2. **Orders the Commission to adjust the applicant's account and pay him the arrears due to him;**

3. **Orders the Commission to pay the costs.**

Mackenzie Stuart Pescatore Touffait

Delivered in open court in Luxembourg on 31 May 1979.

A. Van Houtte
Registrar

A. J. Mackenzie Stuart
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 3 MAY 1979 [1]

Mr President,
Members of the Court,

The applicant in the proceedings in which I am about to give my opinion entered the service of the Communities on 1 May 1975 in accordance with the terms of Article 29 (2) of the Staff Regulations of Officials and was appointed to the Joint Nuclear Research Centre at Ispra as a director in Grade A 2. By decision of 28 September 1977, adopted in accordance with the first paragraph of Article 50 of the Staff Regulations, his employment was terminated with effect from 1 November 1977. That provision is worded as follows:

"An official holding a post in Grade A 1 or A 2 may be retired in the interests of the service by decision of the appointing authority".

Accordingly, the applicant receives the allowance provided for in the third paragraph of Article 50 and Annex IV to the Staff Regulations, in relation to which the fifth paragraph of Article 50 provides that:

"The allowance and the total remuneration last received as referred to in the preceding paragraph shall be weighted at the rate fixed for the place where the official was last employed".

Following the termination of his employment the applicant took up residence in Brussels, where he had for many years been employed in a private company and had his place of residence before he entered the service of the Communities. He therefore considers that the aforementioned allowance must be paid in Belgian francs and without previous conversion into Italian lire on the basis of the par values in force on 1 January 1965. Since the administrative authority rejected his request he submitted a complaint through official channels to the appointing authority on 17 January 1978. That complaint was

1 — Translated from the German.

dismissed as unfounded by decision of 20 April 1978. The applicant therefore applied to the Court on 19 July 1978 and requests it to:

1. Declare that the rejection of his complaint is null and void;

2. Declare that he is entitled to payment in Belgian francs of the allowance to which he is entitled under Article 50 of the Staff Regulations of Officials;

3. Declare that the Commission must adjust the applicant's account, if necessary under the supervision of the Court;

4. Order the Commission to pay the arrears due, which amount — for the time being — to Bfr 200 000.

My opinion in these proceedings is as follows:

1. Article 50 of the Staff Regulations in fact says nothing about the currency in which the allowance to which the retired official is entitled is to be paid. In that respect the applicant is quite correct.

(a) However, the Commission considers that there is no question in this instance of a lacuna in the law in the true sense. On the contrary, a general principle may easily be inferred from the relevant provisions of the Staff Regulations and in paying the allowance provided for in Article 50 of these regulations it is obviously proper to proceed in accordance with that principle.

Thus, it may be seen from Article 63 of the Staff Regulations that remuneration is to be expressed in Belgian francs and is to be paid in the currency of the country in which the official performs his duties. An important factor is that for each Member State a weighting is to be fixed, whose purpose is to compensate for variations in the cost of living and to take account of any changes in exchange rates; it is applied according to the place of employment. If remuneration is not paid in Belgian francs conversion is to be carried out on the basis of the par values in force on 1 January 1965.

Similar provisions were contained in several regulations regarding special measures in relation to premature termination of service, such as became necessary following the merger of the executive bodies of the Communities and the accession of three new Member States (Regulation No 259/68 of 29 February 1968, Official Journal, English Special Edition 1968 (I), p. 30, Regulation No 2530/72 of 4 December 1972, Official Journal, English Special Edition 1972 (1-8 December), p. 11, and Regulation No 1543/73 of 4 June 1973, Official Journal L 155 of 11 June 1973, p. 1). As regards the decreasing allowance to be paid to the retired officials the latter two regulations expressly provided that the allowance is to be expressed in Belgian francs, that it is to be weighted for the country where the recipient resides and to be paid in the currency of that country. In the case of payment in a currency other than Belgian francs the par values in force on 1 January 1965 referred to in the third paragraph of Article 63 of the Staff Regulations are applicable. It is true that, as opposed to that, Regulation No 259/68 only referred to the weighting fixed for the place of residence as the decisive factor but in practice payment has always taken place in the currency of the country of residence and on the basis of the par values referred to in Article 63 of the Staff Regulations.

