OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 5 July 1988 *

Mr President,
Members of the Court,

1. The Community Staff Regulations entitle Community officials to transfer to the Community's pension scheme rights acquired in a national scheme before they entered the Community civil service. In two separate cases the Luxembourg Cour de cassation has referred to this Court a number of questions for a preliminary ruling which, once again, bear witness to certain difficulties experienced in the effective implementation of that transfer.

2. I shall deal in the first place with the Retter case, the facts of which took place before those in the Decker case.

3. Mr Retter was established as an official of the ECSC on 5 February 1962. Prior to his establishment he had been employed in the service of a company and had been affiliated for 61 months to the Caisse des pensions des employés privés (Pension fund for private employees), hereinafter referred to as 'the Fund'. The issue centres on the question whether the scheme for the reimbursement of the surrender value of contributions, which was in force in Luxembourg in 1964 when Mr Retter requested and obtained such a reimbursement, is compatible with Community law.

4. For ECSC officials the 'Regulation laying down the Staff Regulations and Conditions of Employment of Other Servants of the Community' adopted by the Committee of Presidents of the ECSC had, in the first subparagraph of its Article 11 (2), provided for the transfer entitlement in the following terms: 'an official who enters the service of the Community after leaving the service of a government administration or of a national or international organization shall have the right, on becoming established with the Community, to pay to it either: — the actuarial equivalent of retirement pension rights acquired by him in the government administration, national or international organization or undertaking; or — the sums repaid to him from the pension fund of the government administration, organization or undertaking at the date of his leaving its service'. Pursuant to Article 2, the regulation was due to enter into force on 1 January 1962. It should be mentioned that this provision reiterated with appropriate textual amendments the provisions of Regulation No 31 (EEC), 11 (EAEC) of the Councils of 18 December 1961 laying down the Staff Regulations and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community [1] which also entered into force on 1 January 1962. However it must be noted that unlike this latter regulation, which was adopted pursuant to Articles 189 of the EEC Treaty and 161 of the EAEC Treaty, the regulation of the Committee of Presidents of the ECSC was apparently not published in the *Official Journal of the European Communities* and does not seem to me to have been published elsewhere.

* Translated from the French.

1 — OJ, English Special Edition 1959-62, p. 135.

5. In these proceedings the Court is asked to give a ruling as to the extent of the direct applicability of the provision of the 1962 ECSC Staff Regulations with regard to a Luxembourg law which was in force when those regulations were adopted. However, throughout the procedure before this Court, both written and oral, argument proceeded as if the provision of the regulations in question had the legal characteristics of a Community regulation whereas, perhaps, it does not exhibit all those characteristics.

6. It seems to me that such a situation justifies this Court requiring the oral procedure to be reopened in order that argument may be heard as to the legal effects of the 1962 ECSC Staff Regulations and, more precisely, of the provision relating to transfer of pension rights, in particular when there has been no publication.

7. In these circumstances I consider that I do not have to continue my Opinion in the Retter case today.

8. The legal background to the Decker case is not identical to that in the first case. It contains a dispute over a request for transfer of pension rights formulated in November 1981 by an official of the European Parliament who was established in April 1981. Under Community law that request was based on the uniform regulations for staff of the European Communities adopted by means of Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 [2] and more precisely on the first subparagraph of Article 11 (2) of Annex VIII which provides 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 that 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.'

From the point of view of Luxembourg law Mrs Decker was requesting the application of the provisions of the Law of 14 March 1979 which set out the detailed rules of domestic law relating to the transfer entitlement provided for by the abovementioned provision of the Staff Regulations. In particular the Luxembourg law amended Article 18 of the Law of 16 December 1963 and provided that, upon request, contributions made to the Luxembourg pension scheme, together with compound interest thereon at the rate of 4% per annum from 31 December of each year of membership, would be transferred to the Community pension scheme and provided further that requests made more than one year after the official's establishment would not be admitted. It became clear during the course of the oral argument presented at the hearing that the scheme for buying up contributions which is laid down in the aforesaid law concerns all contributions made, in other words both the employee's and the employer's contributions.

9. Mrs Decker lodged a request to have her pension rights transferred with the adminis-

2 — OJ, English Special Edition 1968 I, p. 30.

tration of the Parliament less than one year after she had been established as a Community official, in other words before the period prescribed by the law of 1979 had expired, but the Parliament passed this request on to the Fund more than one year after she had been so established. Her situation prompted the Cour de cassation to refer to this Court a question designed to ascertain the extent to which a time-limit on the exercise of the entitlement was compatible with the transfer entitlement granted under the Staff Regulations.

10. Since it was for the national legislature to determine the detailed rules for the transfer provided for by the Staff Regulations I agree with the analysis of the Commission and of the United Kingdom according to which those detailed rules may include the rule that if the request to the competent national authority is not made within one year the request will not be admitted. The requirements of sound management of the national authorities which administer the pension rights acquired by individuals before they entered the Community public service seem to me in principle to justify the concern which the national legislature may have in obliging a Community official to make up his mind within a certain period.

11. However, since the time-limit in question is one imposed by national law on the effective exercise of a right granted by Community law it is only compatible with Community law if it complies with certain limits.

