In Case 28/83

SANDRO FORCHERI, an official of the Commission of the European Communities, represented by E. Lebrun, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of T. Biever, 83 Boulevard Grande-Duchesse-Charlotte,

applicant,

supported by

LUIGI CASELLA, ENRICO OSIO, CORNELIA OUD AND JAN ROBERT DE RIJK, officials of the Commission, assisted and represented by E. Lebrun, also with an address for service in Luxembourg at the Chambers of T. Biever,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Principal Legal Adviser, B. Paulin, acting as Agent, with an address for service in Luxembourg at the office of Oreste Montalto, a member of its Legal Service, Jean Monnet Building, Kirchberg,

defendant,

supported by

THE GOVERNMENT OF THE KINGDOM OF BELGIUM, represented by M. Waelbroeck, of the Brussels Bar, with an address for service in Luxembourg at the Belgian Embassy, 4 Rue des Girondins,

APPLICATION for

(a) an order requiring the Commission to take all the necessary steps to have the convertibility of his remuneration paid in convertible Belgian francs by the Commission restored to 100% with retroactive effect from 1 February 1982 and

(b) the annulment of the implied decision rejecting his complaint of 29 July 1982 and, so far as is necessary, the implied decision rejecting his request for assistance of 8 February 1982,

THE COURT (Second Chamber)

composed of: K. Bahlmann, President of Chamber, P. Pescatore and O. Due, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Facts and written procedure

1. The Belgo-Luxembourg rules on foreign-exchange transactions are characterized by the existence of two distinct foreign-exchange markets: a regulated market on which the margins of fluctuation of Belgian and Luxembourg francs as against other currencies are kept within certain limits by the intervention of the Banque Nationale de Belgique and a free market on which the exchange rate is determined by supply and demand and in which the Banque Nationale does not intervene. Consequently, the exchange rates on the two markets move independently, with the foreign-exchange rates on the free market usually being higher than on the regulated market.

The Belgo-Luxembourg authorities considered, however, that the unreserved application of the rules on the operation of the regulated market and the free market to officials of the Communities who were not Belgian or Luxembourg nationals was not fair. They therefore devised a special system for such officials. Initially the system enabled such officials to obtain authorization to transfer funds abroad from a "normal" account, that is to say an account such as may be opened by Belgian or Luxembourg residents, and to buy foreign currency on the regulated market on the sole condition that only amounts not exceeding a specific proportion of the salary paid by the Community should be used for that purpose. In order to make controls easier, it was decided at the beginning of the 1970's to introduce "special convertible foreign accounts"

with which all foreign-exchange transactions could be effected on the regulated market. Only salaries paid by the European Communities and amounts from other convertible accounts could be transferred to the special accounts.

It had become common practice for many officials to take advantage of the possibilities afforded by the special convertible foreign accounts to buy foreign currency on the regulated market which they immediately re-sold on the free market ("arbitrage"), profiting in that way from the difference between the two rates ("exchange premium").

In order to put a stop to that practice, on 21 December 1981 the Institut Belgo-Luxembourgeois des Changes [Belgo-Luxembourg Currency Exchange Institute, hereinafter referred to as the "Exchange Institute"] amended the existing system so that in future only 25% of emoluments could be transferred to special convertible accounts without special authorization; as a result, officials were at liberty to use no more than 25% of their emoluments for buying foreign currency on the regulated market.

However, those new rules meant that officials were no longer altogether free to decide how to use their salary within the territory of the Union Economique Belgo-Luxembourgeoise [Belgo-Luxembourg Economic Union] or outside that territory and, in the latter case, to take advantage of the regulated market. Following the adoption of those measures the European Community institutions received from officials a large number of requests for assistance and then complaints under Article 90 of the Staff Regulations. The Community institutions therefore made representations to the Exchange Institute requesting that officials who were not of Belgian or Luxembourg nationality be permitted to have the whole of their salary paid into a convertible account.

On 1 June 1982 the Exchange Institute published a circular stating that such officials were once more authorized to have the whole of their salary credited to a special convertible foreign account, provided, however, that the institution employing them countersigned a declaration in which the account-holder acknowledged that he was aware that he was "obliged to receive his remuneration either in a convertible account or in foreign currency which must be sold within eight days to an approved bank operating on the regulated market".

