OPINION OF ADVOCATE GENERAL TESAURO
delivered on 13 March 1992 *

Mr President,
Members of the Court,

1. In this appeal Mr Lestelle is requesting the Court to set aside the judgment delivered by the Court of First Instance on 22 November 1990 in Case T-4/90 [1] and, in accordance with the originating application, to annul the decision by the Commission to continue after 22 March 1989 to deduct pension contributions from the 'termination of service' allowance received by the applicant under Council Regulation (ECSC/EEC/Euratom) No 3518/85 of 12 December 1985 introducing special measures to terminate the service of officials of the European Communities as a result of the accession of Spain and Portugal. [2]

2. A brief summary of the legislative background will make it easier to understand the issues involved.

Regulation No 3518/85, which was adopted in order to facilitate the integration of Spanish and Portuguese officials following accession, confers certain financial benefits on Community officials who apply for definitive termination of service.

To that end Article 4 of the regulation provides in paragraphs 1 and 2 that a former official to whom a measure terminating service is applied is to be entitled to a monthly allowance equal to 70% of the basic salary for the grade and step held at the time of departure, and that entitlement to the allowance is to cease not later than the last day of the month in which the former official attains the age of 65 and in any event as soon as the former official, before reaching that age, meets the conditions for entitlement to the maximum retirement pension.

Furthermore, Article 4(7) provides that: 'during the period for which he is entitled to receive the allowance, the former official shall continue to acquire further rights to retirement pension based on the salary attaching to his grade and step, provided that the contribution provided for in the Staff Regulations ... is paid during that period ...'.

Article 5 of the regulation, in its turn, makes special provision for former ECSC officials, and in particular provides in paragraph 1 that the officials referred to in the last paragraph of Article 2 of Council Regulation (EEC, Euratom, ECSC) No 259/68 [3] and in Article 102(5) of the Staff Regulations and to whom the measures terminating service are applied,

* Original language: Italian.
1 — [1990] ECR II-689.
2 — OJ 1985 L 335, p. 56.
3 — OJ 1968 L 56, p. 1.

may ask for their pecuniary claims to be settled in accordance with Article 34 of the Staff Regulations of the European Coal and Steel Community and Article 50 of the Rules and Regulations of the ECSC.

The abovementioned provisions governed the non-active status of ECSC officials. In particular, under the terms of Article 34: '... those officials shall receive for two years a monthly allowance corresponding to the remuneration provided for in Article 47(1) and for a further two years an allowance equal to one-half of that remuneration. On the expiry of four years on non-active status, officials shall receive a proportional pension under the conditions laid down in the pensions scheme.' Moreover, under Article 50 of the Rules and Regulations of the ECSC: 'in calculating the retirement pension rights of an official permitted to retire following a period of non-active status under Article 34 of the Staff Regulations, the number of actual years' service completed by that official until the time he is awarded a pension shall be doubled. The total number of reckonable years' service for the calculation of such an official's pension may not however be greater than 30 or greater than the number of years' service which he could have completed if he had remained in service until the age of 65.'

It should also be remembered that under Article 95 of the Rules and Regulations of the ECSC, officials having non-active status and in receipt of the allowance provided for in Article 34 of the Staff Regulations of the ECSC were obliged to pay to the pension fund a contribution equal to 7.5% of their basic salary.

Finally, Article 5(2) of Regulation No 3518/85 lays down that Article 4(3) and (5) to (9) of this regulation are to continue to apply to former ECSC officials who apply for the abovementioned special arrangements on definitive termination of service.

3. I now come to the facts of the present case.

Mr Lestelle, who entered the service of the High Authority of the ECSC in June 1956, made a request in June 1988 for the application to him of a measure terminating his service under Regulation No 3518/85. Subsequently, he informed the Commission that in accordance with Article 5 of the regulation he wished to have the special provisions concerning former ECSC officials applied to him and that he did not wish to continue to acquire fresh pension rights beyond the level at which they were established on the date of termination of service; consequently, he requested the Commission to cease payments by way of contributions to the pension scheme.

Since the Commission continued each month to deduct the pension contribution, Mr Lestelle requested the administration to treat his request as a complaint within the meaning of Article 90 of the Staff Regulations.

By a decision of 24 October 1989, the Commission rejected that complaint on the ground that 'the period during which the monthly allowance is paid is considered to

be a period of service and gives rise to the payment of pension contributions'.

In those circumstances Mr Lestelle sought the annulment of that decision before the Court of First Instance together with a declaration that under the terms of Regulation No 3518/85 the payment of contributions to the pension scheme constitutes an option and not an obligation.

