

OPINION OF ADVOCATE GENERAL
 POIARES MADURO
 delivered on 29 June 2004¹

1. The Court of Justice is called upon to give a ruling on the appeal brought by Albert Nardone against the judgment delivered on 26 February 2003 by the Court of First Instance of the European Communities in Case T-59/01 ('the judgment under appeal'),² by which the Court of First Instance dismissed the action brought by the present appellant for annulment of a Commission decision of 20 March 2000. By that decision, the Commission rejected a request for the award of an invalidity pension on the ground that Mr Nardone did not meet the conditions laid down in Article 13 of Annex VIII to the Staff Regulations of Officials of the European Communities ('the Staff Regulations').

2. Contrary to its appearance, this is not a straightforward case. In fact, it raises rather complex legal issues. What is more, it concerns asbestos-related occupational diseases, which are acknowledged by all the Member States and by the Community itself

to be of a special and sensitive nature.³ The Court of Justice's decision on this appeal will undoubtedly have to take account of that specific aspect of the situation.

I — Legal framework and facts of the appeal

3. The first paragraph of Article 78 of the Staff Regulations provides that '[a]n official shall be entitled, in the manner provided for in Articles 13 to 16 of Annex VIII, to an invalidity pension in the case of total permanent invalidity preventing him from performing the duties corresponding to a post in his career bracket'. Under the following paragraph, '[w]here the invalidity arises from an accident in the course of or in

1 — Original language: Portuguese.

2 — *Nardone v Commission* [2003] ECR-SC I-A-55 and II-323.

3 — See in particular Council Directive 83/477/EEC of 19 September 1983 on the protection of workers from the risks related to exposure to asbestos at work (second individual Directive within the meaning of Article 8 of Directive 80/1107/EEC) (OJ 1983 L 263, p. 25), as amended by Council Directive 91/382/EEC of 25 June 1991 (OJ 1991 L 206, p. 16), Council Directive 98/24/EC of 7 April 1998 on the protection of the health and safety of workers from the risks related to chemical agents at work (fourteenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1998 L 131, p. 11) and Directive 2003/18/EC of the European Parliament and of the Council of 27 March 2003 (OJ 2003 L 97, p. 48). See, generally, in that regard Bothwell, E., 'The Asbestos Problem and the European Economic Community', *Columbia Journal of Transnational Law*, 1993, p. 205.

connection with the performance of his duties, from an occupational disease, from a public-spirited act or from risking his life to save another human being, the invalidity pension shall be 70% of the basic salary of the official'. Article 13 of Annex VIII to the Staff Regulations provides that, '[s]ubject to the provisions of Article 1(1), an official aged less than 65 years who at any time during the period in which he is acquiring pension rights is recognised by the Invalidity Committee to be suffering from total permanent invalidity preventing him from performing the duties corresponding to a post in his career bracket, and who is obliged on these grounds to end his service with the Communities shall be entitled, for so long as such incapacity persists, to invalidity pension as provided in Article 78 of the Staff Regulations'.

4. Mr Nardone entered the service of the High Authority of the European Coal and Steel Community in 1963. In 1971 he began his service with the Commission, working as head locksmith in the Berlaymont building in Brussels (Belgium), initially below ground level and later on the mezzanine floor. He resigned from his duties in 1981 and he maintains that his state of health has prevented him from carrying on any occupational activity ever since. On 18 November 1999 he submitted a request pursuant to Article 90(1) of the Staff Regulations for the award of an invalidity pension by reason of occupational disease. The appellant referred in his request to pathological symptoms

related to prolonged exposure to asbestos in the course of his duties at the Commission. The Commission rejected that request by decision of 20 March 2000 ('the contested decision').

5. Mr Nardone lodged a complaint against that decision under Article 90(2) of the Staff Regulations. Following an implied rejection of the complaint, he brought an action for annulment of the contested decision.

6. That action was dismissed by the judgment under appeal. Having found, at paragraph 14 of that judgment, that the action was in fact brought against the contested decision rather than against the decision of 26 October 1981 by which the Commission accepted the appellant's resignation, the Court of First Instance declared the action admissible. As to the substance, however, it rejected the pleas in support of the claim for annulment in their entirety.

7. As a preliminary point the Court of First Instance pointed out that there was no need to adjudicate on the application of the general principles of law invoked by the appellant because he had not raised a plea of illegality against the relevant provisions of the Staff Regulations. In that regard it also found that the Commission had rejected the request for the award of an invalidity pension for succinctly but clearly defined reasons pertaining to the fact that the legal conditions relating to the appellant's administra-

tive position, rather than to his medical condition, which are laid down in the Staff Regulations and in Annex VIII thereto patently had not been met. The Court of First Instance therefore rejected the plea alleging a misuse of powers.

8. The Court of First Instance still considered it necessary to examine whether the Commission had applied the relevant provisions of the Staff Regulations correctly in the contested decision. It concluded that the conditions for initiating a procedure to establish invalidity were not met. First, it found that the appellant, having resigned in 1981 and submitted his request for an invalidity pension in 1999, could not meet the condition stipulating that a procedure to establish invalidity may be initiated only in relation to an official who is obliged to end his service because he is suffering from invalidity preventing him from performing his duties. Secondly, it was not disputed that, once he had resigned in 1981, the appellant was not in a position to meet the second condition laid down in the Staff Regulations in this context, namely that a procedure to establish invalidity may only be initiated in respect of an official who is acquiring pension rights.

