OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 11 OCTOBER 1979 [1]

Mr President,
Members of the Court,

1. The present action concerns the conditions for the application of the weighting to the pension paid by the Communities and in particular the criteria whereby, pursuant to Article 82 of the Staff Regulations of Officials, that weighting is to be calculated.

Mr Michaelis, who was an official of the Communities from 1953, was retired in the interests of the service within the meaning of Article 50 of the Staff Regulations by a decision of the Commission of 3 February 1971. His right to a pension with effect from 1 September 1974 was subsequently recognized. The Directorate General for Personnel informed him of all the factors to be taken into account in calculating the pension and sent him a questionnaire to complete, which he returned on 1 August 1974. In that questionnaire he stated *inter alia* that his place of residence was the town of Vallendar in the Federal Republic and he declared for the purposes of determining the appropriate weighting that he wished to establish his home there, requesting that his pension be paid in German marks into his current post office account in Cologne. In that questionnaire the applicant stated immediately after the declaration concerning his home address that the exact time (when the said choice was to take effect) was under discussion with the Director of Personnel.

On 5 September 1974 the Commission communicated to the applicant a detailed statement of the calculation of the pension in which it informed him (p. 3 at no. 7) that it had applied the weighting for the Federal Republic.

In a letter to the Personnel Directorate of 11 September 1977 Mr Michaelis stated that he had postponed making his home in the Federal Republic for the time being and that he was retaining his home in Brussels; accordingly, he requested that the weighting for Belgium be applied to his pension from the ourtset, that is from 1 September 1974. In a letter of 26 September 1977 he continued to uphold his point of view as to the date from which the weighting was to apply. The Personnel Directorate ultimately applied the Belgian weighting with retroactive effect; it did so however with effect only from 1 January 1977 in view of the fact that in a declaration of 29 January 1977 the applicant had stated for the first time that his home was in Brussels.

Mr Michaelis lodged a complaint, pursuant to Article 90 of the Staff Regulations, against that decision on the ground that the Belgian weighting had not been applied to his pension for the period from 1 September 1974 to 31 December 1976. The Commission rejected his complaint in a letter from the Commissioner, Mr Tugendhat, of

1 — Translated from the Italian.

12 July 1978. The applicant lodged an application at the Court Registry on 2 October 1978 against that decision adversely affecting him.

2. The defendant institution raised a preliminary objection to the effect that the application was inadmissible because it failed to relate in summary form "the ground on which [it] is based" and was thereby in breach of the provisions of Article 38 (1) (c) of the Rules of Procedure. That objection is nevertheless unfounded.

First of all it cannot be said that the application fails to set out the grounds upon which it is based. It is clear from the wording of the application that the person concerned claims that the Commission has infringed Article 82 of the Staff Regulations in which it is provided *inter alia* that pensions shall have the weighting appropriate to the country of the Communities where the person entitled to the pension declares his home to be. This point is set out fully in paragraphs 8 to 24 of the application and is repeated in paragraph 41, in which reference is expressly made to Article 82 of the Staff Regulations. Furthermore it is settled that, in accordance with the case-law of the Court of Justice, the requirements of Article 38 (1) (c) of the Rules of Procedure must be considered fulfilled where the application is drafted in such a way that the essential features of the grounds on which it is based can be clearly discerned and it is possible to distinguish the provisions on which the action is founded (for this view as last formulated see the judgment of 14 May 1975 in Case 74/74 *CNTA* v *Commission* [1975] ECR 533).

3. The admissibility of the application is also contested on the ground of irregularity in the prior administrative complaint. As the Court is aware, under the first indent of Article 91 (2) of the Staff Regulations, an appeal is admissible if "the appointing authority has previously had a complaint submitted to it pursuant to Article 90 (2) *within the period prescribed therein* ...". In the present case the Commission argued in its letter of 12 July 1978 whereby it rejected the request of Mr Michaelis for the application *ex tunc* of the Belgian weighting that the complaint *was out of time.* The Commission observed in this connexion that the decision concerning Mr Michaelis's pension was notified to him on 5 September 1974 and that it was then stated that the pension had been calculated on the basis of the weighting for Germany. Accordingly the complaint should have been submitted within the period of three months from that date and not after a period of three years or more.

