OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 24 JUNE 1981 [1]

Mr President,
Members of the Court,

1. The Commission has brought an action before the Court against the Kingdom of Belgium under Article 169 of the EEC Treaty for a declaration that it has failed to fulfil its obligations under Article 11 (2) of Annex VIII to the Staff Regulations of Officials (introduced by Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968). That provision allows Community officials who before entering the service of the Community worked in a Member State or in the service of an international organization to have transferred by means of a payment to the Communities either the actuarial equivalent of retirement pension rights acquired in the government administration, national or international organization or undertaking by which they were employed or any sums which may be due to them from the pension fund of the government administration, organization or undertaking at the date of their leaving its service. All the Member States, with the exception of Belgium and the Netherlands, have now adopted (or, like Greece, are on the point of adopting) the national provisions needed in order to set up the transfer machinery required. Belgium, on the other hand, has refused outright to do so; it is that refusal which has given rise to this case.

2. The Belgian Government's position is based essentially on the proposition that Article 11 (2) places no obligation on the Member States. In support of that view the defendant does not confine itself to advocating an interpretation of that provision which is different to that adopted by the Commission but puts forward three preliminary arguments according to which:

(a) the Council could not have been entitled to exercise its power to lay down the Staff Regulations of Officials in such a manner as to impose on the Member States obligations concerning the transfer of pension rights;

(b) whilst the Staff Regulations of Officials are in the form of a regulation, they are intended to govern solely the relations between the Communities and their staff;

(c) it is in any event not permissible to impose obligations on the Member States indirectly and by implication.

It seems to me that those arguments should be discussed first.

That provision which empowered the Council to define the position of all Community officials is Article 24 of the Treaty merging the executives, which provides: "The Council shall, acting by a qualified majority on a proposal from the Commission and after consulting the other institutions concerned, lay down the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of those Communities". There

1 — Translated from the Italian.

is no doubt that that article confers upon the Council a wide discretion to determine the subject-matter of the relations between officials and the Community institutions in whose service they are employed. Such a power must clearly be exercised in the interests of the Community and within the confines of the objective pursued by Article 24; that requirement was certainly fulfilled, however, when the Council decided that it was appropriate to grant officials the option of making use, in the Community context, of pension rights which they had acquired as a result of previous employment in a Member State.

The conferment of such a right is intended to facilitate movement from national employment, whether public or private, to the Community administration and therefore to ensure that the Communities have a good chance of being able to choose qualified staff who already possess suitable experience. The provision is therefore one which, in addition to benefiting individuals, serves primarily to satisfy one of the Communities' own interests by promoting the better organization and more efficient functioning of their administrations. In view of that, it was in my opinion perfectly permissible for the Council to impose on the Member States the obligation to adopt the measures necessary in order to enable the abovementioned scheme to be put into effect. These measures are not to be compared with those on the harmonization of national social security schemes — a subject which is certainly different and relates to different objectives. The purpose of the provisions in the present case is to establish a certain continuity for pension purposes between national and Community employment without prejudice to the differences existing between the social security schemes of the Member States.

As far as the identity of the addressees of the Staff Regulations is concerned, it seems to me that the possibility can by no means be excluded that those regulations impose obligations or confer rights on subjects other than the Communities and officials. Even if it is correct that most of the provisions of the Staff Regulations are intended solely to govern the position of servants *vis-à-vis* the Community institutions, there is nothing to prevent a given provision from containing obligations which are also incumbent on Member States. As a matter of form, it would be sufficient to regard the regulation laying down the Staff Regulations of Officials as a measure having general application within the meaning of Article 189 of the EEC Treaty; even though the adoption of the Staff Regulations was specifically provided for by Article 24 of the Treaty merging the executives, there is no reason to think that that entailed a derogation from the principles of Article 189. On the contrary, it may be argued that precisely because the power provided for by Article 24 of the Merger Treaty was exercised by way of adopting a regulation, there can be not doubt that the Staff Regulations have general application. It depends therefore on the structure of each provision whether it governs solely relations between the Communities and officials or possibly also relations between Member States and the Communities. More specifically, Article 11 (2) of Annex VIII is not the only provision of the Staff Regulations whose implementation requires the cooperation of the Member States: examples which may be cited are Article 11 which places an obligation on the

official not to seek or take instructions from any government and consequently by implication imposes on the governments of the Member States an obligation not to give instructions to any official of the Communities and Article 83 (1) which provides that the Member States are to guarantee jointly payment of benefits under the pension scheme.

In any event, the achievement of the objectives laid down in the Staff Regulations of Officials is also covered by the general obligation placed on the Member States by Article 5 of the EEC Treaty, under which those States are bound to adopt "all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community", and also to facilitate the achievement of the Community's tasks. In view of the breadth of the expression "resulting from action taken by the institutions" and the duty to facilitate the fulfilment of the Community's tasks, the objection that it is not permissible to impose obligations on the Member States indirectly or by implication also fails. Where it is certain that a provision of the Staff Regulations places an obligation on the Community (in this case, to allow the right conferred upon officials by Article 11 (2) of Annex VIII to be exercised) and cannot be put into effect without the cooperation of the Member States, the Member States are bound to adopt the necessary measures. That is the conclusion to which the reference to Article 5 of the EEC Treaty leads.

3. In my view, therefore, the initial objections raised by the Belgian Government do not stand up to critical examination. I may therefore move on to consider the problems raised by the wording of the provision in question and in particular to determine whether it lends itself to the interpretation proposed by the Belgian Government, which maintains that the setting-up of the transfer machinery for retirement pension rights is subject to a prior agreement which each Member State is free either to conclude or not to conclude with the Communities.

