

ORDER OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
14 December 1993^{*}

In Case T-29/93,

Antonio Calvo Alonso-Cortés, an official of the Commission of the European Communities, residing in Brussels, represented by Georges Vandersanden and Laure Levi, of the Brussels Bar, with an address for service in Luxembourg at the office of Fiduciaire Myson SARL, 1 Rue Glesener,

applicant,

v

Commission of the European Communities, represented by Ana Maria Alves Vieira, of its Legal Service, acting as Agent, assisted by Denis Waelbroeck, of the Brussels Bar, with an address for service in Luxembourg at the office of Nicola Anzecchino, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION, first, for annulment of the Commission's implied decision not to grant the applicant's request of 8 May 1992 for the transfer of the pension rights acquired by him in Spain and, as far as necessary, annulment of the implied decision rejecting the complaint lodged by him on 9 September 1992 and, secondly, for a declaration that he is entitled to 6.56 or 5.77 additional years of contributions to the pension fund of the European Communities,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of: A. Kalogeropoulos, President, R. Schintgen and D. P. M. Barrington,
Judges,

^{*} Language of the case: French.

Registrar: H. Jung,

makes the following

Order

Facts and Procedure

- 1 The applicant, Antonio Calvo Alonso-Cortés, practised as a self-employed architect in Madrid and the Canary Islands (Spain) from 16 January 1973 to 31 August 1986 and was affiliated throughout that period to the pension fund for self-employed architects in Spain, the *Hermandad Nacional de Prevision Social de Arquitectos Superiores* (hereinafter 'Hermandad').
- 2 After serving a nine-month probationary period with the Commission, he was established on 1 June 1987 as an official in Grade A 6 and assigned to the Directorate-General for Personnel and Administration (DG IX).
- 3 Following the judgment in Case C-37/89 *Weiser* [1990] ECR I-2395, where the Court of Justice held that restricting the benefit of Article 11(2) of Annex VIII to the Staff Regulations of Officials of the European Communities (hereinafter 'the Staff Regulations') to officials who had acquired pension rights as employed persons infringed the principle of equal treatment, Council Regulation (EEC, Euratom, ECSC) No 571/92 of 2 March 1992 amending the Staff Regulations of Officials of the European Communities (OJ 1992 L 62, p. 1) was adopted.
- 4 Article 11(1) of Annex VIII to the Staff Regulations was replaced by the following:

‘An official who leaves the service of the Communities to:

- enter the service of a government administration or a national or international organization which has concluded an agreement with the Communities;
- pursue an activity in an employed or self-employed capacity, by virtue of which he acquires pension rights under a scheme whose administrative bodies have concluded an agreement with the Communities,

shall be entitled to have the actuarial equivalent of his retirement pension rights in the Communities transferred to the pension fund of that administration or organization or to the pension fund under which he acquires pension rights by virtue of the activity pursued in an employed or self-employed capacity.’

5 The first subparagraph of Article 11(2) was replaced by the following:

‘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
- pursuing an activity in an employed or self-employed capacity;

shall be entitled upon establishment to have paid to the Communities either the actuarial equivalent or the flat-rate redemption value of retirement pension rights acquired by virtue of such service or activities.’

6 Article 2 of Regulation No 571/92 states:

‘An official who was established before this regulation entered into force may apply to his institution for transfers within the meaning of Article 1(2) relating to activities pursued in a self-employed capacity.

Applications shall be made within 12 months of the entry into force of this regulation.’

7 On 8 May 1992 the applicant, acting in accordance with Article 2 of Regulation No 571/92, submitted a request to the Commission’s Director-General for Personnel and Administration pursuant to Article 90 of the Staff Regulations for appropriate steps to be taken to secure payment to the pension fund of the Communities of the actuarial equivalent or the flat-rate redemption value, whichever was the higher, of the pension rights acquired by him with the Hermandad.

8 On 9 September 1992 the applicant lodged a complaint against the implied rejection of his request for transfer of his pension rights, claiming as follows:

‘By this complaint I am challenging the implied rejection of my request for transfer of the pension rights acquired by me with the Hermandad on my establishment as a Commission official.

I am accordingly asking for acknowledgement of my entitlement to 10 additional years of contributions to the pension fund of the Communities, which backdates to 1 September 1976 my notional entry into service for pension rights purposes.