The account-holder also had to undertake in particular not to

"... carry out any transaction designed to circumvent those provisions, such as arbitrage transactions, that is to say, buying foreign currency on the regulated market or transferring funds to convertible foreign accounts with the aim of procuring the means of payment to cover current expenditure within the territory of the Belgo-Luxembourg Economic Union."

If holders of special convertible foreign accounts do not sign that undertaking, they remain subject to the above-mentioned provisions adopted on 21 December 1981.

2. The applicant, Sandro Forcheri, an Italian national, is an official of the Commission.

Considering that the measures adopted by the Exchange Institute on 21 December 1981 were unlawful and adversely affected his status as an official of the European Communities, on 8 February 1982 he requested the Commission for assistance pursuant to Article 24 of the Staff Regulations. He never received a reply to his request.

Since he considered that the undertaking proposed following the Exchange Institute's circular of 1 June 1982 was unacceptable, that the aforementioned alternative procedure was still unlawful and that the Commission had not responded satisfactorily to his request for assistance, on 29 July 1982 he also lodged a complaint under Article 90 (2) of the Staff Regulations. Having received no reply to that complaint either, by application lodged at the Court Registry on 23 February 1983 the applicant brought the present action.

3. By order of the Court (Second Chamber) of 14 July 1983, four Commission officials, Luigi Casella, Enrico Osio, Cornelia Oud and Jan Robert de Rijk, were granted leave to intervene in the case in support of the applicant. By a further order of the Court (Second Chamber) of the same date, the Government of the Kingdom of Belgium was granted leave to intervene in support of the defendant.

4. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

The *applicant* claims that the Court should:

Principally,

1. Declare his application admissible and well founded;

2. Consequently:

   (a) Order the defendant to take all the necessary steps to have the convertibility of his remuneration paid in convertible Belgian francs by the defendant restored to 100% with retroactive effect from 1 February 1982; and

   (b) Annul the implied decision rejecting his complaint of 29 July 1982 and, so far as is necessary, the implied decision rejecting his request for assistance of 8 February 1982;

3. Order the defendant to pay the costs;

In the alternative,

Order the defendant to produce the report or reports concerning its agreement to the Exchange Institute's second decision.

The *Commission* contends that the Court should:

1. Declare the application unfounded; and

2. Order the applicant to pay the costs.

III — Submissions and arguments of the parties

Introduction

1. The *applicant* advances only one submission alleging disregard or infringement of:

(a) the EEC Treaty, in particular Articles 67 and 169;

(b) the Protocol on the Privileges and Immunities of the European Communities, in particular Article 12 (c);

(c) the First Directive for the implementation of Article 67 of the Treaty (Council Directive of 11 May 1960, Official Journal, English Special Edition 1959-1962, p. 49), as amended by the Second Council Directive, of 18 December 1962

(Official Journal, English Special Edition 1963-1964, p. 5), in particular Article 1;

(d) the Staff Regulations of Officials of the European Communities, in particular Article 24 thereof and Article 17 of Annex VII thereto; and

(e) general legal principles and rules, in particular the principle of equality and distributive justice and the duty to assist officials.

The applicant's complaint is that, by reason of the contested decisions of the Exchange Institute, the Belgian State has failed to fulfil its obligations under the EEC Treaty or secondary legislation and infringed the applicant's status and, furthermore, that the defendant, which is under obligation to ensure that the provisions of the Treaty and provisions adopted thereunder are observed and which, in particular, is under a duty to assist its officials and servants, including the applicant, has not taken all the steps needed to have the aforementioned decisions annulled and is thus, in a certain manner, associated in the implementation of the Exchange Institute's decision contained in the circular of 1 June 1982.

2. The *Commission* objects that all the measures complained of by the applicant were adopted by the Belgian authorities and not by the Commission.

The Commission's attitude towards the payment of remuneration to its staff has not changed since 21 December 1981 or since 1 June 1982. It has merely continued to transfer from its own accounts to the accounts indicated by its staff their remuneration and allowances in Belgian or Luxembourg francs without qualifying the currency in any other way. the division of those payments between a special convertible foreign account and an account "assimilated" to that of a resident is done by the banks; the Commission plays no part in it and has no power to do so.

