# OPINION OF ADVOCATE GENERAL MISCHO

delivered on 3 February 2000 *

1. The order of the Court of First Instance of 20 January 1998 in *Kögler* v *Court of Justice* [1] contested in the appeal which is the subject of this Opinion, sets out the legislative background and facts giving rise to the dispute as follows.

'1. The applicant is a former Director of the Translation Directorate of the Court of Justice of the European Communities who was retired with effect from 1 December 1987. Following his retirement he has always lived in Konz, in Germany.

2. Under Article 82(1) of the Staff Regulations of Officials of the European Communities (hereinafter "the Staff Regulations"), the pensions of former officials are to be weighted at the rate fixed for the country where the recipient proves he has his residence.

3. After Germany was reunified, Berlin became the capital of Germany in October 1990.

4. In Case T-536/93 *Benzler* v *Commission* [1994] ECR-SC II-777 and Case T-64/92 *Chavane de Dalmassy and Others* v *Commission* [1994] ECR-SC II-723 the Court of First Instance held that Article 6(2) of, *first*, Council Regulation (ECSC, EEC, Euratom) No 3834/91 of 19 December 1991 adjusting, with effect from 1 July 1991, the remuneration and pensions of officials and other servants of the European Communities and the weightings applied thereto (OJ 1991 L 361, p. 13, hereinafter "Regulation No 3834/91") and, *secondly*, Council Regulation (EEC, Euratom, ECSC) No 3761/92 of 21 December 1992 adjusting, with effect from 1 July 1992, the remuneration and pensions of officials and other servants of the European Communities and the weightings applied thereto (OJ 1992 L 383, p. 1, hereinafter "Regulation No 3761/92"), in so far as they fixed a provisional weighting for Germany on the basis of the cost of living in Bonn, infringed the principle set out in

* Original language: French.

1 — T-160/96 [1998] ECR-SC I-A-15 and II-35.

Annex XI to the Staff Regulations that the weighting for each Member State should be fixed by reference to the cost of living in its capital, since Berlin had been the capital of Germany since 3 October 1990. Accordingly the Court annulled the applicants' pay and pension slips in those cases as based on those regulations.

5. The weightings, described in a footnote in the abovementioned regulations as "provisional figure" or stated to be applicable "without prejudice to the decisions which the Council may be required to adopt following a proposal from the Commission", were not subsequently amended.

6. Following the judgments referred to above, several meetings were held within the Council to determine the measures to be adopted in execution thereof. Then, on 19 December 1994, the Council adopted Regulation (ECSC, EC, Euratom) No 3161/94 adjusting, with effect from 1 July 1994, the remuneration and pensions of officials and other servants of the European Communities and the weightings applied thereto (OJ 1994 L 335, p. 1, hereinafter "Regulation No 3161/94"). Article 6(1) of that regulation provides, with effect from 1 July 1994, for a general weighting for Germany based for the first time on Berlin and also for special weightings for Bonn, Karlsruhe and Munich.

7. Subsequently, from 1st July 1995, Council Regulation (EC, Euratom, ECSC) No 2963/95 of 18 December 1995 adjusting the remuneration and pensions of officials and other servants of the European Communities and the weightings applied thereto (OJ 1995 L 310, p. 1), confirmed the fixing of a general weighting for Germany based on the cost of living in Berlin, with retroactive effect from 1 July 1995.

8. Since the applicant considered that the Court should have applied to his pension slips for the period 1 July 1991 to 30 June 1994 the weightings based on the cost of living in Berlin rather than establishing them on the basis of the cost of living in Bonn, by a letter of 29 January 1996 he submitted a request under Article 90(1) of the Staff Regulations for his pension to be redetermined with retroactive effect.

9. The applicant's request was rejected by decision of 12 March 1996 of the Registrar of the Court of Justice acting in his capacity as appointing authority.

10. On 10 May 1996 the applicant submitted a complaint to the same effect to the Complaints Committee of the Court (hereinafter "the Committee"); he further requested that the Court should designate a date in the near future when the desired calculation would be made.

11. That complaint was rejected on 1 July 1996 on the ground that it had been submitted out of time and was therefore inadmissible. The acts adversely affecting the applicant within the meaning of Article 90(2) of the Staff Regulations were in this instance the pensions slips for the period in question. Accordingly, the applicant allowed the periods for bringing staff actions to expire.'

