JUDGMENT OF THE COURT OF FIRST INSTANCE (Appeal Chamber)

18 December 2008 *

In Joined Cases T-90/07 P and T-99/07 P,

APPEALS against the judgment of the European Union Civil Service Tribunal (First Chamber) of 16 January 2007 in Case F-92/05 *Genette* v *Commission*, not yet published in the ECR-SC, seeking to have that judgment set aside,

Kingdom of Belgium, represented by L. Van den Broeck and C. Pochet, acting as Agents, and by L. Markey, lawyer,

Commission of the European Communities, represented by V. Joris and D. Martin, acting as Agents,

applicants,

the other party to the proceedings being

* Language of the case: French.

Emmanuel Genette, official of the Commission of the European Communities, residing in Gorze (France), represented by M.-A. Lucas, lawyer,

applicant at first instance,

THE COURT OF FIRST INSTANCE

OF THE EUROPEAN COMMUNITIES (Appeal Chamber),

composed of M. Jaeger, President, V. Tiili, M.E. Martins Ribeiro, O. Czúcz and I. Pelikánová (Rapporteur), Judges,

Registrar: E. Coulon,

having regard to the written procedure and further to the hearing on 19 September 2008,

gives the following

Judgment

1 In their appeals, brought under Article 9 of Annex I to the Statute of the Court of Justice, the Kingdom of Belgium and the Commission of the European Communities are seeking to have set aside the judgment of the European Union Civil Service Tribunal

(First Chamber) of 16 January 2007 in Case F-92/05 *Genette* v *Commission*, not yet published in the ECR-SC (the 'judgment under appeal'), in which the Tribunal annulled the decision of the Commission of 25 January 2005 refusing Mr Genette's request of 31 October 2004.

Legal context

2 Article 11(2) of Annex VIII to the Staff Regulations of Officials of the European Communities, in the version prior to the entry into force of Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 amending those Staff Regulations (OJ 2004 L 124, p. 1) (the 'old Staff Regulations'), provided that:

'An official who enters the service of the Communities after:

— leaving the service of a government administration or of a national or international organisation; or

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

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

In such case the institution in which the official serves shall, taking into account his grade on establishment, determine the number of years of pensionable service with which he shall be credited under its own pension scheme in respect of the former period of service, on the basis of the amount of the actuarial equivalent or sums repaid as aforesaid.'

3 Article 11(2) of Annex VIII to the Staff Regulations, in the version resulting from Regulation No 723/2004 (the 'new Staff Regulations'), which under Article 2 thereof came into force on 1 May 2004, provides that:

'An official who enters the service of the Communities after:

— leaving the service of a government administration or of a national or international organisation; or

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

shall be entitled, after establishment but before becoming eligible for payment of a retirement pension within the meaning of Article 77 of the Staff Regulations, to have paid to the Communities the capital value, updated to the date of the actual transfer, of pension rights acquired by virtue of such service or activities.

In such case the institution in which the official serves shall, taking into account the official's basic salary, age and exchange rate at the date of application for a transfer, determine by means of general implementing provisions the number of years of pensionable service with which he shall be credited under the Community pension scheme in respect of the former period of service, on the basis of the capital transferred, after deducting an amount representing capital appreciation between the date of the application for a transfer and the actual date of the transfer.

Officials may make use of this arrangement once only for each Member State and pension fund concerned.'

4 In accordance with Article 107a of the new Staff Regulations, 'transitional measures' are set out in Annex XIII to the Staff Regulations. Under Article 26(3) of that annex:

'Officials who submitted a request for transfer within the time-limits but rejected the offer made to them, who did not submit a transfer request within the time-limits previously stipulated, or whose request was rejected for having been submitted after those time-limits, may still submit or resubmit such a request by 31 October 2004 at the latest.'

5 Article 3 of the Belgian law of 21 May 1991 establishing certain relations between the Belgian pension schemes and those of institutions governed by public international law, published in the *Moniteur belge* of 20 June 1991, p. 13871 (the 'law of 1991'), laid down that 'any civil servant may, with the agreement of the competent institution, request that the amount of retirement pension relating to service and periods prior to the date on which he joined the institution should be paid to that institution'. That law introduced a special transfer system, subrogation, derived from the formula for the transfer of the actuarial equivalent laid down in Article 11(2) of Annex VIII to the old Staff Regulations.

6 Article 9 of the law of 1991 provides as follows:

'As long as the subrogation provided for in Article 11 [of the law] has not taken effect, the official may, with the agreement of the institution, withdraw his transfer request. Such withdrawal is final.'

7 The Belgian law of 10 February 2003 governing the transfer of pension rights between Belgian pension schemes and those of institutions governed by public international law, published in the *Moniteur belge* of 27 March 2003, p. 14747 (the 'law of 2003'), amended Belgian legislation on the transfer of pension rights acquired in Belgian schemes to the Community pension scheme. The law, which pursuant to Article 29 thereof is applicable to transfer requests submitted on or after 1 January 2002, establishes a system for the payment of the flat-rate redemption value of contributions paid into a Belgian pension scheme plus compound interest. Under this new legislation, the transfer of pension rights gives rise to the immediate payment of a capital sum to the Community scheme.

8 Article 4 of the law of 2003 provides as follows:

'An official or temporary servant who, having acquired rights to one or more pensions referred to in subparagraphs 1 to 4 of Article 3(1), has entered the service of an institution may, with the agreement of the latter, request that the amounts determined in accordance with Article 7 be transferred to that institution or to its pension fund in respect of his membership of those pension schemes for the period before his entry into the service of the institution. …'

9 Article 9(1) of the law of 2003 provides as follows:

'The transfer request shall become irrevocable on the date on which the [National Pension] Office receives from the institution final confirmation of the transfer request submitted by the official or temporary servant.'

10 Article 194 of the Belgian law of 20 July 2006 containing various provisions, published in the *Moniteur belge* of 28 July 2006, p. 36940 (the 'law of 2006'), amended Article 9 of the law of 1991, which now provides as follows:

'As long as the subrogation provided for in Article 11 has not taken effect, an official leaving the institution without being able to receive a retirement pension may, with the agreement of the institution, withdraw his transfer request. Such withdrawal is final.'

11 Pursuant to Article 195 of the law of 2006, that new version of Article 9 of the law of 1991 came into force with retroactive effect as from 1 May 2004.

The facts

12 The facts are set out in the judgment under appeal as follows:

‘8 Before entering the service of the Commission on 1 April 2000, in grade B 5, step 3, [Mr Genette], who was born in 1968, worked in the private sector in Belgium as a self-employed worker from 1992 to 1996 and then as an employee from 1996 to 2000.

9 In those capacities, he was first affiliated to the Institut national d’assurance sociale des travailleurs indépendants … (“Inasti”) and then to the Office national des pensions (National Pension Office) (“ONP”), paying contributions to their pension schemes and therefore acquiring pension rights with these bodies.

10 After his establishment as a Community official on 1 January 2001, [Mr Genette] requested, in a letter to the Commission dated 13 July 2001, that the rights he had

acquired in the Belgian schemes for self-employed and salaried workers be transferred to the Community pension scheme. That request was based on Article 11(2) of Annex VIII to the [old] Staff Regulations …, and on Article 3 of the law of 1991.

