ORDER OF THE COURT OF FIRST INSTANCE (First Chamber)
26 November 1996 *

In Case T-226/95,

Hedwig Kuchlenz-Winter, the divorced spouse of a former official of the European Parliament, residing at Kehlen, Luxembourg, represented by Dieter Rogalla, Rechtsanwalt, Sprochkövel, with an address for service in Luxembourg at the Chambers of Armin Machmer, 1 Rue Roger Barthel, Bereldange,

applicant,

v

Commission of the European Communities, represented by Julian Currall, of its Legal Service, acting as Agent, assisted by Bertrand Wägenbaur, Rechtsanwalt, Hamburg, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre,

defendant,

APPLICATION for a declaration that the Commission has infringed Article 175 of the EC Treaty by failing to propose to the competent institutions of the European Union amendments to the Staff Regulations of Officials of the European Communities which would have enabled the applicant to remain covered by the Sickness Insurance Scheme common to the institutions of the European Communities,

* Language of the case: German.

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

composed of: A. Saggio, President, V. Tiili and R. M. Moura Ramos, Judges,

Registrar: H. Jung,

makes the following

Order

Facts and procedure

1 The applicant, a German national, entered the service of the Court of Justice of the European Coal and Steel Community in 1956. In 1957 she married Mr Kuchlenz, another German national, and in 1958 she was transferred to the Commission of the European Atomic Energy Community in Brussels. Her husband meanwhile became an official of the European Parliament and was transferred to Luxembourg in 1963. After seven years in the service of the Communities, the applicant thereupon left the service and accompanied her husband to Luxembourg.

2 Upon leaving the Commission, the applicant ceased to be covered in her own right by the Sickness Insurance Scheme common to the institutions of the European Communities ('the Joint Sickness Insurance Scheme') but remained insured by virtue of her husband, who, as an official, was a member of the Scheme.

3 By judgment of 10 December 1993, which became final on 1 April 1994, the Luxembourg Cour d'Appel (Court of Appeal) pronounced a decree of divorce dissolving the marriage between the applicant and Mr Kuchlenz. Following delivery of that judgment, the applicant and her former husband agreed, pursuant to the provisions of the Bürgerliches Gesetzbuch (German Civil Code, hereinafter 'the BGB') providing for the adjustment of pension rights in the event of divorce (Paragraph 1587 et seq. of the BGB), to share the retirement pension received by Mr Kuchlenz from the Community. That agreement was ratified by the Luxembourg Tribunal de Paix (Magistrates' Court) by act of 5 January 1995.

4 Under Article 72(1b) of the Staff Regulations of Officials of the European Communities ('the Staff Regulations'), the divorced spouse of an official may continue to be insured against sickness for a maximum of one year from the date of the decree absolute of divorce.

5 The documents in the case show that, as a resident of Luxembourg, Mrs Kuchlenz-Winter is entitled to Luxembourg social security. On the other hand, since she has not completed the requisite periods of insurance in Germany, she is not entitled to cover under the German State sickness insurance scheme. Nor does she fulfil the criteria for voluntary membership of the German scheme; and, since she suffers from a serious illness, the private sickness insurance schemes have refused to cover her. In any event, the social security which she receives in Luxembourg is conditional on her residing in that country. The applicant therefore maintains that she can no longer return to Germany, since she has no social security protection there and her departure from Luxembourg would cause her to lose the only sickness insurance available to her.

6 By letter of 26 April 1994, the claims office of the Joint Sickness Insurance Scheme informed the applicant that her cover under the Scheme would expire on 31 March 1995, one year after the date of her divorce.

7 On 7 February 1994 the applicant submitted to the Commission a request under Article 90 of the Staff Regulations, seeking permission to remain covered under the Joint Sickness Insurance Scheme after the expiry of the one-year period laid down by Article 72 of the Staff Regulations. Following the rejection of that request, the applicant submitted a complaint in accordance with Article 90(2) of the Staff Regulations against the decision rejecting it.

8 By letter of 11 January 1995, the Commission rejected that complaint. On 24 February 1995 the applicant brought an action (Case T-66/95) for annulment of that decision.

9 By letter of 20 April 1995, the applicant, relying on the second paragraph of Article 175 of the EC Treaty, called upon the Commission to propose an amendment to the Staff Regulations which would prevent divorced spouses who have acquired their own pension entitlement from being excluded from the Joint Sickness Insurance Scheme.

10 The applicant addressed similar requests to the Parliament and to the Council. Having received a negative response from the Parliament, and in the absence of any reply from the Council, the applicant brought actions for a declaration of failure to act (Cases T-164/95 and T-167/95).

11 By letter of 23 June 1995, the Commission pointed out that, within the framework of Article 175 of the Treaty, individuals may take action only on the basis of the third paragraph, and went on to state that, in line with positions previously adopted, it considered that the matter in question fell within the competence of the Member States. The Commission also stated that, even if it were competent, the exercise of its right to initiate measures lay within its sole discretion.

12 On 21 August 1995 the applicant brought an action against the Commission before the Court of Justice under the third paragraph of Article 175 of the Treaty.