As the basis for that interpretation the defendant claims that there is an analogy between paragraphs (1) and (2) of Article 11. In the case of an official who leaves the service of the Communities to enter the service of a government administration or a national or international organization, Article 11 (1) provides that he is to be entitled to have the actuarial equivalent of his retirement pension rights in the Community transferred to the pension fund of the administration or organization provided that the administration or organization in question has concluded an agreement with the Communities. Paragraph (2), which governs the reverse situation, makes no mention of the need for such an agreement, but the defendant takes the view that such a requirement is implicit in view of the analogous nature of the two situations.

It seems to me that the argument based on a literal interpretation of Article 11 is in fact more convincing. The fact that it refers to an agreement in paragraph (1) and not in paragraph (2) means that an agreement constitutes a condition only for the transfer provided for by paragraph (1). Let us nevertheless consider the proposition that there is an analogy between the situations envisaged in the two paragraphs of the article in question.

In the situation governed by paragraph (1) it stands to reason that the Communities, before agreeing to the transfer of their own funds to the funds of another social security institution, should have some means of agreeing with the authorities controlling that institution the terms for enabling a valid transfer to be made in accordance with the prescribed purpose; it is appropriate that they should retain their discretion until the agreement has been concluded. However the situation envisaged by paragraph (2) is different: in this case it is the Communities which determine the effects for the purposes of their own pension scheme of the transfer of pension rights acquired by an official in a Member State. What is more, as I have shown, the conferment on officials of the right provided for by paragraph (2) serves one of the Communities' own interests. The intention not to make the application of the provision in question subject to the free consent of each Member State was therefore justified.

The idea of an analogy between the two paragraphs of Article 11 seems to me therefore to be refuted by the existence of significant distinguishing factors. However, the Belgian Government sees in the wording of paragraph (2) another feature favourable to its case, namely the fact that the government administrations, national organizations and undertakings are mentioned alongside international organizations in a single formulation serving to define the official's previous employer. In relations between the Communities and international organizations the implementation of the system for transferring the pension rights necessarily presupposes an agreement. The defendant finds support therein for the assertion that the provision also requires, by implication, an agreement when the previous employer was the administration of a Member State or an organization or undertaking controlled by it. However, I think it may be said in reply that the need for the agreement with international organizations arises from the fact that, unlike the Member States, they are not bound by Community rules. It is precisely that different position *vis-à-vis* the Communities, and in particular the fact that there is the general obligation incumbent on the Member States under Article 5 of the EEC Treaty, which explains the different kinds of relations which are established between the Communities and international organizations and between the Communities and the Member States for the purposes of the application of Article 11 (2) of Annex VIII to the Staff Regulations of Officials.

4. The representative of the Belgian Government pleaded finally the technical difficulties which would prevent any form of transfer from a Belgian pension scheme to a social security scheme falling outside the scope of Belgian law, such as that of the Communities, even though on the other hand detailed rules for transfer (or at least for taking account for pension purposes of service previously accomplished) in the case of an official who moves from the Belgian administration into employment in the private sector are expressly provided for by the Belgian rules. Expanding his argument, the representative of the Belgian Government referred *inter alia* to the impossibility of determining, before the date of actual retirement, the value

of the rights acquired by an official, having regard to the fact that the Belgian pension scheme is not based on the payment of contributions by individuals and also to the possibility of legislative amendments either increasing or reducing those rights. However, it does not seem to me that situation constitutes an insurmountable obstacle to the fulfilment of the obligation arising from the provision in question, and, in any event, I would point out that no Member State may plead difficulties relating to its internal legal system in order to avoid complying with Community rules. It is for the Belgian legislature to find a method of enabling the right conferred by the provision in question on Community officials who have previously performed pensionable service under a Belgian scheme to be exercised.

With regard to the concern expressed by the Belgian Government, I think it appropriate to recall that Article 11 (2) merely provides for the coordination of national social security schemes with the Community pension scheme with the particular purpose of preventing employees of the Communities from losing rights which they would have retained if they had continued to work in their Member States of origin. Even though the provision considered in its own right also applies where an official has already completed a sufficient number of years' service in his country of origin to claim entitlement to a pension in that State, the provision takes on practical importance primarily where an official has not yet completed a sufficient number of years' service to claim entitlement to a pension when he moves from national to Community employment. Thus it is that if the Community pension scheme were not to take account of the official's previous years of employment, he would lose the benefit thereof.

I think that there is a final point which may usefully be made. Article 11 (2) neither presupposes the uniformity of national pension schemes nor seeks to introduce it. On the contrary, it leaves all retirement pension schemes unaffected provided that in each State the necessary measures are taken in order to ensure the effective exercise of the right conferred on the Community officials. That means that the Member States retain considerable discretion as to the kind of measures which they may consider to be more compatible with their scheme and yet sufficient to give effect to the provision of the Staff Regulations. In practice that discretion is exercised ultimately on the basis of consultations and agreements with the Commission but on the firm understanding that no Member State is free to refuse to cooperate for the purposes of putting into operation the transfer machinery provided for or to claim that that machinery is paralysed by the difficulty in harmonizing the State's own social security scheme with it.

5. For all those reasons, I am of the opinion that the action brought by the Commission against the Kingdom of Belgium by application of 9 June 1980 should succeed. In conclusion, therefore, I propose that the Court should

declare that that State, by refusing to adopt the national provisions necessary for giving effect to Article 11 (2) of Annex VIII to the Staff Regulations of Officials of the European Communities, has failed to fulfil its obligations under that provision and under Article 5 of the EEC Treaty. The defendant should therefore be ordered to pay the costs.