Admissibility of the appeal

2. The Council submits that Mr Kögler's appeal is manifestly inadmissible. It puts forward two arguments in this respect.

3. The Council submits, firstly, that the appellant is requesting a re-examination of his application at first instance, without invoking specific pleas in law in support of his claims, and this, under the first paragraph of Article 49 of the EC Statute of the Court of Justice and under the case-law, does not fall within the jurisdiction of the Court of Justice.

4. The Council submits that the appellant has not precisely indicated the contested aspects of the order he seeks to have set aside or the specific pleas in law relied on in support of this action. He confines himself to rehearsing or reproducing word for word the pleas in law and arguments set out before the Court of First Instance.

5. It is undeniable that the appellant's pleadings will appear familiar to anyone who has read the application at first instance.

6. On the other hand, it is in the very nature of an appeal to seek to submit to the competent court the pleas and arguments, the dismissal of which by the Court of First Instance is considered by the appellant to constitute an infringement of Community law.

7. Admittedly, it does not follow that an appeal can be limited to a straightforward repetition of the application. Nevertheless, it may prove to be inevitable for the appellant to rely to a certain extent on arguments already submitted at first instance.

8. I therefore consider that this argument of the Council must be rejected.

9. The Council maintains, secondly, that the findings of the Court of First Instance concerning the inferences that the appellant was entitled to draw from the wording of Regulations Nos 3834/91 and 3761/92 and on the Council's replies to the questions put by the Court of First Instance in *Benzler* v *Commission*, cited above, are findings of fact which are not amenable to review by the Court of Justice on appeal.

10. I do not share this point of view. The determination of the inferences that the appellant was entitled to draw from the wording of the Council regulations must, in my opinion, be considered as a problem of interpretation of the abovementioned regulations. The interpretation of the applicable regulations is undeniably a question of law amenable to review on appeal.

11. The arguments seeking to establish the inadmissibility of the appeal cannot, therefore, in my opinion, be upheld and the substance of the appeal must be examined.

**Substance of the appeal**

12. The contested order examines in turn the two arguments put forward by the appellant to contest the objection on the grounds of inadmissibility raised by the Council.

13. Firstly, the Court of First Instance states that the appellant was essentially claiming that the Council had 'firmly undertaken' to make the weightings described as 'provisional' in the footnotes to Regulations Nos 3834/91, 3761/92 et seq. definitive and that, in those circumstances, the principle of the protection of legitimate expectations precluded any suggestion that he should have challenged his pension slips earlier.

14. According to the Court of First Instance, it is settled case-law that an official cannot plead breach of the principle of the protection of legitimate expectations if the administration has not given him precise assurances.

15. Subsequently, according to the Court of First Instance, it was clear from all the circumstances of the case that the Council was merely leaving open the possibility that it might alter the weightings but not binding itself to adjust them retroactively once fixed.

16. Thus, according to the Court of First Instance, the Council could not be said to have given the appellant 'precise assurances' as required by the case-law relating to the principle of the protection of legitimate expectations. Consequently, the Court of First Instance found that 'the applicant cannot claim that the Council led him to entertain a "legitimate expectation" allowing him to hope that he might escape the application of the time-limits in the Staff Regulations referred to above'.

17. As regards the appellant's second argument before the Court of First Instance, to the effect that his action was not directed against an act of the appointing authority but against an omission, the contested order noted, firstly, that the monthly pension slips sent to him from 1 July 1991 to 30 June 1994 clearly constitute acts adversely affecting him, in so far as each of them determines the amount of his pension.

18. The Court of First Instance found that, since each pension slip was sent to the appellant individually, he should have submitted a complaint against each one within three months, so complying with the time-limit laid down in Article 90 of the Staff Regulations. However, in this case, he submitted his complaint on 10 May 1996, almost two years after expiry of the prescribed period, which began to run when he received the final slip for June 1994.

19. The Court of First Instance therefore declared the action to be inadmissible on the ground that that complaint was out of time.

20. Furthermore, it pointed out that an official who has failed within the time-limit laid down in Articles 90 and 91 of the Staff Regulations to institute proceedings for the annulment of an act adversely affecting him cannot, by means of a claim for compensation for the damage caused by that act, make good that omission and thus contrive to make time begin to run afresh.