13 By order of 14 November 1995, the Court of Justice, recalling that actions brought by natural or legal persons under the third paragraph of Article 175 of the Treaty fall within the jurisdiction of the Court of First Instance, referred the case to this Court pursuant to the second paragraph of Article 47 of the EC Statute of the Court of Justice.

14 By document lodged on 28 February 1996, the Commission raised an objection of inadmissibility. On 19 April 1996 the applicant lodged her observations on that objection.

Forms of order sought by the parties

15 The applicant claims that the Court should:

— declare that the Commission has failed to act, inasmuch as it has failed to propose to the institutions of the European Union such amendments to the Staff Regulations as would prevent her exclusion from the Joint Sickness Insurance Scheme;

— order the defendant to pay the costs.

16 In its objection of inadmissibility, the Commission contends that the Court should:

— dismiss the action as inadmissible;

— order the applicant to pay the costs.

17 In her observations on the objection of inadmissibility, the applicant contends that the Court should declare the action admissible and reject the objection.

Admissibility

18 According to Article 114 of the Rules of Procedure, where a party applies to the Court for a decision on admissibility not going to the substance of the case, the remainder of the proceedings concerning the objection of inadmissibility must be oral, unless the Court decides otherwise.

19 According to Article 111 of the Rules of Procedure, where an action is manifestly inadmissible, the Court may, by reasoned order and without taking further steps in the proceedings, give a decision on the action. In the present case, the Court considers that it has sufficient information from the documents before it, and finds that there is no need to take any further steps in the proceedings.

Arguments of the parties

20 The Commission's first plea concerns the interrelation between the present case and the proceedings concurrently pending in Case T-66/95. It states that the two actions are based on the same facts and the same pleas in law. Thus the forms of order sought in the two cases are the same, inasmuch as they seek the amendment of Article 72(1b) of the Staff Regulations. In both cases, moreover, the applicant advances pleas concerning her exclusion from the Joint Sickness Insurance Scheme and failure to act on the part of the Commission. Where an action is based on the same submissions as another action which is already pending between the same parties, it is inadmissible on the ground of litispendency (Joined Cases 358/85 and 51/86 *France* v *Parliament* [1988] ECR 4821, paragraph 12; judgment in Case T-28/89 *Maindiaux and Others* v *Economic and Social Committee* [1990] ECR II-59, paragraph 23).

21 By its second plea, the Commission argues that, in the event that the Court declines to accept its submission regarding litispendency, the action should be declared inadmissible on the ground that the applicant does not have a legal interest in bringing proceedings. The relief sought in the present case is the same as that in Case T-66/95, namely reinstatement of the applicant within the Joint Sickness Insurance Scheme. Since the Court has not yet given judgment in Case T-66/95, the applicant has no interest in bringing a second action before the Court for the same relief as that sought in the case already pending.

22 By its third plea, the Commission maintains that there has not been any failure to act on its part in so far as the Directorate-General for Personnel and Administration (DG IX) rejected the applicant's request in its letter of 23 June 1995. The fact that the Commission gave a negative response does not alter the position in any way, since it is clear from the third paragraph of Article 175 of the Treaty that a failure to act on the part of an institution occurs where it fails to take a decision or to define a position, and not where it adopts a measure different from that desired by the persons concerned. Consequently, the admissibility criteria laid down in Article 175 of the Treaty are not fulfilled (Joined Cases 5/62 to 11/62 and 13/62 to 15/62 *San Michele and Others* v *High Authority* [1962] ECR 449, Case C-25/91 *Pesqueras Echebastar* v *Commission* [1993] ECR I-1719, paragraph 12, and Joined Cases C-15/91 and C-108/91 *Buckl & Söhne and Others* v *Commission* [1992] ECR I-6061, paragraph 17).

23 The fourth plea concerns, first, the fact that the measure sought must be an act of which the applicants are the potential addressees, as required by the third paragraph of Article 175 of the Treaty and the relevant case-law (orders in Cases T-479/93 and T-559/93 *Bernardi* v *Commission* [1994] ECR II-1115 and in Case T-5/94 *J* v *Commission* [1994] ECR II-391, paragraph 16). The defendant maintains that a regulation such as the Staff Regulations cannot form the subject-matter of an action for a declaration of failure to act brought by a private individual (Case 90/78 *Granaria* v *Council and Commission* [1979] ECR 1081, paragraph 14); in so far as its purpose is to require the Commission to propose to the Council the amendment or adoption of a regulation, such an action is inadmissible (Case 134/73 *Holtz & Willemsen* v *Council* [1974] ECR 1, paragraph 5). The

Commission contends, secondly, that an action for failure to act presupposes that the legal effect of the measure sought is binding on the applicant. In the present case, the proposal which, according to the applicant, the Commission should have submitted to the Council would not directly bind Mrs Kuchlenz-Winter. Lastly, the Commission argues that it has a wide discretion as regards the submission of proposals for legislation, which cannot be circumscribed by means of proceedings brought by a natural or legal person.

