2. Orders the parties to bear their own costs.

O'Keeffe Mertens de Wilmars Capotorti

Delivered in open court in Luxembourg on 24 June 1976.

A. Van Houtte
Registrar

A. O'Keeffe
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 3 JUNE 1976 [1]

Mr President,
Members of the Court,

The proceedings on which I am today giving my opinion concern the question whether an official of the Commission, who is employed in Brussels, can require that his remuneration be paid to a bank in Luxembourg. In addition, a claim for damages is being made against the Commission for belated transmission of a writ of summons for a civil action in which the applicant in the present proceedings was involved.

The following preliminary observations are to be made as to the facts of the case.

The applicant was for a long time employed as an official of the Commission in Luxembourg. In October 1968 he was transferred to Brussels. Nevertheless the Commission at his request continued to pay his remuneration to a bank in Luxembourg. This went on after October 1971 when the applicant transferred his family residence which had previously been in Luxembourg to Brussels.

By a request submitted to the Commission on 22 August 1974 the applicant sought to have his remuneration paid to another Luxembourg bank. He did this in view of the fact that he had been granted a personal credit by this bank on condition that the remuneration payable to him should be paid to the bank giving credit, that is that the applicant should give to the Commission an appropriate irrevocable payment order to this effect which could only be withdrawn with the agreement of the bank. However by a reply of 27 August 1974 this request was rejected. This was justified by reference to the fact that the bank in Luxembourg to which the remuneration of the applicant had been paid until then under a standing arrangement had not given the appropriate clearance. In fact the clearance from this bank of 9 August 1974 was not received by the Commission until 3 September 1974. In

1 — Translated from the German.

addition the reply referred to Article 17 (1) of Annex VII to the Staff Regulations which provides that 'Payment shall be made to each official at the place and in the currency of the country where he carries out his duties'.

At roughly the same time the applicant was involved in a dispute with the lessor of the flat which he occupied in Brussels over payment of rent. In connexion with this matter a writ of summons for a court appearance on 10 October 1974 had to be served on him. By a letter of 26 September 1974 to which were attached two copies of a writ of summons the Belgian Foreign Ministry got into touch with the Commission. The appropriate departments in the Commission attempted, as was stated in the proceedings, to reach the applicant by telephone in his office. As they were unsuccessful – in fact at that time the applicant was not at work because of illness – the writ of summons was returned to the Belgian Foreign Ministry on 10 October 1974. A renewed request from this Ministry to deliver the writ of summons to the applicant, this time contained in a letter of 24 October 1974, was complied with by service of the summons on the applicant on 4 November 1974. However in the meantime on 25 October 1974 a judgment in default had already been delivered.

On these grounds the applicant lodged a formal complaint with the appointing authority on 26 November 1974 claiming that the refusal of 27 August 1974 concerning the transfer of his remuneration was unlawful. Since the applicant could subsequently make no use of the favourable credit facilities of the bank in Luxembourg, this refusal had caused him material damage and also non-material damage. The belated notification of the summons in the Belgian civil action had led to judgment in default and consequently to the necessity to oppose the judgment in default which entailed payment of costs. In this way too he had been caused material and non-material damage.

As he received no answer to his complaint – incidentally I may point out that the administration often reacts in this unsatisfactory way in administrative proceedings – the applicant applied to the Court of Justice on 26 June 1975.

In his application he claimed that the Court should:

- annul the decision refusing to pay his remuneration to Luxembourg;
- rule that the Commission is obliged to pay the remuneration of the applicant to the Luxembourg bank specified by him;
- order the Commission to pay damages of BF 50 000 each for material and non-material damage because of this refusal;
- rule that the Commission was guilty of a wrongful act or omission in the transmission of the summons to the civil action in which he was concerned and
- order the Commission to pay damages of BF 10 000 in respect of this wrongful act or omission.

In the applicant's reply the application for the order that the Commission should pay damages was modified: the Commission was to be ordered to pay BF 43 500 for material damage in respect of its refusal to transfer his remuneration to Luxembourg and to pay one Belgian franc for non-material damage. In addition the application for damages with regard to the belated transmission of the judicial summons was reduced to one Belgian franc.

1. In examining the matters at issue I shall look at the question of transferring the remuneration of the applicant to Luxembourg.

(a) In the first place we must examine the general question whether under the Staff Regulations there exists such a right

for Luxembourg officials who are employed in Brussels or whether the interpretation of the provisions of the Staff Regulation set out by the Commission in its defence of its refusal in August 1974 is correct.