That argument of the defendant appears to me reasonable and well founded; in fact Mr Michaelis was informed on 5 September 1974 of the fact that the institution had taken as his "declared home", for the purposes of determining the appropriate weighting, Vallendar in the Federal Republic, which was indicated in the declaration made by the applicant on 1 August 1974. It is true that it is the administration's practice to set out the essential criteria for the calculation of the pension in the explanatory note which accompanies the monthly payment so that it might be argued that the complaint was in time if it is related to the last explanation notified to the applicant one month earlier. However, that view may easily be countered by the argument that explanations of the salaries or pensions usually repeat what was stated in the measure first determining (or perhaps subsequently

modifying) the amount thereof. If, therefore, it is borne in mind that, according to the case-law of the Court of Justice, purely "confirmatory" measures cannot form the subject-matter of independent proceedings it seems necessary to rule out in the present case the possibility that the statement of pension, which did not contain any new details concerning the weighting in relation to the decision of 5 September 1974, could constitute the measure against which the complaint was submitted. In this connexion I would recall the judgment of the Court of Justice of 21 February 1974 in Joined Cases 15 to 33, 52, 53, 57 to 109, 116, 117, 123, 132 and 135 to 137/73, *Schots (née Kortner) and Others* v *Council and Commission of the European Communities and the European Parliament* [1974] ECR 177; that case was concerned to establish whether, for the purposes of a complaint against the refusal of the administration to grant an expatriation allowance, the period could be taken to run from the date when the salary statement was sent. The Court answered in the affirmative, on condition that "it [the salary statement] clearly shows the decision taken" (paragraphs 18 and 19 of the decision) and that the person concerned had not been previously informed of the decision. In the present case it is precisely that latter situation which obtains: shortly after his retirement the applicant was in fact notified of the decision of the administration in which, *inter alia,* the weighting was calculated, so that the subsequent statements of pension merely repeated that initial decision.

The applicant relies on procedural arguments to challenge the relevance of the point whether or not the administrative complaint was lodged in time. He objects that the defendant institution failed to raise that objection in its defence, as is required by Article 40 (1) of the Rules of Procedure, and introduced it for the first time in its rejoinder; accordingly the ground in question is said to be inadmissible.

I consider this argument to be unfounded. It is to be doubted from the outset whether the objection based on the alleged lateness of the complaint may be classified as a "fresh issue" within the meaning of Article 42 (2) of the Rules of Procedure since it concerns a matter which appears in the letter rejecting the complaint; the applicant moreover indulges in the application in lengthy consideration of the question whether the complaint was submitted in time precisely in relation to what was stated in this connexion in the administrative decision rejecting it. However, apart from the foregoing, it must be emphasized that it is a condition of admissibility of an application to the Court that the administrative complaint should have been submitted in good time and that, according to the case-law of the Court of Justice, "the admissibility of the proceedings must be examined by the Court of its own motion" (cf. judgment of 17 March 1976 in Joined Cases 67 to 85/75 *Lesieur Cotelle et Associés S.A. and Others* [1976] ECR 391 at paragraph 12 of the decision). In my view there is no doubt that that principle may be relied upon in the present case: in fact the provision prescribing a time-limit before which the complaint must be submitted protects the general interest in the certainty of legal relationships between the staff and the administration and that interest of necessity may not be affected by the parties. If that consideration is, as I think, correct there is no question of relying on Article 40 (1) of the Rules of Procedure in relation to the first sub-paragraph of Article 42 (2) thereof: those provisions, which prohibit the raising of fresh issues in the course of

proceedings, manifestly relate to claims which the parties are entitled to make of their own volition and accordingly fix time-limits which are intended primarily to ensure that the procedure is fair and that each party has a proper opportunity to meet the arguments of his opponent; on the other hand, appraisal of the admissibility of applications to the Court, which must be considered by the Court of its own motion, cannot be precluded through the application of time-limits.

