OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 4 May 1988 *

Mr President,
Members of the Court,

A — Facts

1. Mrs Giovanna Gritzmann-Martignoni, the applicant in the case in which I deliver my opinion today, seeks the assistance of the Commission of the European Communities, the defendant, in the transfer to the Community scheme of her pension rights acquired under the Italian insurance scheme.

2. The applicant was engaged by the defendant in 1962 as a local employee [1] and then, in 1976, as a member of the temporary staff at the Joint Research Centre in Ispra.

3. On 6 June 1985 she applied to have her pension rights transferred. By a letter of 2 August 1985, the defendant pointed out to the applicant that under the general provisions for giving effect to Article 11 (2) of Annex VIII to the Staff Regulations she ought to have made her application before 31 December 1978. However, a Commission decision of 12 December 1984 enabled officials who had submitted their requests late to benefit from the application of Article 11 (2), except that any increases in capital occurring after their establishment would not be taken into account. Accordingly, a proposal to this effect, based on the actuarial value of her rights acquired at national level, would be made to her.

4. By a letter of 20 May 1986 the defendant informed the applicant that the reference to its decision of 12 December 1984 was incorrect. Accordingly, her late request for a transfer of rights could no longer be granted.

5. The applicant challenged that decision of the defendant first by means of a complaint and then by bringing this action. In her view, the decision infringed the principle of protection of legitimate expectations and breached, or incorrectly interpreted, the general provisions for giving effect to Article 11 (2) of Annex VIII to the Staff Regulations, since, regard being had to the various versions of these provisions, the period of six months referred to therein could not be regarded as a limitation period but was merely for administrative convenience.

6. Consequently, the applicant claims that the Court should:

(1) Annul the defendant's decision of 20 May 1986 revoking the preceding decision of 2 August 1985 which

* Translated from the German.

1 — It may be inferred from the employment contracts in her personal file that she was employed as a local employee and not, as both parties stated, a member of the establishment staff.

permitted the transfer to the Community pension scheme of the actuarial equivalent of the applicant's national pension rights;

(2) Order the defendant to pay the costs.

7. The defendant claims that the Court should:

(1) Dismiss the action as unfounded, and

(2) Order the parties to bear their own costs.

8. The defendant regrets that it was obliged to revoke its decision of 2 August 1985. That decision was unlawful as its decision of 12 December 1984 was not applicable to the applicant's request.

9. The applicant cannot, says the defendant, rely on the principle of protection of legitimate expectations, as the decision of 2 August 1985 did not cause her to do or to refrain from doing anything specific. The communication of 2 August 1985 was not a decision capable of conferring rights on the applicant.

10. If the time-limits mentioned in the general provisions for giving effect to Article 11 (2) were not adhered to, officials who made their applications later would be placed at an advantage since the Italian old-age insurance scheme takes, as the relevant date for the transfer of pension rights, the date on which the application is received by it, rather than the date of establishment of an official.

11. I will deal with the other arguments of the parties, so far as is necessary, in the course of my opinion.

B — Opinion

12. It should be pointed out first of all that the parties devoted a large part of their arguments to the legal situation applicable to officials without, however, discussing in detail whether that situation may simply be extended to members of the temporary staff. Both parties thus seem to proceed on the assumption that the time-limits mentioned in the general provisions for giving effect to Article 11 (2) also apply to the applicant. I shall begin my assessment of the case with an examination of that question.

13. Since 1976, the applicant has been a member of the temporary staff within the meaning of Article 2 (d) of the Conditions of Employment of Other Servants of the European Communities. Their pension rights are determined, pursuant to Article 39 (2) of those conditions, in accordance with Section V, Chapter 3 of the Staff Regulations and Annex VIII thereto. Article 11 (2) of Annex VIII to the Staff Regulations thus applies in principle also to the applicant, and she is entitled to transfer to the Community pension scheme any pension rights acquired with a national organization.