The Commission states, finally, that the rules relating to pensions also follow that line, inasmuch as in accordance with Article 82 of the Staff Regulations the weighting fixed for the place of residence is applied to the amount of the pension expressed in Belgian francs. However, the rules governing pensions are unusual in that in accordance with Article 45 of Annex VIII to the Staff Regulations beneficiaries may choose the currency of payment, which may be either the currency of the country of origin or of the place of residence or of the country where the institution in which the official was last employed has its seat, and here too the par values in force on 1 January 1965 are applicable.

From all the foregoing the Commission concludes that there is a general principle to the effect that emoluments expressed in Belgian francs are to be paid in the currency of either the place of employment or of the place of residence depending on which weighting is applied, and that if payment is made in a currency other than Belgian francs conversion takes place on the basis of the par values in force on 1 January 1965. It is, therefore, fundamental that a close link exists between the currency in which payment is made and the weighting applicable — either that of the place of employment or that of the place of residence. In so far as the pension rules deviate from that, they must be disregarded as anomalous. From the point of view of the arrangements for payment those rules are not suitable for generalization but, as exceptional provisions, must rather be given a narrow interpretation. In that respect it is not without interest that in his opinion in Case 28/74 (*Fabrizio Gillet* v *Commission*, judgment of 19 March 1975, [1975] 1 ECR 463) Mr Advocate General Mayras expressed the view that it was the scheme of payment of pensions which should be revised so that every pension which was weighted ought compulsorily to be paid in the currency of the country in respect of which the weighting was calculated.

(b) As opposed to that the applicant advocates that the provision in Article 50 of the Staff Regulations, which is defective as regards the arrangements for payment, be supplemented by a logical interpretation. In that connexion it must be borne in mind that from the start the applicant's employment at Ispra was only intended to be short-term. In particular, it is important to avoid, as it were, penalizing officials who, following the application of Article 50, change their place of residence from one of the other Member States to Belgium and, as a result of the principles applied by the Commission, suffer discrimination there as compared with other officials who have completed their career at the central seat of the Community institutions, in that they receive an allowance in Belgian francs which is 30% to 40% smaller. To that end, since the allowance is paid in lieu of salary, reference must be made to the whole of Article 63, not just to its third paragraph, in which case, having regard to the duty of residence contained in Article 20 of the Staff Regulations, the term " country of residence" may without difficulty be substituted in the second paragraph for the country in which the official performs his duties. An application by analogy of the aforementioned special provisions concerning the premature termination of service of — because the allowance payable under Article 50 is a sort of premature pension — of the rules relating to pensions, is also conceivable. From all those rules, as well as, after appropriate rectification, from Article 63, the principle is to be inferred that as regards the choice of the weighting and

of the currency to be used in payment the *place of residence* is the decisive factor.

2. As regards those statements I have, first, the impression that no decisive conclusions may be drawn from the applicant's earlier remark, made more or less incidentally, to the effect that he was only sent to Ispra to perform duties of a temporary nature, that is, to carry out programmes which were subject to a time-limit.

First, the Commission has energetically disputed both that and the related submission that the contested post has only ever been occupied at Ispra on an interim basis. It emphasizes that as "Directeur des projets approuvés" the applicant's duties (co-ordination of the various projects) were in all respects permanent. Furthermore, the post was filled for the first time by the applicant and after his retirement in October 1977 a vacancy notice was drawn up the aim of which was to fill the post again.

Secondly, it is to my mind of no importance whatever whether the duties in question were undertaken on a temporary or a permanent basis. The only important factor is that the applicant became an official even if in a grade which does not guarantee the same permanence as lower grades. Accordingly, the only question to be considered is what are the consequences which ensue from a premature cessation of service in accordance with Article 50 and in that connexion the applicant has himself explained elsewhere that it took place as a result of problems which arose between him and his superior. Since Article 50 provides for no possibility of differentiation such consequences can be of one type and therefore if the wording of the provision is not to be infringed the question how long the appointment was intended to last when it took effect certainly cannot be regarded as significant.