I remain, of course, at the service of the Commission and, in particular, the Unit for Pensions and Relations with Former Staff should they wish to discuss the mathematical elements to be used in the calculation.

I very much hope that a decision can be made in my favour within the four-month time-limit prescribed by the Staff Regulations.'

- 9 On 24 September 1992 the Interdepartmental Group met to consider the applicant's complaint and noted that his request had never reached the competent department. The Interdepartmental Group decided at that meeting that the Spanish pension fund would be contacted with a view to having the applicant's pension rights transferred.
- 10 By a letter of 29 September 1992, the Head of the Transfer Section in the Unit for Pensions and Relations with Former Staff (hereinafter 'the Pension Transfer Section') asked the Hermandad to transfer the applicant's pension rights under Article 11 of Annex VIII to the Staff Regulations. He informed the applicant of this by a memorandum of the same date.
- 11 By a memorandum of 30 September 1992, the Head of the Pension Transfer Section informed the applicant that his file was being dealt with by that section and that he would be kept informed.
- 12 On 26 February 1993 the Hermandad replied that it was not authorized by its statutes and rules to effect the requested transfer.
- 13 By a memorandum of 16 March 1993, the Head of the Pension Transfer Section informed the applicant of the Hermandad's refusal to transfer the pension rights for the time being and indicated that he was keeping the file open until such time

as it was possible to transfer rights acquired under Spanish supplementary pension schemes.

- 14 In those circumstances the applicant brought the present action by application lodged at the Registry of the Court of First Instance on 7 April 1993.
- 15 By application lodged at the Registry of the Court on 16 June 1993 the Commission raised a preliminary plea of inadmissibility pursuant to Article 114(1) of the Rules of Procedure.
- 16 The applicant lodged observations at the Registry of the Court on 19 August 1993 seeking the dismissal of that plea.

Forms of order sought

- 17 In his application the applicant claims that the Court of First Instance should:
 - (1) annul the Commission's implied decision not to grant his request of 8 May 1992 for the transfer of the pension rights acquired by him in Spain and, as far as necessary, the implied decision rejecting the complaint lodged by him on 9 September 1992;
 - (2) declare that he is entitled to 6.56 or 5.77 additional years of contributions to the pension fund of the Communities;
 - (3) order the Commission to pay the entire costs in any event.

18 The Commission claims that the Court should:

- (1) uphold the plea of inadmissibility without considering the substance of the case;
- (2) declare the action inadmissible;
- (3) order the applicant to pay his own costs in accordance with Article 87(2) and Article 88 of the Rules of Procedure.

19 In his observations on the plea of inadmissibility, the applicant claims that the Court should:

- (1) consider the admissibility of the action together with the substance;
- (2) in any event dismiss the Commission's plea of inadmissibility and permit him to commence argument on the substance;
- (3) order the Commission to pay the entire costs in any event.

Admissibility

Pleas in law and arguments of the parties

20 In its plea of inadmissibility the Commission claims that the applicant's action for annulment of the Commission's implied decision not to transfer the pension rights acquired by him in Spain and for a declaration that he is entitled to 6.56 or 5.77 additional years of contributions to the pension fund of the European

Communities is inadmissible since it has as its object something which the Commission has no power to do (Case 18/69 *Fournier v Commission* [1970] ECR 249).

21 The Commission maintains that responsibility for transferring the pension rights lies solely with the Member State and the pension fund in that State and that the Commission itself has no power to secure the transfer.

22 According to the Commission, the applicant is confusing entirely the relevant obligations of the Community institution on the one hand and the Spanish authorities and pension fund on the other. He is wrong in thinking that it is for the Commission to transfer his pension rights. Article 11(2) of Annex VIII to the Staff Regulations itself states very clearly that it is for the national pension fund to transfer the pension rights, as it refers to the entitlement to 'have paid to the Communities' either the actuarial equivalent or the flat-rate redemption value of pension rights.

23 The Commission contends that its only obligation under Article 2 of Regulation No 571/92 is to ask the competent pension fund to transfer the pension rights. It has carried out that requirement in this case, so that it cannot be said to have failed to comply with the regulation.