12. Drawing on an analogy with the *Ferwerda* judgment of 5 March 1980 in which the Court acknowledged that it was

'for the national legal system of each Member State to determine the Court's jurisdiction and to fix the procedures for applications to the courts intended to protect the rights which the subject obtains through the direct effect of Community law',

but added that such procedures

'may in no case be laid down in such a way as to render impossible in practice the exercise of the rights which the national court must protect', [3]

I take the view that the detailed rules for the exercise of a right conferred by a directly applicable Community regulation may not be formulated by the national legislature in such a way as to render it impossible or even difficult. More precisely, as the United Kingdom stressed in its written observations, the period within which the transfer entitlement must be exercised must be sufficient to allow an official both to form an opinion and to make an informed decision.

13. From this point of view, the setting of a period of one year from the official's establishment in the Community civil service, as provided by the Luxembourg law of 1979, which was, moreover, adopted after discussion with the Commission, does not appear to render impossible or even difficult the exercise of the transfer entitlement, especially if one bears in mind, as the Fund pointed out, that the official's establishment is normally preceded by a one-year probationary period.

3 — Case 265/78 [1980] ECR 617, paragraph 10.

14. Must, however, the compatibility of a reasonable time-limit with the first subparagraph of Article 11 (2) of Annex VIII to the Staff Regulations be made subject to a reservation to the effect that in certain cases non-compliance with that time-limit may not be used as a ground for not admitting a request?

15. The Commission has formulated some suggestions on this point. Those suggestions are inspired by the circumstances of the misfortune experienced by Mrs Decker, who expressed in good time her desire to request the transfer only to find that the administration of the Parliament had been slow in transmitting her request.

16. The Commission referred mainly to the consistent cooperation between Community and national institutions concerning transfer of pension rights and considers that as a result of this cooperation, which is based on Article 5 of the Treaty and more specifically on Article 19 of the Protocol on the Privileges and Immunities of the European Communities, a request by an official, formally expressed to his Community administrative within the one-year period, cannot be treated as inadmissible.

17. I find myself far from convinced by this line of argument. If, as I believe, it is referring to the first paragraph of Article 5 of the Treaty, it must be recalled that according to the Court's case-law the obligation expressed by that provision is not sufficient to produce legal effects with regard to the Member States. To adopt the expression of Professor Vlad Constantinesco it serves to 'reinforce a pre-existing [Community] obligation' and to do this it must be relayed by a specific obligation. [4] Bearing in mind the question at issue it seems to me difficult to regard Article 19 of the abovementioned protocol as constituting such an obligation. That article provides that 'the institutions of the Community shall, for the purpose of applying this protocol, cooperate with the responsible authorities of the Member States concerned'. Even read in conjunction with Article 5 that provision seems to me to be too general to form the basis of an exception to the forfeiture of rights resulting from non-compliance with a time-limit fixed by national law where this is due to the tardiness of a Community administration in transmitting a request.

18. Developing its argument on the close cooperation between national administrations and Community institutions on the transfer of pension rights the Commission explained that such cooperation was based on the practice of using the Community administration as 'the official's appointed agent' and inferred from this that if the official clearly expressed his wish to his administration within one year after his establishment then his wish should be considered to have been validly expressed.

19. Such an argument seems to me to show signs of some confusion as to the concept of agent. Even supposing that a Community administration could be regarded as the appointed agent of the official it would still be subject to the same time-limit as the official for the purpose of making the request for transfer. In fact, in order to avoid the forfeiture of the right to transfer it would have to be possible to regard the Community administration as being the agent not of the official but of the national administration. Consequently, if the Community administration were to receive a request within the one-year period this

4 — 'L'article 5 CEE, de la bonne foi à la loyauté communautaire', contribution to 'Du droit international au droit de l'intégration', *Liber amicorum Pierre Pescatore*, Nomos Verlagsgesellschaft, Baden-Baden, 1987, p. 110.

could be considered to meet the condition laid down in the Luxembourg law of 1979. However, as we have seen, it is difficult to derive a legal basis for the 'appointed agent' situation from the provisions of the Treaty and the Protocol on the Privileges and Immunities relied on and there does not appear to be any other Community provision which could provide the necessary basis in this respect.

20. It must also be added that at the hearing the Commission's representative indicated in reply to a question that he was not going so far as to consider the Community institution to be the necessary agent of national institutions.

21. In reality, such a concept of 'necessary agent' would be a considerable innovation as regards relations between Community and national institutions and it certainly cannot be established, in the absence of a formal provision by means of a legal interpretation which is too closely inspired by an individual situation.

22. If it is not possible to make the reservation that a request cannot be treated as time-barred because it is transmitted via a Community institution, might it be considered possible to do so in the case of non-compliance with a time-limit, where this is wholly beyond the official's control? In fact, my question relates to a possible taking into account of *force majeure*.