11 On 11 June 2002 the unit dealing with "Pensions and relations with former officials" of Directorate B of the Directorate-General (DG) for Personnel and Administration at the Commission sent [Mr Genette] a note indicating the number of additional years of pensionable service that would be credited to him under the Community scheme on the basis of the actuarial equivalent, calculated by the Commission, of the national pension acquired in the Belgian scheme for self-employed workers. If [Mr Genette] retired at the age of 65, the actuarial equivalent of the pension of EUR 1431.29 per year calculated by the Inasti would amount to EUR 8139.33 and the seniority allowance to be taken into account in the Community scheme would be 1 year and 19 days. The Commission also informed him that pursuant to Article 11 of the law of 1991 it would be subrogated to his pension rights acquired in Belgium when his Community pension became payable.

12 On 26 August 2002 the same department sent [Mr Genette] a similar note concerning the pension rights he had acquired as a salaried employee and informing him that, at age 65, the actuarial equivalent of the pension of EUR 1952.48 per year calculated by the ONP would amount to EUR 11102.79 and that the corresponding seniority allowance in the Community scheme would be one year, five months and five days.

13 In these notes the applicant was informed that, once his agreement to the proposals they contained was received, his transfer request [of 13 July 2001] could no longer be rescinded. However, the notes stated that in exceptional circumstances the request could be rescinded if his employment with the Commission ended before he met the conditions for receipt of a Community pension under Article 77 of the Staff Regulations.

14 On 17 July and 29 August 2002 [Mr Genette] notified his agreement to the Commission's proposals of 11 June and 26 August 2002 respectively.

15 ...

16 Shortly before October 2004 [Mr Genette] learnt that a person of his acquaintance, who had entered the service of the Commission in 2003 and who, like him, had applied under the version of the Staff Regulations applicable before the Regulation of 22 March 2004 came into force to transfer to the Community scheme the pension rights he had acquired in the Belgian scheme for salaried employees, had had transferred by Belgium a capital sum corresponding to years of affiliation and salary comparable to his own, which had given rise to the crediting of a much larger number of additional years of pensionable service to the Community scheme than that to which he himself was entitled.

17 On 31 October 2004 [Mr Genette] submitted to the Commission, under Article 90(1) of the Staff Regulations, a request that the Commission:

— decide to permit him, in accordance with Article 9 of the law of 1991, to withdraw the request he had made on 13 July 2001 on the basis of that law for the pension rights he had acquired in the Belgian pension schemes for self-employed and salaried workers to be transferred to the Community scheme;

— decide to permit him, in accordance with Article 4(1) of the law of 2003, to request the transfer of his pension rights on the basis of that law.

18 On 2 February 2005 [Mr Genette] was notified of a decision of 25 January 2005 taken by the Head of the "Pensions" Unit refusing his request of 31 October 2004 ("the contested decision") in the following terms:

19 "… You wish … to be permitted first to withdraw the request under Article 11(2) of Annex VIII [to the Staff Regulations] to transfer your pension rights acquired under the Belgian Inasti and ONP schemes, which has already been actioned by the schemes in accordance with the provisions of the law of 1991, and secondly to submit a new request to be actioned by the schemes in question in accordance with the provisions of the law of 2003.

20 The proposals sent to you by the administration of the Commission on 11 June 2002 and 26 August 2002 after the Inasti and the ONP had notified the amount of transferable pension stated clearly that the transfer would become irrevocable once the department concerned received your agreement to the proposals. As a result of your acceptance, the transfer of your rights has been actioned and the ONP and Inasti files have been closed definitively by the [appointing authority].

21 Although the law of 1991 provides for the possibility 'with the agreement of the institution, [to] withdraw [the] transfer request' (Article 9 of the law of 1991), in practice that possibility was available at the level of the [i]nstitutions only in exceptional cases, which moreover were indicated in the proposal sent to the person concerned: 'In exceptional circumstances the request may be withdrawn if the employment of the person concerned ceases before the conditions for receiving a Community pension under Article 77 of the Staff Regulations are met'. Here it is not a matter in any way of the possibility of withdrawing the request, but of annulling the operation in a very specific case.

22 Moreover, in its judgment of 9 November 1989 in Joined Cases 75/88, 146/88 and 147/88, the Court of Justice of the European Communities clearly established the distinction between two different legal systems into which the decisions concerning on the one hand the calculation of the transferable amount and on the other the conversion of that entitlement into years of pensionable service fall and which must each be dealt with by the courts having jurisdiction under the relevant legal system. Consequently, a theoretical possibility to withdraw the transfer request provided for by the Belgian law has no effect since Community rules make no provision for it. That is the case here.

23 In these circumstances, it is impossible for me to permit you to withdraw the request that has already been closed and to submit a new request relating to a transfer that has been duly finalised."

24 On 22 April 2005 [Mr Genette], via his adviser, lodged a complaint with the Commission against the contested decision on the basis of Article 90(2) of the Staff Regulations.

25 On 10 June 2005 the Director-General of the Personnel and Administration DG adopted, in his capacity as appointing authority, a decision "in response to the requests and complaints of many officials concerning the transfer of pension rights from the Belgian scheme to the Community scheme", which was notified to the applicant by e-mail and fax on 14 June 2005 …'

Procedure at first instance and the judgment under appeal

13 By application lodged at the Registry of the Court of First Instance on 26 September 2005, Mr Genette sought annulment of the decision of the Head of the Pensions Unit in the Office for Administration and Payment of Individual Entitlements (PMO) of 25 January 2005 (the 'decision of 25 January 2005') and the decision of the Director-General of the Personnel and Administration DG of 10 June 2005 (the 'decision of 10 June 2005'). That action was entered under number T-361/05.

14 By order of 15 December 2005, pursuant to Article 3(3) of Council Decision 2004/752/EC, Euratom of 2 November 2004 establishing the European Union Civil Service Tribunal (OJ 2004 L 333, p. 7), the Court of First Instance referred the present case to the Civil Service Tribunal. The application was recorded at the Registry of the latter under number F-92/05.

15 By an application received at the Registry of the Civil Service Tribunal on 8 May 2006, the Kingdom of Belgium applied to intervene in the proceedings in support of the Commission. Under Articles 115(1) and 116(6) of the Rules of Procedure of the Court of First Instance, which apply *mutatis mutandis* to the Tribunal pursuant to Article 3(4) of Decision 2004/752 until the Rules of Procedure of the latter enter into force, the President of the First Chamber of the Tribunal allowed that intervention at the hearing, by order of 29 June 2006.

16 In the judgment under appeal, the Civil Service Tribunal annulled the decision of 25 January 2005.

17 The Civil Service Tribunal first rejected the plea of inadmissibility raised by the Commission on the ground that the application was submitted after expiry of the period laid down in Article 91(3) of the Staff Regulations.

18 It then considered that the claims for annulment of the decision of 10 June 2005, rejecting the complaint submitted by Mr Genette on 22 April 2005, did not have a content of their own independent of the claims for annulment of the decision of 25 January 2005 and that their sole object was therefore an application for annulment of the latter decision.