4. By judgment of 22 November 1990 (Case T-4/90), however, the Court of First Instance dismissed the application in particular on the ground that:

'Although it is true ... that the provisions of Article 4(7) of Regulation No 3518/85 are without relevance and cannot be invoked by the recipient of an allowance under Article 34 of the ECSC Staff Regulations who fulfils the conditions for the maximum pension entitlement, the person concerned nevertheless remains subject to the general obligation to make contributions imposed on him by Article 95 of the Rules and Regulations of the ECSC' (paragraph 38 of the judgment).

5. It is essentially against those arguments that Mr Lestelle directs his allegations in his appeal against the judgment at first instance; Mr Lestelle makes two pleas in support of his appeal, the first based on an infringement of Article 4(7) of Regulation No 3518/85 and the second on an infringement of the principle that judgments must be supported by a statement of reasons.

In his first plea the applicant argues in particular that the Court of First Instance based its decision on a provision of the ECSC Rules and Regulations which is no longer in force, and did not take into consideration the fact that Regulation No 3518/85 temporarily provided for arrangements derogating from the ordinary rules of law.

Let me say at once that I share some of the applicant's misgivings with regard to the arguments on which the Court of First Instance based its decision.

As is clearly stated at paragraphs 37 and 38 of the judgment appealed against, the Court of First Instance founded the applicant's obligation to make contributions to the pension scheme on Article 95 of the ECSC Rules and Regulations pursuant to which any official on non-active status in receipt of the allowance provided for in Articles 34 and 42 of the ECSC Staff Regulations is to continue to pay to the pension fund the deduction provided for in Article 93 thereof.

It should, however, be remembered that the ECSC Staff Regulations and the ECSC Rules and Regulations of 1956 were repealed with effect from 1 January 1962 by a regulation issued by the Presidents of the ECSC which laid down new Staff Regulations (but which was not published); accordingly, as the applicant rightly points out, the Court of First Instance based its reasoning on rules which had been repealed.

Although it is true that the reference in Article 5(1) of Regulation No 3518/85 is intended to preserve the pecuniary rights

enjoyed by former ECSC officials under the earlier system of non-active status, there is no warrant for the view, in the absence of an express provision, that the legislature sought to give renewed applicability to the old rules in the case of former ECSC officials. That is further borne out by the fact that the Commission itself, far from imposing on such officials a deduction of 7.5%, as provided for in Article 93 of the ECSC Staff Regulations, merely claims a contribution of 6.75%, as provided for in Article 83(2) of the current Staff Regulations of Officials.

6. It follows from the foregoing that, by deciding that an official to whom a measure of definitive termination of service is applied within the meaning of Article 5 of Regulation No 3518/85 continues to be subject under Article 95 of the ECSC Rules and Regulations to the obligation to contribute to the pension scheme, the Court of First Instance erred in law.

Since that argument constituted the essential ground of the decision of the Court of First Instance, I consider that the Court of Justice cannot but set aside the judgment appealed against.

Under the terms of the first paragraph of Article 54 of the EEC Statute of the Court of Justice, where the decision of the Court of First Instance is quashed, the Court may itself give final judgment in the matter, where the state of the proceedings so permits.

The question arising in the present case essentially concerns the interpretation of Article 4(7) and Article 5 of Regulation No 3518/85, a question which the parties have argued fully both before the Court of First Instance and before the Court of Justice; also, the examination of Mr Lestelle's action does not as it stands call for the establishment of any facts; I consider therefore that the state of the proceedings is such as to permit the Court to give final judgment in the present dispute.

7. To that end, it may be useful to give a brief account of the characteristics of the Community pension scheme, bearing in mind above all that, under the terms of the first paragraph of Article 77 of the Staff Regulations, an official who has completed at least ten years' service is entitled to a retirement pension. He is, however, entitled to such a pension, irrespective of length of service, if he is over 60, or if it has not been possible to reinstate him during a period of non-active status or else in the event of retirement in the interests of the service.

Moreover, under Article 83(1) and (2) of the Staff Regulations, benefits paid under the pension scheme are charged to the budget of the Communities, and the Member States jointly guarantee payment of such benefits, whilst officials for their part contribute one-third of the cost of financing the scheme by means of a contribution of 6.75% of the basic salary.

Similarly, Article 36 of Annex VIII to the Staff Regulations lays down that salaries are in all cases to be subject to deduction of the

contribution to the pension scheme provided for in Articles 77 to 84 of the Staff Regulations, whilst Article 37 thereof states that an official on secondment is to continue to pay the contribution referred to in the preceding article, and the same applies to an official receiving the allowance provided for in respect of non-active status or retirement in the interests of the service, and to officials on leave on personal grounds who are continuing to acquire further pension rights.