9. In support of his appeal, the appellant raises two pleas alleging that both conditions, which, according to the Court of First Instance, create an entitlement to initiate a procedure to establish invalidity, have been assessed incorrectly.

10. Before assessing the appeal, I must point out that the proceedings concern the decision whether to initiate the procedure to establish invalidity, not the final decision whether to award the pension in question. Although the Staff Regulations make no formal distinction between the two — connected — decisions, the decisions are subject to separate conditions. The Staff Regulations are drafted in such a way that the decision to initiate the procedure concerned is separate from the decision to award the official an invalidity pension. The Commission first of all decides whether or not to refer the matter to an invalidity committee whose subsequent opinion is taken as the basis for the Commission's decision whether to award the pension. Referring a matter in this context to a special committee made up of medical experts constitutes a measure of inquiry which is required as a matter of course in a complex area where scientific appraisal is essential and the objective of which is to enable the relevant administrative authority to take a decision in full knowledge of the facts.⁴

II — Assessment of the pleas raised in the appeal

11. The fundamental question raised by this appeal is whether an official suffering from

⁴ — As regards the Invalidity Committee, see Articles 7 to 9 of Annex II to the Staff Regulations. For the discretion enjoyed by the Invalidity Committee in examining the file of the applicant concerned, see inter alia Case 156/80 *Morbelli v Commission* [1981] ECR 1357. Regarding the division of powers between the Invalidity Committee and the administrative authority, see inter alia Case 76/84 *Rienzi v Commission* [1987] ECR 315, paragraphs 8 to 12.

an occupational disease which prevents him from pursuing any new activity after leaving the service may, when the causes of the disease come to light, avail himself of his rights under the Staff Regulations to obtain an invalidity pension. In this case, legal considerations seem to preclude such a possibility. The provisions of the Staff Regulations are, or at least appear to be, applied strictly in the judgment under appeal. Moreover, the judgment appears to rely on a clear line of authority established by the Court of Justice and the Court of First Instance in this regard. In support of its reasoning, the Court of First Instance cites *inter alia* the judgment of the Court of Justice in Case 12/83,⁵ and its own judgment in Case T-295/97⁶ which follows the principles developed by the Court of Justice.

A — *The first plea of the appeal*

13. By his first plea, the appellant argues that the judgment under appeal and the case-law of the Court of Justice are contradictory. He claims that the Court of First Instance was wrong not to have considered the possibility of upholding his right to the initiation of a procedure to establish invalidity when a request to that effect was made. It had misinterpreted the condition established in that regard by the Court of Justice.

14. The Staff Regulations lay down the conditions for the award of an invalidity pension. However, they do not refer expressly to the conditions on which a procedure to establish invalidity may be initiated under Article 78 thereof. Called upon to give a ruling on that matter, the Court of Justice held in *Bähr v Commission*:⁸

12. There are, therefore, two aspects to this case: it calls for adjudication on both the interpretation of the case-law of the Court of Justice and the application of the provisions of the Staff Regulations in the specific circumstances of this case. The difficulty here lies in the fact that the case-law and the Staff Regulations were not drawn up with a view to giving a ruling in such circumstances.⁷

'It follows from the unequivocal provisions of Article 13 of Annex VIII which lays down, in accordance with Article 78 of the Staff Regulations, the conditions on which an official is entitled to an invalidity pension, that the procedure to establish invalidity may be initiated only in relation to an official who is obliged to end his service with the Communities because he is suffering from an invalidity preventing him from performing his duties.

5 — *Bähr v Commission* [1984] ECR 2155.

6 — *Coussios v Commission* [1999] ECR-SC I-A-103 and II-577.

7 — 'Neque leges neque senatus consulta ita scribi possunt, ut omnes casus qui quandoque inciderint comprehendantur' (Neither laws nor acts of senate can be so written as to include all cases that have happened at any time) (*The Digest of Justinian*, I.3, 3-10).

8 — Cited above in footnote 5, at paragraphs 12 and 13.

It follows that an official who has left the service several years ago and who suffers from an illness which would render him incapable of performing his duties if he were still in active employment is not entitled to request, on that ground alone, the initiation of the procedure to establish invalidity.'

15. The Court of First Instance expressly cited that case-law at paragraphs 31 and 32 of the judgment under appeal. It therefore had no difficulty in establishing that the present appellant, who had resigned in 1981 and submitted his request for an invalidity pension in 1999, was in the factual situation described by the Court of Justice. It inferred as a matter of course from that finding that the first condition governing the award of the pension was not met.

16. There is no question about the fact that Mr Nardone submitted his request after he had left the service. But does it necessarily follow that the Commission would have grounds to consider him to be in the position of a former official suffering from an illness which would render him incapable of performing his duties if he were still in active service? In its reasoning the Court of First Instance appears to assume that the mere fact that a request was submitted after the end of active service precludes the initiation of a procedure to establish invalidity.