19 The Civil Service Tribunal first examined the claims for annulment of the decision of 25 January 2005 in so far as they were directed against the Commission's refusal to permit Mr Genette to withdraw his request to transfer to the Community scheme the pension rights he had acquired in Belgian pension schemes. In paragraphs 42 to 50 of the judgment under appeal, the Tribunal interpreted Mr Genette's claims in that regard. It stated that the transfer to the Community pension scheme of rights acquired under national pension schemes is an operation entailing two successive unilateral decisions taken at the request of the person concerned and in the exercise of limited discretion, first by the bodies managing the national pension schemes and secondly by the Community institution. Since, under Article 9 of the law of 1991, the person concerned was entitled to request the withdrawal of the decisions taken by the bodies managing the Belgian pension schemes as long as the subrogation provided for in Article 11 of the same law had not taken effect, the Civil Service Tribunal considered that the transfer of the rights was entirely rescinded if the decision of the institution determining the corresponding credit in terms of years of service to the Community scheme was also withdrawn and that, consequently, the agreement of the institution referred to in Article 9 of the law of 1991 could refer only to withdrawal of the decision taken by the institution at the time of the transfer of the pension rights. Consequently, it considered that the claims directed against the Commission's refusal to permit Mr Genette to withdraw his request of 13 July 2001 to transfer his pension rights must be interpreted as seeking the annulment of the Commission's refusal to withdraw its decisions of 11 June and 26 August 2002.

20 In paragraphs 55 to 93 of the judgment under appeal, the Civil Service Tribunal examined the admissibility of the claims for annulment of the Commission's refusal to withdraw its decisions of 11 June and 26 August 2002. It pointed out first that the request to withdraw those decisions, made after the expiry of the time-limits for bringing actions, was none the less justified by a new substantial fact constituted by the successive entry into force of the law of 2003 and of Article 26(3) of Annex XIII to the new Staff Regulations. Those new provisions altered Mr Genette's legal situation with regard to the transfer to the Community pension scheme of his pension rights acquired in Belgian pension schemes and justified a review of the decisions of 11 June and 26 August 2002. The interpretation that Mr Genette was excluded from the scope of those new provisions was likely to create an unjustified difference in treatment, having regard to Article 11(2) of Annex VIII to both the old and the new Staff Regulations, between officials who transferred their rights under Belgian pension schemes and those who had not obtained such a transfer. Moreover, the retroactive application of those provisions to certain limited categories of officials and not to Mr Genette cast doubt on the legality of that difference in treatment in the light of the principle of the protection of legitimate expectations.

21 The Civil Service Tribunal then took the view that the request of 31 October 2004, intended to obtain a review of the decisions of 11 June and 26 August 2002, had been submitted within a reasonable time after Mr Genette obtained precise knowledge of the new substantial fact justifying that review. It concluded that the claims for annulment of the Commission's refusal to withdraw its decisions of 11 June and 26 August 2002 were admissible.

22 Finally, the Civil Service Tribunal granted Mr Genette's application for annulment by accepting the first and third pleas alleging errors of law in the grounds of the decision of 25 January 2005 to the effect that the transfer to the Community pension scheme of the rights acquired by Mr Genette in the Belgian pension schemes had become irrevocable by virtue of the applicant's agreement to it and that that transfer could not be rescinded in the absence of a provision of Community law permitting such action.

23 With regard to the first claim for annulment, the Civil Service Tribunal considered, in paragraphs 103 to 110 of the judgment under appeal, that the Commission had committed an error of law by refusing to withdraw its decisions of 11 June and 26 August 2002 on the ground that their express acceptance by Mr Genette had rendered them definitive. In the Tribunal's view, although that acceptance enabled those decisions to come into force, only the expiry of the periods laid down in Articles 90 and 91 of the Staff Regulations had the effect of rendering them definitive.

24 With regard to the third claim for annulment, the Civil Service Tribunal considered, in paragraphs 118 to 135 of the judgment under appeal, that the Commission misconstrued the scope of its powers under Article 11(2) of Annex VIII to both the old and the new Staff Regulations and thus committed an error of law in its decision of 25 January 2005. In the absence of special provisions of Community law governing that subject, the withdrawal of decisions transferring to the Community pension scheme rights acquired under national pension schemes are subject to the case-law of the Court of Justice concerning individual decisions creating rights. After stating that the withdrawal of the decisions of 11 June and 26 August 2002 was not of itself liable to affect the rights of the Belgian pension schemes, the Civil Service Tribunal held that there was no obstacle to the Commission withdrawing them, as requested by Mr Genette.

25 Secondly, the Civil Service Tribunal examined, in paragraphs 137 and 138 of the judgment under appeal, the claims for annulment of the Commission's refusal to permit Mr Genette to submit a new request for the transfer to the Community pension scheme of rights he had acquired under the Belgian pension schemes. It considered that that refusal must also be annulled since it was justified on the same grounds, vitiated by errors of law, which were relied on in refusing to withdraw the decisions of 11 June and 26 August 2002.

The appeals

Procedure

26 By applications lodged at the Registry of the Court of First Instance on 26 and 29 March 2007, the Kingdom of Belgium, in Case T-90/07 P, and the Commission, in Case T-99/07 P, brought the present appeals.

27 On 30 June 2007, in Case T-90/07 P, and on 3 July 2007, in Case T-99/07 P, Mr Genette lodged his responses. By letters of 3 May 2007, in Case T-90/07 P, and 8 May 2007, in Case T-99/07 P, the Kingdom of Belgium and the Commission, respectively, waived their right to lodge a response.

28 By letters lodged at the Registry of the Court of First Instance on 13 July 2007, in Case T-99/07 P, and 17 July 2007, in Case T-90/07 P, the Commission and the Kingdom of Belgium, respectively, applied under Article 143 of the Rules of Procedure for leave to submit a reply. By decisions of 25 and 30 July 2007, the President of the Appeal Chamber allowed those applications, although limiting the scope of the replies solely to questions of admissibility. The replies and rejoinders were lodged within the prescribed time-limits.

29 The written procedure was closed on 27 December 2007, in Case T-99/07 P, and on 28 January 2008, in Case T-90/07 P.

30 By letter lodged at the Registry of the Court of First Instance on 29 January 2008, the Commission applied to be heard by the Court under Article 146 of the Rules of Procedure so as to submit its observations orally in Case T-99/07 P. By letters lodged at the Registry of the Court on 19 February 2008, the Kingdom of Belgium made a similar application in Case T-99/07 P and Case T-90/07 P. In the same letters, the Kingdom of Belgium applied under Articles 50 and 144 of the Rules of Procedure for an order that Case T-99/07 P and Case T-90/07 P be joined for the purposes of the oral procedure and of the final judgment. By letters lodged at the Registry of the Court on 29 February and 11 March 2008, the Commission and Mr Genette, respectively, submitted their observations on the application for joinder.

31 After hearing the report of the Judge-Rapporteur, the Court of First Instance (Appeal Chamber) decided to open the oral procedure in Cases T-99/07 P and T-90/07 P. By order of 4 July 2008, the President of the Appeal Chamber ordered that the cases be joined for the purposes of the written or oral procedure and of the final judgment.

32 In the framework of the measures of organisation of procedure provided for in Articles 64 and 144 of the Rules of Procedure, the Court called on the parties to answer several written questions. That request was complied with within the prescribed time-limit.

Forms of order sought

33 The Kingdom of Belgium claims that the Court should set aside the judgment under appeal.

34 The Commission claims that the Court should:

— set aside the judgment under appeal;

— declare inadmissible the action brought by Mr Genette before the Civil Service Tribunal;

— in the alternative, declare that action unfounded;

— order that it and Mr Genette are to bear their own costs in these proceedings and in those brought before the Civil Service Tribunal.

35 Mr Genette contends that the Court should:

— dismiss the appeals;

— in the alternative, grant him the form of order sought at first instance;

— order the Kingdom of Belgium and the Commission to pay the costs.