Under Article 63 of the Staff Regulations the official's remuneration shall be expressed in Belgian francs and paid in the currency of the country in which the official performs his duties. Article 62 further refers to Annex VII to the Staff Regulations; it provides expressly that officials are entitled to remuneration in accordance with this Annex. In Annex VII, Article 17 (1) — that is the basic provision which I have already cited — provides that payment shall be made to the official at the place and in the currency of the country where he carries out his duties. Article 17 (2) sets out exceptions to the basic rule. It permits regular transfers in other currencies and to other places; however this only applies to one part of the emoluments, namely to the expatriation allowance and to amounts which are necessary to cover expenditure which arises out of commitments proved to have been regularly entered into by the official outside the country where the institution has its seat or where the official carries out his duties. Article 17 (3) contains a further concession whereby in exceptional circumstances for reasons supported by evidence an official may be authorized to transfer sums which he may desire to have available in the currencies mentioned in paragraph (2).

In the present case we are only concerned with the scope of the first paragraph of Article 17. The applicant only relies on that provision and not on the facilities offered by the other paragraphs of Article 17.

On consideration of the whole system of Article 17 and in particular of the wording of its first paragraph there can in my opinion be no doubt that only the interpretation advocated by the Commission can be correct. While Article 17 (1) does provide that payment shall be made to each official at the place and in the currency of the country where he carries out his duties, this obviously does not include payments to be made in the currency of another Member State and in a place which lies outside the country where the institution has its seat. In my opinion where the wording is clear, as is Article 17 (1), it would conflict with all current principles of interpretation to apply considerations of the object of the law and relying on these to seek an interpretation which is not compatible with the wording and which, if it had been intended, could quite easily have been specified by using a different wording. Apart from that it must also be said that the applicant's arguments relating to the scheme of Article 17 — avoidance of payments into the various Member countries and avoidance of disruption of the currency policy of the Member States — are not merely unsupported by anything such as preparatory documents; according to the submissions of the Commission they are definitely incorrect. This may be said as the Commission makes use of banking machinery for the payment of remuneration and because it has accounts in all the Member States. Therefore the scheme of Article 17, as the Commission correctly pointed out, is rather to be seen in conjunction with the official's obligation as to residence based on Article 20 of the Staff Regulations, that is the duty to reside either in the place of employment or at not greater distance therefrom as is compatible with the proper performance of his duties. Indeed Article 17 of Annex VII is nothing more than the logical consequence of the duty of residence and thus primarily it guarantees the uniform treatment of all officials as to payment of remuneration.

In addition it is in my opinion not possible to justify the interpretation of Article 17 desired by the applicant by reference to the special relationship

between Belgium and Luxembourg that is by reference to the Belgo-Luxembourg Economic Union. In this respect it is decisive that this particular relationship was well known when the Staff Regulations were drafted but was not taken into consideration. From that, it may only be deduced that even for Belgian and Luxembourg officials or more generally, for officials with special connexions with these countries, transfer of remuneration beyond the borders of the country in which the institution has its seat in derogation from Article 17 (1) can only be undertaken in accordance with paragraphs (2) and (3) of this article which apply to all officials.

Accordingly we may first decide that the Commission has correctly interpreted Article 17 (1) of Annex VII to the Staff Regulations and that on the basis of this provision the applicant has no right to have his remuneration transferred to Luxembourg.

(b) In this connexion it must further be considered what significance is to be attached to the fact that in spite of his transfer to Brussels in 1968 the applicant's remuneration was in fact transferred for many years to Luxembourg. It must therefore be asked whether this may give rise to vested rights which cannot simply be overridden.

In this respect we can at least leave open the question whether such a practice appeared acceptable in view of the particular circumstances in which the applicant found himself after his transfer and until the end of 1971 (long periods in Luxembourg because of illness and retention of the family residence in Luxembourg). Such circumstances certainly no longer existed in summer 1974. I shall return later to the point, which may also be of some relevance here, that in the summer of 1974 the applicant was granted credit facilities by a bank in Luxembourg.

