REPORT FOR THE HEARING
delivered in Case 401/85 *

I — Facts

1. In the context of proceedings between Francesco Schina, an official of the Commission assigned to the Publications Office in Luxembourg, and a construction company, Fatone SàRL, the juge de paix (Luxembourg Cantonal Court), Luxembourg, made an order on 12 August 1982 authorizing that undertaking to attach Mr Schina's remuneration in the hands of his employer, the Commission of the European Communities, in respect of an amount of LFR 450 000.

By letters dated 18 August 1982, the Head of the Commission's Personnel Division in Luxembourg informed the lawyers for Mr Schina and for Fatone that, pursuant to the attachment order, the Commission would pay the attachable amount, calculated in accordance with Luxembourg legislation, namely LFR 63 520 per month.

Between September 1982 and April 1983, the Commission withheld a total amount of LFR 450 000 from Mr Schina's monthly remuneration.

Mr Schina's appeal before the tribunal d'arrondissement de Luxembourg (District Court, Luxembourg) against the attachment order was dismissd on 27 June 1983.

2. On 8 July 1983, Mr Schina asked the Commission for information on the way in which the attachment part of his remuneration was calculated and that information was supplied to him by the Commission in a memorandum dated 12 July 1983.

By memorandum dated 6 October 1983, Mr Schina submitted a complaint under Article 90 (2) of the Staff Regulations of Officials against execution of the attachment order claiming that the deductions made from his remuneration were unlawful and had caused him damage by forcing him to borrow.

By a memorandum dated 23 November 1983, Mr Schina requested the Commission to adopt compensatory measures designed to make good in the short term the damage he had suffered and to place the money on fixed-term deposit for a period of one year, if need be in a bank account opened by the Commission.

Informed of that request, the lawyer acting for Fatone indicated to the Head of the Commission's Personnel Division in a letter of 14 December 1983 that he had no objection to such steps being taken since the amount of LFR 450 000 was in any event insufficient to cover the debt. However, he stated that Mr Schina should not receive the interest earned, which should remain blocked, and that the fixed-term deposit should be on a month-by-month basis and not for one year.

In a memorandum dated 30 March 1984 addressed to the Commission, Mr Schina set out the extent of the damage suffered as a result of the execution of the attachment order, referring in particular to a loan agreement entered into by him for an amount of LFR 450 000 which involved an obligation to pay interest at the rate of 13%.

* Language of the Case: French.

By letter of 5 July 1984, the Commission rejected Mr Schina's complaint against the execution of the attachment order.

By an application lodged at the Court Registry on 10 July 1984, Mr Schina brought an action before the Court (Case 180/84) seeking in particular the annulment of the Commission's decision to execute the attachment order, a declaration that the applicant's remuneration could not be attached and an order that the Commission compensate the applicant for the loss he sustained by virtue of having to contract the abovementioned loan. Since the Commission raised an objection of inadmissibility, alleging failure to comply with the time-limits for the bringing of actions laid down in Article 91 (2) of the Staff Regulations of Officials, Mr Schina withdrew that action by a document dated 19 December 1984. The case was removed from the Court Register.

3. On 21 November 1984, the tribunal d'arrondissement de Luxembourg delivered judgment on the substance of the case pending between Mr Schina and Fatone and ordered Mr Schina to pay LFR 625 147, together with interest and costs. Mr Schina paid Fatone the amounts due under that judgment.

By letter of 15 February 1985, Mr Schina informed the Commission of that fact and asked it to pay him the amount due to him, including interest, referring in that regard to his memorandum of 23 November 1983. He repeated that request in a letter of 13 March 1985.

By letter of 28 February 1985, the lawyer acting for Fantone informed the Commission that the judgment of the tribunal d'arrondissement had been fully complied with by Mr Schina and gave notice of cessation of the attachment order.

On 8 March 1985, the Commission paid Mr Schina the LFR 450 000 which had been withheld from his salary. In a memorandum dated 22 March 1985, it refused to pay him interest.

4. Mr Schina submitted a complaint against that refusal on 21 June 1985.

Since he received no reply to that complaint, he reminded the Commission of his complaint on 25 October 1985 and informed it of his intention to bring an action before the Court.

On 9 December 1985, after proceedings in this case had been initiated, Mr Schina received a letter from the Commission rejecting his complaint.

