administration and thus ensure that the Communities have the best possible chance of being able to choose qualified staff who already possess suitable experience' (judgment of 20 October 1981 in Case 137/80 *Commission* v *Belgium* [1981] ECR 2393, paragraph 11 of the decision). Accordingly, that provision required the Member States to adopt 'all appropriate measures, whether they be general or particular ... to enable the Community scheme to be *coordinated* with the national schemes' (paragraphs 9 and 12 of the decision, emphasis added).

Therefore it was not essential for the various Member States to adopt a single method of transfer. The reason for this is obvious. At the time when the Staff Regulations were drawn up (February 1968), Italy was applying the procedure involving the transfer of the actuarial equivalent, whereas in the other five Member States the transfer of pension rights was being carried out by a method which was similar or identical to the transfer of the sums repaid. The Council took that situation into account and referred to both methods of transfer, thereby securing the advantage of facilitating transfers between the administrative authorities concerned without requiring the Member States to amend their systems. I would point out, moreover, that this state of affairs was not affected by the successive enlargements of the Community following the entry into force of the Staff Regulations. Accordingly, it cannot be said that at present there is a common principle which supports the applicant's argument or that new requirements have come into being which are such as to justify that argument as an interpretation of developments.

Thus, having regard to those findings and to the aforesaid case-law, I am compelled to conclude that Article 11 (2) does not give precedence to either method of transfer over the other, nor does it entitle officials to select whichever method they consider to be more appropriate. That, moreover, was the view taken by the Court in a judgment which it gave when these proceedings were already in progress. It held that 'an analysis of the wording of that article clearly reveals that its fundamental purpose is to ensure the transition from a national insurance scheme to the Community scheme by one of the two procedures to which it refers, that is to say transfer of the actuarial equivalent or transfer of the sums repaid; it does not, however, require that both procedures should be provided for', quite apart from whether or not they exist under national law (judgment of 23 January 1986 in Case 171/84 *Soma* v *Commission* [1986] ECR 173, paragraph 20 of the decision).

4. In the light of the aforesaid considerations, I suggest that the Court dismiss the action brought by the Commission of the European Communities against the Grand Duchy of Luxembourg and, under Article 69 (2) of the Rules of Procedure, order the applicant to pay the costs.