Admissibility

1. Whilst not questioning the admissibility of the application, the *Commission* contends that the conclusions set out therein are, in certain respects, inadmissible or extravagant because, as a matter of law and of fact, the Commission is altogether unable to take "all the necessary steps to have the convertibility of the applicant's remuneration paid in convertible Belgian francs by the defendant restored to 100% with retroactive effect . . .". The Commission's powers are limited to ordering the sums capable of being made convertible to be transferred, and the rest is a matter for the Belgo-Luxembourg authorities and the banking authorities subject to their control.

In the Commission's view, the action can be taken to raise only two questions:

(1) Did the Commission properly fulfil its duty of assistance by reacting quickly and effectively enough in coming to the aid of its staff whose position was adversely affected by the Exchange Institute's decision of 21 December 1981?

(2) Was the Commission right to accept the measures introduced by the Exchange Institute in June 1982, or did it have a duty to continue its

efforts to obtain still more favourable measures from the Belgian authorities?

Consequently, the applicant's conclusions contain only two claims, namely for a finding that the Commission failed to act and, if appropriate, an order requiring it to pay damages.

Even in that limted context, the applicant may not raise the question of the Commission's use of all the means at its disposal and, in particular, whether it should have initiated the procedure provided for under Article 169 of the Treaty against the two Member States concerned. A refusal by the Commission to initiate that procedure may not be challenged either in an action for a declaration of nullity or in an action to establish a failure to act (see the judgment of the Court of 1 March 1966 — Case 48/65, *Lütticke* v *Commission*, [1966] ECR 19). Moreover, in proceedings brought under Article 169 of the EEC Treaty the Commission, generally speaking, confines itself to applying for a declaration that a Member State has failed to fulfil its obligations, which would not afford the applicant satisfaction in any case. Lastly and most importantly, the Commission still considers that there can be no substantive legal objection to the new measures adopted by the Exchange Institute.

2. Whilst acknowledging that the contested decisions of the Exchange Institute were not adopted by the Commission but by a Member State, the *applicant* points out that the Commission has, amongst other things, a duty to assist its officials and must ensure that *inter alia* the Protocol is respected. The applicant alleges that the contested decisions of the Exchange Institute concern him directly and are contrary to Community law and he claims to be entitled, by reason of that duty and obligation incumbent upon the Commission, to demand that it should use all means at its disposal that are necessary to have those decisions annulled retroactively. Since the applicant considers that the Commission has not in fact used all such means, he takes the view that his claim for an order requiring the Commission to "take all the necessary steps to have the convertibility of his remuneration paid in convertible Belgian francs by the defendant restored to 100% with retroactive effect from 1 February 1982" is admissible whether or not he may also require it to use the ultimate means at its disposal, that is, an action for a declaration that a Member State has failed to fulfil its obligations.

With regard to that last submission, the applicant emphasizes the special nature of the present action, in which the Court has unlimited jurisdiction, based on Article 179 of the EEC Treaty and Article 91 of the Staff Regulations and consequently brought by an official to whom the Commission owes specific duties and obligations. In his view, an official who complains of measures adopted by a Member State which are contrary to Community law and not only concern him directly but also adversely affect his status may require the Commission, if it has failed to secure the withdrawal of those measures by other means, to initiate the procedure for establishing a Member State's failure to fulfil its obligations or, alternatively, at least the preliminary stage of that procedure. If the Court rules that a Member States has indeed failed to fulfil

one of its Treaty obligations, by virtue of Article 171 of the Treaty that State is bound to take the necessary measures to comply with the judgment of the Court. The applicant argues that, by means of that procedure, the Commission is in a position to obtain the result he seeks.

The applicant concludes that the Commission is wrong to consider the claim in question inadmissible or extravagant.

Substance

A — The legality of the new measures adopted by the Exchange Institute

(i) The applicant's arguments

(a) The *applicant* points out that Article 12 (c) of the Protocol provides that officials and other servants of the Communities are to be accorded in the territory of each Member State the same facilities in respect of currency or exchange regulations as are customarily accorded to officials of international organizations. As is shown *inter alia* by the situation prior to 21 December 1981, described above, those facilities imply that remuneration paid by the Community insitutions to their officials and agents in convertible Belgian francs must be freely convertible into foreign currencies.