It is common ground, moreover, that a serving official who has already acquired entitlement to the maximum amount of the retirement pension nevertheless continues to be obliged to pay pension contributions.

It follows from all those considerations that, unlike in a private insurance scheme where everyone is free to determine the amount and frequency of contributions, under the scheme established by the Staff Regulations pension contributions are mandatory in nature, since such a scheme is based on the notion of collective solidarity, and is a distributive scheme rather than a capitalized scheme.

As Advocate General Capotorti rightly pointed out in the *Grogan* case: [4] 'the fact remains that, according to the Staff Regulations of Officials, the amount of the pension is not determined on the basis of the amount of the contributions paid but by reference to the "total number of years of pensionable service acquired" (first paragraph of Article 2 of Annex VIII to the Staff Regulations) and to the salary payable on termination of service (first subparagraph of Article 82(1) of the Staff Regulations). Any variation, during the term of the employment relationship, in the amount of the social security contributions paid has no bearing on the final amount of the pension. Therefore, it is quite conceivable that, whilst there is a difference between the total number of contributions paid by them, two officials may, on retiring, become entitled to a pension of the same amount. That may occur in the case of officials who have acquired the same number of years of pensionable service and who are, on termination of service, in receipt of the same salary, irrespective of the stage reached in their career. That type of system, moreover, is in conformity with that in force in some of the Member States (for example, France, Italy, Luxembourg and the Netherlands), which provides for the monthly deduction from the salaries of public servants of specific amounts by way of social security contributions but does not correlate the amount of the pension to the amounts deducted'.

8. It is against that legislative background that the scope of Article 4(7) of Regulation No 3518/85 falls to be determined; in particular it is necessary to examine whether in providing that 'during the period for which he is entitled to receive the allowance, the former official can continue to acquire further rights to retirement pension based on the salary attaching to his grade and step, *provided* [5] that the contribution provided for in the Staff Regulations by reference to that

4 — Judgment in Case 127/80 *Grogan* v *Commission* [1982] ECR 869, paragraph 5 of the Opinion.

5 — The terms used in the French, English and German versions are respectively: 'sous réserve que', 'provided that', and 'sofern'.

salary is paid during that period ...', the legislature sought to grant to the officials in question the right to elect whether or not to continue to acquire further pension rights by paying the corresponding contributions, or whether it wished to dispense from payment those persons who had acquired entitlement to the maximum retirement pension.

In that connection I would point out first of all that, as is clear from the actual wording of Regulation No 3518/85, in adopting that instrument the Community legislature did not intend to create a new pension scheme for certain staff members, but was simply seeking to foster a reduction in staff by granting to certain officials a monthly allowance intended to cease when the person in question had reached the age of 65 years or had satisfied the conditions conferring entitlement to the maximum retirement pension.

In actual fact it is a system which has already been adopted before, on the occasion of the accession of other countries to the Community, [6] and is largely based on Articles 41 and 50 of the current Staff Regulations concerning officials affected by staff reduction measures and retirement in the interests of the service.

The officials affected by those measures are required, as provided for in Article 37 of Annex VIII to the Staff Regulations, to pay contributions to the pension scheme, even if they have already acquired entitlement to the maximum retirement pension. [7]

Moreover, the wording of Article 4(7) of Regulation No 3518/85 corresponds to that of analogous regulations on early termination of service [8] and essentially incorporates the expression used in Article 3 of Annex VIII to the Staff Regulations which in its turn reflects the wording of Article 49 of the old ECSC Rules and Regulations of 1956.

It is true that in the context of Article 3 of Annex VIII relating to the calculation of years of pensionable service, the phrase 'provided that the servant concerned has paid his share of the pension contribution in respect of such periods of service' may easily be explained by the fact that the article also makes provision for situations such as leave for military service and leave on personal grounds, which do not necessarily involve the payment of pension contributions since the official is not receiving any remuneration.

However, given the specific nature of the Community pension scheme which imposes a generalized obligation to contribute on all

6 — See Council Regulation (Euratom, ECSC, EEC) No 2530/72 of 4 December 1972 (OJ 1972 L 272, p. 1) adopted on the accession of Denmark, Ireland and the United Kingdom; Council Regulation (ECSC, EEC, Euratom) No 2150/82 of 21 July 1982 (OJ 1982 L 228, p. 1) adopted on the accession of Greece.

