OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 11 December 1985 *

Mr President,
Members of the Court,

1. Dr Maria Sommerlatte is a retired official of the Commission of the European Communities who as such is paid a Community pension from which 1.35% is deducted as her contribution to the Community sickness fund. In addition, she is entitled to a German old-age pension by virtue of her occupation before taking up her duties at the Commission. As she is therefore covered by a German sickness insurance scheme she pays 6.05% of that pension as a contribution to the Barmer Ersatzkrankenkasse, hereinafter referred to 'the German fund').

Until 31 December 1982 the German contributions to a compulsory sickness insurance scheme were calculated exclusively on the income from the German pension fund. That position was changed by the amendment, pursuant to the Gesetz über die Anpassung der Renten der gesetzlichen Rentenversicherung im Jahr 1982 [Law on the adjustment of statutory pensions for 1982] of 4 December 1981, of Paragraph 180 of the Reichsversicherungsordnung [Law on sickness insurance] which, with effect from 1 January 1983, extended the liability to pay a contribution, *inter alia*, to pensions paid by 'an international or supranational organization'.

For German pensioners like Dr Sommerlatte, that change means that the basis for the calculation of the contribution to a German compulsory sickness insurance scheme is extended to their income from the Community pension fund, which is henceforth also subject to the German contribution of 6.05% in addition to the aforementioned contribution of 1.35%.

However, the Law of 4 December 1981 provides that any person who is subject to the compulsory insurance scheme may be exempted from that obligation, and may thus avoid having his Community pension made subject to two contributions, if he produces evidence that he is insured with another fund. The application for exemption 'must be addressed to the relevant fund by 31 March 1983' (Paragraph 534 of the Reichsversicherungsordnung).

2. On 2 March 1983, pursuant to the aforementioned provisions, the German fund calculated Dr Sommerlatte's contribution on the basis of her income from the Community pension fund, the amount of which she had disclosed to the German fund at its request. Consequently, from 1 January 1983 Mrs Sommerlatte has been obliged to pay a supplementary contribution of approximately DM 140 per month.

Dr Sommerlatte states that she became aware of the change only at the beginning of April through the 28 March 1983 issue of the Staff Courrier concerning the details of the aforementioned legislative amendments and was unable to take advantage of the possibility of exemption provided for by the German legislation within the statutory time-limit of three months. In those circumstances Dr Sommerlatte applied to the Commission on 27 August 1983 under Article 90 (1) of the Staff Regulations of Officials for payment of financial compensation to cover the resulting increase in her contributions.

That application was rejected by the Commission. On 6 October 1983 the

* Translated from the French.

Commission sent her a certificate attesting that she was affiliated to the Communities sickness insurance scheme and on 29 November 1983 she applied to the German fund for exemption from the German scheme. Her application was rejected by the fund on the ground that it was made out of time.

By this application objecting to the Commission's rejection of her complaint of 24 December 1983, the applicant therefore seeks a declaration that the Commission was at fault in failing to enable her to exercise in good time the option of disaffiliation provided for by the German legislation and that it must make good the resulting damage from which she is still suffering.

In order to consider the applicant's arguments they must be set in the framework of the relationship between the Commission and officials in the same position as the applicant.

3. It is clear from the documents before the Court that since July 1982 the Commission has been dealing with problems raised by the German legislation at the behest of the Ex-Officials Association and of certain pensioners.

Initially the Commission advised the persons concerned, by a standard letter dated 17 November 1982, not to declare the amount of the Community pension to any German sickness insurance fund requesting the information. In that letter it stated that 'pensions paid by the European Communities are exempt from any national tax, direct or indirect, similar to the tax levied by the Community on the same sources of income' and referred, in that connection, to the second paragraph of Article 13 of the Protocol on the Privileges and Immunities of the European Communities according to which officials and other servants of the Communities

'shall be exempt from national taxes on salaries, wages and emoluments paid by the Communities'.

The Commission requested the German authorities to alter their position. In reply, however, they referred to the Court's judgment of 25 February 1969 in Case 23/68 *Klomp* v *Inspektie der Belastingen* [1969] ECR 43, according to which, with regard to the aforementioned exemption,

'it is proper to distinguish between a tax intended to provide for the general expenses of public authorities and a contribution intended to finance a social security scheme, even if such a contribution is levied in a manner resembling the levying of taxes. Accordingly when such a contribution is assessed on the basis of the income of the person concerned there is no objection to salaries and emoluments paid by the Community being taken into account in determining the basis of assessment' (paragraphs 20 and 21 of the decision).