However, there is no doubt as to the striking nature of the applicant's statements regarding the disadvantage which he suffers as a result of the fact that he has not remained in Italy, a country where the cost of living is lower, but has removed his place of residence to Brussels, where he was already previously employed and where, following the termination of his service with the Communities, he has been endeavouring to make a new career. The magnitude of the disadvantage involved if one compares the position of the applicant with that of officials who were employed in Brussels and who remain there after being retired from the service uhder the terms of Article 50 is clearly shown by the tables drawn up in that connexion by the Commission. As already stated, when calculated in accordance with the method applied by the Commission (application of the weighting fixed for Italy and conversion on the basis of the par values in force on 1 January 1965), the applicant's allowance is approximately 30% to 35% less than that received by a comparable official who was previously employed in Brussels. That such a situation is unsatisfactory is self-evident, unless it be regarded as normal for an official to remain at the place of employment following retirement from the service. That may possibly be correct in the case of the application of Article 41 of the Staff Regulations, in which a comparable rule applies, since in that case the employment is not completely terminated since such officials have, as the Court knows, priority for reinstatement.

However, I must also say straightaway that I have the impression that the consequence which the applicant rightly feels to be unsatisfactory cannot be avoided by means of the interpretations which he has outlined in the course of the proceedings.

(a) As regards Article 63, there is no getting around the fact that the second paragraph of that article expressly states that:

"It" (that is, the remuneration) "shall be paid in the currency of the country in which the official performs his duties."

That provision cannot, therefore, be applied to cases such as the present precisely because this case concerns a former official who no longer performs duties on behalf of the Communities. Neither, on the other hand, do I find it possible to speak of "country of residence" instead of "country in which the official performs his duties", as suggested by the applicant. Even though the duty of an official to reside either in the place where he is employed or at no greater distance therefrom than is compatible with the proper performance of his duties is laid down in Article 20 of the Staff Regulations, it is surely sensible to draw a distinction between the place where the duties are performed and the place of residence. In any event, it goes beyond a permissible interpretation of the text to declare that, in a provision of the Staff Regulations, which are, moreover, careful to distinguish between the place of performance of duties and the place of residence, those concepts are simply interchangeable.

(b) As regards the application by analogy of the rules relating to pensions, on the other hand, let me refer first to the quite different nature of the allowance provided for in Article 50 of the Staff Regulations and to its method of determination, which is completely different from the rules relating to pensions. Secondly let me refer to what was said earlier on the subject of the special nature of the rules relating to pensions. Moreover, in the light of the critical remarks made by Mr Advocate General Mayras in Case 28/74 *(Gillet)* it is scarcely possible to advocate the extension of individual principles contained within those rules to cover circumstances of a different nature.

(c) The same also applies not least as regards the rules laid down by the regulations to which I have just referred which relate to measures providing for premature termination of service in consequence of the merger of the executive bodies of the Communities and the accession of the new Member States. It was expressly provided in those regulations that the weighting for the *place of residence* was to be applied and the allowances due are therefore paid in the currency of the country of residence. The fifth paragraph of Article 50, on the other hand, refers to the application of the weighting fixed *for the place where the official was last employed.* If that weighting were combined — which, by the way, the applicant does not wish — with payment in the currency of the country of residence (that is, in the present case, if the Italian weighting were applied to the allowance expressed in Belgian francs), the result would be an unjustified advantage since at the appropriate time the Italian weighting was very high, having regard to changes in the par values of the lira: calculated in lire the applicant's allowance would be greater than the amount of his last basic salary. I can, however, see no justification for eliminating from Article 50 the reference to the weighting fixed for the place where the official was last employed. That would be an application the provision of which is contrary to its wording and would certainly no longer have anything to do with an application of legal provisions by analogy.