17. However, that is not really what the Court of Justice's case-law means. In the judgment in *Bähr v Commission*, cited above,

the Court of Justice — in my view — merely inferred the condition governing initiation of the procedure from the condition governing the award of the pension laid down in the Staff Regulations. A procedure to establish invalidity can be initiated only if it is possible to establish that the invalidity and the performance of duties in the service of the Communities are concomitant, thereby resulting in permanent incapacity for such service. In the specific context of a request for a pension in respect of occupational disease, concomitance is insufficient; a causal link must also be established. It must be shown that 'the performance of [the] duties was the principal or the predominant cause of the disease or of the aggravation of an existing disease'.⁹ Thus it is apparent that an alleged 'subsequent fact' which did not arise during the occupational activity or at the place of its performance and, consequently, is unconnected with that activity cannot give rise to the initiation of a procedure to establish invalidity. If the connection between the performance of the duties and the invalidity cannot be established, there is no need to initiate the procedure.

18. Consequently, late requests for the initiation of that procedure should, generally, be rejected, not so much because they are late but because the fact that they are late suggests the unlikelihood of finding a causal link between the disease causing the invalidity and the occupational activity. In fact, the

⁹ — Opinion of Advocate General Roemer in Case 29/71 *Vellozzi v Commission* [1972] ECR 513. See also, to that effect, the judgment in Case C-185/90 P *Commission v Gill* [1991] ECR I-4779, paragraph 17, in which the Court held *a contrario* that the official is obliged to prove the existence of a causal link between the disease or its aggravation and the performance of his duties with the Communities in order to establish the existence of an occupational disease within the meaning of the second paragraph of Article 78 of the Staff Regulations.

presumption is that a late request relates to a fact arising after and unconnected with service. Since a request of that kind obviously cannot meet the condition for the award of an invalidity pension, it is rightly considered to be entirely unfounded.

19. However, the appellant in the case at issue is not invoking a 'subsequent fact'. He is relying on 'new facts', transpiring after he left the service, with regard to the nature of his condition. I should point out that, in the course of the procedure concerning the payment of compensation in the event of invalidity connected with an occupational disease, as provided for in Article 73 of the Staff Regulations, the Commission has already recognised the occupational origin of some of the diseases contracted by the appellant.¹⁰ The parties admittedly agree that the two procedures in question are separate: recognition of invalidity under Article 73 of the Staff Regulations is entirely without prejudice to the right to initiate a procedure to establish invalidity under Article 78 thereof.¹¹ Nevertheless, such recognition is sufficient to establish that the alleged pathological conditions cannot be regarded as straightforward facts arising after and

unconnected with service.¹² The appellant submitted his request in 1999, not because he had contracted a new disease at that time, as the reasoning of the Court of First Instance in paragraph 32 of the judgment under appeal would suggest; he did so because it has been possible only in recent years to diagnose and recognise the occupational nature of the conditions from which he has been suffering for a long time.

20. The Court of First Instance certainly acknowledges that it may be appropriate to make a distinction between the point at which the request to initiate the procedure is made and the time of onset of the disease, but it makes that distinction, in paragraphs 35 to 42 of the judgment under appeal, in relation to the situation contemplated by the Court of Justice in the judgment in *Bähr v Commission*. However, it would appear that judgment in that case was given in the light of circumstances that were entirely different from those which are the subject of this appeal. Furthermore, the Court's reasoning in those proceedings was closely linked to the facts of that case. It must be examined, therefore, whether the different circumstances should have prompted the Court of First Instance to depart from that reasoning.

21. In *Bähr v Commission*, the claims focused on two separate facts, one coinciding

10 — This may be seen clearly in Case T-27/98 *Nardone v Commission* [1999] ECR-SC I-A-267 and II-1293, paragraph 11, which the Court of First Instance, adjudicating on a Commission decision based on Article 73 of the Staff Regulations, had to hear and determine in the light of the same factual circumstances as have arisen in this case. I would point out that the diseases connected with exposure to asbestos, such as asbestosis and mesothelioma, are included in the schedule drawn up by the Commission Recommendation of 19 September 2003 concerning the European schedule of occupational diseases (OJ 2003 L 238, p. 28).

11 — Under Article 25 of the Rules on the Insurance of Officials of the European Communities against the Risk of Accident and of Occupational Disease, '[r]ecognition of total or partial permanent invalidity pursuant to Article 73 of the Staff Regulations and to these Rules shall in no way prejudice application of Article 78 of the Staff Regulations and vice versa'. See, to that effect, Case C-76/95 *Commission v Royale belge* [1996] ECR I-5501, paragraph 86.

12 — The Court of Justice held to that effect that 'there is no valid reason for taking the view that the term "occupational disease" must have a different meaning depending on whether it is a question of invalidity pension rights arising from occupational disease under Article 78 of the Staff Regulations or of cover against the risks of occupational disease within the meaning of Article 73 of the Staff Regulations' (*Commission v Gill*, cited above in footnote 9, at paragraph 14).

with the official's service and the other, which would have rendered him unfit for work, arising after he had left the service. It was therefore necessary to ascertain whether there was a link between the two facts. Had it been possible to establish that the second cardiac infarction, which rendered the official concerned unfit for work, was a corollary of the first infarction, which was intrinsically bound up with the duties performed, it would have been possible to establish the causal link between the invalidity and the active service. In that case it would have been logical to allow the possibility of initiating the procedure to establish invalidity. In such a case, the continuity from the first illness to the second made it possible to establish a causal link between the invalidity and the active service.

situation. In its judgment in that case, it allowed an exception to the rule that the administration need not cause to be examined and determine as a matter of course the cause of the invalidity.¹⁴ Accordingly, 'if it is established that there is a direct and immediate connection between the official's ultimate invalidity and the state of his health when he left the service', it is for the Commission, in the Court's view, 'to determine whether the state of the applicant's health *at the time at which he expressed the intention of leaving the service* was such that he could have continued to perform his duties if he had chosen not to end his service with the Communities'.¹⁵ If the Commission failed to meet that obligation, its decision refusing to refer the matter to the Invalidity Committee could be declared unlawful.