However, the two decisions at issue reduce those facilities and consequently disregard Article 12 (c) of the Protocol. The first decision restricts the proportion of remuneration which may be paid into a special convertible foreign account to 25%, whilst the second decision presupposes a specific undertaking which is unacceptable in so far as it requires the official or agent to submit to exchange controls enforced by criminal penalties, and allow the Exchange Institute to decide which transactions shall be unlawful. Officials are also required to transfer remuneration received in foreign currency to an approved bank on the regulated market within eight days, an obligation which thus even affects amounts transferred directly in foreign currency by the institutions pursuant to Article 17 of Annex VII to the Staff Regulations.

(b) The applicant points out that Article 1 of the First Directive for the implementation of Article 67 of the Treaty requires Member States to grant "all foreign exchange authorizations required for the conclusion or performance of transactions or for transfers between residents of Member States in respect of the capital movements" relating inter alia to transfers of workers' savings during their period of stay. Moreover, the transaction in question are to be carried out "on the basis of the exchange rate ruling for payments relating to current transactions", in other words at the official exchange rate, which is the exchange rate prevailing on the regulated market.

Consequently, in so far as the Exchange Institute's decisions require all, or some, of the transactions in question to be carried out on the free market, where the exchange rate is not official and is less favourable than the official exchange rate, Article 1 of the First Directive has been infringed and those decisions constitute, so to speak, measures having an effect equivalent to a restriction of transfers.

(c) The contested decisions of the Exchange Institute are contrary to the principle of equality in so far as they put officials and servants of the European Communities working in Belgium or Luxembourg on an unequal footing compared with Community nationals working for international organizations or foreign governments in countries other than Belgium or Luxembourg whose remuneration is subject to no exchange restrictions imposed by the competent authorities.

Even in Belgium or Luxembourg, the Exchange Institute's decisions are applied to various categories of persons in different ways. Only officials working for international organizations are subject to them whereas diplomats are not.

(d) Moreover, the decisions at issue result in unwarranted appropriation on the part of the Belgian State. The remuneration of officials and servants of the Communities comes from the Communities' own resources. By compulsorily and unilaterally changing convertible amounts into non-convertible amounts pursuant to the Exchange Institute's decision of 21 December 1981, the Belgian authorities are performing an unlawful transaction at the expense of the European taxpayer.

(e) The applicant makes the final point that the aim of the Exchange Institute's decisions is to stop "arbitrage" transactions and that he is certainly not claiming to be entitled to carry out such transactions. However, the decisions are not confined to providing an appropriate technical solution to put a stop to "arbitrage" transactions in the strict sense of the term and it is certainly not necessary to derogate from the foreign status of officials and servants of the Community institutions. Consequently, the rules in question are contrary to the principle of proportionality.

(ii) The Commission's arguments

The *Commission* considers first of all that detailed consideration of the submissions set out above is not required. The only relevant question is whether the new measures adopted by the Exchange Institute required it to intervene for a second time. Consequently, it is sufficient to examine those measures and to investigate whether they are still open to objection in any way. The measures have two main effects: first, they restore the convertibility of the whole of an official's remuneration and, secondly, they require holders of convertible accounts to sign the declaration referred to above. No comment is called for on either aspect since they do not in themselves adversely affect the applicant. Besides, the applicant criticizes the declaration only in so far as it refers to the prohibition of arbitrage transactions.

(a) As regards the arguments relied on by the applicant, the Commission denies that Article 12 (c) of the Protocol gives him the right to carry out arbitrage transactions. The fact that such a practice has been tolerated in the past certainly cannot give rise to any legal right since an official employed in Belgium or Luxembourg does not need to be able to carry out arbitrage

transactions in order to cover current expenditure. Article 12 (c) of the protocol merely requires that an official whose country of origin is not Belgium or Luxembourg be able to transfer funds freely to his country of origin or another country by means of his convertible account.

The Commission points out that pursuant to Article 18 of the Protocol and Article 23 of the Staff Regulations, the privileges, immunities and facilities are to be accorded to officials and other servants of the Communities solely in the interests of the Communities. Article 23 of the Staff Regulations also provides that: "Subject to the Protocol on Privileges and Immunities officials shall not be exempt from fulfilling their private obligations or from complying with the laws and police regulations in force".

The Commission concludes that the Protocol has not been infringed in the present case.

(b) The Commission contends that the submission regarding the alleged infringement of Article 1 of the First Directive (Directive of the Council of 11 May 1960) for the implementation of Article 67 of the Treaty (as subsequently amended) is, in any case, irrelevant, since convertibility has been restored.