24 The Commission explains that the pension rights have not been transferred solely because Spain has not yet taken the concrete measures that would permit the transfer. The Commission also points out that it has sent to the Kingdom of Spain a letter of formal notice on its failure to adopt appropriate measures to implement at national level Article 11 of Annex VIII to the Staff Regulations. Settled case-law has established that Article 11 is mandatory and directly applicable and the

Member States 'are therefore required to adopt all appropriate measures to implement that provision, whether they be general or particular' (Case 129/87 *Decker, née Fingruth v Caisse de Pension des Employés Privés* [1988] ECR 6121 and Case 130/87 *Retter v Caisse de Pension des Employés Privés* [1989] ECR 865).

- 25 The Commission adds that it cannot be challenged for not having brought proceedings under Article 169 of the EEC Treaty against Spain for having failed to adopt measures implementing Article 11 of Annex VIII to the Staff Regulations, because actions seeking to require the Commission to bring Article 169 proceedings are inadmissible, the Commission having a discretion in that regard. Moreover, the applicant would in fact be seeking through his action the adoption of acts which are not of direct and individual concern to him, within the meaning of the second paragraph of Article 173 of the EEC Treaty, and which he could not challenge by means of an action for annulment in any event (Case 247/87 *Star Fruit v Commission* [1989] ECR 291 and Case 48/65 *Lütticke v Commission* [1966] ECR 19).
- 26 In his observations on the plea of inadmissibility, the applicant disputes the Commission's contention that he confused the division of obligations under Article 11 of Annex VIII to the Staff Regulations between the institution, in this case the Commission, and the national authorities.
- 27 The applicant admits that only the relevant Member State has the power actually to transfer to a Community institution pension rights acquired by a new official of that institution under a pension fund in that Member State, but maintains that the relevant institution is obliged under Article 2 of Regulation No 571/92 to register the official's transfer application, acknowledge his right to the transfer of his pension rights and, in so far as that right is well founded, ensure that the official's pension rights are actually transferred.

28 The applicant adds that the appointing authority is subsequently required to convert the actuarial equivalent determined by the administrative body of the national pension scheme into years of pensionable service under its own scheme.

29 The applicant, who considers that the institution must diligently take all measures necessary for the transfer of the pension rights, maintains that the obligation imposed on the institution by Article 2 of Regulation No 571/92 forms part of the general duty to assist officials imposed on the institutions by Article 24 of the Staff Regulations.

30 In the applicant's view, the Commission has failed in this case to fulfil its obligations under Article 11 of Annex VIII to the Staff Regulations and Article 2 of Regulation No 571/92.

31 In that regard the applicant claims, first, that the Commission did not reply to his request of 8 May 1992, thereby requiring him to lodge a complaint.

32 Secondly, he considers that after the Interdepartmental Group had noted that his application had not been forwarded to the competent department, the Commission's Pension Transfer Section should have pressed his national pension fund for a reply.

- 33 Thirdly, he alleges that the Commission was late in sending to him the national pension fund's rejection letter and failed to remind the fund that it was obliged to transfer the pension rights because the relevant provisions in the Staff Regulations are mandatory and directly applicable.
- 34 Fourthly, the applicant claims that the Commission failed to convene a further meeting of the Interdepartmental Group, despite its undertaking to do this if the Hermandad's reply was in the negative.
- 35 The applicant contends that all those claims establish a breach of paragraph 2 of Annex VIII to the Staff Regulations, as they provide concrete evidence of the Commission's failure to take the positive and active steps required by that provision to enable his pension rights to be transferred.
- 36 The applicant accepts that the Commission lacks power actually to transfer his pension rights, but concludes that his action is admissible because it concerns the Commission's failure to take all the measures necessary to secure the transfer by his national pension fund, the Hermandad, of the pension rights acquired by him under it.
- 37 The applicant also submits that his request, complaint and application are couched in clear terms. He points out that he has never asked the Commission to transfer his pension rights itself. By asking the Commission, in his request, to take appropriate steps to secure payment to the pension fund of the Communities of the actuarial equivalent or the flat-rate redemption value, whichever is the higher, of his pension rights, by asking it, in his complaint, 'to acknowledge his entitlement to ten additional years of contributions to the pension fund of the Communities' and by contending, in his application, that it is the Commission's responsibility 'to acknowledge an official's right to have his pension rights transferred to the pension

fund of the Communities and take all the appropriate measures — including *vis-à-vis* the national social security body — to enforce that right and thereby secure the transfer’, he has merely sought compliance with Article 11 of Annex VIII to the Staff Regulations, as amended by Regulation No 571/92.