14. Officials may apply for such transfer under Article 11 (2) of Annex VIII to the Staff Regulations on becoming established. Under the defendant's general provisions for giving effect to Article 11 (2) of 2 July 1969, this application had to be made within

a time-limit of six months from the official notification of an official's establishment.

15. By a decision of 4 April 1972, the Commission deleted the words which showed that that period was a limitation period, on account of the great number of requests submitted outside the time-limit.

16. Following a further amendment to the general provisions in March 1977, the six-month period for bringing the applications runs either from notification of the official's establishment or from the moment when a transfer of rights becomes possible, or from the entry into force of the said provisions. In the version of the general provisions for giving effect to Article 11 (2) which was supplied to the Court by the defendant the date of entry into force is not mentioned; nor is there any indication that the time-limit is a limitation period.

17. The three versions of the aforementioned general provisions share the common feature that they contain no express provision giving members of the temporary staff the possibility of transferring pension rights.

18. It was only by a notice from the head of personnel at the Joint Research Centre in Ispra dated 13 July 1978 that members of the temporary staff were informed that they could avail themselves of the possibility of rights of transfer. Such persons were given a period of six months from the date of publication of the notice, that is to say 14 July 1978, within which to lodge their applications.

19. The question to be determined is therefore whether an effective limitation period was laid down for the submission by members of the temporary staff of requests for the transfer of pension rights.

20. The Staff Regulations themselves do not lay down either for officials or for members of the temporary staff a limitation period for submitting the request for transfer of rights. However, it can be inferred from the fact that *officials* may only lodge *such an application on being established*, that the defendant has the power to lay down a limitation period in the general provisions for giving effect to the Staff Regulations which it issues pursuant to Article 110 thereof, since the date of establishment gives a precise indication of when the official may avail himself of his right in this respect.

21. Matters are different, however, as regards members of the temporary staff, whose contracts are concluded for a definite or indefinite period but in respect of whom there is no comparable clearly definable moment in time like the date of establishment. If one wished to consider it permissible at all to lay down a limitation period in the case of members of the temporary staff as well, then it must at least be required that the date from which this period begins to run should be clearly determined.

22. Moreover, the difference in the situations of members of the temporary staff and established officials precludes the application by analogy of Article 11 (2) of Annex VIII to the Staff Regulations.

23. The establishment of a probationary official marks an important turning point in his career, as the person concerned then enters a permanently foreseeable and secure

legal situation (leaving aside the ordinary risks of life). It may be expected of such an official that, within a reasonable period, he will decide to which pension scheme he would like to belong.

24. The situation is different for a member of the temporary staff, who, at least on entering the service of the Community, can by no means foresee how long he will be employed by the Community and whether he will be able to complete the minimum period of 10 years after which he is entitled to a pension under the Staff Regulations. That is to say, either he has a contract for a definite period, and then there is the uncertainty as to whether it will be renewed, or he has one for an indefinite period, and in that case he may be given notice of between 3 and 10 months (see Article 47 of the Conditions of Employment of Other Servants of the European Communities, to which the applicant's contract of employment expressly refers). Precisely because it cannot be excluded that members of the temporary staff may take up a subsequent professional activity outside the Community, or is at least rather more probable than in the case of officials, they cannot be expected, at least during a relatively short period of time, to take a definitive decision about their pension situation.

25. It must of course be acknowledged that Article 11 (1) of Annex VIII to the Staff Regulations gives a person the possibility, on quitting the Community, to have pension rights transferred to a national body. In view of the complicated transfer machinery, however, a member of the temporary staff can scarcely be expected to arrange several times for transfers from the national pension scheme to the Community scheme and later back to the national scheme. Finally, even for experts in staff matters the transfer procedure is very obscure and involved, so that repeated transfer operations cannot be expected of a member of the temporary staff, in view of the uncertainty surrounding his employment.