21. The Court of First Instance found that, 'in the present case the applicant's action, which is based on an alleged failure to act on the part of the Council, must be regarded as an attempt to circumvent the time-limits laid down in Articles 90 and 91 of the Staff Regulations in that its purpose is, first, the annulment of a decision of the Committee which merely confirms that the action is inadmissible and, second, to obtain, by an action for compensation, the additional amount he would have received if the "Berlin" weighting had been applied from 1991'.

22. I would like to say at the outset that I agree with the analysis of the Court of First Instance and that I consider that the three arguments essentially put forward by the appellant in support of his appeal should be dismissed. I will examine these in the order in which they have been submitted by the appellant.

23. Firstly, he claims that the Court of First Instance was wrong to refuse to consider the weighting applied in this case as provisional. The terms used by the Council in the regulations applicable at the time of establishment of the pension slips at issue, in particular Regulations Nos 3834/91 and 3761/92 and Council Regulation (Euratom, ECSC, EC) No 3608/93 of 20 December 1993 adjusting, with effect from 1 July 1993, the remuneration and pensions of officials and other servants of the European Communities and the weightings applied thereto, [2] show that these measures were not to be regarded as definitive.

24. The appellant emphasises that the last two of these regulations include the expression 'without prejudice to the decisions which the Council *may be required to adopt*'. That expression shows that the adoption of such decisions in the future constitutes a binding delegation on the part of the Council.

25. Furthermore, the appellant stresses that the first of these regulations refers to the weightings laid down as 'provisional figures' and, in the last recital in its preamble, expressly gives reasons for the provisional nature of those weightings.

26. This recital is worded as follows: 'whereas, pending a decision by the Council on the Commission proposal establishing, as from 1 October 1990, the weightings to which the remuneration and pensions of officials and other servants of the European Communities are subject in Germany, it is appropriate to adjust, on a provisional basis, the existing weightings'.

27. I would first of all observe that the appellant's argument essentially amounts to saying that the Council had led him to entertain the 'legitimate expectation' that the 'provisional figures' would soon be adjusted and made definitive and that it was not, therefore, necessary for him to bring an action within the time-limit prescribed in the Staff Regulations. Therefore, the question whether or not the relevant provisions of regulations in point here are provisional should only be examined in the context of the application of the principle of the protection of legitimate expectations.

28. As the Court of First Instance rightly pointed out, in paragraph 34 of the contested order, such a legitimate expectation can, in accordance with settled case-law, result only from 'precise assurances' given by a Community institution. [3]

2 — OJ 1993 L 328, p. 1.

3 — See, for example, Case T-207/95 *Ibarra Gil* v *Commission* [1997] ECR-SC I-A-13 and II-31 and Case T-211/95 *Petit-Laurent* v *Commission* [1997] ECR-SC I-A-21 and II-57.

29. It is not, therefore, sufficient that the provisions in question allow the interpretation of them put forward by the appellant; his reading of them must follow with a sufficient degree of certainty from their context. In particular, the interpretation offered must not be merely one of the possible meanings of the provisions at issue.

30. That is the case here and in paragraphs 35 to 38 of the contested order the Court of First Instance cites the reasons which justify this conclusion.

31. The Court of First Instance rightly notes that the only certain meaning of the expression 'without prejudice to the decisions to be taken by the Council following the Commission proposal of 10 September 1991 (SEC (91) 1612 final)' is that the Council is reserving its position as regards the possibility of altering the weightings.

32. Therefore, there is nothing in that wording that offers certainty with regard to the Council's future decisions. In particular, although those provisions do not exclude the possibility that the Council will adopt new weightings with retroactive effect, they certainly do not allow this possibility to be considered a certainty.

33. In his second argument, the other aspects of which will be examined later, the appellant also claims that his expectation was based on the fact that the Council would apply a definitive regulation and not, as the Court of First Instance states in paragraphs 37 and 38 of the contested order, on the fact that the 'Berlin' weighting would be applied to him.

34. This point is of no relevance. The very principle of the adoption of a retroactive act could not be the subject of any certainty. Therefore, his interpretation of the possible content of such an act is of little consequence.

35. I would add that the term 'provisional', used to describe the weighting laid down and to which the appellant attaches considerable importance, only appears in Regulation No 3834/91 and had already been abandoned by the Council, two years before the last pension slip at issue, in July 1992, on adoption of the following regulation.