Admissibility

Arguments of the parties

36 Mr Genette contends, principally, that the appeals brought by the Kingdom of Belgium and the Commission are inadmissible on the ground that they are not seeking, or do not properly seek, one or other of the same forms of order, in whole or in part, as those sought at first instance, in accordance with the requirements of Article 139(1)(b) of the Rules of Procedure.

37 In Case T-90/07 P, Mr Genette contends that the Kingdom of Belgium is merely seeking to have the judgment under appeal set aside. The appeal, if allowed, would thus be without useful effect because the Civil Service Tribunal or the Court of First Instance could not, in the absence of a claim to that effect, grant the Kingdom of Belgium the form of order sought at first instance, as set out in paragraph 32 of the judgment under appeal. In addition, that lacuna cannot be corrected by referring to the Commission's pleas in Case T-99/07 P, as the Kingdom of Belgium proposes.

38 In Case T-99/07 P, Mr Genette relies on the fact that the Commission does not correctly seek a form of order concerning the consequences of the judgment under appeal being set aside by the Court. The Commission's claims that Mr Genette's action before the Civil Service Tribunal should be declared inadmissible or, in the alternative, unfounded, are inadmissible in as much as they are new pleas which change the subject-matter of the proceedings at first instance. In the absence of admissible pleas by the Commission that the forms of order sought at first instance should be granted, it would be of no interest and contrary to the sound administration of justice for the Court to rule on the Commission's application to set aside the judgment under appeal, with the result that the latter's appeal should be dismissed as inadmissible.

39 The Kingdom of Belgium and the Commission claim that the Court should reject the objection of inadmissibility raised by Mr Genette in regard to their respective appeals.

Findings of the Court

40 The absence, in the present appeals, of pleas to the effect that the forms of order sought at first instance should be granted, in whole or in part, within the meaning of Article 139(1)(b) of the Rules of Procedure does not justify rejection of the appeals as inadmissible since they contain pleas by the appellants seeking that the judgment of the Civil Service Tribunal be set aside in accordance with Article 139(1)(a) of those rules.

41 The useful effect of such an appeal is maintained in such circumstances inasmuch as, although the Court allows the appellants' claim to set aside the judgment, it does not terminate the dispute but puts the parties back in the situation they were in before the judgment under appeal was delivered. The court which will definitively decide the dispute, whether the Civil Service Tribunal or the Court of First Instance itself, in accordance with the use the latter has made of the possibility granted to it by Article 13(1) of Annex I to the Statute of the Court of Justice, will have to take account of the forms of order sought by those parties at first instance, either for the purpose of allowing them, in whole or in part, or of rejecting them, without being able to base such rejection on the fact that those forms of order were not once again sought before it (see, to that effect and by analogy, the order of 14 December 2006 in Case C-12/05 P *Meister* v *OHIM* (not published in the ECR), paragraph 107).

42 In the present case, it is not disputed that the Kingdom of Belgium is seeking to have the judgment under appeal set aside. If the Court allows the appeal and sets aside that

judgment, in whole or in part, the court which will rule definitively on the dispute will have to take account of the forms of order sought by the Kingdom of Belgium at first instance in support of the Commission.

43 Similarly, independently of the question whether, as Mr Genette contends, the Commission does not seek the same forms of order in its appeal as at first instance, it is not disputed that it validly is seeking to have the judgment under appeal set aside. Therefore, if the Court allows the appeal and sets aside the judgment under appeal, in whole or in part, the court which will rule definitively on the substance of the case will have to take account of the forms of order sought by the Commission at first instance while excluding pleas which were put forward for the first time in support of those forms of order in the framework of the appeal (see, by analogy, Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 59).

44 Consequently, the pleas of inadmissibility raised by Mr Genette in regard to the present two appeals must be rejected.

Substance

45 In Case T-90/07 P, the Kingdom of Belgium puts forward four pleas in law in support of its application to have the judgment under appeal set aside. The first plea alleges, principally, that the Civil Service Tribunal did not have jurisdiction to assess the admissibility under Belgian law of the request of 31 October 2004 and, in the alternative, that the interpretation of Belgian law adopted in the judgment under appeal is vitiated by an error of law. The second plea alleges errors of law vitiating the annulment of the Commission's refusal to permit Mr Genette to submit a new transfer application. The

third plea alleges errors of law vitiating the finding that the application for annulment of the Commission's refusal to withdraw its decisions of 11 June and 26 August 2002 was admissible. Finally, the fourth plea alleges a breach of the principle of legal certainty.

46 In Case T-99/07 P, the Commission relies on four pleas in law in support of its application to have the judgment under appeal set aside. The first plea alleges that the Civil Service Tribunal ruled *ultra petita* by changing the subject-matter of the dispute. The second plea alleges a lack of jurisdiction on the part of the Civil Service Tribunal and an infringement of the rights of the defence. The third plea alleges, essentially, an error of law in regard to the assessment of the effect of Mr Genette's agreement to the proposals put forward by the Commission in its decisions of 11 June and 26 August 2002. Finally, the fourth plea alleges, principally, an infringement of Article 11(2) of Annex VIII to the old Staff Regulations, in the alternative, an infringement of the rules applicable to the withdrawal of individual decisions creating rights, a lack of jurisdiction on the part of the Civil Service Tribunal, a breach of the principle of the protection of the rights of the defence and an error of fact and, in the further alternative, an error of law vitiating the annulment of the Commission's refusal to withdraw its decisions of 11 June and 26 August 2002.

47 The Court considers that, in the present case, sound administration of justice justifies examining, initially, the first plea in law put forward by the Kingdom of Belgium in Case T-90/07 P alleging, principally, that the Civil Service Tribunal did not have jurisdiction to assess the admissibility under Belgian law of the request of 31 October 2004 and, in the alternative, that the interpretation of Belgian law adopted in the judgment under appeal is vitiated by an error of law, and the Commission's first plea in law in Case T-99/07 P alleging that the Civil Service Tribunal ruled *ultra petita* by changing the subject-matter of the dispute.

The first plea in law put forward by the Kingdom of Belgium in Case T-90/07 P alleging, principally, that the Civil Service Tribunal did not have jurisdiction to assess the admissibility under Belgian law of the request of 31 October 2004 and, in the alternative, that the interpretation of Belgian law adopted in the judgment under appeal is vitiated by an error of law

— Arguments of the parties

48 The Kingdom of Belgium claims essentially that the Civil Service Tribunal exceeded its jurisdiction by assessing the admissibility of the request of 31 October 2004 and, consequently, of the action brought before it, in regard to Article 9 of the law of 1991 and Article 194 of the law of 2006. In so doing, it misapplied the rules concerning the division of jurisdiction between the Community legal order and the Belgian legal order.

49 In the Kingdom of Belgium's view, the Civil Service Tribunal also committed an error of law in the interpretation of Article 9 of the law of 1991, in the version in effect before the entry into force of the (amending) law of 2006, and Article 194 of the latter law by considering, on the basis of those provisions, that the request of 31 October 2004 and, later, the action brought before it were admissible. In any event, the request of 31 October 2004 should have been examined in the light of Article 9 of the law of 1991, in the version resulting from the law of 2006, from which it is clear that the withdrawal of a transfer request is possible only in the case of premature departure of the official concerned, as is provided for in Article 77 of the Staff Regulations.

50 Finally, the Kingdom of Belgium seeks the rejection of the objections of inadmissibility raised by Mr Genette in regard to the present plea.