In my view, then, it must be found that the complaint was submitted out of time and that accordingly Mr Michaelis's application is inadmissible since it is in breach of the first indent of Article 91 (2) of the Staff Regulations.

4. Counsel for the applicant endeavours to have the action dealt with under Article 41 of Annex VIII to the Staff Regulations; this endeavour is also intended to overcome the procedural obstacle constituted by the objection that the application is inadmissible, which I have discussed earlier.

The said Article 41 provides in its first paragraph that "the amount of pension may at any time be calculated afresh if there has been error or omission of any kind" and continues in the second paragraph that it "shall be liable to modification or withdrawal if the award was contrary to the provisions of the Staff Regulations or of this Annex". According to the applicant that provision enables the person entitled to the pension to claim at any time, irrespective of any time-limit, the review and modification of the pension with unrestricted retroactive effect. It is clear that if this were so, the question concerning admissibility would have to be answered in the affirmative.

It does not appear to me, however, that Article 41 may be interpreted as the applicant maintains. It merely confers upon the institutions power at any time to review, modify or withdraw pensions ("if there has been error or omission of any kind" or where such pensions were awarded contrary to the relevant provisions). In this connexion it should be emphasized that the institution paying the pension is not obliged to remedy the matter immediately when it discovers an error or notes that the calculation is contrary to the provisions of the Staff Regulations; that is clear from the use of the words "may" and "shall be liable to" which are employed in both the first and second paragraphs of Article 41, from which it may be inferred that all decisions in the matter invariably come within the discretion of the administration. If that is what the provision means I think it must be excluded from the category of measures concerned in particular to protect the interests of individuals. Persons entitled to pensions who have grounds for complaint based on errors in the calculation of payments made to them must, in my view, rely on the general remedies, through administrative or judicial proceedings, provided for in Articles 90 and 91 of the Staff Regulations. It does not appear to me that Article 41 may be relied upon as a ground for an application distinct from and concurrent with the usual grounds of appeal governed by Title VII of the Staff Regulations.

It is clear that there is nothing to prevent the person entitled to a pension from notifying errors, omissions or unlawful matters to the administration if he considers it proper in order to request the administration to exercise its power under Article 41 to rectify the error or

situation contrary to the provisions. However, such notification or request is clearly distinct from a complaint or an application to the Court. On the one hand, in fact, the administrative complaint provided for in Article 90 (2) of Staff Regulations of Officials constitutes a step which it is necessary to take prior to an appeal to the Court under Article 91 (2) and cannot be replaced by a notification or request in connexion with Article 41. On the other hand, I have already pointed out that the administration is not obliged to exercise the power conferred upon it by Article 41 and likewise is not therefore obliged to state its views on any such notification or request. At the most an act of this nature could be related to the request to take a decision submitted to the appointing authority under Article 90 (1); however, it is evident that a proper complaint must be submitted to contest the rejection of such a request, as the said Article 90 (1) shows. Accordingly Article 41, far from providing grounds of appeal other than the ordinary grounds, merely permits the submission of a request which must be followed by the ordinary complaints procedure.

5. In order to sustain his argument concerning the special nature of the procedure said to be based on Article 41 the applicant relies on three arguments, none of which however, in my view, should be upheld.

The first argument is drawn from the wording of Article 41: since that provision confers power almost without restriction to calculate the pension afresh or modify it, it must be possible for an individual to request such recalculation or modification by informing the administration of an error, omission or breach of the Staff Regulations. I have already considered that argument and concluded that it cannot provide support for the view that the provision in question sets up a special procedure without temporal restrictions of any kind. As I have observed, when the calculation of the pension is contrary to the provisions of the Staff Regulations the remedies which are actually open to the person concerned remain those ordinary procedures referred to in Articles 90 and 91 with all their concomitant limitations including those with regard to time.

