JUDGMENT OF THE COURT
17 December 1987 *

In Case 315/85

Commission of the European Communities, represented by its Principal Legal Adviser, Henri Etienne, and by its Legal Adviser, Dimitrios Gouloussis, acting as Agents, with an address for service in Luxembourg at the office of G. Kremlis, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

applicant,

v

Grand Duchy of Luxembourg, represented by Benny Berg, Minister for Social Security, and Georges Schroeder, Director of the General Inspectorate for Social Security, acting as Agent, assisted by Nicolas Decker, of the Luxembourg Bar, with an address for service in Luxembourg at Mr Decker's Chambers, 16 avenue Marie-Thérèse,

defendant,

supported by:

(1) **French Republic,** represented by G. Guillaume, Director of Legal Affairs at the Ministry of Foreign Relations, acting as Agent, with an address for service in Luxembourg at the French Embassy, 2 rue Bertholet,

(2) **United Kingdom,** represented by Brian McHenry of the Treasury Solicitor's Department, Queen Anne's Chambers, London, acting as Agent, with an address for service in Luxembourg at the British Embassy, 28 boulevard Royale,

interveners,

APPLICATION for a declaration that the Grand Duchy of Luxembourg has failed to fulfil its obligations under the EEC Treaty by refusing to allow Community officials to opt for the transfer of the actuarial equivalent in all cases, in accordance with Regulation (EEC, Euratom, ECSC) No 259/68 of the Council

* Language of the Case: French.

of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission (Official Journal, English Special Edition 1968 (I), p. 30),

THE COURT (Second Chamber),

composed of: Lord Mackenzie Stuart, President, G. Bosco, O. Due and G. C. Rodríguez Iglesias (Presidents of Chambers), T. Koopmans, K. Bahlmann, R. Joliet, T. F. O'Higgins and F. Schockweiler, Judges,

Advocate General: G. F. Mancini
Registrar: B. Pastor, Administrator

having regard to the Report for the Hearing and further to the hearing on 19 February 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 7 July 1987,

gives the following

Judgment

1 By application lodged at the Court Registry on 22 October 1985, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that the Grand Duchy of Luxembourg has failed to fulfil its obligations under the EEC Treaty by refusing to allow Community officials to opt for the transfer of the actuarial equivalent of their pension rights in all cases, as provided for by Article 11 (2) of Annex VIII to Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission (hereinafter referred to as 'the Staff Regulations').

2 Article 11 (2) of Annex VIII provides as follows:

'An official who enters the service of the Communities after leaving the service of a government administration or of a national or international organization or of an undertaking shall have the right, on becoming established with [the] Community, to pay to it either:

(i) the actuarial equivalent of retirement pension rights acquired by him in the government administration, national or international organization or undertaking; or

(ii) the sums repaid to him from the pension fund of the government administration, organization or undertaking at the date of his leaving its service.

In such case the institution in which the official serves shall, taking into account his grade on establishment, determine the number of years of pensionable service with which he shall be credited under its own pension scheme in respect of the former period of service, on the basis of the amount of the actuarial equivalent or sums repaid as aforesaid.'

3 Article 18 of the Luxembourg Law of 16 December 1963 on the coordination of pension schemes, as amended by the Law of 14 March 1979 and the Law of 23 May 1984, provides, with regard to successive affiliation first to a contributory and then to a non-contributory scheme, as follows:

'(1) Where a person moves from a contributory scheme to a non-contributory scheme, the contributions paid in respect of the periods of affiliation to the contributory scheme which are to be taken into consideration under the non-contributory scheme shall be transferred to the institution that is to assume responsibility for those sums.

(2) ...

(3) Where a person moves from a Luxembourg contributory pension scheme to a pension scheme of an international institution which provides for the buying-in of pension rights acquired during periods of employment prior to his establishment, the contributions paid to the Luxembourg pension scheme shall be transferred

upon request by the person concerned to the pension scheme of the international institution, together with interest at 4% per annum as from 31 December of each year of affiliation.

(4) The request shall be submitted within one year from the date of establishment, failing which it will not be admitted.

(5) . . .'.