22. The assertion of such 'continuity of fact' could, according to Advocate General Verloren van Themaat, provide comprehensive justification for an exception to the rule laid down in the Staff Regulations which provides that an invalidity pension may be awarded only if the official concerned is obliged to end his service with the Communities. He accordingly concluded that '[i]f it were possible to establish a causal connection between the applicant's first and second cardiac infarctions and if there had not been such a long interval between the two infarctions, it would perhaps have been unreasonable to ascribe such far-reaching consequences to a phrase of a provision contained in an annex [, the official being 'obliged on these grounds to end his service with the Communities']'.¹³ In the light of that Opinion, the Court of Justice decided to take account of the special nature of the

23. Although it acknowledges, at paragraph 36 of the judgment under appeal, that 'the circumstances of the case that led to the judgment in *Bähr v Commission* are very different from those in this case', the Court of First Instance chooses to examine the case pending before it in the same manner, that is to say, it seeks to ascertain whether the Commission could have been obliged to convene the Invalidity Committee when the appellant resigned. It goes on to conclude that the fact that neither the Commission nor the appellant knew the true state of the appellant's health in 1981 when he resigned relieved the Commission of any obligation to refer the appellant's case to the Invalidity Committee.

14 — That rule emerges clearly from Case 257/81 *K v Council* [1983] ECR I, paragraph 12.

15 — *Bähr v Commission*, cited above in footnote 5, at paragraphs 15 and 16; my emphasis.

13 — Opinion in *Bähr v Commission*, cited above in footnote 5.

24. It is surprising that the Court of First Instance comes to that conclusion. Mr Nardone's situation is clearly unlike that of Mr Bähr: Mr Bähr claimed, as the Court of First Instance explains in paragraph 41 of the judgment under appeal, that there was a serious, permanent fact, a clearly identified disease whose consequences in some instances can be anticipated. Mr Nardone, on the other hand, is claiming that occupational diseases arose, the true nature of which did not come to light until later. Whereas Mr Bähr was relying on a fact producing permanent effects that can be identified from the outset, Mr Nardone is invoking a *new fact* which brings to light *ex post facto* pathological conditions connected with his service. In this case, it could not be assumed with any certainty in 1981 that the appellant would suffer from invalidity which was directly and immediately connected with his state of health when he left the service. However, that does not mean that the connection did not exist. Indeed, in the case of a disease the nature and effects of which become apparent only after a lengthy incubation period, that connection could be established only at a later stage. In such circumstances, the true nature of the disease contracted by the official cannot be known until after the initial symptoms of the condition causing the invalidity present.

25. A clear distinction must be made between the onset of the disease, that is to say the point at which it is contracted, and its full-blown development, that is to say the point at which all its symptoms become apparent and its cause is known to the person affected by it. It should be borne in mind that, in this case, the appellant was

completely unaware, during his service, of the presence of asbestos and of the effects of exposure to that substance. When he left the service, he was therefore unable to make a connection between exposure of that kind and the illnesses from which he already seemed to be suffering.

26. Thus, the issue raised in these proceedings is different from that in *Bähr v Commission*. The issue here is not whether the Commission failed to fulfil one of its obligations by not referring the matter automatically to the Invalidity Committee *at the time when* the appellant indicated his intention to leave the service. First, the Court of First Instance clearly stated at paragraph 14 of the judgment under appeal that the Commission's decision of 26 October 1981 accepting the appellant's resignation was not at issue in those proceedings. Secondly, it is not disputed that a wrongful omission by the Commission in this regard, assuming that one could be established, comes under the Community's non-contractual liability; it does not concern the award of an invalidity pension. Therefore, the only issue in this case is whether the procedure may still be initiated, upon the request from the appellant, *at the timewhen* the disease is recognised.

27. The rule that the procedure may not be initiated unless a request to that effect has been made before the end of active service is reasonable as regards service-related 'acci-

dents'. Those were the circumstances on which the Court of First Instance had to rule in *Coussios v Commission*, cited above. In that case, the Court of First Instance dismissed the action brought against the refusal to award an invalidity pension because the applicant could have submitted his request while he was still in active service.¹⁶ That rule is still appropriate in the case of a 'permanent fact' which has foreseeable consequences and is directly and immediately connected with the official's state of health at the time when he leaves the service, provided that the Commission is obliged to refer the matter in good time to the Invalidity Committee. That is the sense of the judgment in *Bähr v Commission*. However, that rule is no longer appropriate in the specific circumstances of this case.

28. Indeed, to require the Commission or the official to submit the request before the official leaves the service is to impose a *condition that cannot be met* in this case. Laying down such a requirement would effectively preclude access to that procedure by officials suffering from degenerative conditions of the kind alleged to have arisen in this case. The state of ignorance in which these officials may find themselves, prior to leaving the service, as regards their situation

prevents them from asserting their pension rights in full knowledge of the facts. Once they have left the service, they are denied the possibility of determining their true situation by the Commission's automatic rejection of their request to refer their case to the Invalidity Committee.