24 In response to the Commission's first plea, the applicant claims that, according to the relevant case-law, an action is inadmissible on the ground of litispendency where the parties, the submissions and the subject-matter of the proceedings are the same as those in another pending action. In the present circumstances, the application in Case T-66/95 is for the annulment of the Commission's decision of 11 January 1995, whereas that in Case T-266/95 is for a declaration of failure to act. Consequently, the subject-matter of the present dispute is not the same as that of Case T-66/95. Moreover, it is apparent from the judgment in *Buckl & Söhne and Others* v *Commission*, cited above, that litispendency does not arise where the position adopted by the institution which has been called upon to act can be challenged only in proceedings for annulment.

25 By contrast, the applicant maintains, the judgment in *France* v *Parliament*, cited by the Commission, is irrelevant because the two actions in that case had been brought against the same decision. Similarly, the analogy with the judgment in *Maindiaux* v *Economic and Social Committee*, cited above, is inappropriate, since that case concerned a pending action and another action which had been determined and had acquired the force of *res judicata*.

26 In the applicant's view, it is apparent from the foregoing that there is no litispendency between the present case and the action in Case T-66/95. Moreover, the two actions do not seek the same relief. Consequently, the Commission's second plea, alleging that she has no interest in bringing proceedings, is also unfounded.

27 In response to the Commission's third plea, Mrs Kuchlenz-Winter considers that, in accordance with the judgment in Case 302/87 *Parliament* v *Council* [1988] ECR 5615, paragraph 17, the action for a declaration of failure to act continues to be justified since the refusal does not put an end to the failure to act.

28 As regards the fourth plea, the applicant maintains that the parallels, acknowledged by the Court of Justice, between the forms of action provided for in Articles 173 and 175 of the Treaty are such that an act addressed to a third party may form the subject-matter of an application under Article 175 of the Treaty. In any event, the act called for does not concern a third party, since it would directly benefit her and she would be its potential addressee. Furthermore, Article 175 of the Treaty may be used to bring about the adoption of a regulation provided that the regulation is of direct and individual concern to the applicant. That would be the position in the case of the amendment of the Staff Regulations sought by her, which would be addressed to specific addressees identified individually.

29 In response to the Commission's argument concerning the wide discretion it enjoys, the applicant maintains that such a discretion cannot result in the complete avoidance by the Commission of review by the courts. In the circumstances of the present case, and having regard to the principles enshrined in the Staff Regulations, in particular the duty to have regard for the interests and welfare of officials, the Commission had no discretion at all and it was bound to avail itself of its right to initiate measures.

Findings of the Court

30 It is settled case-law that, where an institution to whom a request has been made pursuant to the second paragraph of Article 175 of the Treaty defines its position, even if it does so after the period of two months laid down by the Treaty has expired, the conditions prescribed by that article are not fulfilled (*Pesqueras Echebastar* v *Commission*, cited above, paragraph 11).

31 In the present case, the Court notes that on 23 June 1995 the Commission replied to the applicant's letter of 20 April 1995, stating, essentially, that her request fell within the purview of the Member States. Having regard to that letter, which set out quite clearly the Commission's position in relation to the applicant's request, that institution cannot be said to have failed to act. The fact that the position adopted by the Commission did not satisfy the applicant is immaterial in that regard. Article 175 of the Treaty refers to failure to act in the sense of failure to take a decision or to define a position, not the adoption of a measure different from that desired or considered necessary by the persons concerned (Joined Cases 166/86 and 220/86 *Irish Cement* v *Commission* [1988] ECR 6473, paragraph 17, and *Buckl & Söhne and Others* v *Commission*, cited above, paragraphs 16 and 17).

32 In that regard, the applicant's argument concerning the judgment in *Parliament* v *Council*, cited above, is not relevant. That judgment, in which it was accepted that a refusal to act may be brought before the Court of Justice under Article 175 of the Treaty, relates only to a situation in which the applicant, having called upon the relevant institution to act, lacks the capacity to bring proceedings for annulment. That being the situation in which the Parliament found itself at the time of those proceedings, the Court of Justice was willing to accept that a refusal to act in response to a request made pursuant to Article 175 of the Treaty could be brought before it by way of an action for a declaration of failure to act, since the individual concerned would otherwise be deprived of all judicial protection. That is not the position in the present case, since the applicant was able to bring an action for the annulment of the Commission's decision of 23 June 1995.

33 In those circumstances, the Court finds that there has not been a failure to act on the part of the defendant.

34 The Commission's objection must therefore be upheld and the action must be dismissed as inadmissible.

Costs

35 Since the object of the applicant's action is to bring about the amendment of the Staff Regulations in such a way as to extend her rights thereunder in her capacity as the divorced spouse of an official, the dispute is based on the relationship between the official and the institution. It is appropriate, therefore, to apply the principle laid down in Article 88 of the Rules of Procedure, according to which, in proceedings between the Communities and their servants, the institutions are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby orders:

1. The action is dismissed as inadmissible.

2. The parties are ordered to bear their own costs.

Luxembourg, 26 November 1996.

H. Jung — Registrar

A. Saggio — President