38 The applicant adds that on 30 March 1993 he submitted a complaint to the Spanish Ministry of Finance for the purpose of obtaining a ruling against the Hermandad and that on 30 June 1993 he requested in connection with that action the Commission’s technical and procedural assistance under Article 24 of the Staff Regulations.

39 Finally, the applicant also complains that the Commission did not at any point in the pre-litigation procedure raise the question of the admissibility of his request and complaint. The applicant admits that the Commission is not thereby time-barred from raising a plea of inadmissibility at the litigation stage, but is surprised that the Commission started to act on his complaint if it considered that the object of his request lay outside its power.

Findings of the Court

40 The Court notes that under Article 113 of its Rules of Procedure it may at any time consider of its own motion whether there is any absolute bar to proceedings. The existence of the measure whose annulment is sought under Article 173 of the EEC Treaty or Article 91 of the Staff Regulations is an essential requirement for admissibility, the absence of which has been considered of the Court’s own motion on a number of occasions by the Court of Justice (Case 248/86 *Brüggemann v ESC* [1987] ECR 3963 and Case 78/85 *Group of the European Right v Parliament* [1986] ECR 1753) and by the Court of First Instance (Case T-64/89 *Automec v Commission* [1990] ECR II-367 and Case T-16/91 *Rendo and Others v Commission* [1992] ECR II-2417).

41 In this case, the applicant seeks ‘annulment of the Commission’s implied decision not to grant his request of 8 May 1992 for the transfer of the pension rights acquired by him in Spain and, as far as necessary, annulment of the implied decision rejecting the complaint lodged by him on 9 September 1992’.

- 42 It is therefore necessary to ascertain whether the measure being challenged amounts to a measure against which annulment proceedings may be brought, in so far as it consists of the Commission's informing the applicant on 16 March 1993 that his national pension fund had refused the request to transfer his pension rights and that the Commission was intending to keep the file open.
- 43 As is apparent from the consistent case-law of the Court of Justice and this Court, it is necessary to determine whether the Commission's expressing its intention to keep the applicant's file open amounts to an implied rejection of his request and therefore a decision against which an action may be brought, in so far as it produces binding effects capable of affecting the applicant's interests by clearly altering his legal position and by definitively laying down the position of the institution (see, most recently, Case T-50/92 *Fiorani v Parliament* [1993] ECR II-555, Case T-69/92 *Seghers v Council* [1993] ECR II-651, Case T-20/92 *Moat v Commission* [1993] ECR II-799 and in Joined Cases T-57/92 and T-75/92 *Graf Yorck von Wartenburg v Parliament* [1993] ECR II-925).
- 44 In order to ascertain the meaning and effect of the Commission's reply to the applicant's complaint, the factual and legal context must be considered.
- 45 Article 11(2) of Annex VIII to the Staff Regulations provides that 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, or after pursuing an activity in an employed or self-employed capacity, is to be entitled upon establishment to have paid to the Communities either the actuarial equivalent of retirement pension rights previously acquired by him or the flat-rate redemption value due to him. In such a case the institution in which the official serves determines, taking into account his grade on establishment, the number of years of pensionable service with which he is to 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 of the flat-rate redemption value.