7 — That obligation to pay contributions is limited to a maximum period of five years in the case of officials affected by the measures contained in Articles 41 and 50 of the Staff Regulations, but that may be explained by the fact that under Article 3 of Annex VIII, and unlike the regulation in question, such officials may acquire further pension rights only for a maximum of five years.

8 — See Article 5(7) of Regulation No 259/68; Art. 3(7) of Regulation No 2530/72; Art. 3(7) of Regulation No 1543/73 (OJ 1973 L 155, p. 1); Art. 2(7) of Regulation No 2150/82; Art. 3(7) of Regulation No 1679/85 (OJ 1985 L 162, p. 1).

officials who receive remuneration or allowances under various heads, I do not consider that it may be inferred from the objectively infelicitous drafting of Article 4(7) that the legislature intended to give the officials in question a choice between contributing or not contributing to the pension scheme.

In other words it seems to me that the provision in question merely sought to confirm that officials benefiting from the arrangements introduced by Regulation No 3518/85 are obliged to continue to pay contributions to the pension fund, specifying at the same time that such officials are to continue to acquire further pension rights during the period in which they are entitled to the allowance.

9. If that interpretation of Article 4(7) is correct, therefore, I do not believe that the scope of the provision in issue can be different with regard to former ECSC officials to whom the provision applies pursuant to Article 5(2) of Regulation No 3518/85.

As the Court has already had occasion to state in relation to a similar provision contained in Regulation No 2530/72, Article 5 of the regulation in question is intended to prevent a staff member from finding himself in a financially less favourable position than he would have been in if he had left the service prior to the entry into force of the new arrangements. [9]

9 — Judgment in Case 28/74 *Gillet* [1975] ECR 463, at paragraph 6.

If that is the rationale of the provision, however, rather than to confer on certain officials an exceptionally privileged position, it must be remembered that under the old ECSC Staff Regulations an official in receipt of the allowance provided for in Article 34 was obliged to continue to make contributions to the pension scheme in accordance with Article 95 of the ECSC Rules and Regulations.

Although it is true, as has been stated, that Article 95 is no longer in force and cannot therefore constitute the legal basis for the pension deduction in the case of former ECSC officials, it is also true that the fact that such officials were nevertheless subject to the deduction is certainly significant in determining the scope and the limits of the rights which the Community legislature intended to confer on them by means of Regulation No 3518/85.

To acknowledge that former ECSC officials are wholly exempt from pension deduction would be to place such persons in a position which they never had even under the old ECSC Staff Regulations; at the same time it seems to me entirely plausible to consider that, just as under the old arrangements they were required to make pension contributions in accordance with Article 95 of the ECSC Rules and Regulations, former ECSC officials are at present subject, in accordance precisely with Article 4(7) of the regulation in question, to the deduction provided for by the current provisions of the Staff Regulations, even if as a result of the years of pensionable service completed, it is not possible for them to acquire further pension rights.

10. In that connection I am not persuaded by the argument relied on by Mr Lestelle to the effect that the interpretation here advocated would in certain cases render the specific arrangements provided for in the case of former ECSC officials less advantageous than the usual arrangements for other officials.

As is borne out by the actual wording of Article 5 ('Officials ... shall be entitled to ask'), the special arrangements for former ECSC officials are optional and the fact that they are not advantageous to all officials likely to be interested cannot therefore be regarded as unjust.

Nor do I consider, finally, as alleged in Mr Lestelle's appeal, that such an interpretation may frustrate the legitimate expectations of those concerned.

In that connection it is sufficient to observe, on the one hand, that former ECSC officials were not entitled to expect a different and more advantageous treatment than that enjoyed in the past and, on the other, that in its notice of 23 January 1986 (Informations administratives — Spécial) the Commission informed its own officials of the exact scope of the rules in question.

11. In the light of the foregoing considerations, therefore, I propose that the Court should quash the judgment given by the Court of First Instance on 22 November 1990 in Case T-4/90, but reject the claim for the annulment of the decision by the Commission to continue, after 22 March 1989, to deduct pension contributions from the allowance received by the appellant pursuant to Regulation (EEC) No 3518/85.

12. With regard to costs, I would point out in the first place that the appeal has been partially successful and, secondly, that the Commission in its defence merely asks the Court to make such order as to costs as may be provided for by law, without expressly seeking an order that the appellant should pay the costs as provided for in Articles 69(2) and 122 of the Rules of Procedure.

Accordingly, I propose that each of the parties, including the intervener, the Union Syndicale, should bear its own costs.