23. It is beyond dispute that the Community institutions have placed themselves in the position of obligatory intermediary as regards the effective implementation of the entitlement to transfer, and more precisely the drawing-up of officials' requests for that transfer. The Commission's written observations and the annexes thereto reveal that a veritable procedure for the preparation of the requests had been established by the Community administration: the informing of officials of the entitlement to transfer as made available under the Luxembourg legislation, centralization of officials' requests for information concerning the sums transferable and the forwarding of those requests to the Luxembourg funds; receipt of replies and their transmission to the officials concerned; centralization of transfer requests properly so-called and their transmission to the Luxembourg funds. Officials were, moreover, made subject by their administration to a time-limit for making up their mind.

24. In the circumstances one might legitimately wonder whether, if an official has sent a transfer request in due form to his administration within the period of one year fixed by the Luxembourg law, the failure to forward the request in due time exhibits the features of *force majeure*? In fact, unless the official has submitted his request to the Community administration only at the last minute he cannot in the ordinary course of events foresee that the administration will not forward the request within the prescribed period and the progress of the request is wholly out of his hands. In other words, the fact that the request, which has been expressed in due time by the official, is not forwarded by his administration within the statutory period appears, from his point of view, to result from an unforeseeable cause external to him and, bearing in mind the procedure instituted by the Community administration, he is powerless to influence events. Must such a situation, of which Mrs Decker's case is a very vivid illustration, lead the Court to add a proviso to its reply?

25. The judgment of 22 January 1986 in *Denkavit* v *FORMA*[5] may help to form an opinion on this point.

26. Ruling on the validity of Article 15 of Commission Regulation EEC No 1380/75 of 29 May 1975 laying down detailed rules for the appliciation of monetary compensatory amounts which provided that 'except in cases of *force majeure*, no claim for payment of a monetary compensatory amount shall be entertained unless the relevant documents are submitted within the six months following the day on which the customs formalities were completed', the Court stated that

'the barring of claims on the ground that the requisite documents have been submitted out of time is not a penalty but, as a general rule, the normal consequence of the expiry of any prescribed period the observance of which is mandatory',[6]

but went on to recall that Article 15 provided that

'delays may be justified by exceptional circumstances amounting to *force majeure*'.

The Court therefore concluded that

'in those circumstances there are no grounds for stating that the rule which bars claims submitted out of time is out of proportion to the aim pursued by the Community legislature'.[7]

27. That judgment seems particularly relevant in so far as it develops the idea that, in order to determine whether a time-bar is unreasonable, it should be considered whether account has been taken of exceptional circumstances constituting *force majeure* which enable forfeiture of the right to transfer to be avoided. It appears to me that a solution of that kind, which was adopted as regards purely Community rules, can be transposed to a situation in which a Community rule establishes an entitlement and national legislation lays down the detailed rules for the exercise of that entitlement. To be more precise, it appears to me to be possible to interpret the first subparagraph of Article 11 (2) of Annex VIII to the Staff Regulations as allowing the national legislature to provide that the right to transfer will be forfeited if it is not exercised within a given period of time provided that that period is defined reasonably, that is to say that its length will allow an informed choice and provided also that exceptional circumstances constituting *force majeure* may justify its being exceeded. For the meaning of *force majeure* it is in my view appropriate to refer to the formula in the judgment of the Court of 9 February 1984 in *Busseni*:

'The concept of *force majeure* essentially covers unusual circumstances which make it impossible for the relevant action to be carried out. Even though it does not presuppose absolute impossibility it nevertheless requires abnormal difficulties independent of the will of the person concerned and apparently inevitable even if all due care is taken'.[8]

28. It should be noted that in the judgment in *Denkavit*, cited above, the Court took the view that the loss of a document due to the negligence of the customs authorities did

5 — Case 266/84 [1986] ECR 149.

6 — Ibid., paragraph 21 of the judgment.

7 — Ibid., paragraph 22 of the decision.

8 — Case 284/82 [1984] ECR 557, paragraph 11 of the judgment.

not constitute *force majeure* which would allow the time-limit to be fixed by the Community regulation in question to be extended. However, this conclusion may be explained on the grounds that the provision itself set out the procedure which the operator was to follow if the document was not returned.

29. In the case before this Court today it will be the responsibility of the national court to determine whether a particular situation exhibits the characteristics of *force majeure* as defined in the *Busseni* judgment.

30. It is not without some hesitation that I have arrived at the solution which I have just suggested to the Court. In averting the effects of a regrettable omission on the part of the Community administration, that solution does not require it to bear the consequences of the omission, at least with regard to the official concerned. However it appeared to me that the Court's case-law led logically to defining the limits within which the national legislature may prescribe a period within which a right granted by a Community regulation must be exercised and to including within those limits the taking into consideration of elements which constitute, so far as the officials in question are concerned, *force majeure*.

31. Consequently I suggest that the Court should:

(i) order the reopening of the oral procedure in the Retter case, and

(ii) in the Decker case, rule as follows:

'The first subparagraph of Article 11 (2) of Annex VIII to the Staff Regulations of the European Communities does not preclude national legislation from prescribing a period within which the option conferred by that article must be exercised, provided that the period is determined in such a way as not to make it impossible or even difficult to exercise the option and provided also that the exercise thereof may not be barred as being out of time where, in respect of an official, this is due to abnormal difficulties independent of his will and which he could not avoid.'