II — Written procedure and conclusions

1. By an application lodged at the Court Registry on 5 December 1985, Mr Schina brought the present proceedings.

2. The applicant claims that the Court should:

(i) annul the Commission's decision of 22 March 1985 refusing to pay the applicant interest on the months withheld pursuant to the interlocutory attachment order on his remuneration;

(ii) order the defendant to pay the costs.

The Commission contends that the Court should:

(i) dismiss the application;

(ii) make the appropriate order as to costs.

3. The parties exchanged reply and rejoinder.

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

III — Submissions and arguments of the parties put forward during the written procedure

The applicant bases his action on two *submissions:*

the *first* seeks to establish that officials' remuneration cannot be attached and that, consequently, the Commission is required to make good the damage resulting from the unlawful deduction made from his salary;

the *second* seeks to establish that the Commission was required by virtue of its duty of care to ensure that the amounts withheld earned interest and must compensate the applicant for the consequences of its failure to perform that duty.

The Commission contends that the two submissions are inadmissible and, in any event, unfounded.

1. *First submission*

With regard to the *admissibility* of the first submission, the *applicant* states that the subject-matter of this action is not the amounts withheld by the administration from his remuneration but the Commission's refusal to pay him interest, first made known in a memorandum dated 22 March 1985.

On the other hand, the *Commission* considers that the applicant's first submission in fact contests the lawfulness of the letter of 18 August 1982 informing him of the attachment order and the deductions from his remuneration made for the first time in September 1982. Since the applicant withdrew his first application (Case 180/84), which was directed precisely against those measures, and which was already inadmissible as being out of time, he cannot once again submit to the Court the same disputed points on the basis of the same arguments.

With regard to the *substance* of this submission, the applicant claims that the relationship between an official and his institution is governed exclusively by the Staff Regulations. It is incompatible with that situation that the aforesaid relationship should be subject to national statutory provisions on the attachment of salaries. By reason of the disparity of national provisions on that subject, in regard to which the applicant cites various examples, the application of national provisions would give rise to inequality between officials according to their place of work. Article 62 of the Staff Regulations of Officials and Article 16 (1) of Annex VII thereto lay down the principle of the protection of officials' remuneration and contain no provision concerning the attachment thereof. That silence on the part of the Community legislature reflects its wish to protect officials' entire remuneration from attachment. The principle of the protection of salaries is also recognized in most of the Member States. Failure to pay salary constitutes an offence under social criminal law. Appropriate sanctions for such an offence are also laid down in Convention No 95 of the International Labour Organization.

The unlawful retention of part of the applicant's remuneration constitutes a wrong requiring the payment of compensatory interest. The obligation to pay default interest results from the mere fact of delaying payment.

Besides the damage covered by default interest, the applicant is entitled to compensation for the damage caused by monetary devaluation. On 3 December 1982 he was obliged to seek a loan repayable with interest at 13%, a rate directly connected with monetary devaluation. According to the principle *dies interpellat pro homine* both default and compensatory interest are due from the date of each unlawful retention.

The *Commission* considers that the principle that officials' remuneration is protected applies only to the relationship between the official and the institution. In regard to third parties, the general principle that an individual's assets are the common security of all his creditors must be respected and, furthermore, Article 23 (1) to the Staff Regulations of officials provides that officials are not exempt from fulfilling their private obligations or from complying with the laws and police regulations in force. In general, an attachment order does not constitute an administrative measure of constraint within the meaning of Article 1 of the Protocol on Privileges and Immunities (orders of the Court of 25 September 1963 in Case 85/63 [1963] ECR 195 and 11 May 1971 in Case 1/71 [1971] ECR 363), and the Commission should not deprive its officials' creditors of the right to recover their debt by opposing an attachment order.

In accordance with the abovementioned decisions of the Court, attachment procedures remain entirely governed by the laws of the Member States and the Commission is required to accept the decision of the national court which is required to apply its national law, in this case, Luxembourg law. The Council refused to accept a Commission proposal (Official Journal 1979, C 191, p. 1) seeking to include in the Staff Regulations uniform rules on the fractions of officials' remuneration that could be attached. In the absence of rules in the Staff Regulations, the question of the attachment of salaries is governed by the binding provisions of the national law of the place in which the official normally performs his duties, namely the law of the official's place of work. The difference in treatment according to the place of work which results from that situation is not discriminatory because officials in different places of work are not in identical positions.