29. An outcome of that kind is unacceptable. It is not possible to base an argument as the Court of First Instance does at paragraph 41 of the judgment under appeal, on the fact that, in 1981, the appellant was himself unaware of the repercussions that such dust inhalation would have on his health and that his ignorance in the matter persisted until 1992. Following that logic, to be entitled to initiate a procedure to establish invalidity the appellant would have had to agree to continue his service with the Commission for as long as the disease was not recognised, even though he would no longer have been able to perform his duties. In practice, the appellant is penalised twice by virtue of that argument: he is penalised for retiring early from the service on health grounds and is precluded in any event from exercising his pension rights. The appellant cannot be criticised for lacking the knowledge that he could not possibly have had. The ignorance of both parties during the period of service cannot be allowed to result in a penalty for one of those two parties. Leaving aside the question whether the appellant's invalidity is

16 — In the case in point, the applicant had submitted a report to the Commission detailing an accident which had taken place on 26 October 1993 while he was still in service; on the basis of that report, he received compensation pursuant to Article 73 of the Staff Regulations. It was not until that decision to grant compensation had been taken that he submitted a request for invalidity pension pursuant to Article 78 of the Staff Regulations, the underlying facts of which had not changed, despite the fact that the request was submitted almost four years after he had left the service.

genuine, it is difficult to see how he can, in such circumstances, be denied access to a procedure for examining his case.

acquiring pension rights when the Invalidation Committee recognises him as suffering from total permanent invalidity. In the appellant's view, however, account should be taken of the benefit paid in respect of his partial invalidity pursuant to Article 73 of the Staff Regulations. That was sufficient, in his view, to demonstrate a need to review his administrative status with a view, in particular, to restoring his pension entitlements.

30. I therefore conclude that the Court of First Instance erred in law in that it misinterpreted the case-law of the Court of Justice by failing to take account of the different circumstances in respect of which it was developed and to which it must be applied. The first plea raised in the appeal must therefore be upheld.

B – *The second plea of the appeal*

31. By his second plea, the appellant calls into question the manner in which the Court of First Instance applied Article 13 of Annex VIII to the Staff Regulations. He considers, in particular, that the Court of First Instance was wrong in finding that he was not acquiring pension rights when he submitted the request.

33. That argument is irrelevant. There is no doubt that the pension referred to in Article 13 of Annex VIII to the Staff Regulations in relation to 'pension rights' is the retirement pension.¹⁷ As the Commission submits, the benefit referred to in Article 73 of the Staff Regulations is not taken into account in calculating the retirement pension pursuant to Articles 2 and 3 of that annex. Thus, it cannot be inferred from the fact that that benefit was paid that the appellant was still acquiring pension rights when he submitted his request for an invalidity pension.

32. The Court of First Instance notes at paragraph 33 of the judgment under appeal that, under Article 13 of Annex VIII to the Staff Regulations, an official who requests an invalidity pension must *inter alia* still be

¹⁷ — I should point out in this regard that the new Staff Regulations of Officials of the European Communities, resulting from Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 amending the Staff Regulations of Officials of the European Communities and the Conditions of Employment of other servants of the European Communities (OJ 2004 L 124, p. 1), refer to the benefit paid pursuant to Article 78 as 'invalidity allowance' rather than by the earlier definition of 'invalidity pension'. Nevertheless, the heading to Annex VIII, entitled 'Pension scheme', has not been amended.

34. However, in examining this plea, it still has to be ascertained whether the Court of First Instance was right to regard the 'condition' laid down by Article 13 of Annex VIII to the Staff Regulations as a condition precluding the initiation of a procedure to establish invalidity in this case.

35. Article 78 of the Staff Regulations clearly makes the award of the pension subject to the conditions laid down in Articles 13 to 16 of Annex VIII to the Staff Regulations. It is therefore necessary to determine the precise meaning of the provision in Article 13 that an official may be recognised as suffering from invalidity only during the period in which he is acquiring pension rights. The reason for including such a provision is clear: its purpose is to prevent concurrent claims under separate pension schemes. The legislature considered it fair that a former official who is already benefiting from the award of his pension rights by receiving a retirement pension should not be eligible for a second pension the sole purpose of which is, specifically, to provide replacement income if needed. Thus, the disputed provision contained in Article 13 must be regarded as a straightforward limitation of the category of persons entitled to claim the invalidity pension. However, in other circumstances the Commission has acknowledged that, provided that the essential condition laid down in the Staff Regulations for the award of an invalidity pension was met without incurring a risk of concurrent pension claims, there was no need to keep to the

letter of Article 13 of Annex VIII to the Staff Regulations.¹⁸ Similarly, the Corte Costituzionale (Constitutional Court, Italy) has held that the law cannot deny workers the right to claim an invalidity pension, even if the request for such a pension is submitted after statutory retirement age, because there are circumstances in which such workers still would not qualify for a retirement pension.¹⁹

36. It would be misguided to regard the provision in Article 13 of Annex VIII to the Staff Regulations as anything more than a prohibition on concurrent claims. That Article is, after all, part of Annex VIII to the Staff Regulations which relates to the 'Pension scheme'. The reference to that Article in Article 78 of the Staff Regulations must therefore be interpreted as a straightforward means of implementing a right guaranteed by the Staff Regulations and not as laying down a new condition in addition to those essential conditions governing entitlement to invalidity pension laid down by the Staff Regulations. Article 13 is merely an exception in that regard. Even if the conditions for the award of an invalidity pension are met, the pension will not be paid if the official concerned is already in receipt of a retirement pension.