(c) The Commission points out that the European Monetary System applies in full to only six Member States, including Belgium and Luxembourg, which, moreover, apply it only to certain transactions. The Commission concludes that in those circumstances there is no uniformity in the system of transfer rates and therefore no unequal treatment of officials of the European Communities compared with Community nationals employed by international organizations and working in countries other than Belgium or Luxembourg.

As far as the Commission is aware, the Exchange Institute's new rules are applied to all officials of international organizations employed in Belgium or Luxembourg who are in the same situation as Community officials. The Commission points out that diplomats are not mentioned in Article 12 (c) of the Protocol. Moreover, the applicant should not overlook a constraint which does not necessarily apply to diplomats or officials of other international organizations, namely Article 63 of the Staff Regulations which states that an official's remuneration "shall be paid in the currency of the country in which the official performs his duties". Consequently, there also cannot be held to exist inequalities in the treatment of officials or servants of the Communities working in Belgium or Luxembourg as compared with other Community nationals working in those two countries for other international organizations or foreign Governments.

(d) The Commission points out that the applicant's assertion that the Exchange Institute's decisions lead to an unwarranted appropriation on the part of the Belgian State has no bearing on the applicant's own personal situation.

(e) Finally, the Commission disputes that the rules in question are contrary to the principle of proportionality. On the contrary they seem to be consistent with the present legal situation in so far as they allow the free transfer of funds and

total convertibility for all transactions for which those facilites are required.

B — The Commission's duty of assistance

(i) The applicant's arguments

The applicant contends that, confronted with the aforementioned situation created by the contested decisions of the Exchange Institute, the Commission failed to adopt the measures which were necessary in order to have the decisions annulled. The Commission not only failed to intervene after the second decision of the Exchange Institute was adopted in June 1982, it also actively collaborated in drawing up, or at any rate in implementing, that decision by agreeing to countersign the undertaking which had to be signed by its officials and servants.

The applicant accordingly concludes that the Commission failed in its duty to assist its officials.

(ii) The Commission's arguments

The Commission points out that its duty of assistance requires it to take certain steps but it is not under an obligation to obtain a specific result. At the end of December 1981, when it was informed of the Exchange Institute's first measures, the Commission took the view that the rules adopted for achieving the legitimate aim of ending improper arbitrage transactions were excessively rigid and disproportionate to that aim and immediatley protested to the Exchange Institute and the Belgian authorities in general. It continued its efforts until June 1982 when the Exchange Institute adopted new measures which the Commission considered satisfactory. (Those measures restored total convertibility of remuneration, except for arbitrage transactions which the Commission maintains are indefensible). The wording used by the Exchange Institute in the later decision was perhaps open to criticism on certain points, but in practice the new arrangements introduced by the Exchange Institute have not, as far as the Commission is aware, given rise to specific difficulties or in any case to situations incompatible with Community law. The Commission is monitoring all developments and will certainly take appropriate action if it feels that the Exchange Institute is applying the present measures in a manner inconsistent with Community law.

Since five months is an extremely short time in which to prevail upon a national administration to revise the substance of measures which it believes are legitimate, the Commission concludes that in this case it has duly complied with its obligation to assist the applicant.

The observations of the interveners

1. *Luigi Casella, Enrico Osio, Jan Robert de Rijk* and *Cornelia Oud* request the Court to order the Commission to pay the costs of the intervention.

2. The *Belgian Government* states that, until the adoption of the Exchange Institute's first decision in December 1981, officials and servants of the Communities increased their income quite substantially by engaging in very simple arbitrage transactions involving the regulated market and the free market which were made possible by their access

to convertible accounts. However, the purchase of foreign currency with Belgian francs on the regulated market for the sole purpose of making a profit was done at the expense of the foreign currency reserves of the Banque Nationale de Belgique and rendered measures to support the Belgian franc more difficult and more costly. Moreover, the arbitrage transactions resulted in officials' current expenditure on consumption in the territory of the Belgo-Luxembourg Economic Union being paid for by francs obtained from selling foreign currencies on the free market whereas that expenditure, in so far as it concerned imports, finally had to be met by Belgium through the country's foreign-exchange reserves, that is to say foreign currency bought on the regulated market.

