REPORT FOR THE HEARING
delivered in Case 315/85 *

I — Law and facts

Article 11 (2) of Annex VIII to the Staff Regulations provides:

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

(i) the actuarial equivalent of retirement pension rights ac quired 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 institutions in which the official serves shall, taking into account his grade or 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.'

For persons coming from a contributory scheme Article 18 of the Luxembourg Law of 16 December 1963, as amended by Article 7 of the Law of 14 March 1979, provides:

'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.'

Apart from points 1 and 2 of Article 1, which took effect from 1 August 1974, the Law of 14 March 1979 according to Article 8 thereof entered into force on the first day of the month following its publication in the *Mémorial.*

As regards officials of the Luxembourg State who enter the service of the Communities, Article 8 (2) of the Luxembourg Law of 27 August 1977 provides:

'The provisions of paragraph (1) do not exclude application of the provisions in the pension scheme of international institutions which are either directly applicable in the Grand Duchy of Luxembourg or are made applicable by agreements made between the Grand Duchy of Luxembourg and such

* Language of the Case: French.

institutions where the dispositions provide that an official who enters the service of the institutions has an option of paying to the institutions:

(i) either the actuarial equivalent of retirement pension rights acquired by him in the national administration, or

(ii) the sums repaid to him on his leaving.

The official in question may opt for the application of either the provisions of paragraph (1) to the Luxembourg scheme by payment of the refunded contributions in order to restore pension rights) or international institution whose service he entered and which are directly applicable in the Grand Duchy of Luxembourg or application of the aforementioned agreement.'

Since the Commission considered that Article 11 (2) of Annex VIII provides that officials of the Communities coming from the private sector where they come under a contributory scheme should have the right to opt for the transfer of the actuarial equivalent of their pension rights in all cases and that the Luxembourg law does not allow such possibility, by letter dated 31 July 1984 it gave formal notice to the Government of the Grand Duchy of Luxembourg, pursuant to the first paragraph of Article 169 of the EEC Treaty to submit its observations on the Commission's finding of a Treaty infringement on its part.

By letter dated 25 July 1984 the Luxembourg Government replied that it did not share the Commission's view and that the Law of 14 March 1979 satisfied the obligations under Article 11 (2) of Annex VIII of the Staff Regulations.

On 30 April 1985 the Commission delivered, pursuant to the first paragraph of Article 169 of the EEC Treaty, a reasoned opinion charging it with having failed to fulfil its obligations under the Staff Regulations. Since the Luxembourg Government did not state its position on the reasoned opinion, the Commission, by application dated 15 October 1985, brought an action before the Court.

II — Written procedure and conclusions of the parties

The *Commission's* application of 15 October 1985 was registered at the Court Registry on 22 October 1985.

By order of 29 April 1986 the Government of the United Kingdom and the Government of the French Republic were allowed to intervene in support of the defendant's conclusions.

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.

The *Commission* claims that the Court should:

(i) Declare that, by not allowing officials of the Communities to opt for the transfer of the actuarial equivalent in all cases, as provided by Article 11 (2) of

Annex VIII to Regulation No 259/68 of the Council laying down the Staff Regulations, the Grand Duchy of Luxembourg has failed to fulfil an obligation imposed upon it by the Treaties establishing the European Communities;

(ii) Order the Grand Duchy of Luxembourg to pay the costs.

The *Government of the Grand Duchy of Luxembourg* contends that the Court should:

(i) Take note that the defendant leaves it to the Court to determine whether the application made on 15 October 1985 is admissible;

(ii) Declare that the Grand Duchy of Luxembourg has not failed to fulfil its obligations under the EEC Treaty by refusing to allow officials to opt for the transfer of the actuarial equivalent of their pension rights in every case as prescribed by Article 11 (2) of Annex VIII to Regulation No 259/68 of the Council laying down the Staff Regulations;

(iii) Order the Commission of the European Communities to pay the costs.

III — Submissions and arguments of the parties

1. The *Commission*, while pointing to the fundamental differences between the two principles and their results, takes the view that under the scheme of the Staff Regulations transfer of the actuarial equivalent is the rule and repayment of contributions is only a special procedure which operates as a safety net. The actuarial equivalent is the only technique for transferring pension rights which guarantees to the official the transfer of his vested rights. On the other hand, repayment of contributions applies only to persons who leave a pension scheme before they have acquired pension rights. Repayment of contributions is far from corresponding always to the pension rights acquired. For example, in the case of a scheme which is adjusted to take account of the increase in income as a result of length of service and which bases the calculation of benefits on the most recent salary, pension rights necessarily differ from the contributions paid at the beginning of the career. As regards the Caisse luxembourgeoise de pension des employés privés (Luxembourg pension fund for private employees, hereinafter referred to as 'the Caisse luxembourgeoise') contributions would not cover the part of the rights acquired which are financed from other sources such as contributions by the State. In the case of the Grand Duchy of Luxembourg the State and the authorities are responsible for financing the basic pension, adjustment to the general level of salaries, special 'increases' and 'minimum pension' supplements (irrelevant in the present case). According to the Law of 23 May 1984 one-third of contributions is financed by the State.