51 Mr Genette contends, principally, that the plea should be rejected as unfounded inasmuch as it raises a claim of lack of jurisdiction and is, as such, inadmissible and is, in any event, unfounded inasmuch as it raises a claim based on an error of law.

52 He argues that the claim based on the Civil Service Tribunal's lack of jurisdiction to interpret Belgian law is unfounded since the Community judicature has jurisdiction, according to the case-law, to interpret national law when such an interpretation determines the application of a rule of the Staff Regulations and, consequently, the legality of a Commission decision.

53 Mr Genette contends that the claim alleging an erroneous interpretation of Belgian law is inadmissible inasmuch as it repeats a claim made and rejected at first instance. In the alternative, he states that the claim should be rejected as unfounded or, in any event, irrelevant. The claim is unfounded inasmuch as, in the judgment under appeal, Article 9 of the law of 1991 was interpreted in accordance with the applicable Community principles and with account being taken of the intentions of the Belgian legislature. In any event, it is irrelevant because it refers only to grounds set out for the sake of completeness in the judgment under appeal, without altering the principal grounds of that judgment.

— Findings of the Court

54 In its first plea in law, the Kingdom of Belgium is critical, essentially, of paragraphs 49 and 50 of the judgment under appeal, in which the Civil Service Tribunal held that, having regard to Article 9 of the law of 1991, until subrogation takes effect, the person concerned was entitled to request withdrawal of the decisions regarding the transfer taken by the bodies managing the Belgian pension schemes and that, in the case before it, the transfer to the Community pension scheme of the rights acquired by Mr Genette was entirely rescinded if the Commission decisions of 11 June and 26 August 2002 were also withdrawn. As has been pointed out by the Kingdom of Belgium, that observation in the judgment under appeal is essential to the Tribunal's assessment of the subject-

matter and, in the final analysis, the admissibility of an action which was, principally, for annulment of the Commission's refusal to permit Mr Genette to withdraw his transfer request of 13 July 2001, since annulment of the Commission's refusal to permit Mr Genette to submit a new transfer request was merely a consequence of the annulment of the refusal to permit withdrawal of that transfer request, as is apparent from point 1 of the operative part of the judgment under appeal, in conjunction with paragraph 138 of the grounds thereof. It is on the basis of that observation that the Civil Service Tribunal redefined, in the judgment under appeal, the principal subject-matter of the action for annulment of the decision of 25 January 2005 as being the Commission's refusal to withdraw its decisions of 11 June and 26 August 2002.

55 It follows from the observations criticised in the framework of the present plea that, in order to assess the subject-matter and, ultimately, the admissibility of the application for annulment of the Commission's refusal to permit Mr Genette to withdraw his transfer request of 13 July 2001, the Civil Service Tribunal impliedly but inescapably held, in the judgment under appeal, that, through the effect of a decision adopted by the Commission in response to the request of 31 October 2004, the decisions of the National Social Security Institute for Self-employed Workers (Inasti) and the National Pension Office (ONP) calculating the amount of the rights acquired by Mr Genette under the Belgian pension schemes could be automatically rescinded in the Belgian legal system.

56 It should be pointed out in that regard that, according to the second subparagraph of Article 11(2) of Annex VIII to the old Staff Regulations, the institution in which the official serves is to determine the number of years of pensionable service with which he is to be credited under its own pension scheme in respect of the former period of service, on the basis of the amount of the retirement pension rights acquired under national pension schemes before entering the service of that institution. It is clear from that provision that the Community institution is under no other obligation than to convert into years of pensionable service to be credited under its own scheme the amount of the pension rights calculated by the bodies which manage the national pension schemes under which the official concerned acquired rights before entering the service of the Communities. On the other hand, the method of calculating the amount of the pension rights which may be transferred is a matter solely for the bodies managing the national pension schemes concerned by the transfer (Joined Cases 75/88, 146/88 and 147/88 *Bonazzi-Bertottilli and Others* v *Commission* [1989] ECR 3599, paragraph 17). In addition, each Member State is bound to select and put into effect

specific measures which will make possible the exercise of the right granted to Community officials to transfer rights acquired under national pension schemes to the Community pension scheme (Case 137/80 *Commission* v *Belgium* [1981] ECR 2393, paragraph 18).

57 The decisions concerning the calculation of the amount of the pension rights to be transferred and the conversion of that entitlement into years of pensionable service to be credited under the Community pension scheme fall within different legal systems, and each must be dealt with by the courts having jurisdiction under the relevant legal system (*Bonazzi-Bertottilli and Others* v *Commission*, cited in paragraph 56 above, paragraph 19; Case T-233/97 *Bang-Hansen* v *Commission* [1998] ECR-SC I-A-625 and II-1889, paragraph 39; and Case T-67/02 *Radauer* v *Council* [2004] ECR-SC I-A-89 and II-395, paragraph 31). Only the national authorities and courts have the power to entertain applications or settle disputes concerning decisions calculating rights acquired by Community officials under national pension schemes and it is for the officials concerned to make such requests to, or bring such disputes before, those authorities and courts, in accordance with the procedures laid down in the applicable national law.

58 In the present case, it is apparent from the judgment under appeal that, as a result of the transfer request of 13 July 2001, the bodies which manage the Belgian pension schemes concerned, namely Inasti and ONP, adopted decisions calculating the rights acquired by Mr Genette under the Belgian pension schemes in accordance with the provisions of the law of 1991, which was then applicable. If it is assumed, as it is by the Civil Service Tribunal in the judgment under appeal, that the intention of the request of 31 October 2004 was, inter alia, to have rescinded, under Article 9 of the law of 1991, the decisions adopted by Inasti and ONP calculating the rights acquired by Mr Genette under Belgian pension schemes, then that request raised a question which falls within the Belgian legal system and is within the sole jurisdiction of the Belgian authorities or courts.

59 By holding that through the effect of a decision adopted by the Commission in response to the transfer request of 31 October 2004, the decisions adopted by Inasti and ONP calculating the amount of the rights acquired by Mr Genette under the Belgian pension

schemes could be automatically rescinded in the Belgian legal system pursuant to Article 9 of the law of 1991, the Civil Service Tribunal exceeded its jurisdiction.

60 It follows that, in the judgment under appeal, the Civil Service Tribunal could not, without encroaching on the powers reserved to the Kingdom of Belgium, hold that, pursuant to Article 9 of the law of 1991, the decisions adopted by Inasti and ONP calculating the rights acquired by Mr Genette under the Belgian pension schemes would be automatically rescinded at the request of the person concerned if the Commission withdrew its decisions of 11 June and 26 August 2002 in order to redefine the principal subject-matter of the claims for annulment as being the refusal of the Commission to withdraw the latter two decisions.

61 The first plea in law put forward by the Kingdom of Belgium in Case T-90/07 P must therefore be upheld.

The first plea in law put forward by the Commission in Case T-99/07 P alleging that the Civil Service Tribunal ruled *ultra petita* by changing the subject-matter of the dispute

— Arguments of the parties

62 The Commission claims that the Civil Service Tribunal ruled *ultra petita* by annulling the Commission's refusal to withdraw its decisions of 11 June and 26 August 2002. It is

clear from the request submitted on 26 September 2005 and, earlier, from the request of 31 October 2004 and the complaint of 22 April 2005 that the principal subject-matter of the action before the Tribunal was not the withdrawal of the decisions of 11 June and 26 August 2002.

63 Mr Genette contends that the present plea should be rejected, principally, as inadmissible and, in the alternative, as unfounded.