The Belgian Government points out that the applicant himself acknowledges that since the aim of the Exchange Institute's contested decisions was to stop arbitrage transactions, it could not be considered unlawful. However, he seeks to restrict the definition of arbitrage to the very simple form it had before the Exchange Institute adopted its decisons, which is unacceptable to the Belgian Government. For the Belgian Government it is not a question of objecting to any particular technical method but of preventing any use of a convertible account which may result in the holder of the account weakening the Belgian franc whilst benefiting from the protective measures adopted at their own cost by the monetary authorities for his expenditure within the territory of the Belgo-Luxembourg Economic Union.

That aim was achieved by introducing a system involving a minimum of essential restrictions on the use of convertible accounts which may be held by officials of the European Communites.

Although the Exchange Institute's second decision presupposes that officials and servants sign a specific undertaking, the Belgian Government believes that the wording of the undertaking is sufficiently clear to prevent the abuses which the applicant seems to fear. As regards the specific obligations entailed by that undertaking, the Belgian Government emphasizes in particular that it is not a question of prohibiting any given arbitrage technique but of preventing a result which, although attained by simple means in the past, might in future be attained in more elaborate ways. That is why the undertaking does not contain an exhaustive list of the practices that may lead to the prohibited result. Furthermore, the undertaking provides that if an official (or servant) fails to comply with his obligations, the Exchange Institute may bring preceedings against him, that is, file a complaint with the Public Prosecutor. Should the latter decide to prosecute, it is for the courts, not the Exchange Institute, to decide whether a wrongful act has been committed and determine its consequences in criminal and civil law. Lastly, the requirement that an official must, within eight days, sell on the regulated market remuneration paid in foreign currency does not apply at all to funds transferred by the official or servant pursuant to Article 17 of Annex VII to the Staff Regulations. The undertaking clearly states the limits placed on the use of the convertible account for buying foreign currency, such

transactions being allowed where they are necessary for meeting any obligation entered into or for savings.

The Belgian Government accordingly requests the Court to declare the action unfounded and to order the applicant to pay the costs of its intervention.

IV — Oral procedure

At the sitting on 19 January 1984, oral argument was presented by the following: the applicant and the interveners supporting him, represented by E. Lebrun; the Commission, represented by B. Paulin, acting as Agent; and the Belgian Government, represented by A. Vandencasteele, intervening in support of the Commission.

At the hearing, the Belgian Government stated that the sole purpose of the undertaking to be signed by officials is to ensure that, for the purposes of an official's current expenditure in either Belgium or the Grand Duchy of Luxembourg, he does not attempt, by means of currency transactions, to increase artificially the amounts of Belgian francs at his disposal. On the other hand, the undertaking by no means prevents any payments to cover expenses abroad, including gifts.

The Advocate General delivered his opinion at the sitting on 23 February 1984.

Decision

1 By an applications lodged at the Court Registry on 23 February 1983, Sandro Forcheri, an official of Italian nationality at the Commission of the European Communities, brought an action for an order requiring the Commission to take all the necessary steps to have the convertibility of his remuneration restored to 100% with retroactive effect from 1 February 1982 and, secondly, the annulment of the implied decision rejecting his complaint of 29 July 1982 and, so far as is necessary, of the implied decision rejecting his request for assistance of 8 February 1982.

2 It should be recalled that there are two distinct exchange markets for the Belgian and Luxembourg franc, namely a regulated market on which the margins of fluctuation in relation to other currencies are maintained within certain limits as a result of the intervention of the central banks and a free market on which the rate is subject to the effect of supply and demand and there is no intervention on the part of the central banks. The exchange rates applicable on the two markets therefore move independently and the rates of foreign currencies on the free market are often higher than those on the

regulated market. The relevant provisions specify for what transactions and under what conditions purchases or sales of currencies may or must be carried out on the regulated market or on the free exchange market.

3 Considering that the unreserved application of those provisions to officials of the Communities who were not of Belgian or Luxembourg nationality was not fair, the Belgian and Luxembourg authorities in the course of the 1970's set up a special system for those officials in the form of special convertible foreign accounts. Those accounts are distinguished, on the one hand, by the fact that only the salaries and allowances paid by the European Communities and sums transferred from other convertible accounts may be deposited in such accounts and, on the other hand, by the fact that they permit all exchange transactions to be effected on the regulated market.