In the Commission's view the term 'buying-in of pension rights' traditionally covers the case of a person who wishes to benefit from the possibility of the re-establishment of his career with the new

institution to which he is affiliated by the payment-in of 'sums repaid' calculated by that institution generally in the form of a lump-sum repayment of contributions. That is the scheme of the Luxembourg Law of 27 August 1977 which governs the case of an international official who rejoins the service of the Luxembourg State. The same law also allows the payment-in of 'sums repaid' to enable officials to continue their insurance should they so desire. In such cases the inadequacy of the contributions paid is borne by the community at large. On the other hand, under the European Community scheme which is based on the principle of an actuarial balance, benefits are based only on actual tranfers. If compensation for acquired rights is provided by national law for a person leaving a scheme, it would be discriminatory to deprive the European official of that option on the sole ground that he is a European official.

The Commission also cites the principle of equality of burdens between the Member States which implies that all should in any event provide for the possibility of the transfer of the actuarial equivalent. Should such a transfer not have been possible, the official would be entitled to have his pension rights fully re-established out of the budget of the Community.

In support of its opinion the Commission refers to the case-law of the Court and to the position which it has adopted in the negotiations which it had conducted at the beginning of 1983 with the Member States, but does not claim that the Court has already resolved the problem at issue.

In the Commission's view the Luxembourg scheme discriminates between a Luxembourg insured person coming from a contributory scheme who enters the service of the Communities and the same person who joins the Luxembourg civil service since the latter not only allows the rights to be maintained but ensures that the career is re-established in the new employment. TheCommission thus denies that the Luxembourg legislation confers any substantial advantage on international officials in relation to ordinary insured persons.

The Commission considers moreover that the concept of actuarial equivalent applies to any scheme of financing, including that of an institution subject to a public scheme to which the State contributes the major part financially.

As regards the fact that it has brought an action for failure to fulfil obligations while the question at issue is still pending before the Court in the form of a request for a preliminary ruling (Judgment of 4 May 1988 in Case 64/85 *Watgen*, not yet published) the Commission says that the action for failure to fulfil obligations has its own objective and is thus admissible.

The *Government of the Grand Duchy of Luxembourg* first of all queries the expedience of an action for failure to fulfil obligations while the question in issue is already the subject of proceedings before the Court. While stressing that it will not fail to comply with any decision of the

Court in the case the Luxembourg Government leaves to the Court the matter of the admissibility of the application.

On the substance of the case the Luxembourg Government contends that according to Article 11 (2) of Annex VIII to the Staff Regulations and the case-law of the Court the option given to officials is confined to the possibility of transferring pension rights and does not extend to the *manner* of their calculation which is a matter for the national legislature.

With regard more particularly to the Luxembourg legislation, the Government states that Article 7 of the Law of 14 March 1979 gives persons who leave the Luxembourg pension scheme for international employment the choice between maintaining their rights and the transfer to the international institution of the contribution paid. The transfer includes all the contributions, namely both from the insured and from the employer. In addition, interest at 4% on the sum transferred is paid by the institution liable. International officials are thereby placed at an advantage over ordinary insured persons since the latter, after completing a qualifying period of 30 months, are entitled to repayment only of half the contributions paid and without interest. There is no possibility under Luxembourg law of opting for the actuarial equivalent, since that concept is unknown to it.

The Luxembourg Government points out furthermore that the Law of 23 May 1984 reformed the system of financing contributory pension schemes by adopting the principle of distribution and abolishing that of capitalization. According to the principle of distribution, the pension benefits of current recipients are paid by the contributions of future recipients. It would be incompatible with that system for the financial situation of the pensions institution in point to be burdened immediately by rights which can be liquidated forthwith.

The Luxembourg Government examines the case-law of the Court and concludes that it has not yet settled the question at issue. The Luxembourg Government denies that there is any discrimination against European officials in relation to insured persons joining the Luxembourg civil service; contributions are transferrred in both cases under Article 18 of the Law of 16 December 1963 and accordingly there is identical treatment of the insured person who leaves the contributory scheme. If there is any discrimination against the Community official it is attributable solely to the scheme which he enters.