In reliance on that judgment, the German authorities confirmed to the Commission the obligation on the part of Community pensioners contributing to a sickness insurance scheme to declare, on pain of penalties, their Community pension or to apply to their fund for disaffiliation.

On its being informed of that position on 1 March 1983, the Commission therefore sent a further standard letter dated 16 March 1983 to those persons in receipt of a Community pension who had notified it of their interest in the matter, in which it referred to the aforementioned provisions of the German legislation and advised them either to disaffiliate from the German scheme or to declare their Community pension. For those purposes a certificate attesting the pensioner's affiliation to the Community sickness insurance scheme was annexed to the letter.

4. In that context the applicant complains that the Commission

misled the German pensioners by adopting successively two contradictory positions;

after it had changed its opinion, failed to inform the applicant thereof since it sent the standard letter of 16 March 1983 only to those German pensioners who had originally notified the Commission of their interest in the matter;

informed all pensioners concerned too late since the relevant Staff Courrier was dated 28 March but was not delivered until after the expiration of the time-limit and they were not in fact able to disaffiliate before 31 March;

failed to bring an action against the Federal Republic of Germany before the Court under Article 169 of the EEC Treaty.

According to the applicant the Commission thereby failed to provide the assistance which it is obliged to give all officials under Article 24 of the Staff Regulations since it did not take all necessary care. As a result of that wrongful omission the applicant was prevented from submitting an application for disaffiliation from the German sickness insurance scheme in good time. Dr Sommerlatte also contends that despite the letter she sent to the German fund on 4 March 1983, in which she enquired as to any statutory possibility of exemption from the increase in contributions introduced on 2 March 1983, the fund did not inform her of the changes made by the said provisions.

Consequently, the applicant claims compensation equal to 6.05% of her Community pension.

5. The Commission states as a preliminary point that, in accordance with the Court's judgment of 15 March 1984 in Case 28/83 *Forcheri* v *Commission* [1984] ECR 1425, the question whether the Federal Republic of Germany has failed to fulfil one of its obligations under the Treaty or whether or not the Commission should immediately have instituted the procedure under Article 169 cannot be considered in the context of this case.

In addition, the Commission makes the following observations.

First, the doubts expressed by it concerning the legality of the German legislation were intended to prevent the immediate disaffiliation of the pensioners concerned since negotiations with the German authorities were seeking to avoid any disaffiliation.

Secondly, once the position of the German authorities was known on 1 March 1983, those pensioners who had expressed their concern to the Commission were immediately informed thereof by the Commission, which was not in a position to know whether or not other persons were affiliated to a German sickness insurance fund.

Thirdly, it was for the applicant in accordance with the second paragraph of Article 23 of the Staff Regulations to notify the Commission of the terms of the German fund's decision of 2 March 1983, by which she was probably also informed of the possibility of disaffiliation from the German scheme or, at least, to refer the matter to the Commission as soon as she received the Staff Courrier of 28 March 1983 since the German fund had not hesitated to extend the time-limit for disaffiliation in the case of another pensioner.

Fourthly, in any case the applicant was informed of the possibility of disaffiliation by the German fund's reply of 18 March 1983 which answered the queries she had

posed in her letter of 4 March 1983 and the full scope of which she was able to understand in view of her professional background and university education.

The Commission, consequently, considers that it has not failed in its duty to assist the applicant since she did not put the Commission in a position where it could in fact fulfil that duty. Moreover, the applicant had the opportunity to protect herself in good time from the effects of the German legislation by a declaration of disaffiliation as a result of the information given to her by the German fund.

6. In this case it is not for the Court to rule on the conformity of the German legislation with Community law or, more particularly, to resolve the question whether the compulsory affiliation of an official to the Community sickness insurance scheme excludes any obligation to affiliate to a similar scheme in the Member State of which the official is a national. Such matters would fall to be considered only if the Commission brought an action before the Court under Article 169 of the EEC Treaty for failure by a Member State to fulfil its obligations (*Forcheri* v *Commission*, cited above, paragraph 12).

Moreover, it appears to me that there is no direct causal link between the position adopted initially by the Commission whereby it advised German pensioners not to declare the amount of their Community pension and the damage caused to the applicant. Even if the Commission might possibly have misled the pensioners concerned by its advice, the fact remains that it changed its position on 16 March 1983 whereas the time-limit for disaffiliation under the legislation did not expire until 31 March 1983. In other words, and without its therefore being necessary to consider the validity of the reasons given by the Commission by way of justification of its original conduct, this action for compensation must be limited to the complaint that the Commission failed to fulfil its duty to provide assistance by failing to inform the applicant in good time of the effect of the changes in the German legislation.