The second argument which the applicant puts forward, on the basis of Article 42 of Annex VIII, is equally unsound. Article 42 provides that the persons entitled under a deceased official must apply for the calculation of their pension within one year from the date of his death or lose their entitlement; on the basis of the foregoing, so it is said, it may be inferred by inverse logic that no limit of this nature applies to the pensioned official. It appears to me however that Article 42 has a specific and restricted purpose and has nothing to do with the procedures made available by the Staff Regulations to persons entitled under a deceased official for the protection of their interests against the administration.

The applicant in his third argument refers to Article 85 of the Staff Regulations which relates — as the title of Chapter 4 itself shows — to the "recovery of undue payment". It provides that "Any sum overpaid shall be recovered if the recipient was aware that there was no due reason for the payment or if the fact of the overpayment was patently such that he could not have

been unaware of it". In Mr Michaelis's submission it would be contradictory if the provisions of the Staff Regulations permitted the administration to recover, without limits as to time, sums improperly received by officials but prevented the latter from applying a procedure likewise unrestricted by time-limits in order to obtain a recalculation or modification *ex tunc* in their favour of a pension. In order to avoid such a contradiction Article 41 must be interpreted as a provision establishing a special procedure which may be initiated by the individual without restriction as to time.

This reasoning is open to criticism. It is in fact impossible to concur in the view that sums improperly paid to officials may be recovered at any time pursuant to Article 85. It is inappropriate to consider the problem of the rules on limitation with regard to debts as between Community institutions and their officials but I shall merely observe that in many national systems of law debts resulting from undue payments to be recovered from public servants are treated in the same way as other debts with regard to the period of time within which they may be claimed. This seems to be reasonable and in accordance with the principle of legal certainty. If, accordingly, the absence of a time-bar with regard to the debts of officials in favour of the administration is excluded the basis for the applicant's argument is removed and it appears logical and not contradictory that there should be a time-bar to the claims of individuals for the recalculation or amendment of the pension with retroactive effect. The consideration that there is a presumption in favour of the administration that its conduct is lawful appears to me to justify the existence of different periods of limitation open to pensioned officials on the one hand and to the administration on the other. However, Article 85 introduces, for the benefit of an official who has acted in good faith, appreciable restrictions on the recovery of debts by the administration, laying down that such recovery can take place only "if the recipient [of the sum over-paid] was aware that there was no due reason for the payment or if the fact of the over-payment was patently such that he could not have been unaware of it".

6. The foregoing considerations confirm the inadmissibility of the application since it is contrary to the first indent of Article 91 (2) of the Staff Regulations. Nevertheless I consider it appropriate also to review the substance of the case which was argued at length in the course of the procedure.

The action is intended to establish in substance whether the Commission infringed Article 82 of the Staff Regulations when it applied the weighting for the Federal Republic to the pension of Mr Michaelis. The applicant complains that the Commission considered that his "declared home" was the Federal Republic although he has not made a declaration to that effect.

In summarizing the facts at the beginning of my opinion I recalled that the Commission requested Mr Michaelis to complete a questionnaire containing

the details necessary for determining his entitlement. The letter accompanying the questionnaire stated *inter alia* in paragraph II that, according to the provisions of the second subparagraph of Article 82 (1) of the Staff Regulations pensions shall be calculated with reference to the weighting fixed "for the country of the Communities where the person entitled to the pension declares his home to be". The applicant completed the questionnaire and stated that he was resident in Vallendar, in the Federal Republic, and declared that he chose that town as his home. However, instead of stating from what time his choice took effect (as was requested in the form) he added the following sentence "the exact time ... is under discussion with the Director of Personnel ..." Subsequently, the administration notified the applicant, on 5 September 1974, of the decision whereby it set out the factors taken as the basis for calculating the pension: amongst those factors mention was made (at point 7) of the weighting fixed for the Federal Republic, for the purposes of Article 82 of the Staff Regulations. Thereafter, until 1977, the Commission invariably paid the applicant the pension calculated in accordance with the weighting for the Federal Republic.

