

OPINION OF MR ADVOCATE GENERAL LENZ

delivered on 6 October 1987*

*Mr President,
Members of the Court,*

A — The facts

1. Some months have elapsed since the hearing in the case on which I am giving my views today. The interval has been used to enable the other institutions of the European Communities to express their views on the issues now before us; the parties to the proceedings subsequently had the opportunity to comment on those views.

2. In bringing this action the applicant, Mrs Elisabetta Brunotti, an official of the Commission of the European Communities, seeks an order requiring the Commission, the defendant, to re-assume responsibility for medical expenses in respect of her mother, which it ceased to reimburse as from 18 January 1985.

3. By decision of 24 January 1984 the defendant decided, pursuant to Article 2 (4) of Annex VII to the Staff Regulations, to treat the applicant's mother as a dependent child for the period from 1 January to 31 December 1984 and, on 12 July 1984, assumed responsibility in full for expenses incurred. On 24 October 1985 the decision was renewed for the period from 1 January to 31 December 1985.

4. By letter of 29 March 1985 the defendant informed the applicant that, in view of Article 3 (3) of the Rules on Sickness Insurance for Officials of the

European Communities, it would no longer reimburse the medical expenses of the applicant's mother, since she was insured with the Servizio sanitario nazionale (the Italian national sickness insurance scheme).

5. The defendant did not give an express decision on the complaint lodged by the applicant on 15 April 1985.

6. The applicant claims that the Court should:

Annul the decision refusing to assume responsibility for the medical expenses in respect of the applicant's mother, and the decision rejecting the applicant's complaint lodged on 15 April 1985;

Order the defendant to assume responsibility for the said medical expenses with effect from the date on which it refused to do so, the sums payable to be subject to default interest at the rate of 10% per annum from the date on which the reimbursement fell due until the date of actual payment;

Order the defendant to pay the costs.

7. *In the alternative* the applicant, in her reply, asks the Court to:

Order the defendant to assume responsibility for the medical expenses to the extent to

* Translated from the German.

which those expenses have not been reimbursed under any other sickness insurance scheme, and to pay default interest on the sums payable at the rate of 10% per annum;

Annul the Commission's aforesaid decisions to the extent indicated by the claims for payment; and

Order the defendant to pay the costs.

8. The defendant claims that the Court should

Dismiss the application as unfounded and make the appropriate order as to costs.

9. I shall consider the submissions of the parties and the observations submitted by the Community institutions at the request of the Court, in so far as it is necessary to do so, in the body of my Opinion.

B — Opinion

10. The relevant parts of Article 72 of the Staff Regulations of Officials of the European Communities (hereinafter referred to as 'the Staff Regulations') are worded as follows:

'(1) An official, his spouse, where such spouse is not eligible for benefits of the same nature and of the same level by virtue of any other legal provision or regulations, his children and other dependants within the meaning of Article 2 of Annex VII are insured against sickness up to 80% of expenditure incurred subject to rules drawn up by agreement between the institutions of the Communities after consulting the Staff Regulations Committee ...

(4) Persons entitled to the foregoing benefits shall declare the amount of any reimbursements paid or for which they can claim under any other sickness insurance scheme provided for by law or regulation for themselves or for persons covered by their insurance.

Where the total which they would receive by way of reimbursement exceeds the sum of the reimbursements provided for in paragraph 1, the difference shall be deducted from the amount to be reimbursed pursuant to paragraph 1 ...'

11. Article 3 of the Rules on Sickness Insurance for Officials of the European Communities (hereinafter referred to as 'the Insurance Rules') provides as follows:

'The persons covered by a member's insurance shall be:

...

(3) Persons treated as dependent children of the member pursuant to Article 2 (4) of Annex VII to the Staff Regulations, *provided that such persons cannot obtain cover under any other public scheme of sickness insurance.*¹

12. It was by decision of 24 January 1984, that the Commission, in view of the circumstances of the applicant's mother, first applied Article 2 (4) of Annex VII to the Staff Regulations, under which any person whom the official has a legal responsibility to maintain and whose maintenance involves heavy expenditure may, exceptionally, be treated as if he were a dependent child by

¹ — Emphasis supplied.

special reasoned decision of the appointing authority, based on supporting documents. The decision expressly mentioned that its adoption was without prejudice to the provisions of Article 3 (3) of the Insurance Rules.