4 Taking the view that Article 11 (2) of Annex VIII to the Staff Regulations confers on Community officials who come from the private sector and who are affiliated to a contributory scheme the right to opt for the transfer of the actuarial equivalent of their pension rights in all cases and that the relevant Luxembourg legislation does not provide for that possibility, the Commission, by a letter of 31 July 1984, gave formal notice to the Government of the Grand Duchy of Luxembourg pursuant to the first paragraph of Article 169 of the EEC Treaty.

5 As the Luxembourg Government did not acknowledge that it had failed to fulfil its obligations, as charged, the Commission addressed a reasoned opinion to that Government on 30 April 1985 pursuant to the first paragraph of Article 169 of the EEC Treaty. Since the Luxembourg Government did not state its position on that reasoned opinion, the Commission brought this action.

6 By orders of 29 April 1986, the French Republic and the United Kingdom were granted leave to intervene in the proceedings in support of the conclusions of the Grand Duchy of Luxembourg.

7 Reference is made to the Report for the Hearing for a fuller account of the facts, the relevant legislation and the conclusions of the parties, which are mentioned hereinafter only in so far as is necessary for the reasoning of the Court.

8 The Commission maintains, in the first place, that Article 11 (2) of Annex VIII to the Staff Regulations imposes an obligation on the Member States to provide not only for the transfer of the sums repaid but also for the transfer of the actuarial equivalent since the latter method of calculation is applied as a rule whilst the first

method has only a subsidiary function. Only the transfer of the actuarial equivalent ensures that an official can transfer to the Community scheme all the rights he has acquired under a national pension scheme.

9 The Commission points out, in the second place, that the national legislation in question places persons insured in Luxembourg who enter the Community administration after being affiliated to a contributory scheme at a disadvantage in relation to insured persons who enter the Luxembourg civil service since the national legislation permits, in the latter case, the rights acquired under the contributory scheme to be maintained and the career to be re-established in the new employment.

10 The Commission contends that for any pension right, whether vested or contingent, there is an actuarial equivalent which is capable of being calculated under any pension scheme. The actuarial equivalent is the sole method of transfer in the field of pensions which makes it possible, whatever the specific features of a social security scheme, to maintain in full the rights acquired under another scheme.

11 According to the Commission, the impossibility of transferring the actuarial equivalent could have a deterrent effect on the recruitment by the Community institutions of officials affiliated to national pension schemes which do not provide for that method of calculation. Such a consequence would be contrary to the purpose of Article 11 (2) of Annex VIII to the Staff Regulations and would lead to unequal treatment of Community officials.

12 Finally, the Commission considers that the transfer of the sums repaid, as provided for by the Luxembourg legislation, does not take into account the contributions paid by the State. Hence that method of transfer does not correspond to the rights acquired, and operates to the detriment of insured persons affiliated to the contributory scheme.

13 The Government of the Grand Duchy of Luxembourg considers that the option conferred on Community officials by Article 11 (2) of Annex VIII to the Staff Regulations is confined to the possibility of transferring or not transferring pension rights acquired under a national scheme. In its view, that provision does not guarantee officials a choice between the two methods of transfer for which it provides.

14 The Luxembourg Government contends, in addition, that the possibility of opting for the actuarial equivalent was never available to insured persons affiliated to the contributory scheme. Luxembourg law makes no provision for the possibility of transferring pension rights acquired under a contributory scheme on the basis of the actuarial equivalent, which is incompatible with that scheme.

15 The French Government and the United Kingdom also consider that the Commission's arguments take no account of the differences between national pension schemes since the specific features of certain social security systems render the concept of actuarial equivalent inoperative. In the case of pension schemes based on the payment of contributions, the only method which makes it possible to transfer pension rights to another scheme is repayment of contributions.

16 The French Government and the United Kingdom also point out that the concept of vested rights, in the context in question, is not defined anywhere, and consequently there are no grounds for claiming that the actuarial equivalent must be provided for in all cases in order to permit the transfer to the Community pension scheme of rights acquired under a national scheme.