36. It is true that, as the appellant observes, the Council stated, in its replies to the written questions put by the Court of First Instance in *Benzler* v *Commission* and *Chavane de Dalmassy and Others* v *Commission*, cited above, that the definitive weightings would be adopted with retroactive effect. The Court of First Instance, however, rightly points out that this sentence can be read only in the global context of the Council's reply. It is clear from that reply, set out in paragraph 25 of the judgment in *Benzler* v *Commission*, cited

above, that there was a considerable degree of reluctance within the Council with regard to the Commission's proposal because the available statistical data did not fully reflect the new situation resulting from the unification of Germany and the change of capital had not yet produced significant effects. The Council had, therefore, requested the Commission to present it with a 'thorough analysis of the statistical, economic, concrete and legal aspects which form the basis of its proposal.'

37. The letter relied on by the appellant clearly shows that a new decision of the Council with retroactive effect depended on the conclusions that could be drawn from this analysis.

38. It follows that the form of words mentioned above, like those used in the contested regulations, certainly allows the interpretation given to it by the appellant, although, given its context, this is not the only possible interpretation of what the author intended to say.

39. Therefore, that phrase alone cannot reasonably be regarded as giving the appellant any assurance of certainty.

40. It follows that the Court of First Instance properly considered that the conditions for application of the principle of the protection of legitimate expectations had not been complied with.

41. Secondly, the appellant puts forward the fact that the Court of First Instance failed to examine the arguments he derived from the principle of good faith, a principle which must be taken into account in interpreting all legal acts of the Community institutions.

42. In this case, he claims, the Council had led him to believe that it would, in due course and with retroactive effect, adopt a definitive regime, the detailed rules of which were as yet unknown, which would rectify any omissions under the provisional regime and which could, if necessary, be challenged by the appellant by means of the remedies provided for under the Staff Regulations.

43. According to the appellant, the Court of First Instance should therefore have understood that the appellant's hope of seeing a later regulation adopted, which would necessarily have to give rise to new limitation periods, was justified and that, therefore, the plea of inadmissibility on the ground of expiry of the period prescribed for initiating proceedings could not be upheld.

44. It must be observed that this argument cannot be dissociated from the appellant's first argument, as may be seen, moreover, from the numerous instances of overlapping in his pleadings.

45. There would not, in this case, be any breach of the principle of good faith unless the appellant's expectations with regard to the future approach of the Council were justified. This would only be the case if the Council had previously given the appellant convincing reasons to hope for a specific action. We have already seen that this was not the case.

46. This argument of the appellant must therefore be rejected.

47. Thirdly, the appellant claims that the Court of First Instance altered the subject-matter of the dispute, so as to enable it to declare the action inadmissible. He states that his request and his action 'are not directed against provisional slips supplied to him but against the fact that the definitive regulation and the slips referred to in the Council's regulations took an inordinate time to materialise.'

48. This argument amounts to maintaining that the action is directed in reality against a failure to act on the part of the Council. It must be observed, however, that the system of remedies under Article 90 of the Staff Regulations does not allow for the possibility of an applicant contesting an omission on the part of the Council, since, by virtue of that provision, persons covered by the Staff Regulations can only act against an act or omission of the appointing authority.

49. Contrary to what the appellant states, it does not follow that he has no recourse against what he considers to be a wrongful omission on the part of the Council.

50. The alleged omission by the Council could have been invoked by the appellant in support of an action against the appointing authority, as was the case, for example, in *Benzler* v *Commission* and *Chavane de Dalmassy and Others* v *Commission*, cited above.

51. It follows that it was against the acts that, in the appellant's case, constituted the specific reflection of the alleged omission by the Council that the appellant should have directed his action, as the Court of First Instance notes in paragraph 39 of the contested order.

52. The Court of First Instance was also justified in refusing to consider that the action before it was concerned with a failure to act on the part of the appointing authority. There is no doubt that the pension slips were sent to the appellant. There can therefore be no question of failure to act by the appointing authority, even if the content of the aforementioned slips did not correspond with the expectations of the appellant.

53. The appellant, however, describes the slips in question as 'provisional' and claims that they do not, therefore, definitively regulate his situation and cannot, therefore, be the subject of an action.