(d) It is therefore established that in principle there is nothing to be said against the Commission's interpretation of Article 50, precisely because a close material connexion exists between the weighting and the choice of the currency in which Community emoluments are paid; that follows from the function of

the weighting, which is to take account *inter alia* of currency developments. In that connexion it is also clear that, as regards the currency of payment, there is no lacuna in Article 50 which might entail an application of the provisions by analogy in the sense recommended by the applicant.

3. Nevertheless, I still have to consider (in relation to the applicant's alternative argument) whether, in view of that interpretation, Article 50 of the Staff Regulations may be regarded as legal or whether it must be declared inapplicable on the ground that it thereby conflicts with a superior rule of law. The prohibition on discrimination constitutes such a rule of law and it applies both as regards those officials who were employed in Belgium before Article 50 was applied and who have continued to reside there as well as to those who became subject to the regulations relating to the premature termination of service in consequence of the merging of the executive bodies of the Communities and the accession of the new Member States.

In that connexion it is once more necessary to draw attention to the disadvantages which ensue for officials in the position of the applicant from the application of the fifth paragraph of Article 50 if they do not continue to reside in Italy after retirement from the service. Thus they are either compelled to remain at the place where they were last employed, to whose cost of living the allowance is geared, thereby giving up the chance of any further employment, which, according to the fourth paragraph of Article 50, is regarded as an obvious possibility, or they have to accept considerable financial losses as a result of the exercise of their right of free movement, which should not be subject to any limitation once service has finally been terminated.

It is, in fact, not really possible to understand why that should be necessary in the case of retirement under Article 50 of the Staff Regulations, whereas otherwise, as the applicant rightly states, the principle to be applied is that following termination of service the place of residence may be freely chosen and the corresponding payments by the Communities are arranged accordingly. There are certainly good grounds for saying that the retirement of an official in accordance with Article 50 is in every way comparable to the circumstances leading up to premature retirement from the service on the basis of the aforementioned special regulations. All those cases concern the freeing of posts in the interests of the service before the completion of a normal official career. The differences which undoubtedly exist between the general scheme of the allowances provided for, on the one hand, by Annex IV to the Staff Regulations and, on the other, by the aforementioned special regulations cannot decisively militate against that fact. It is also significant that the Commission itself is now proposing to the Council that Article 50 be amended in such a way that the relevant weighting shall be that of the *place of residence*. If that solution, the only appropriate one, has not been proposed hitherto — and I cannot see any grounds for thinking that such arrangements are appropriate only in special regulations dealing with premature retirement from the service — that is obviously only because problems related to developments in the par values of the currencies did not at first ensue from the application of the provision in Article 50, into which, as we have heard, the weighting was first introduced in 1969.

Having regard to all the foregoing the Court should not hesitate to declare that the rule in Article 50, which at present is still in force (applicability of the weighting fixed for the place where the official was last employed, in conjunction with the principle that that weighting governs the currency of payment), is inapplicable on the ground that it leads, in cases such as the present, to results which are quite inappropriate. Instead the basic concept in the special regulations governing premature retirement from the service, according to the decisive factor is the place of residence chosen after retirement, should be adopted.

As regards the present case that means that the calculation of the allowance payable to the applicant must be set aside as incorrect, that the rejection of his complaint must similarly be annulled and that the applicant must be declared to be entitled to have the allowance provided for in Article 50 paid in Belgian francs with application of the weighting fixed for Belgium. On the other hand, there is in my opinion no need for any further findings to be made in the judgment, such as, in particular, a detailed calculation of the allowance and of the accumulated arrears. That is the task of the Commission, against which the application was brought and which must now draw the necessary administrative conclusions from the annulment which I have advocated of the contested measure and of the statement of reasons on which it is based.

4. Accordingly, I suggest that the application lodged by the applicant be accepted as regards his first three conclusions and that, since that must essentially be regarded as a success for the applicant, the Commission must be ordered to pay the costs.