13. Since it is undisputed that the applicant's mother is covered by the Italian national sickness-insurance scheme, this action can succeed only if Article 3 (3) of the Insurance Rules is invalid for being contrary to Article 72 of the Staff Regulations, which does not include — at least not expressly — a restrictive condition to that effect, namely that the dependant is not affiliated to any other public scheme of sickness insurance.

14. The applicant's view that such is the case is opposed not only by the defendant but also, in effect at least, by the other Community institutions.

15. In considering whether Article 3 (3) of the Insurance Rules is compatible with higher-ranking provisions of Community law, I shall first consider whether the Community institutions were authorized to adopt such a provision and then examine whether its contents are compatible with superior provisions of Community law.

1. Competence of the Community institutions to adopt Article 3 (3) of the Insurance Rules

16. Under Article 24 of the Treaty Establishing a Single Council and a Single Commission of the European Communities of 8 April 1965,² the Council, acting on a

proposal from the Commission and after consulting the other institutions concerned, is to lay down the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of those Communities.

17. Under that procedure, which is characterized by the special requirement of consultation with the other institutions concerned, which means the appointing authorities of the servants of the Communities, the Council adopted the Staff Regulations of Officials of the European Communities by way of Regulation No 259/68 of 29 February 1968.³

18. Article 72 of the Staff Regulations, which defines the entitlements of officials in case of sickness, contains no express provision allowing children and other dependants to be treated differently, once the appointing authority has availed itself of the derogation provided for in Article 2 (4) of Annex VII and has treated the dependant as a dependent child on account of the heavy expenditure incurred by the official. Whereas there has been a special rule for spouses since the entry into force of Regulation No 2074/83 of 27 July 1983,⁴ no distinction is drawn between children and other dependants.

19. In this connection reference should be made to the case-law of the Court, according to which the provisions of the Staff Regulations employ precise wording and there is no reason to extend their scope by analogy to situations to which they do not expressly refer.⁵ If Article 3 (3) of the

³ — Official Journal, English Special Edition 1968 (I), p. 30.

⁴ — Official Journal 1983, L 203, p. 1.

⁵ — Judgment of 16 March 1971 in Case 48/70 *Giorgio Bernardi v European Parliament* [1971] ECR 175, at p. 184, and the judgment of 20 June 1985 in Case 123/84 *Klein v Commission* [1985] ECR 1907, at p. 1918, paragraph 23.

² — Journal Officiel 1967, No 152, p. 2.

Insurance Rules introduces a further restrictive condition, not expressly envisaged by Article 72, on an official wishing to claim sickness benefits in respect of other dependants, such a provision could be covered only by the authority given to the Community institutions — also by Article 72 of the Staff Regulations — to draw up, by agreement between the institutions, rules on the reimbursement of medical expenses.

20. In the applicant's view it is not possible to infer from that authority more than the power to lay down rules on points of detail and secondary points; it does not allow the adoption of essential provisions on social security cover under the Community scheme.

21. In the defendant's view, on the other hand, Article 72 (1) of the Staff Regulations does not exhaustively define the conditions for cover in the event of illness. The phrase 'subject to rules' means that the authors of the Staff Regulations conferred on the institutions an unlimited authority to lay down rules on the subject — and hence also the authority to impose further, objectively justified, conditions governing the entitlement to sickness insurance.

22. At this point it should again be emphasized that the legislative body responsible for drawing up the Staff Regulations is the Council, which adopts the requisite regulations on a proposal from the Commission and after consulting the other institutions concerned — that is to say, the appointing authorities. In Article 72 of the Staff Regulations the legislative body empowers the Community institutions to

adopt, by common agreement, rules on insurance against sickness.