In that state of affairs it appears to me beyond dispute that the applicant made the declaration concerning his home for the purposes of establishing the weighting in accordance with the instructions provided by the Personnel Directorate in pursuance of Article 82 of the Staff Regulations. I do not consider it relevant in this connexion that the person concerned did not state *the time from which* his choice of home took effect. In fact the reference to the discussion then in progress with the Personnel Directorate was in no way connected with the problem of the weighting and even the applicant did not consider that it was. The applicant was probably prompted to make that reference by a desire to prevent the information given by him with regard to the pension from affecting the outcome of another dispute which had been outstanding (from 1974) for some time with the administration concerning the grant of a resettlement allowance.

Accordingly for the purposes of determining the appropriate weighting the applicant's declaration of his home was final; it follows from this that the behaviour of the administration, in employing the German weighting for its calculations, is not open to complaint.

7. According to the applicant there has been a further breach of Article 82 of the Staff Regulations: the Commission is said to have applied to the pension the weighting for Germany even though it knew that the applicant had never transferred his home from Brussels to Vallendar.

In my view this complaint disregards the clear wording of the second subparagraph of Article 82 (1) of the Staff Regulations. As the Court is aware that prohibition lays down that pensions shall be weighted in the manner provided for the country of the Communities "where the person entitled to the pension declares his home to be". The wording employed ("... declares his home to be") shows that the Community legislature intended in this matter to give precedence to the choice of the person concerned. That tendency is in

accordance with other provisions on pensions contained in Annex VIII; reference may be made to the third paragraph of Article 45 which provides that "beneficiaries may elect to have their pensions paid in the currency either of their country of origin or of their country of residence or of the country where the institution to which the official belonged has its seat". I would add that Article 82 (1) is all the more logical in that it is not unusual for a person entitled to a pension to continue to maintain his home in the city where he worked as a Community official and at the same time to maintain another house in the country which is the scene of his new activities: this is precisely what happened in the present case. In a situation of this nature it is entirely proper that the choice of the home which is relevant for these purposes should be made by the person concerned.

Nevertheless I do not wish to go so far as to maintain that the declaration of the person concerned for the purposes of Article 82 continues to be decisive in determining the weighting even where the objective situation is at variance with the declaration when, that is, the person concerned has not established his home in the country stated. In fact Article 43 requires persons entitled to a pension to furnish such written proof as may be required and to "inform the institution ... of any facts liable to affect their entitlement". There are accordingly two possibilities: either the person entitled to a pension provides such information or the administration learns by other means that his home is not in the place stated. The administration is in a position to act if, and from the moment when, such information is provided; in that case it appears reasonable to recognize, having regard to the obligation imposed on individuals, a duty on the administration to act on the basis of such information, all the more so since fresh information regarding the home amounts to a new statement of choice. However, and precisely for that reason, the new information must have effect solely *ex nunc;* if this were not so it would cancel the effect of the first declaration and would mean that the person entitled to a pension has an unrestricted right to obtain a review of the weighting initially fixed for him. Whilst, on the other hand, in the absence of such information, the administration is required to establish a discrepancy between the declaration of the person entitled to the pension and the actual situation, it is always empowered under Article 41 of the annex to the Staff Regulations to calculate the pension afresh, but in implementation of that discretionary power which, as I have stated, is conferred on it within the framework of Article 41.

The above remarks serve to clarify the provisions in view of which the applicant's complaints must be considered. In substance my view is that when the administration has learnt indirectly of the fact that the actual home of the person entitled to a pension is not in accordance with his declaration it is empowered but not obliged to make the necessary adjustments and any delay or omission in this matter does not give grounds for complaint by the person concerned. The latter, in addition to the ordinary grounds for an application, can only call for the weighting to be calculated afresh *ex nunc* by informing the institution, in pursuance of Article 43, that he has established his home in a different country.