Since the Commission correctly applied the decision of the Luxembourg court, the reductions made from the applicant's remuneration are not unlawful and cannot therefore give rise to an obligation to pay compensation for damage.

2. *Second submission*

The *Commission* first contests the admissibility of the second submission by contending that the action is also out of time in regard to that submission. It is in fact directed against the rejection of the applicant's request to place the sums withheld from his salary on fixed-term deposit. Since that request was also made for the first time in the memorandum of 23 November 1983, the periods laid down in Articles 90 and 91 of the Staff Regulations of Officials began to run from that date.

The *applicant* considers that in his memorandum of 23 November 1983, he merely proposed placing the money on fixed-term deposit on a temporary basis, without making a request within the meaning of Article 90 (1) of the Staff Regulations.

Only the definitive refusal to pay him interest at the time that the money was released constitutes a measure affecting his legal position.

With regard to the *substance* of the second submission, the *applicant* claims that the administration must, as far as possible, take account of officials' interests. Where an attachmnent order has been made, it must not adopt a purely passive position. It is required to hold the amounts attached 'in trust for those who are entitled to them' by managing the funds with the same degree of care as if they were its own property. The failure to take any steps to ensure that the money involved earned interest constitutes a failure to perform that duty which is particularly serious in view of the fact that the applicant had proposed placing the money on fixed-term deposit and his creditor's lawyer had agreed, on 14 December 1983, to the placing of the money on deposit on a month-to-month basis.

With regard to the form which compensation might take, the applicant refers to his arguments in support of the first submission.

The *Commission* considers that it has no duty of care in regard to officials' private affairs. Its role as the third party to whom the attachment order is directed is purely passive. No rule of Luxembourg law requires an employer to ensure that the amounts which have been attached and which he is required to retain earn interest. In any event, the sums attached must remain available at all time. A duty to invest the money can be imposed on it only by judicial decision. Furthermore, the Commission is likely to be subject to criticism if it obtains different rates of interest, according to the circumstances. Finally, the Commission refers to various internal memoranda and documents showing that its position is in accordance with the agreements made at inter-institutional level.

IV — Oral procedure

At the hearing on 10 December 1986, the applicant, represented by Jean-Noël Louis, and the Commission, represented by Marie Wolfcarius, presented oral argument on the substance of the second submission.

The *applicant* stated that the employer, in his capacity as third party to whom the attachment order is directed, is required to comply with the instructions given to him by agreement between the party against whom the attachment order is made and the party to whom it is granted. The amounts attached do not belong to him, he is not entitled to keep them and must, upon the joint request of the creditor and his employee, invest the money involved. If he does not do so, the employee's remuneration has not been paid, and consequently, interest is due on the amounts not paid at the date on which they fall due. Moreover, it could be argued that the joint request to invest the amounts deducted from the employee's salary in such a way as to cause them to earn interest amounts to an implied putting on notice. Moreover, the employer is unjustifiably enriched if, in his capacity as third party to whom the attachment order is directed, he uses the amounts withheld, which do not belong to him, in order to obtain a benefit for himself. He cannot avoid the ensuing obligation to pay interest unless he produces evidence that he actually placed the amounts in question in a special account for a special purpose, thereby providing the party in whose favour the attachment order is made and the party against whom it is made with formal assurances and a particular degree of security.

The *Commission* observes that an order attaching the salary of one of its officials is entirely governed by national law, in this case, Luxembourg law. In such a case, there is no legal obligation to pay interest for late payment because the failure to pay is justified by the legal prohibition of payment

which results from an order of the court having jurisdiction in the matter and which is tantamount to a case of *force majeure*. The third party to whom the attachment order is directed is not entitled to part with the money by making it unavailable as a result of being invested at the joint request of the party to whom the attachment order was granted and the party against whom it was made because the money must be available at all times not merely for the former party but for any potential future creditor as against whom that party has no right of preference. Only the competent court could order that the money be invested. Furthermore, there has been no unjustified enrichment because the law constitutes the just cause of any enrichment there may be and the loss suffered by the person against whom the attachment order is made originates in the attachment and the previous conduct of that person himself. Moreover, since the attachment order applies both to the property attached and to the income therefore, interest on the amounts attached should be paid to the creditor who has obtained the attachment order and not to the official if the Commission were to invest the money in question so as to earn interest.

The parties also replied to questions put by the Court and discussed the effects of an attachment order under Luxembourg national law.

U. Everling
Judge-Rapporteur