17 As for the question whether Article 11 (2) of Annex VIII to the Staff Regulations requires the Member States to confer on Community officials the right to opt for the transfer of the actuarial equivalent of pension rights in all cases, it should in the first place be borne in mind that the Court pointed out, in its judgment of 20 October 1981 in Case 137/80 *Commission* v *Belgium* [1981] ECR 2393, that, by

establishing for the benefit of officials a system for the transfer of pension rights, the Staff Regulations seek to facilitate movement from national employment, whether public or private, to the Community administration and thus ensure that the Communities have the best possible chance of being able to choose qualified staff who already possess suitable experience.

18 In that judgment, the Court emphasized more specifically that movement to the European civil service must be facilitated by machinery which ensures that Community officials may retain the rights which they have acquired in their own State even though they may be limited, or even conditional or future, or insufficient to give rise to the immediate award of a pension, and also to ensure that account may be taken of those rights by the pension scheme to which the persons concerned are affiliated at the end of their careers, in this case the Community scheme.

19 Since that is the aim pursued by Article 11 (2) of Annex VIII to the Staff Regulations, the Member States are under an obligation to take practical steps to enable officials to exercise the option conferred upon them of transferring the rights acquired under a national scheme to the Community pension scheme.

20 As regards the Commission's argument to the effect that the repayment of contributions is merely subsidiary to the actuarial equivalent, it must be stated that neither the wording of that provision nor its objectives as set out above give precedence to either of those methods of calculation. As the Court held in its judgment of 23 January 1986 in Case 171/84 *Soma* v *Commission* [1986] ECR 185, the purpose of Article 11 (2) of Annex VIII to the Staff Regulations is to ensure the transition from a national insurance scheme to the Community scheme by one of the two procedures to which it refers.

21 In that regard, it must be added that Article 11 (2) of Annex VIII to the Staff Regulations does not presuppose that national pension schemes should be consistent with one another so as to enable the actuarial equivalent to be transferred in all cases. The Community legislature did not intend to harmonize national provisions in the field of public and private pensions which, as these proceedings have clearly shown, are characterized by widely differing features and a high degree of complexity.

22 It follows from the foregoing considerations that, in order to discharge that obligation, the Member States are not required to grant officials the option of choosing between transfer of the actuarial equivalent and transfer of the sums repaid.

23 As for the Commission's argument that that interpretation would lead to unequal treatment of Community officials who were affiliated to different pension schemes, it must be pointed out that the existence of certain differences between pensions that are transferred is not the result of Community law but stems exclusively from divergences between the national schemes which created the rights in question. The Commission's argument cannot therefore be upheld.

24 As for the Commission's second argument, to the effect that the Luxembourg legislation places at a disadvantage insured persons affiliated to a contributory scheme who enter the Community administration, it must be stated that, in cases where the national provisions provide for the mechanism of the actuarial equivalent for the purpose of transferring pension rights to another national scheme, it is appropriate to provide for the same possibility with regard to the transfer of the rights of Community officials. Different treatment would have a deterrent effect on the recruitment by the Communities of nationals of the Member States concerned and would be contrary to the aim of Article 11 (2) of Annex VIII to the Staff Regulations.

25 In that regard, however, it must be stated that the Luxembourg legislation does not in any circumstances give persons affiliated to a contributory scheme the possibility of transferring the actuarial equivalent, as defined by the Court in its judgment of 18 March 1982 in Case 212/81 *Caisse de pension des employés privés* v *Bodson* [1982] ECR 1019, to another Luxembourg scheme. In such a situation, the fact that the repayment of contributions, as provided for by the national provisions, takes no account of the contributions paid by the State is of no account. The Commission's second argument cannot therefore be upheld.

26 It follows from the foregoing considerations that the action brought by the Commission against the Grand Duchy of Luxembourg for failure to fulfil its obligations must be dismissed.

Costs

27 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. As the Commission has been unsuccessful in its submissions, it must be ordered to pay the costs, including those of the interveners.

On those grounds,

THE COURT

hereby:

(1) Dismisses the application;

(2) Orders the applicant to pay the costs, including those of the interveners.

Mackenzie Stuart Bosco Due Rodríguez Iglesias

Koopmans Bahlmann Joliet O'Higgins Schockweiler

Delivered in open court in Luxembourg on 17 December 1987.

P. Heim
Registrar

A. J. Mackenzie Stuart
President