- 46 It follows from those provisions that the institution cannot itself transfer pension rights acquired by an official in his own country, and cannot acknowledge any entitlement and determine the number of years of pensionable service to be credited under its own pension scheme in respect of the previous period of service, until the relevant Member State has established detailed rules for such transfers.
- 47 Accordingly, if Member States have not established detailed rules for the transfer of pension rights, transfers cannot be effected and, as a result, requests submitted for that purpose by Community officials who have acquired pension rights in those States cannot be acted upon. Furthermore, the failure of Member States to adopt the measures necessary for implementing Article 11(2) of Annex VIII to the Staff Regulations has led the Commission to bring proceedings under Article 169 of the Treaty on a number of occasions, and it has been held in those actions that those provisions of the Staff Regulations are binding in their entirety and directly applicable in all Member States (Case 137/80 *Commission v Belgium* [1981] ECR 2393, Case 383/85 *Commission v Belgium* [1989] ECR 3069, Case 72/85 *Commission v Netherlands* [1986] ECR 1219 and Case 315/85 *Commission v Luxembourg* [1987] ECR 5391).
- 48 In this case, the Court notes that the Commission sent to the Kingdom of Spain on 27 October 1992 a letter of formal notice concerning its failure to adopt the measures necessary to enable retirement pension rights acquired in Spain by officials entering the service of the Communities to be transferred as required by Article 11(2) of Annex VIII to the Staff Regulations.
- 49 The Court therefore considers that the Commission's reply of 16 March 1993 must be interpreted as referring by implication to the procedure which may be initiated under Article 169 of the Treaty to enable the requested transfer to take place.

- 50 The Commission has accordingly expressed its intention to defer consideration of the applicant's request to a later date, while reserving the possibility of bringing, if appropriate, proceedings under Article 169 of the Treaty, the result of which will determine the outcome of the applicant's request.
- 51 That deferral does not amount to a definitive decision rejecting the applicant's request, since the Commission has left open the possibility of taking further steps in the procedure initiated under Article 11(2) of Annex VIII to the Staff Regulations once the Kingdom of Spain has established the detailed rules necessary for the transfer of pension rights.
- 52 The Court accordingly holds that the measure being challenged does not amount to a definitive decision on the request to transfer pension rights. It therefore has not given rise to legal effects and there is no decision adversely affecting the applicant. The claims seeking annulment of that measure are therefore inadmissible.
- 53 In his observations on the plea of inadmissibility, the applicant interprets his claims as relating not to the Commission's implied refusal actually to transfer his pension rights but to its failure diligently to take all measures necessary for the transfer of the pension rights.
- 54 It must be noted, first, that the jurisdiction of the Court of First Instance in disputes between the Communities and their servants referred to in Article 179 of the EEC Treaty is to be exercised only within the limits and under the conditions laid down in the Staff Regulations or the Conditions of Employment of Other Servants and, secondly, that, under Article 91(1) of the Staff Regulations, the Court has jurisdiction in any dispute between the Communities and any person to whom those Staff Regulations apply regarding the legality of an act adversely affecting such a person within the meaning of Article 90(2) of the Staff Regulations (Case T-134/89 *Hettrich and Others v Commission* [1990] ECR II-565).

55 The applicant's claims, as interpreted by him in the course of these proceedings, seek not to contest the legality of an act adversely affecting him within the meaning of Article 91(1) of the Staff Regulations, but to have the Commission ordered to use its powers as an institution under Article 169 of the EC Treaty. As is apparent from the case-law of the Court of Justice (*Lütticke v Commission* and *Star Fruit v Commission*, cited above, Case C-87/89 *Sonito and Others v Commission* [1990] ECR I-1981, Case C-72/90 *Asia Motor France v Commission* [1990] ECR I-2181 and Case C-29/92 *Asia Motor France v Commission* [1992] ECR I-3935), individuals are in any event not entitled to challenge the Commission's refusal to bring infringement proceedings against a Member State.

56 Finally, as to the applicant's claim for a declaration that he is entitled to 6.56 or 5.77 additional years of contributions to the pension fund of the Communities, it is sufficient to point out that pension rights under the Community scheme cannot be finally calculated until the Commission has first been notified by the body to which the official concerned was previously affiliated of the amount of the actuarial equivalent or flat-rate redemption value of the rights acquired (Joined Cases 75/88, 146/88 and 147/88 *Bonazzi-Bertottilli and Others v Commission* [1989] ECR 3599). It is unnecessary to consider whether such claims fall within the Court's jurisdiction as they must in any event be regarded as premature and therefore dismissed as inadmissible.

57 The action must therefore be dismissed as inadmissible.

Costs

58 Under Article 87(2) of the Rules of Procedure of the Court of First Instance the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, Article 88 of those Rules provides that in proceedings between the Communities and their servants the institutions are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the action as inadmissible;
2. Orders the parties to bear their own costs.

Luxembourg, 14 December 1993.

H. Jung

Registrar

A. Kalogeropoulos

President