64 Mr Genette argues, primarily, that the present plea is inadmissible under Article 139(2) of the Rules of Procedure inasmuch as it changes the subject-matter of the action before the Civil Service Tribunal. At first instance, the Commission itself contended that the subject-matter of the action was annulment of its refusal to withdraw the decisions of 11 June and 26 August 2002.

65 In the alternative, Mr Genette contends that the present plea is unfounded both in law and in fact. Since the Civil Service Tribunal granted the claims made in the initiating application by annulling the decision of 25 January 2005, it cannot be said that it went beyond the objective limits of the dispute. In addition, the subject-matter which he himself gave to his action at first instance is irrelevant since his aim was primarily to prevent that action being declared inadmissible. Moreover, he put forward, at first instance, an argument in the alternative based on the hypothesis that the subject-matter of his action was the refusal of the Commission to withdraw its decisions of 11 June and 26 August 2002. Finally, the Community judicature has a discretion in determining the subject-matter of an action on the basis of an objective analysis of the content of the application, which is what the Civil Service Tribunal did in the present case.

66 In any event, Mr Genette points out that the Civil Service Tribunal is required to examine, of its own motion and in an objective fashion, questions of admissibility,

which are a matter of public policy, raised in the action and that it is not bound in that regard by the arguments of the parties. That is why, in the present case, it assessed the subject-matter of the action independently.

— Findings of the Court

67 The Court must first examine the objection of inadmissibility raised by Mr Genette, which alleges, in essence, that, by putting forward the present plea, the Commission is seeking to bring before the Court a broader dispute than that brought before the Civil Service Tribunal.

68 It follows from Article 225a EC, Article 11(1) of Annex I to the Statute of the Court of Justice and Article 138(1)(c) of the Rules of Procedure that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal (order of 10 March 2008 in Case T-233/07 P *Lebedef-Caponi* v *Commission*, not yet published in the ECR-SC, paragraphs 24 and 25, and judgment of 12 March 2008 in Case T-107/07 P *Rossi Ferreras* v *Commission*, not yet published in the ECR-SC, paragraphs 26 and 27).

69 In its first plea in law, the Commission claims that the annulment decided by the Civil Service Tribunal went beyond what Mr Genette had applied for in his action. Although the Commission has changed its position as to the subject-matter of the dispute, such a plea, which essentially contests the characterisation by the Tribunal of the principal subject-matter of the action in the judgment under appeal, cannot be regarded as bringing before the Court a broader dispute than was brought before the Civil Service Tribunal. Moreover, it fulfils the conditions for admissibility laid down in the Rules of Procedure and must therefore be regarded as admissible.

70 Accordingly, Mr Genette's objection of inadmissibility must be rejected.

71 With regard to whether the present plea is well founded, it must be borne in mind, first of all, that pursuant to the first paragraph of Article 21 of the Statute of the Court of Justice, applicable to procedure before the Civil Service Tribunal by virtue of Article 7(1) of Annex I thereto, and Article 44(1)(c) of the Rules of Procedure, the application must contain, inter alia, the subject-matter of the proceedings and a summary of the pleas in law on which the application is based. The application is thus the initiating document of the action in which the applicant must define the subject-matter of the dispute (see, by analogy, Case 232/78 *Commission* v *France* [1979] ECR 2729, paragraph 3; Case C-256/98 *Commission* v *France* [2000] ECR I-2487, paragraph 31; and the order in Case C-242/07 P *Belgium* v *Commission* [2007] ECR I-9757, paragraph 41).

72 Furthermore, since it would be *ultra vires* for the Community Court before which an action for annulment has been brought to rule *ultra petita*, the scope of the annulment which it pronounces may not go further than that sought by the applicant (see Case C-310/97 P *Commission* v *AssiDomän Kraft Products and Others* [1999] ECR I-5363, paragraph 52, and the case-law cited therein).

73 It must be pointed out in that regard that, as is apparent from paragraphs 40 and 41 of the judgment under appeal, Mr Genette argued before the Civil Service Tribunal that 'the purpose of his application [was] not to obtain the withdrawal of [the decisions of 11 June and 26 August 2002] but to require the Commission to permit him to withdraw the request … to transfer [of 13 July 2001]', and that 'the decisions of 11 June and 26 August 2002 would remain in existence as they were even if the Commission granted his request'. In addition, as is clear from paragraph 41 of the judgment under appeal, Mr Genette himself argued before the Civil Service Tribunal that withdrawal of the decisions of 11 June and 26 August 2002 could not be envisaged at that stage and could be envisaged only if the Belgian authorities, possibly as a result of an action brought in the Belgian courts, took new decisions on the basis of the law of 2003 as to the sums to transfer to the Community pension scheme, something which had not yet occurred. Consequently, Mr Genette argued at first instance that his claims for annulment of the

Commission's refusal to permit him to withdraw his transfer request of 13 July 2001 could not be interpreted as an application for annulment of the Commission's refusal to withdraw its decisions of 11 June and 26 August 2002.

74 Under those circumstances, it must be concluded that the Civil Service Tribunal could not, as it did in paragraph 50 of the judgment under appeal, redefine the principal subject-matter of the action as the annulment of the Commission's refusal to withdraw the decisions of 11 June and 26 August 2002 (see, by analogy, Case C-176/06 P *Stadtwerke Schwäbisch Hall and Others* v *Commission* (not published in the ECR), paragraph 25).

75 The Commission was therefore right to argue that the Civil Service Tribunal had ruled *ultra petita* by annulling in the present case, as is apparent from point 1 of the operative part in conjunction with paragraph 136 of the grounds of the judgment under appeal, the refusal of the Commission to withdraw its decisions of 11 June and 26 August 2002, contained in its decision of 25 January 2005.

76 Consequently, the first plea in law put forward by the Commission in Case T-99/07 P must be upheld.

77 It follows from the foregoing that the Civil Service Tribunal could, without encroaching on the powers reserved to the Kingdom of Belgium, neither rule *ultra petita* nor redefine the principal subject-matter of Mr Genette's action as being the annulment of the Commission's refusal to withdraw its decisions of 11 June and 26 August 2002. The judgment under appeal must be set aside inasmuch as it carries out such a re-characterisation.

78 In addition, since the Civil Service Tribunal had ruled *ultra petita* by modifying the subject-matter of the action before it, the judgment under appeal must be set aside inasmuch as it annuls the Commission's refusal to withdraw its decisions of 11 June and 26 August 2002, contained in its decision of 25 January 2005. Finally, since the annulment of the Commission's refusal to permit Mr Genette to submit a new transfer request was itself merely a consequence of the annulment of the refusal to withdraw the decisions of 11 June and 26 August 2002 (see paragraph 54 above), the judgment under appeal must also be set aside inasmuch as it annuls the refusal of the Commission, in its decision of 25 January 2005, to permit Mr Genette to submit a new transfer request.

79 It follows from the foregoing that the judgment under appeal must be set aside in its entirety.

The action at first instance

80 In accordance with Article 13(1) of Annex I to the Statute of the Court of Justice, if the appeal is well founded, the Court of First Instance may, where the decision of the Civil Service Tribunal is quashed, itself give judgment in the matter, where the state of the proceedings so permits.