26. The general reference in Article 39 (2) of the Conditions of Employment to Annex VIII to the Staff Regulations does not cover Article 11 (2) of the Annex, as that article refers to a factual element, namely the establishment of an official, which in the case of a member of the temporary staff does not exist and, in the nature of things, cannot exist. The defendant's submission that the end of the probationary period could be taken as the relevant date is not convincing in this connection since, first of all, the completion of a probationary period is not compulsory for members of the temporary staff under Article 14 of their Conditions of Employment and, secondly, the legal situation of a member of the temporary staff, even if he has successfully completed a probationary period, is not comparable with that of an established official.

27. As the Staff Regulations and the Conditions of Employment cannot therefore be applied as they stand, because the reference can have no practical effect in this case, it was for the defendant in its capacity as appointing authority to provide expressly for the reference in question by means of its general provisions for giving effect to Article 11 (2) and thus make it 'applicable' in actual fact. But this is precisely what it did not do.

28. As a provisional conclusion it may therefore be said that neither the Staff

Regulations nor the Conditions of Employment of other servants of the Community, which on this point refer to the Staff Regulations, lay down a limitation period for the submission of requests for transfer by members of the temporary staff.

29. It must further be determined whether the defendant's general provisions for giving effect to Article 11 (2) provide for a limitation period. In this connection it must first be noted that those provisions, by their wording, deal only with the situation of officials and not of members of the temporary staff. In addition it should be stated that words giving the time-limit for applications the effect of a limitation period were contained in the first version of the implementing provisions but were later expressly deleted even in respect of officials, on account of the large number of late applications. Therefore there is much weight in the argument that even for officials there is no longer any limitation period under the general provisions; in this connection we may disregard the issue whether this is compatible with the provision contained in Article 11 (2) of Annex VIII to the Staff Regulations.

30. It should nevertheless be observed that those provisions neither expressly mention members of the temporary staff nor expressly apply a limitation period to them, nor yet do they indicate the point in time from which such a limitation period would begin to run.

31. In these circumstances, to apply a limitation period to the applicant as a member of the temporary staff would, in my view, be contrary to the principles of legal certainty and legal clarity. She cannot therefore be met with the objection that only in 1985 did she make the application for transfer of her pension rights. As was explained at the hearing, she did this only when she was able to evaluate the progression of her rights and when the completion of the 10-year period of service as a member of the temporary staff was no longer very far off.

32. Nor am I persuaded by the defendant's arguments that late applications for transfer of pension rights from the Italian scheme could, on account of the methods of calculation, lead to an unjustified advantage accruing to the person concerned on the ground that an accurate calculation back to the date of the official's establishment is difficult and is not carried out by the Italian authorities. Should this undue advantage actually occur, it would be for the defendant as the appointing authority to take account of this factor by an appropriate amendment to its provisions for giving effect to Article 11 (2). It cannot be accepted that the defendant should disregard the right of members of the temporary staff to a transfer of pension rights, particularly as it itself agreed the methods of transfer with the Italian authorities and the latter are prepared to make available to the Community the amounts required.

33. This result, arrived at by an interpretation of the Staff Regulations, the Conditions of Employment and the general provisions for giving effect to Article 11 (2), is not altered by the fact that the head of personnel at the Ispra Joint Research Centre mentioned for the first time in his notice of 13 July 1978 that members of the temporary staff had the possibility of transferring their

national pension rights to the Community scheme, and that he indicated a time-limit for the submission of requests.

34. Even in the light of the far-reaching powers which the Court, for example in its judgment of 8 March 1988 in Case 339/85,[2] has held that subordinate law-making authorities of the Community institutions enjoy, it is not within the power of a head of department of the defendant to lay down limitation periods which have no basis either in the Staff Regulations or in the general provisions for giving effect thereto issued by the relevant appointing authority.

C — Conclusion

35. As the defendant's decision of 2 August 1985 was therefore the correct one, I propose that the Court should allow the action and order the defendant to pay the costs of the proceedings.

2 — Judgment of 8 March 1988 in Case 339/85 *Brunotti* v *Commission* [1988] ECR 1379.