18 — It is its reply in the context of Case T-9/01 *Becker v Court of Auditors* [2002] ECR-SC I-A-79 and II-379, the Commission stated that it was prepared, in the case of an official on leave on personal grounds within the meaning of Article 40(3) of the Staff Regulations, to initiate a procedure to establish invalidity even though that official was not acquiring new rights to a retirement pension. The reason for that approach was that, in that case, the official concerned did not have the status of a 'former official' claiming the retirement pension. As far as the Commission was concerned, the provisions of the Staff Regulations had to take precedence, in that particular case, over the provision contained in Article 13 of Annex VIII to those regulations.

19 — Decision of 25 March 1988, No 436, published in *Giurisprudenza Costituzionale* 1988, p. 1978.

37. In any event, Article 13 of Annex VIII to the Staff Regulations cannot be intended to restrict Article 78 of the Staff Regulations. The Court of Justice has already held that a provision included in an annex cannot nullify the effectiveness of the main provision to which it relates.²⁰ In a different context, the Court of Justice recalls that the time-limits laid down in an annex are not mandatory; they merely constitute rules of sound administration.²¹ That line of authority can be applied in this case. I therefore take the view that Annex VIII cannot in law constitute a nullifying obstacle to pension entitlement, where it is established that the condition for awarding the pension, which is laid down by the Staff Regulations, can be met. The single substantive condition governing the award of a pension under Article 78 of the Staff Regulations is that a causal link must be established between the total permanent invalidity and the active service.

38. In this case the appellant is not considered to be making concurrent claims under separate pension schemes. He was certainly entitled to payment of the severance grant provided for in Article 12 of Annex VIII to the Staff Regulations when he ended his service, but that grant is not treated as an invalidity pension, which he could not, in any case, request in 1981 for the reasons set out above.

39. Article 13 of Annex VIII is of limited material scope and is in the form of an exception. Its main objective is to lay down the procedural conditions for entitlement to an invalidity pension. It provides in that regard that an invalidity pension can be granted only at the end of a special procedure in which the official is recognised as being incapable of continuing his service. As far as that procedure is concerned, Article 13 of that annex merely states that the Invalidity Committee alone has authority to make the relevant medical findings.²²

40. It can therefore be inferred that the procedure must be such as to ensure the effectiveness and the protection of the right guaranteed by the Staff Regulations. A right can be exercised only if there is a means of protecting it (*ubi jus, ibi remedium*). Herein lies the other reason for having procedural rules: in addition to their being used to establish the facts which should facilitate a decision, they are also used to afford guarantees of protection, that is to say to enable any holder of a right to dispose of and assert that right.

41. Thus it is perfectly natural to assume that the recognition of invalidity must *in general* be contemporaneous with the period of active service. Such a procedural rule is

20 — See, to that effect, the judgment in Case C-215/99 *Jauch* [2001] ECR I-1901, paragraphs 20 to 22, and the Opinion of Advocate General Alber in that case, in points 62 and 63.

21 — Case C-270/99 P v *Parliament* [2001] ECR I-9197, paragraph 21.

22 — *K v Council*, cited above in footnote 14, in paragraph 11.

consistent with the principle of sound administration. First, it is obviously easier to establish the causal link where the procedure is initiated during active service. Secondly, the right in question cannot be exercised indefinitely. That approach is dictated by the requirements of legal certainty and protection of the public interest.

42. However, it is essential to ensure that the right to obtain an invalidity pension can be exercised. It cannot be considered to be totally exhausted before the possibility of exercising it has even arisen. Nevertheless, that is the inevitable consequence of the reasoning adopted by the Court of First Instance. By prohibiting referral in such a case to the Invalidity Committee once the period of service has ended, the Court of First Instance makes it absolutely impossible to exercise the right conferred by the Staff Regulations.²³ I do not therefore consider it possible to maintain that procedural rule any longer in circumstances such as those arising in this case in which the disease, which was contracted in the course of service and resulted in total incapacity for work, became apparent only once the period of service had ended.

43. The condition relating to the 'period in which [the official] is acquiring pension rights' is not considered to be decisive where, for example, as a result of unforeseeable

delays which cannot be attributed to the official, the Invalidity Committee does not meet until more than six years after the submission, during his service, of the application for a declaration of invalidity.²⁴ It would be illogical and unfair not to allow an interval between the processing of the application and the emergence of the disease in cases where the causal link can be established with certainty only at the end of an incubation period after the official has left the service. That does not mean that the period allowed for referring a matter to the Invalidity Committee lasts indefinitely. There is, however, a reasonable period, beginning upon recognition of the disease and of its occupational nature, within which it should be possible to request a pension of that kind. Otherwise, the exercise of individual rights would effectively be subject to the good will of the administration, and officials enjoying the same rights would be treated differently depending on the nature of their respective diseases.

44. I therefore take the view that, in circumstances such as those arising in this case, the conditions laid down in Annex VIII to the Staff Regulations must not be construed as denying the appellant his right to request the initiation of a procedure to establish invalidity by reason of occupational disease.

23 — See, to that effect, point 26 of this Opinion.

24 — That was, *inter alia*, the situation found to exist in Case T-43/89 *Gill v Commission* [1990] ECR II-173, paragraph 7.

45. By misinterpreting the provisions of the Staff Regulations in the circumstances of this case, the Court of First Instance has erred in law. Accordingly, the second plea of the appeal must also be upheld.