It may nevertheless be doubted that in the present case the administration had knowledge of the fact that the applicant

had his home in Belgium rather than the Federal Republic. The essential argument advanced to establish that it had that knowledge is as follows: the Commission, by a decision of 20 June 1974, rejected Mr Michaelis's request for the resettlement allowance (referred to in Article 6 of Annex VII to the Staff Regulations) on the ground of his failure to provide due evidence that he had settled with his family in the Federal Republic; furthermore, the Director of Personnel stated in the said decision that the applicant was still resident in Brussels. This argument assumes that the conditions for granting the resettlement allowance are identical with those for fixing the weighting; this view cannot be upheld. Whilst, as we have seen, Article 82 of the Staff Regulations in fact takes the *declaration of the person concerned* that he has established his home in a certain country as the basis for fixing the weighting, Article 6 of Annex VII makes the grant of the allowance conditional on actual removal from the place where the official was employed to a different place and indeed paragraph (4) provides that the allowance "shall be paid against evidence that the official and his family ... have resettled" at a place other than that where the official was employed. There is accordingly no contradiction between a decision of the administration taking the view that insufficient evidence has been provided of the resettlement of the family and the conduct of such administration which persists in considering relevant, for the purposes of determining the weighting, a previous declaration as to the location of the home even if such declaration refers to the same place where the person entitled to a pension claimed he had resettled with his family, albeit he was unable to prove it. The consideration which was set out above concerning the possibility of there being two places of residence, only one of which is the family home, applies to this case. Accordingly it does not seem to me possible to state on the basis indicated above that in the present case the administration could be *sure* that the applicant's declaration concerning his home did not correspond to the actual situation.

The other evidence adduced by the applicant for his view that the administration was always aware that he had not in fact removed from Belgium does not persuade me to depart from the conclusions I have now reached. The declaration which the applicant made to the Commission on 26 January 1976 concerning his family situation is not very persuasive; in fact it contained two addresses, one in Brussels and another in Vallendar, and thus manifestly could not clarify the situation. Only the later declaration of 29 January 1977, which contained only the Brussels address, put an end to the ambiguity. The Commission was thus justified in taking it into account and applying the Belgian weighting with retroactive effect from 1 January 1977. Similarly, it does not seem to me of particular significance that the applicant worked for the Commission as an adviser almost without interruption from 29 September 1971 to 31 October 1976 with the task of making a study of European policy concerning supplies of raw materials. Indeed it is not clear that that task required him to stay throughout in Brussels. On the other hand, in the

same period the applicant, having claimed the resettlement allowance, submitted to the Commission two residence certificates issued by the police authorities of Vallendar dated 7 October 1971 and 27 March 1974 respectively (cf. the Commission's rejoinder, p. 4). It should finally be recalled that Mr Michaelis has for some time occupied a teaching post at the University of Cologne, in which city the pension is paid to him.

8. In the alternative the applicant maintains that the administation, by applying the German instead of the Belgian weighting to his pension, has unjustifiedly enriched itself at his expense. He therefore claims on this ground a sum equal to the balance which has been underpaid (and improperly retained by the Commission) during the period from 1 September 1974 to 31 December 1976.

In my view this request cannot be upheld. Even if it is conceded that proceedings for unjustified enrichment may in certain cases be brought against the institutions (the point is doubtful) the applicant must still overcome the obstacle which arises from the fact that such an action is usually regarded as being subsidiary in nature. It is indeed well known that it can be employed only in the absence of other possible remedies. It is clear that in these proceedings the applicant could protect his own interests by the ordinary appeals provided for in Articles 90 and 91 of the Staff Regulations and accordingly the essential precondition for the plea of unjustified enrichment is lacking.

9. I am therefore of the opinion that the Court of Justice should rule that the action instituted against the Commission by Mr Michaelis by an application dated 2 October 1978 is inadmissible or at least unfounded. In view of the nature of the proceedings the parties should bear their own costs.