7. The arguments submitted by the Commission do not appear to me to be convincing.

It became apparent during the hearing that the Commission had the means — in particular electronic data-processing facilities — to draw up, if not at the time of the adoption of the German legislation in question, then certainly in November 1982, a list of persons in receipt of a Community pension who were in a position similar to that of the applicant, of whom there were only eight. The Commission should have been aware of the applicant's affiliation to the German fund: the applicant declared that fact to the Community sickness fund in 1976 and she also subsequently sent that fund an account of her German refunds. The Commission cannot seriously deny that the precautionary measure of informing the persons concerned collectively through the Staff Courrier of 28 March 1983 was incapable, in view of the delay inherent in its distribution, of enabling those persons to make a declaration of disaffiliation from the German scheme in good time, namely before 31 March 1983. In that connection, it cannot rely on the extension of the time-limit granted by the German fund by letter of 6 April 1983 to one of the pensioners concerned since it appears that the pensioner in question had, as a precautionary measure, *before the expiration of the aforementioned time-limit*, submitted a declaration of disaffiliation on which the German fund had agreed merely to defer its final decision in order to allow the pensioner further time for reflection.

Consequently, by failing to give the information to the applicant at the same time as it informed all the pensioners who had drawn its attention to their situation or to inform them collectively in an effective manner in good time, the Commission acted negligently. That was all the more serious since the circumstances created by it imposed a special duty of care towards *all* the persons concerned. Its decision to advise the pensioners who had expressed their concern to it to await the outcome of its discussions with the German authorities before proceeding with their individual declarations of disaffiliation is not in itself necessarily open to criticism. But in view of the delay thereby caused with regard to the mandatory time-limit laid down by the German legislation, when the time came the Commission should have been prompted to act in respect of all the pensioners of whom it knew or ought to have known and with all the care expected of an administrative authority seeking to preserve the financial entitlement of its officials.

Consequently, it must be declared that the Commission has failed to provide the assistance which it is obliged to give under Article 24 of the Staff Regulations to all officials whose financial entitlement guaranteed by the Community is threatened by the decision of the German authorities to deduct double contributions (see in particular the Court's judgment of 9 November 1978 in Case 140/77 *Verhaaf* v *Commission* [1978] ECR 2117, paragraph 12 of the decision). More generally, the Commission has failed to comply with the principle of good administration under which each Community institution owes a particular duty of care to its retired officials who are, as a result of the termination of their service, cut off from their working environment and accordingly from the regular contacts which ensure that they are adequately informed (Joined Cases 33 and 75/79 *Kuhner* v *Commission* [1980] ECR 1677, paragraph 22 of the decision, and the Opinion of Mr Advocate General Mayras, in particular at p. 1708).

Dr Sommerlatte's application for a declaration that the Commission is guilty of a wrongful omission which prevented her from submitting her declaration of disaffiliation from the German sickness insurance scheme to the German fund before 31 March 1983 is therefore well founded.

8. The Commission claims that it is not liable because of the applicant's own wrongful act in failing to inform it of her particular situation whereas the second paragraph of Article 23 of the Staff Regulations requires that

'when privileges and immunities are in dispute, the official concerned shall immediately inform the appointing authority'.

However, in that connection the Commission may not rely effectively on the letter sent to the German fund on 4 March 1983 by Dr Sommerlatte, from which it is not possible to infer that she was aware of the terms of the German legislation, nor on the German fund's reply since it has not been established that the applicant had notice of it.

It is true, however, that Dr Sommerlatte failed to inform the Commission, as she was obliged to do under the second paragraph of Article 23 of the Staff Regulations, of the German fund's decision of 2 March 1983 to calculate the sickness insurance contribution on the basis of her Community pension and that she made no enquiries to the German fund concerning the delay in replying to her letter of 4 March 1983, if it is assumed that she had no knowledge of the letter of 18 March 1983.

Nevertheless, those two omissions cannot completely relieve the Commission of liability. Although the Commission is not exclusively liable, it appears to me that the Commission's contribution to the damage suffered by Dr Sommerlatte, which is agreed to be real and extant, is the principal contribution, and I would estimate the proportion at three-quarters.

9. I am therefore of the opinion that the Court should:

(1) Declare that the Commission is bound to compensate the applicant to the extent of three-quarters for the material damage suffered by her by virtue of her obligation to continue to contribute to the German supplementary sickness insurance scheme;

(2) Order the Commission to pay the costs.