III — Examination of the appeal

46. Under the first paragraph of Article 61 of the Statute of the Court of Justice, in the event that the decision of the Court of First Instance is quashed, the Court of Justice may itself give final judgment in the matter, provided that the state of the proceedings so permits. In this case, the errors in law committed by the Court of First Instance can be easily rectified in my view. The Court of Justice must therefore give final judgment on those pleas raised in the appeal that the Court of First Instance had dismissed in the parts of its judgment that are to be quashed.

47. By those various pleas the appellant claims that it should be possible, in the circumstances of this case, to award an invalidity pension to a former official in spite of the fact that he resigned from the service.

48. It should be borne in mind that the Staff Regulations subject the award of an invalidity

pension related to an occupational disease to two separate conditions: an obligation that the official cease his duties, although no indication is given of the form that such a measure must take, and proper recognition of total permanent invalidity by a special committee. In applying and interpreting those conditions, a balance must be found between the protection of officials' rights conferred by the Staff Regulations, on the one hand, and the requirements of legal certainty and of the protection of the Community's (in particular financial) interests, on the other. To achieve such a balance, it is necessary to limit the possibility of initiating procedures to establish invalidity.

49. On any view, it is for the Commission to assess in each case the conditions to be imposed to achieve such a balance. However, it falls to the Court of Justice to satisfy itself that the Commission has remained within 'reasonable bounds' in its assessment and has not used its power 'in a manifestly incorrect way'.²⁵ It must, in particular, satisfy itself that the Commission has not, by its decisions, undermined the guarantees provided in the Staff Regulations, infringed the rights protected by the Community legal order or offended against the principles of sound administration.

50. In general, it is indeed consistent with the Staff Regulations and their principles to

²⁵ — Case C-277/01 P *Parliament v Samper* [2003] ECR I-3019, paragraph 35.

restrict the right to initiate a procedure to requests made by officials before ending their service. However, in situations resulting from the recognition of asbestos-related diseases, it is essential, in my view, to allow requests made after active service has ended. There are two lines of reasoning, in my view, to support that conclusion.

51. First, the situation of those officials relates to a fundamental right of access to social security benefits providing protection in cases such as illness, industrial accidents, dependency or old age, and in the case of loss of employment. That right is entailed by Article 12 of the 1961 European Social Charter and point 10 of the 1989 Community Charter of the Fundamental Social Rights of Workers, Article 136 EC expressly referring to both charters. That right is currently laid down in Article 34 of the Charter of Fundamental Rights of the European Union.²⁶ Although it does not as yet have binding legal effects, the above-mentioned charter none the less serves as a guide to and point of reference for the rights guaranteed by the Community legal order.²⁷ The specific purpose of Article 78 of the Staff Regulations is to provide such protection in the European public service.

26 — OJ 2000 C 364, p. 1.

27 — See, to that effect, point 28 of the Opinion of Advocate General Tizzano in Case C-173/99 *BECTU* [2001] ECR I-4881, and points 82 and 83 of the Opinion of Advocate General Léger in Case C-353/99 P *Council v Hautala* [2001] ECR I-9565.

52. In the context of the Member States' domestic law, there is a ruling by the Corte Costituzionale that is worthy of note; it states that a law under which an invalidity pension may not be obtained where it is applied for after statutory retirement age is contrary to Article 38 of the Italian Constitution, which protects workers' rights to means of subsistence in the event of illness.²⁸ In the same vein, national legislative systems in general fix a limitation period within which a request for an invalidity pension may be submitted after the end of active service. Occasionally, in cases concerning asbestos-related invalidity, special provisions restoring eligibility for benefits and pensions have even been introduced.²⁹

53. This case certainly is not concerned with challenging the validity of the Staff Regulations. However, the existence of the right to protection in the event of invalidity must have implications for the interpretation of their provisions. The principle of consistent interpretation undoubtedly applies here.³⁰ Under that principle, the provisions relating to the invalidity pension scheme must be interpreted as consistently as possible with the provision of the Staff Regulations that they are intended to implement and with the

28 — Decision cited above in footnote 19.

29 — Thus, in France, Article 40 of Law No 98-1194 financing the social security scheme in respect of 1999, of 23 December 1998, as amended by Law No 2001-1246 (*JORF*, 26 December 2001, p. 20552), provided for the restored eligibility — free from limitation periods — of persons suffering from asbestos-related diseases for social security benefits and allowances.

30 — This is one of the most distinctive principles of interpretation of Community case-law (see, for example, Case C-61/94 *Commission v Germany* [1996] ECR I-3989, paragraph 52).

fundamental rights protected by the Community legal order.³¹ The Commission must, therefore, make every effort to consider requests for referral to the Invalidity Committee in the light of the objective pursued by Article 78 of the Staff Regulations, namely to guarantee the right to a replacement income in the form of an invalidity pension in case of need.³² It would appear that the Commission, in the contested decision, favoured an interpretation of the procedural rules which makes it impossible to exercise the right conferred by the Staff Regulations. By prohibiting referral to the Invalidity Committee at the time when the request for referral was made, the Commission misinterpreted the Staff Regulations.

situation of an official it should take into consideration all the factors which may affect its decision and that, in so doing, it should take into account not only the interests of the service but also those of the individual concerned'.³³ Thus, the Commission is obliged in particular to assist in establishing the true position of members of its staff.³⁴ In this instance, the administration has failed to take account of the circumstances of the case in examining the file. Indeed, the contested decision does not refer either to the extensive exposure to asbestos dust cited by the appellant in his request or to the potential link between, on the one hand, the established invalidity and, on the other, his state of health when he ended his service, as shown in the medical report annexed to the request. Having examined that report, the Commission decided to have regard only to its reference to an invalidity 'currently' existing and thus concluded that the conditions laid down by the Staff Regulations were not fulfilled.