On the decisive question whether a beneficial administrative action — the transfer of his remuneration to Luxembourg — which, as has been shown, was in itself contrary to the Staff Regulations, can, after being applied for many years, be brought to an end in the summer of 1974 with future effect, the applicant in his attempt to justify a complaint against the Commission relies chiefly on the ruling of the Court of Justice in Joined Cases 7/56 and 3 to 7/57 *Algera and Others* v *Common Assembly of the ECSC*, Judgment of 12 July 1957, Rec. 1957, p. 83. He deduces from this and from the legal systems of some of the Member States — namely French, Belgian and German law — the principle that the administration must comply with a reasonable time-limit. In addition in his opinion the question is whether there exists a serious infringement of the law and whether its removal is indispensable for the future in order to avoid serious harm to the administration. Since such a situation does not exist in the present instance it cannot be accepted that the Commission was able in the summer of 1974 to revoke a decision taken in 1968 for the benefit of the applicant.

In this respect also it is not possible to accept the applicant's view.

In the proceedings reference was correctly made to the point that the necessity to comply with a time-limit only applies in principle for the *retroactive* withdrawal of unlawful beneficial measures. In addition it might be noted that this principle has been considerably qualified in the decided cases on the equalization of scrap (cf. Judgment of 12 July 1962, Case 14/61 *Koninklijke Nederlandsche Hoogovens and Staalfabrieken NV* v *High Authority of the ECSC, supported by Société des Aciéries du Temple*, [1962] ECR 253). In the present case, on the other hand, we are solely concerned with alteration of an administrative practice for the future. As regards such a situation

the proper course was shown in the decision of the Court in case 15/60 (Judgment of 1 June 1961, *Simon* v *Court of Justice of the European Communities,* Rec. 1961, p. 225). These proceedings were concerned with the fact that a separation allowance which had been wrongfully granted to an official was to be withdrawn in the future. In the judgment, it is stated that:

'If the administrative authority becomes aware that a certain allowance has been granted as a result of a wrong interpretation of a legal provision it has the power to amend the previous decision.

Even if in certain cases in view of vested rights withdrawal on grounds of unlawfulness does not have a retroactive effect it always takes effect from the present.'

It may therefore be assumed that even after the lapse of a long period of time the administration is not prevented from modifying, with future effect, a situation which is recognized as unlawful.

Contrary to the view of the applicant I do not think that in this connexion it is justifiable to take account of considerations concerning the importance of the infringement of the law. Illegality is illegality, and thus failure to comply with a not particularly important provision does allow of correction for the future when the error is discovered.

The arguments of the applicant are finally not supported by a balance of interests referred to in the judgment in Case 14/61. In this respect with regard to the interest of the applicant we must primarily consider the credit facilities granted by the bank in Luxembourg which have been mentioned above and which were subject to the condition that the remuneration of the applicant should be permanently paid to this bank. In this respect it is already important that when the applicant lodged his application in August 1974 he did not mention the offer of credit and therefore did not place the administration in a position to consider his interests. In addition the Commission has shown that even without direct transfer of his remuneration to Luxembourg it would have been possible for the applicant to receive the credit in Luxembourg which he maintains is more favourable. I here refer to two of the letters submitted by the Commission of 3 and 4 December 1975 which show that the Luxembourg bank concerned would have been satisfied with an irrevocable standing order to transfer the applicant's remuneration to Luxembourg given to a Belgian bank and which also shows that a Belgian bank would have accepted such a standing order.

Accordingly, it is clear that continuation of the transfer of remuneration to Luxembourg can also not be claimed by reliance on vested rights. The alteration of administrative practice in autumn 1974, which incidentally did not happen overnight but merely with effect from October 1974, was fully justified.

(c) With regard to the first issue, it is thus clear the applicant's claims for the annulment of the decision of 27 August 1974 and seeking a ruling that the Commission is obliged to pay the remuneration of the applicant to a Luxembourg bank are without foundation. Furthermore as the Commission's conduct was not unlawful it is also clear, without need to examine further the conditions for the claim, that the applicant's further claim in respect of the liability for breach of official duty is also without foundation.

2. The second issue with which I shall now deal relates to the fact that the Commission allegedly belatedly served a writ of summons to attend a civil action addressed to the applicant. In the final version of the application with regard to this question the Commission is to be

ordered to pay one Belgian franc in compensation for the non-material damage caused to the applicant.

In this respect it must first be made clear that the Protocol on the Privileges and Immunities of the Communities does not exclude a direct summons of officials of the Community to civil actions with the aid of the appropriate national body and that the involvement of the Community body is not compulsory. In view of the difficulties which exist – officials of the Community do not need to have themselves entered in the register of aliens – oral agreements have evidently been reached between the Commission and the Belgian Foreign Ministry whereby in the interest of a simplification of legal business summonses may be sent to the Commission which then serves them on the officials concerned.