23. Pursuant to that authority, the appropriate rules were adopted for the European Parliament by its Bureau, for the Economic and Social Committee, by its Chairman acting on behalf of its Bureau, and by the Administrative meeting of the Court of Justice. Those bodies therefore acted, quite manifestly, not as institutions but as appointing authorities. Although the Council submits that it adopted the rules as an 'institution within the meaning of the Staff Regulations', and although the Commission states that it determined the rules itself, those answers do not contradict the finding that the various Community institutions acted as administrative authorities, and not in their capacity as institutions — that is, as participants in the legislative process.

24. Since the rules were not adopted by the legislative body designated by Article 24 of the Merger Treaty but by the Community institutions, there is much to suggest that the authority can relate only to the institutions *qua* administrative authorities responsible for staff matters — that is to say, the appointing authorities. It follows that the Insurance Rules do not rank equally with the Staff Regulations but are subordinate to them.

25. In its judgment of 20 November 1980 in Case 806/79,⁶ the Court rightly described the Insurance Rules as provisions implementing the Staff Regulations.

6 — Judgment of 20 November 1980 in Case 806/79 *Gerin v Commission* [1980] ECR 3515, at p. 3526.

26. In the same judgment, concerning the granting of sickness insurance for dependent children, in which regard the Insurance Rules contained less stringent conditions than Article 72 of the Staff Regulations, the Court stated as follows:

'... the system established by the Staff Regulations has the same conditions for the grant of the dependent-child allowance and of sickness insurance for dependent children. That is the meaning of the reference in Article 72 to Article 2 of Annex VII viewed as a whole. The Rules, in so far as they are provisions implementing the Staff Regulations, were not capable, by means of an incomplete reference to the said Article 2 of Annex VII, of abolishing one of the conditions laid down by that article ...'

27. Since Article 72 brings within the Community sickness insurance scheme precisely that class of person for whom the official receives allowances with his salary pursuant to Articles 1 and 2 of Annex VII, and since its only exception relates to a spouse who is eligible for benefits of the same nature and of the same level by virtue of any other legal provision or regulations, it may be assumed from the precise wording of the Staff Regulations — which the Court has recognized — that Article 72 thereof is exhaustive as regards the class of person entitled to receive benefits. It follows, however, that the Community institutions are not authorized to include in the rules which they adopt special provisions with regard to the class of persons entitled to benefits which apply only to some of the persons covered as specified in Article 72 of the Staff Regulations.

28. Such a conclusion is fully consistent with the aforesaid judgment of 20

November 1980. Since the judgment gave priority to the Staff Regulations over the Insurance Rules to the detriment of the official concerned, the same principle must prevail where the Staff Regulations operate in his favour. For that reason the principles set out in that judgment must also be applied in this case: once dependants have been assimilated to dependent children under Article 2 (4) of Annex VII; then the scheme created by the Staff Regulations imposes the same conditions on the grant of the allowance for those other dependants as it does on the grant of sickness insurance for such persons. That is why Article 72 refers to Article 2 of Annex VII in general. As the instrument implementing the Staff Regulations by means of special provisions relating to specific persons mentioned in Article 2 of Annex VII, the Insurance Rules could not impose conditions which are additional to those contained in Article 72 of the Staff Regulations.

29. Article 3 (3) of the Insurance Rules cannot therefore be applied, because it conflicts with Article 72 of the Staff Regulations.

2. Compatibility of Article 3 (3) of the Insurance Rules with Community law generally

30. Apart from the question whether the Community institutions were formally authorized to adopt a provision such as Article 3 (3) of the Insurance Rules, consideration must also be given to whether that provision, as formulated, is compatible with superior principles of Community law, and in particular with the prohibition on discrimination and the principle of proportionality.

(a) Different treatment of dependent children and persons treated as such

31. The different treatment of dependent children on the one hand and persons treated as dependent children on the other, contained in Article 3 (3) of the Insurance Rules, finds no formal justification either in Article 72 of the Staff Regulations or in Article 2 of Annex VII thereto. Furthermore, such treatment also appears to have no objective justification.