54. Secondly, the Community institutions are bound by a duty to have regard to the welfare of their officials, which requires them to examine thoroughly the individual cases on which they have to give a decision. It is apparent from the case-law of the Court of Justice that 'the administration's duty to have regard to the welfare of officials ... reflects the balance of ... rights and obligations established by the Staff Regulations in the relationship between the official authority and the civil servants. A particular consequence of this balance is that when the authority takes a decision concerning the

55. In such circumstances, there was nothing to prevent the initiation of a procedure to establish invalidity once the nature and effects of the disease were ultimately recognised; on the contrary, everything pointed to the need to implement such a measure. Here, the legitimate requirements of legal certainty and considerations of public interest are safeguarded if the request is submitted within a 'reasonable period' of the date on

31 — See, by analogy, Case C-135/93 *Spain v Commission* [1995] ECR I-1651, paragraph 37.

32 — As regards the objective pursued by Article 78 of the Staff Regulations, see Case T-47/97 *Plug v Commission* [2000] ECR-SC I-A-119 and II-527, paragraph 73.

33 — Case C-298/93 P *Klinke v Commission* [1994] ECR I-3009, paragraph 38.

34 — See also Article 24 of the Staff Regulations which imposes a duty on the Communities to assist their staff.

which the disease was diagnosed for the first time.³⁵

56. In the alternative, one final question deserves consideration: Should it be concluded that the Commission is right to deny the appellant the right to request an invalidity pension because — as the Commission maintained at the hearing — he had other means of subsistence, in that he benefited *inter alia* from the sickness insurance guaranteed by Article 73 of the Staff Regulations,³⁶ and because there was another remedy available to him through an action for damages brought pursuant to Article 236 of the Treaty?³⁷ Both limbs of that argument must be rejected. First, it has been consistently held that a capital sum obtained under Article 73 of the Staff Regulations constitutes compensation which is neither equivalent to nor incompatible with a pension awarded under Article 78 of the Staff Regulations.³⁸ Secondly, it must be

perfectly clear by now that payment of an invalidity allowance cannot be compared with damages, as regards either its purpose or its effects. For one thing, the Commission must be found to have committed a serious breach of Community law for damages to be awarded. Furthermore, the Court of Justice has held that compensation payable under the insurance scheme provided for in the Staff Regulations cannot, in principle, preclude the award of damages by operation of the ordinary law relating to liability. In its judgment of 8 October 1986 in *Leussink and Others v Commission*, the Court of Justice in theory recognises 'the right [of the official and the members of his family] to seek additional compensation where the institution is responsible for the accident according to general law and the benefits payable under the staff insurance scheme are insufficient to provide full compensation for the injury suffered'.³⁹ In practice, however, the Court concludes that the abovementioned principle may not lead to double compensation for the same harm.⁴⁰

35 — The concept of the 'reasonable period' already arises in the Rules on the Insurance of Officials of the European Communities against the Risk of Accident and of Occupational Disease, adopted pursuant to Article 73 of the Staff Regulations. Article 17(1) of those rules provides that '[a]n official who requests application of these rules on grounds of an occupational disease must submit a statement to the administration of the institution to which he belongs within a reasonable period following the onset of the disease or the date on which it was diagnosed for the first time. The statement may be submitted by an official or, where the symptoms of the disease allegedly caused by his occupation become apparent after the termination of his service, the former official'. That concept is prominent in the case-law of the Court of Justice in matters involving limitation periods which are not resolved by the Treaty (see, for example, Case 120/73 *Gebrüder Lorenz* [1973] ECR 1471, paragraph 4).

36 — See, in that regard, *Nardone v Commission*, cited above in footnote 10.

37 — The present appellant brought an action on that basis before the Court of First Instance (Case T-57/99 *Nardone v Commission*). However, those proceedings were stayed pending the decisions to be taken by the Commission in the light of the judgment in Case T-27/98, cited above in footnote 10.

38 — See, in particular, *K v Council*, cited above in footnote 14, at paragraph 10.

57. It is clear from the foregoing considerations that the contested decision is plainly the result of a misinterpretation in the application of the relevant provisions of the Staff Regulations. The Commission's decision refusing to initiate — upon a request from the appellant — a procedure to establish invalidity under Article 78 of the Staff Regulations must consequently be annulled.

39 — Joined Cases 169/83 and 136/84 [1986] ECR 2801, paragraph 13.

40 — Case C-257/98 P *Lucaccioni v Commission* [1999] ECR I-5251, paragraph 21.

IV — Conclusion

58. For the foregoing reasons, I take the view that the pleas raised in the appeal should be upheld and, consequently, that the judgment delivered by the Court of First Instance of the European Communities on 26 February 2003 in Case T-59/01 (*Nardone v Commission*) should be set aside.

59. I also suggest that the Court, ruling on the merits, should:

- annul the decision of the Commission of the European Communities of 20 March 1998 concerning the award of an invalidity pension to the appellant;
- order the Commission to pay the costs of both proceedings.