4 Towards the end of 1981 the gap between the exchange rates on the regulated market and those on the free market widened and it became common practice for many officials to use the possibilities offered by the convertible accounts to effect "arbitrage" transactions in which they bought foreign currency on the regulated market and then immediately resold it on the free market, thereby making a profit in Belgian or Luxembourg francs based on the difference between the two rates. In order to stop that practice, on 21 December 1981 the Institut Belgo-Luxembourgeois du Change [Belgo-Luxembourg Exchange Institute, hereinafter referred to as "the Exchange Institute"] amended the existing system so that in future, in the absence of special authorization, only 25% of sums paid as salary or allowances could be credited to the special convertible accounts which placed a corresponding limitation on the possibility for officials to buy foreign currency freely on the regulated market.

5 Following the adoption of those measures, the Community institutions received numerous requests for assistance from their officials and then complaints submitted under Article 90 of the Staff Regulations. For their part, the institutions made representations to the Exchange Institute to have the possibility for officials of other than Belgian or Luxembourg nationality to have all their salary and allowances paid into a convertible account restored.

6 On 1 June 1982, after negotiations with the Community institutions, the Exchange Institute published a circular stating that such officials were once more authorized to have all their salary and allowances credited to a special convertible foreign account, provided, however, that they signed a declaration — which had to be countersigned by the institution employing them — in which the holder of the convertible account:

"Acknowledges that he is aware . . . [that he] is obliged to receive his remuneration either in a convertible account or in foreign currency which must be sold within eight days to an approved bank operating on the regulated market . . .;

. . .

Acknowledges that he has been informed that funds in Belgian or Luxembourg francs standing to the credit of the aforesaid accounts may be used without restriction, either in order to effect any payments within the territory of the Belgo-Luxembourg Economic Union or in order to buy, on the regulated market, the foreign currency needed to meet, outside the territory of the Union, any obligations entered into or to build up savings of which he will provide evidence at the Exchange Institute's request;

Undertakes to use funds standing to the credit of the said account only on the conditions stipulated above and not to carry out any transaction designed to circumvent those provisions, such as arbitrage transactions, that is to say, buying foreign currency on the regulated market or transferring funds to convertible foreign accounts with the aim of procuring the means of payment to cover current expenditure within the territory of the Belgo-Luxembourg Economic Union;

Acknowledges that if he fails to comply with this undertaking in any way, proceedings may be brought against him by the Exchange Institute".

7 If holders of convertible accounts do not sign that undertaking, they remain subject to the rules laid down on 21 December 1981 described above.

8 On 8 February 1982, the applicant, taking the view that the rules laid down on 21 December 1981 were unlawful and adversely affected his status as an official of the European Communities, requested the Commission for assistance under Article 24 of the Staff Regulations. He never received a reply to his request.

9 Considering that the undertaking proposed in the Exchange Institute's circular of 1 June 1982 was unacceptable, that the alternative procedure was still unlawful and that the Commission had not responded satisfactorily to his request for assistance, the applicant also refused to sign the undertaking and on 29 July 1982 lodged a complaint under Article 90 (2) of the Staff Regulations. Having received no reply to that complaint either, he brought the present action.

10 Before the Court the applicant argued that the measures adopted by the Exchange Institute on 21 December 1981 and 1 June 1982 constituted infringements by the two Member States concerned of Article 67 of the EEC Treaty and of the directives adopted for the implementation of that article. He further argued that those measures adversely affected the facilities accorded to officials of the Communities in respect of currency or exchange regulations under Article 12 (c) of the Protocol on the Privileges and Immunities of the European Communities. Finally, he argued that the measures were contrary to the principles of equality and distributive justice.

11 He contends that, confronted with that unlawful situation adversely affecting the status of its officials, the Commission did not take the steps which were necessary. It thus failed to fulfil, on the one hand, its duty to assist officials and consider their welfare, laid down *inter alia* in Article 24 of the Staff Regulations, and, on the other hand, its duties as "guardian" of the Treaty.

12 In view of those arguments it must be pointed out in the first place that in an action brought by an official under Article 179 of the EEC Treaty the Court cannot determine whether or not a Member State has failed to fulfil one of its obligations under the Treaty or rule whether the Commission has properly discharged the supervisory duties incumbent upon it under *inter alia* Article 155 of the EEC Treaty. In the present case therefore, it is solely a

question of deciding whether the Commission, as the appointing authority, has failed in its duty to provide assistance to an official who is alleging that a Member State infringed the rights conferred on him in the interests of the Communities by his status as an official. It is only in view of that question that it may possibly be necessary to examine the national measures first.