32. Although the defendant submits that the difference between the two classes of person is objectively justified, since dependent children by definition have not had a gainful occupation entitling them to social security cover, whereas other dependants, being mostly elderly persons, are normally insured in their State of origin either in their own right or through their spouse or in some other way, it must be pointed out to the defendant that their different circumstances are fully taken into account by Article 72 (4) of the Staff Regulations. Article 72 (4) requires persons entitled to benefits to declare the amount of any reimbursements paid or which they can claim under any other sickness insurance scheme provided for by law or regulation for themselves or for persons covered by their insurance. Furthermore, the total amount which such persons could claim is reduced to the amount reimbursable under Community provisions. Thus, if a person treated as a dependent child is insured with some other statutory sickness insurance scheme, the benefits available under that scheme are taken into account when reimbursement is paid under the Community provisions, and the Community benefits are reduced

accordingly. However, the actual amount of benefits which may actually be claimed under any other statutory sickness insurance scheme are brought into account, and it does not therefore appear necessary to exclude such persons from the Community sickness insurance scheme altogether, irrespective of the nature and level of the benefits which they are entitled to receive from another statutory sickness insurance scheme.

(b) Different treatment of dependants according to the organization of the national sickness insurance scheme

33. The applicant has pointed to a further reason for examining whether Article 3 (3) of the Insurance Rules has infringed the prohibition on discrimination. She submits that, by virtue of the provisions of the Insurance Rules, sickness benefits for dependants are excluded regardless of the level of the sickness benefits which may be claimed from a compulsory insurance scheme in a Member State.

34. Again, the applicant's objection is a valid one, because in practice the benefits payable to the official concerned will vary according to the manner in which the national sickness insurance held by the dependants is organized. The fact that regard is had to different national sickness insurance benefits thus results in the official's being treated differently depending on the organization of the national sickness insurance scheme. As a result, the legal position of the official is determined not

only by the Staff Regulations but also by the national law of the various Member States. Community institutions must not be permitted to treat Community servants differently in that manner, otherwise the result would be that the scope of the Staff Regulations would depend on the arrangements under national law regarding compulsory insurance. The scope of Community law would thus be defined by national law. The Court has, however, held that this is not permissible.⁷

3. Conclusion

35. The decision on the application must therefore follow the Staff Regulations, in particular Article 72 (1) and (4) thereof, and must disregard Article 3 (3) of the Insurance Rules.

36. However, the applicant's main claim, namely that the defendant should be ordered to pay the medical expenses in their entirety, cannot be upheld, since by virtue of Article 72 (4) of the Staff Regulations the sum available from the Italian national sickness insurance scheme must be brought into account.

37. However, the Court should uphold the applicant's alternative claim together with her claim for the payment of interest,

which, since the defendant has not expressly challenged the rate sought, must stand at 10%. Interest is payable once the reimbursement falls due, but runs only from the moment at which the applicant first sought payment thereof, namely by bringing her action.

38. The individual consequences are as follows:

the defendant's decision of 29 March 1985 no longer to assume responsibility for medical expenses in respect of the applicant's mother must be annulled;

the defendant must be ordered to pay the medical expenses of the applicant's mother to the extent to which they exceed the level of her entitlement under any other statutory sickness-insurance scheme, together with default interest at the rate of 10% from the date on which payment fell due, but not before the bringing of this action;

the remainder of the application must be dismissed.

39. Since the applicant has been essentially successful in her arguments, the defendant should be ordered to pay the costs of the case pursuant to Articles 69 and 70 of the Rules of Procedure.

⁷ — See most recently, the judgment of the Court of 7 May 1987 in Case 189/85 *Commission v Germany* [1987] ECR 2061, at paragraphs 16 and 21.

C — Conclusion

In conclusion I propose that the Court should give the following judgment:

- (1) The defendant's decision of 29 March 1985 no longer to assume responsibility for medical expenses in respect of the applicant's mother is annulled;
- (2) The defendant is ordered to pay the applicant medical expenses in respect of her mother to the extent to which they exceed the level of her mother's entitlement under any other statutory sickness insurance scheme, together with default interest at the rate of 10% as from the date on which payment fell due but not before the bringing of this action;
- (3) The remainder of the application is dismissed;
- (4) The defendant is ordered to pay the costs.