54. It should be noted that the appellant starts from the premiss that an individual act adopted on the basis of a temporary regulation is also itself necessarily provisional, reasoning which does not seem to me to be unassailable.

55. In any case, he ignores the fact that, in *Benzler* v *Commission*, cited above, which he invokes on several occasions, the Court of First Instance had already held that the pension slips for the period in question must be considered to be acts adversely affecting the persons concerned, even if they resulted from the application of a provisional weighting.

56. The Court of First Instance therefore properly concluded that there was no failure to act on the part of the appointing authority, since it had addressed to the appellant acts adversely affecting him and therefore open to challenge by way of an action.

57. The complaint against those acts was clearly out of time, since the time-limit for complaints under Article 90 of the Staff Regulations had expired. The inadmissibility of the action follows clearly from this, and it is not possible to criticise the Court of First Instance, as the appellant has done, for construing that provision with undue rigour.

58. As the Court of First Instance pointed out in paragraphs 40 and 41 of the contested order, without being contradicted by the appellant, it is settled case-law that the time-limit for submitting a complaint is mandatory and is not at the disposal of the parties. It follows that the fact that the defending institution has answered a complaint made out of time on its merits does not make a later action admissible.

59. On the other hand, it is also clear from the case-law cited by the Court of First Instance that the obstacle of the expired time-limit for complaints cannot be circumvented by the opening of a new period through the introduction of a request under Article 90(1) of the Staff Regulations.

60. The appellant goes on to state that the effect of the argument of the Court of First Instance is to deprive him of any recourse since the Court held that, if a provision of a regulation is correctly applied and the circumstances which justify its provisional nature only cease to exist after expiry of the time-limit for bringing an action against the individual implementing measure, the persons concerned by that measure cannot, at any time, bring an action with any chance of success against the same measure, which is now without any legal basis, or against its legal basis, which has become invalid.

61. That submission cannot be upheld. If an individual act is adopted on the basis of provisional legislation which no longer has any *raison d'être*, that consideration can be invoked to contest the validity of that act.

If, on the other hand, the provisional legislation was still justified at the time of adoption of the individual act, the fact that it later lost that justification does not mean, as such, that all the individual acts adopted on the basis of it will be brought into question.

62. As the Council has rightly argued, the principle of legal certainty precludes such a proposition.

63. The appellant also states that, at the time when he should, according to the Court of First Instance, have contested the pension slips at issue, he could no longer have effectively formulated his complaint alleging failure by the Council to adopt a definitive weighting covering the period in question since it was not yet clear that the Council was not going to do so.

64. This argument must be rejected. The fact that, after the expiry of the period prescribed for instituting proceedings against a measure, something occurs on the basis of which the applicant considers he could have founded a complaint is not such as to cause time to run afresh for the purpose of proceedings against that measure.

65. Finally, the appellant claims that the Court of First Instance's erroneous modification of the subject-matter of the action can also be seen from the fact that it considered that the object of the action was to obtain the award, for the period in question, of a pension calculated in accordance with the cost of living in Berlin. [4]

66. However, it can be seen that the arguments on which the merits of the appellant's appeal are based all have the aim of demonstrating his right to obtain such a pension.

67. Thus, the Court of First Instance rightly held that such was indeed the true object of his action — namely to challenge the pension slips after the expiry of the time-limit under the Staff Regulation in order to obtain the payment of a higher pension for the period in question, recalculated in accordance with the cost of living in Berlin.

68. In any case, it must be observed that the appellant is criticising on this point an element which is not essential to the validity of the reasoning of the Court of First Instance. That reasoning is based on the consideration that the appellant had been the subject of an act adversely affecting him which he should have contested within the time-limits. Thus, the Court of First Instance ruled on the procedural plea that the appellant should have used. The objective he would be pursuing in bringing such an action is not relevant in this respect.

4 — In particular, see paragraph 42 of the contested order.

## Conclusion

69. In view of the foregoing, the appeal must be dismissed.

70. With regard to costs, the Court of Justice and the Council have applied for costs against the appellant. By virtue of Article 122 of the Rules of Procedure of the Court of Justice, Article 70 of those Rules is not applicable to an appeal brought by officials or other servants of the institutions. Therefore, in my opinion, it is appropriate to apply Article 69(2) of the Rules of Procedure and to order the appellant to pay the costs of the action; the Council, as intervener, should bear its own costs, in accordance with Article 69(4).