13 The second point which must be made is that, after the first measures were adopted by the Exchange Institute in December 1981, the Commission, together with the other Community institutions, immediately made representations to the Exchange Institute in order to have those measures replaced by others which, whilst putting an end to the improper use of special convertible accounts which enabled officials to enjoy an unjustified advantage by carrying out "arbitrage" transactions, would still make it possible for them to buy on the regulated market all the foreign exchange needed to cover their expenditure outside the Belgo-Luxembourg Economic Union. It was as a result of that action that the Exchange Institute, by its circular of 1 June 1982, introduced the present system which once again enables officials of other than Belgian or Luxembourg nationality to have all their remuneration and allowances paid into a special convertible account provided only that they comply with the obligations set out in a signed declaration.

14 As the applicant himself has admitted in the course of the proceedings before the Court, this action in fact raises only one question, namely whether the Commission was under a duty to pursue its efforts to persuade the Belgian and Luxembourg authorities to withdraw or amend the declaration to be signed by officials. In order to answer that question, it is sufficient to examine the applicant's objections regarding the text of that declaration.

15 Those objections concern the obligation to sell to an approved bank at the rate prevailing on the regulated market all remuneration paid in foreign currency and to abstain not only from arbitrage transactions in the strict sense of the term but also from other currency transactions with the aim of procuring funds to cover current expenditure within the territory of the Belgo-Luxembourg Economic Union. Lastly, the applicant contends that, as

a Community official, he cannot be subject to the control of the Exchange Institute.

16 As regards the first two obligations, it should first be pointed out that Article 63 of the Staff Regulations provides that an official's remuneration is to be paid in the currency of the country in which he performs his duties, in the applicant's case, therefore, in Belgian francs. The only exceptions to that rule are laid down in Article 17 of Annex VII to the Staff Regulations which provides that an official receiving the expatriation allowance may transfer part of his emoluments through the institution which he serves either in the currency of the Member State of which he is a national or in the currency of the Member State of which either his own domicile or the place of residence of a dependent relative is located.

17 Secondly, the Court must take formal notice of the statements made during the proceedings before the Court by the Belgian Government, intervening in support of the Commission. It is clear from those statements that the obligation to sell foreign currency to an approved bank does not apply at all to the part of emoluments transferred through the institution pursuant to the aforementioned Article 17 and that the right to purchase foreign currency on the regulated market extends to all means of payment, needed to cover an official's expenditure outside the territory of the Belgo-Luxembourg Economic Union, including gifts.

18 It must therefore be held that, by the measures adopted on 1 June 1982, the Belgian and Luxembourg monetary authorities, acting in accordance with the spirit of the Protocol on Privileges and Immunities, fully restored the possibility for officials of other than Belgian or Luxembourg nationality to purchase on the regulated market all the foreign currency needed to cover their expenditure outside the territory of the Belgo-Luxembourg Economic Union, on the sole condition that they abstain from all currency transactions designed to increase the value in Belgian or Luxembourg francs of means of payment intended to cover their expenditure within the territory of the Belgo-Luxembourg Economic Union and that they be subject to the control of the monetary authorities in that regard. It is by no means possible for that condition to affect officials in such a way that the interests of the Communities are harmed.

19 In those circumstances, it cannot be maintained that the Commission has failed in its duty to assist its officials by not objecting to the measures adopted by the Exchange Institute on 1 June 1982. The application must, therefore, be dismissed.

Costs

20 Article 69 (2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs. However, under Article 70 of the Rules of Procedure, Community institutions are to bear their own costs in proceedings brought by servants of the Communities. The officials Luigi Casella, Enrico Osio, Jan Robert de Rijk and Cornelia Oud, who intervened in support of the applicant, and the Belgian Government, which intervened in support of the Commission, must bear their own costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the parties, including the interveners, to bear their own costs.**

Bahlmann Pescatore Due

Delivered in open court in Luxembourg on 15 March 1984.

For the Registrar

H. A. Rühl

Principal Administrator

K. Bahlmann

President of the Second Chamber