81 Such is the case here. The Court has at its disposal all the factors necessary to rule on the action.

Arguments of the parties

82 In Case T-99/07 P, the Commission asks the Court, if it decides to set aside the judgment under appeal and rule on the dispute itself, to declare the action inadmissible on the ground that the request of 31 October 2004, in so far as it seeks to cause Mr Genette to be permitted to withdraw his transfer request of 13 July 2001, is without purpose since there is no legal basis in the Staff Regulations on which such permission could be granted. Nor can Article 9 of the law of 1991 provide a legal basis for the permission requested, since the Staff Regulations do not provide for it. The scope of provisions of the Staff Regulations cannot depend on the content of national law. The decision of 25 January 2005 cannot therefore be regarded as an act adversely affecting Mr Genette and giving him a right of action. In the alternative, the Commission contends that the action should be dismissed as unfounded.

83 At first instance, the Commission, in support of which the Kingdom of Belgium intervened, also claimed that the action should be dismissed as inadmissible or, in the alternative, unfounded. The objections of inadmissibility raised by the Commission before the Civil Service Tribunal in support of those claims were based on the ground that the application was submitted after expiry of the period laid down in Article 91(3) of the Staff Regulations and on the inadmissibility of the request of 31 October 2004 by reason of the irrevocable nature of the decisions of 11 June and 26 August 2002, on the absence of a new fact justifying that request and on the late submission thereof in the light of the requirement to submit it within a reasonable time.

84 Mr Genette contends that, far from seeking that its claims at first instance be granted, the Commission has put forward new claims before the Court. In particular, it has put forward a new plea in law alleging that it did not have the power to entertain the request of 31 October 2004. That plea is based on a new definition of the subject-matter of the dispute, which no longer is, as the Commission claimed at first instance, the withdrawal of its decisions of 11 June and 26 August 2002 but the withdrawal of the transfer request of 13 July 2001. Even supposing that it was not new, that plea should be rejected as inadmissible since it was ambiguously formulated in the appeal.

85 Moreover, Mr Genette claimed at first instance that the action was admissible and, consequently, that the objections of inadmissibility raised by the Commission should be rejected.

Findings of the Court

86 Since the conditions for admissibility of an action under Articles 90 and 91 of the Staff Regulations are a matter of public policy, it is for the Community judicature, where appropriate, to consider them of its own motion (Case T-587/93 *Ortega Urretavizcaya* v *Commission* [1996] ECR-SC I-A-349 and II-1027, paragraph 25; Case T-157/96 *Affatato* v *Commission* [1998] ECR-SC I-A-41 and II-97, paragraph 21; order in Case T-132/97 *Collins* v *Committee of the Regions* [1998] ECR-SC I-A-469 and II-1379, paragraph 12; and order in Case T-25/98 *de Compte* v *Parliament* [1998] ECR-SC I-A-629 and II-1903, paragraph 38). Its review is not confined to objections of inadmissibility raised by the parties (see Case T-99/95 *Stott* v *Commission* [1996] ECR II-2227, paragraph 22, and Joined Cases T-94/01, T-152/01 and T-286/01 *Hirsch* v *ECB* [2003] ECR-SC I-A-1 and II-27, paragraph 16, and the case-law cited therein).

87 Articles 90 and 91 of the Staff Regulations make the admissibility of an action subject to the condition that it is brought against an act adversely affecting the official. Only acts which directly and immediately affect the official's legal situation can be regarded as adversely affecting him (Case 204/85 *Stroghili* v *Court of Auditors* [1987] ECR 389, paragraph 6, and *Affatato* v *Commission*, cited in paragraph 86 above, paragraph 21). Furthermore, it is apparent from the case-law that the refusal of the appointing authority to grant an official's request submitted under Article 90(1) of the Staff Regulations cannot constitute an act adversely affecting the official if the appointing authority does not have the power to adopt the measures requested of it (Case T-35/98 *Hecq and SFIE* v *Commission* [1999] ECR-SC I-A-11 and II-41, paragraph 30).

88 In the present case, since the request of 31 October 2004 was submitted under Article 90(1) of the Staff Regulations, the Court considers that it must ascertain of its own motion whether the decisions contested in the action, namely the decision of 25 January 2005 and the decision of 10 June 2005, could adversely affect Mr Genette within the meaning of Article 90(2) of the Staff Regulations.

89 First of all, it should be recalled that Article 11(2) of Annex VIII to the old Staff Regulations, in addition to being intended to enable the Community pension scheme to be coordinated with the national pension schemes, seeks to ensure that Community officials may retain the rights which they have acquired in a Member State even though they may be limited, or even conditional or future, or insufficient to give rise to the immediate award of a pension, and that account may be taken of those rights by the pension scheme to which the persons concerned are affiliated at the end of their careers, in this case the Community pension scheme (*Commission* v *Belgium*, cited in paragraph 56 above, paragraph 12).

90 For those reasons, it is clear that the 'right' mentioned in Article 11(2) of Annex VIII to the old Staff Regulations is intended to confer upon officials a right which they may freely exercise (*Commission* v *Belgium*, cited in paragraph 56 above, paragraph 13).

91 In the present case, Mr Genette exercised the right provided for in Article 11(2) of Annex VIII to the old Staff Regulations by submitting, on the basis of the law of 1991, the transfer request of 13 July 2001. Consequently, the bodies managing the Belgian pension schemes concerned, namely Inasti and ONP, on the one hand, and the Commission, on the other, acted in a coordinated fashion in order for the former to adopt, in accordance with the detailed rules laid down in that regard by the law of 1991, decisions calculating the amount of the pension rights acquired by Mr Genette under the Belgian pension schemes and for the latter to adopt, in accordance with Article 11(2) of Annex VIII to the old Staff Regulations and the general implementing provisions therefor, the decisions of 11 June and 26 August 2002 converting that amount into years of pensionable service with which Mr Genette was to be credited under the Community pension scheme according to the age at which he entered the pension scheme and subject to the fulfilment of certain additional conditions. Those

decisions had the double effect of preserving for Mr Genette, in the Belgian legal system, the amount of the rights acquired by him in the Belgian pension schemes and of ensuring that, in the Community legal order and subject to the fulfilment of certain additional conditions, those rights are taken into account in the Community pension scheme, in accordance with the age at which Mr Genette entered that pension scheme.

92 It is apparent from the text of the request of 31 October 2004 itself that the request is based on the alleged illegality of the law of 1991, 'since, in [Mr Genette's] view, the system of subrogation provided for in [that] law … is discriminatory and contrary to Article 11(2) of Annex VIII to the [old] Staff Regulations' and on the fact that 'since the system of subrogation provided for in the law [of 1991] was contrary both to Article 11(2) of [Annex VIII to] the [old] Staff Regulations and to the principle of equal treatment, [neither] the "amount to be transferred in Mr Genette's case, calculated by Inasti on 3 January 2002 and by ONP on 13 February 2002, [nor] the decisions … of 11 June and 26 August 2002 concerning the number of years of pensionable service to be taken into account on that basis were … correct'. It is '[u]nder those circumstances' that, according to the request of 31 October 2004, 'the Commission [must] agree to permit [Mr Genette] to apply to the Belgian authorities on the basis of [Article 9 of] the law of 1991 to withdraw his [transfer] request of 13 July 2001 on the basis of that law and to submit a new one on the basis of Article [4(1)] of the law of … 2003'.'

93 The request of 31 October 2004 was thus based on a challenge to the application by Inasti and ONP of the law of 1991 for the purpose of calculating the amount of the rights acquired by Mr Genette under the Belgian pension schemes. However, according to the case-law referred to in paragraph 57 above, such a challenge, which concerns the application of national law by the bodies managing national pension schemes, is, in accordance with the division of powers which flows from the second subparagraph of Article 11(2) of Annex VIII to the old Staff Regulations, part of the national legal system and, consequently, is within the sole jurisdiction of the national authorities or the national courts, and proceedings brought before the latter could, in an appropriate case, give rise to a reference to the Court of Justice for a preliminary ruling under Article 234 EC.