In the present instance the dispute is concerned with the extent of the obligation of the Commission on the basis of these agreements, all the details of which are not all known. The Commission maintains the view that it only needs to undertake transmission to the offices of the person concerned; in an emergency it is usual to send the document on to officials who are not at work if their place of residence is known. However the Commission has no more extensive obligations; in particular it is not obliged to undertake investigations when officials are absent from duty without authorization. This was the case with regard to the applicant at the time in question. At the direction of the Invalidity Committee on 8 September 1974 he was sent to a clinic for eight days for observation. After the expiry of this period he did not report for duty and, contrary to the provisions of Article 59 of the Staff Regulations he did not submit a doctor's certificate as to his continuing incapacity for work until 8 October 1974.

The applicant does not deny that the lastmentioned observation as to his absence from duty is correct. However he takes the view that even in such a case the Commission may not remain inactive and may not return the summons to the Foreign Ministry – which incidentally it did not do until 10 October 1974; rather in the interests of the private rights of individuals it should undertake certain investigations, that is to say, make contact either by telephone or by letter with the official concerned and if needs be send a summons on to his private address.

In assessing this case – this much appears certain – it may be accepted that the Commission's obligation in this respect is not as extensive as the obligations of national officials responsible for service. This can be said since in such a case direct service on the individual is possible on the basis of information which the Commission or the Belgian Foreign Ministry would automatically give to the national body responsible for service. Apart from that however I am also of the opinion that the duty of care and responsibility of the Commission which has, without legal basis, become involved in cooperating in a difficult sphere in which in certain circumstances very short time-limits are concerned – should be further extended. This does not mean that it should be required to undertake time consuming and costly inquiries in cases where officials remain away from their posts and where their place of residence is unknown; its departments are not designed for this purpose and for the majority of the officials under its control it needs to undertake no such responsibility. On the other hand even in the case of unauthorized absence from duty it should not be content simply to take the line that service of the notice in the place of work is not possible. In my opinion it is in no way asking too much of the Commission if in such cases it is at least called upon to attempt to contact by telephone the private address of the official concerned and if it is expected subsequently to send the summons on to

the private address as it seemingly always does if it knows the residence of an official. In the case of the applicant this is the more applicable as the Commission had at least informed the Belgian Foreign Ministry of his holiday address when a summons concerning him was delivered a short time before and as, on 20 September 1974, that is at a time when the applicant was also absent from duty without authorization, it had sent a messenger with the summons to his residence.

If one accepts this then in the present case one cannot deny that there is substantial breach of duty and thus a wrongful act or omission by the Commission since its department's efforts in respect of the applicant were confined to telephone calls to the applicant's office while they undertook no further steps which might have been expected — on 26 September 1974 the applicant states that he was at his house — and did not even give the applicant the summons on 8 October 1974 when he handed in his doctor's certificate.

It can also not be denied — and this concerns a further indispensable element of the right against the institution — that the applicant was prejudiced to a substantial degree. In the proceedings we heard that after the delivery of the judgment in default against him he paid the arrears of rent demanded of him and thus recognized the claim at issue. However the point must not be rejected out of hand that if the summons had been delivered in good time he would have had sufficient time to give an answer after due consideration. This would have enabled the applicant to settle the dispute before the delivery of a judgment and thus avoid the costs of registration which apparently finally had to be borne by him. In fact this point can remain open as can the answer to the question whether the Commission must accept responsibility for the costs of the appeal lodged against the judgment in default, that is for costs which have not definitively been decided as the applicant has lodged a further appeal against the judgment delivered following his objection. In fact the applicant only seeks an order that the Commission should pay one Belgian franc as compensation for non-material damage, in other words he seeks principally the determination of a wrongful act or omission and only a more or less token condemnation of the Commission. In my opinion after all that has been revealed as to the action in the course of the proceedings this can scarcely be denied him.

As regards the second part of the application it must in conclusion be determined that the head of claim in its final form is fully justified.

3. In conclusion therefore:

In my opinion the application is without foundation in so far as it concerns the fact that as from August 1974 the remuneration of the applicant was no longer transferred to Luxembourg. However in accordance with the application the Commission should be ordered to pay one Belgian franc in view of the fact that it committed a wrongful act or omission in serving a summons addressed to the applicant for a court hearing on 10 October 1974. With regard to the costs of the proceedings, I feel it is right in the light of the conclusions to which I have come to order the Commission to bear one half of the costs incurred by the applicant.