The Luxembourg Government observes finally that since the reform of the financing of pensions insurance by the Law of 23 May 1984 the authorities no longer help with benefits but solely in respect of contributions. The Commission has thus proceeded from false premises and has drawn the wrong conclusions.

The *Government of the French Republic*, intervening in support of the conclusions of

the defendant, also considers that the Commission's view that transfer of the actuarial equivalent is always possible is not justified and it takes no account of the diversity of national pension schemes. In particular, in a *distributory* scheme such as that in force in France, the notion of actuarial equivalent or vested rights to a specific amount of benefits is virtually meaningless. Under such a scheme those concerned have rights only to distribution of a fund available when they retire on the basis of all the contributions paid by those engaged in an occupational activity at the time. Thus their actual contributions serve only to determine the proportion of drawing rights they may have in regard to the fund. In consequence, in the absence of an actuarial equivalent or vested rights, transfer can take place only on a 'sums repaid' basis.

The French Government therefore agrees with the Luxembourg Government that Article 11 (2) of Annex VIII to the Staff Regulations must be interpreted as meaning that it gives those concerned the option of transferring their pension rights to the pension scheme of the Communities but does not give them the right to choose between the two methods of calculation. It is a matter for the national pensions legislation to determine the method according to which the transfer should take place.

The *United Kingdom* agrees with that view. It observes first of all that Article 11 (2) is concerned only with occupational pension schemes. It therefore does not concern general social security schemes which provide for the payment of old-age pensions, unemployment benefit, sickness benefit and social security benefits. The proceedings are thus not concerned with the national general social security scheme of the United Kingdom. The United Kingdom therefore asks the Court to avoid any too general declaration which might give the impression that Article 11 (2) applies in a general way to all national insurance schemes independently of their nature and restrict its decision in the present case to occupational pension schemes. At the same time it stresses the importance in the United Kingdom of such schemes of which there are a number of different varieties with different characteristics. After analysing in detail the most important schemes applicable in its territory the United Kingdom concludes that with regard to *final salary schemes,* although it would be possible to determine the actuarial equivalent it would be impossible to calculate the 'sums repaid' as defined by the Court in its case-law. On the other hand, in money-purchase schemes there is no actuarial equivalent although it would be possible to determine the amount of contributions. For that reason it is impossible *ratione materiae* to adopt the transfer of the actuarial equivalent as a general rule. To give the person concerned an option to take the actuarial equivalent would mean giving him an advantage for

which he has not paid and for which his fellow members of the scheme he is leaving will have to pay. That advantage, moreover, could not be confined to officials entering the employment of a Community institution but would have to be extended to all other officials.

In analysing the wording of the provision at issue and the case-law of the Court the United Kingdom observes that to satisfy the criterion laid down by the Court in its case-law (judgment of 23 January 1986 in Case 171/84 *Soma* v *Commission* [1986] ECR 173), namely 'to guarantee the transition from a national insurance scheme to the Community scheme' it is sufficient that the official should have at least one of the two methods available to him without necessarily having the right to choose between them. That approach is perfectly in accord with the diversity of methods adopted in the Member States in relation to retirement pensions based on different techniques of contribution to a pension fund. The United Kingdom states that the actuarial equivalent may be transferred in all cases of vested rights to pension where their amount can be determined and the pension is due to be paid subsequently according to the national law. On the other hand, if the pension bears no relation to the salary or if its amount cannot be determined for any other reason so that it is impossible to calculate the actuarial equivalent, there is no vested right which may be transferred on that basis.

The United Kingdom considers that the real objective of the Commission is to amend the provision at issue which is not for the Court to do but for the Council after considering the various practical difficulties which arise. In any event, if the 'right of choice', which the Commission desires, were systematically applied throughout the United Kingdom, it would involve extremely serious consequences.

Finally, the United Kingdom contends that neither the transfer of the actuarial equivalent nor payment of 'sums repaid' could in themselves ensure transfer of the vested rights of the person concerned in the absence of appropriate provisions in the Staff Regulations. To do so it would be necessary to credit him with an equal number of years of pensionable service, irrespective of the actual value of the transfer payment. It is however clear from Article 11 (2) that the Community has no such obligation. For the rest, the United Kingdom stresses that no Community official should be granted by the Court such a right simply because he is a European official in view of the principle of reciprocity which is of fundamental importance in the development of the case-law of the Court.

K. Bahlmann
Judge-Rapporteur