94 Consequently, the second subparagraph of Article 11(2) of Annex VIII to the old Staff Regulations deprives the Commission of any power to entertain a challenge concerning, essentially, the application by Inasti and ONP of the law of 1991 to Mr Genette's case and, on that basis, to permit the latter to request those bodies to withdraw decisions they have already adopted on the basis of the law of 1991 and to adopt new ones on the basis of the law of 2003.

95 Under those circumstances, it cannot be considered that, in rejecting the request of 31 October 2004 in its decisions of 25 January and 10 June 2005, the Commission adopted an act adversely affecting directly and immediately Mr Genette's legal situation or his situation under the Staff Regulations.

96 It follows that the rejection of the request of 31 October 2004 contained both in the decision of 25 January 2005 and the decision of 10 June 2005 cannot be regarded as an act adversely affecting Mr Genette within the meaning of Article 90(2) of the Staff Regulations.

97 Thus, and without there being any need to rule on the admissibility of the Commission's argument set out in paragraph 82 above or on whether the objections of inadmissibility referred to in paragraph 83 above are well founded, the action must be declared inadmissible inasmuch as it is directed against the rejection of the request of 31 October 2004 contained both in the decision of 25 January 2005 and that of 10 June 2005.

98 In so far as Mr Genette argued, in answer to questions from the Court of First Instance and at the hearing, that his action was also directed against the rejection of a request for the Commission's assistance pursuant to Article 24 of the Staff Regulations, impliedly formulated in the request of 31 October 2004, it must be made clear that a request under Article 90(1) of the Staff Regulations must be sufficiently clear and precise to

enable the Commission to ascertain in specific terms the content of the decision which it is being asked to adopt.

99 In the present case, as the Commission pointed out at the hearing, the request of 31 October 2004 contains nothing clear and precise which would allow it to be interpreted, even taking a broad approach, as seeking the Commission's assistance pursuant to Article 24 of the Staff Regulations. Thus, the decision of 25 January 2005 cannot itself be interpreted as an implied rejection of a request for assistance under Article 24 of the Staff Regulations.

100 In so far as, in Mr Genette's view, it is apparent from the complaint of 22 April 2005 that the Commission failed to take a step required by the Staff Regulations by failing to grant him its assistance of its own motion for the purpose of acting before the Belgian administrative or judicial authorities, it must be pointed out that the failure of an institution to assist its officials and other staff under Article 24 of the Staff Regulations constitutes an act adversely affecting them within the meaning of Article 90(2) of the Staff Regulations only if the obligation to assist is imposed on the institution independently of any request from its officials or other staff.

101 However, according to case-law, it is, in principle, for the official concerned to request assistance from the relevant institution and only exceptional circumstances may oblige the Community institution to provide specific assistance not in response to a request from the official concerned but on its own initiative (Case 229/84 *Sommerlatte* v *Commission* [1986] ECR 1805, paragraph 20).

102 In the present case, no exceptional circumstance is apparent from the documents in the file, in particular no assistance granted to officials in a situation comparable to that of

Mr Genette, which would have justified the Commission taking, in regard to him, any measure of assistance on its own initiative (see, to that effect, *Sommerlatte* v *Commission*, cited in paragraph 101 above, paragraphs 21 and 22).

103 It follows that the Commission's failure to act did not constitute, in the present case, an act having adverse effects within the meaning of Article 90(2) of the Staff Regulations.

104 Account must be taken, however, of the fact that, at the same time as he submitted the complaint of 22 April 2005, Mr Genette submitted a request for assistance under Article 24 of the Staff Regulations asking the Commission to '[d]ecide to grant him financial and technical assistance for any action before the Belgian administrative and judicial authorities for the purpose of challenging the conformity with Community law of the decisions adopted in regard to him by the Belgian authorities on the basis of the Belgian law of 21 May 1991'. That request was expressly rejected by the Commission in the decision of 10 June 2005 which constitutes, in that regard, an act adversely affecting Mr Genette.

105 As the Court has consistently held, any action challenging an act adversely affecting the applicant and originating from the appointing authority must, as a general rule, necessarily be preceded by a complaint which has been rejected by express or implied decision. By virtue of Article 91(2) of the Staff Regulations, an action brought before that preliminary procedure has been completed is premature and therefore inadmissible (order in Case 130/86 *Du Besset* v *Council* [1986] ECR 2619, paragraph 7; judgment in Joined Cases T-47/89 and T-82/89 *Marcato* v *Commission* [1990] ECR II-231, paragraph 32; and order in Case T-78/91 *Moat and TAO/AFI* v *Commission* [1991] ECR II-1387, paragraph 3).

106 Since, as is clear from the case-law set out in paragraph 86 above, the plea raises a matter of public policy, it is for the Community judicature to examine it of its own motion.

107 In the present case, even if it is supposed that the action is also directed against the rejection of the request for assistance under Article 24 of the Staff Regulations brought by Mr Genette in his complaint of 22 April 2005, it was not, to that extent, preceded by the prior administrative complaint required by Article 91(2) of the Staff Regulations.

108 Accordingly, the action must in any event be dismissed as inadmissible.

Costs

109 Pursuant to the first paragraph of Article 148 of the Rules of Procedure, where the appeal is well founded and the Court itself gives judgment in the case, the Court is to make a decision as to costs.

110 Under the first subparagraph of Article 87(2) of the same rules, which apply to the procedure on appeal pursuant to Article 144 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

111 Nevertheless, Article 88 of the Rules of Procedure, applicable to appeals brought by the institutions, under Article 144 and the second paragraph of Article 148 thereof, provides that in proceedings between the Communities and their servants the institutions, as a rule, are to bear their own costs.

112 Pursuant to the first subparagraph of Article 87(4) of the Rules of Procedure, which apply to the present case, the Member States which have intervened in the proceedings are to bear their own costs.

113 Accordingly, Mr Genette must bear his own costs both in the proceedings before the Civil Service Tribunal and in the present instance. The Commission must bear its own costs both in the proceedings before the Civil Service Tribunal and in the present instance. The Kingdom of Belgium, which intervened in the proceedings before the Civil Service Tribunal and has not applied for costs to be awarded against Mr Genette in the present proceedings, must bear its own costs both in the proceedings before the Civil Service Tribunal and in the present proceedings.

On those grounds,

THE COURT OF FIRST INSTANCE (Appeal Chamber)

hereby:

1. **Sets aside the judgment of the European Union Civil Service Tribunal of 16 January 2007 in Case F-92/05 *Genette* v *Commission*;**

2. **Dismisses as inadmissible the action brought by Mr Genette before the Civil Service Tribunal in Case F-92/05;**

3. **Orders Mr Genette to bear his own costs both in the proceedings before the Civil Service Tribunal and in the present proceedings;**

4. **Orders the Commission to bear its own costs both in the proceedings before the Civil Service Tribunal and in the present proceedings;**

5. **Orders the Kingdom of Belgium to bear its own costs both in the proceedings before the Civil Service Tribunal and in the present proceedings.**

Jaeger Tiili Martins Ribeiro

Czúcz Pelikánová

Delivered in open court in Luxembourg on 18 December 2008.

[Signatures]

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