ORDER OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
7 June 1991 *

In Case T-14/91,

Georges Weyrich, former official of the Commission of the European Communities, residing at Luxembourg, represented by Aloyse May, of the Luxembourg Bar, with an address for service in Luxembourg at his chambers, 31 Grand'Rue,

applicant,

v

Commission of the European Communities, represented by Joseph Griesmar, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Guido Berardis, a member of the Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the determination of the applicant's pecuniary rights in connection with a measure terminating his service pursuant to Council Regulation (ECSC, EEC, Euratom) No 3518/85 of 12 December 1985 introducing special measures to terminate the service of officials of the European Communities as a result of the accession of Spain and Portugal (Official Journal 1985 L 335, p. 56),

THE COURT OF FIRST INSTANCE
(Fifth Chamber)

composed of: C. P. Briët, President of the Chamber, D. Barrington and J. Biancarelli, Judges,

Registrar: B. Pastor,

makes the following

* Language of the case: French.

Order

Facts and legal background

1 By application lodged at the Registry of the Court of First Instance on 7 March 1991, Georges Weyrich brought an action for a declaration that (i) Article 5(1) and (2) and, in so far as necessary, Article 4(3) and (5) to (9) of Council Regulation (ECSC, EEC, Euratom) No 3518/85 of 12 December 1985 introducing special measures to terminate the service of officials of the European Communities as a result of the accession of Spain and Portugal (Official Journal 1985 L 335, p. 56) are unlawful in his regard, (ii) that the Commission's decision constituting the measure adversely affecting the applicant, as adopted by the Commission on 1 August 1990 and sent to the applicant on 13 August 1990, is null and void, and (iii) that the Commission's definitive decision of 19 December 1990 is null and void.

2 By a document received at the Court Registry on 10 April 1991, the Commission raised an objection of inadmissibility under Article 91(1) of the Rules of Procedure of the Court of Justice, applicable *mutatis mutandis* to the procedure before the Court of First Instance, and asked for that objection to be ruled upon before the substance of the case was examined.

3 The applicant, who was born on 14 November 1931, entered the service of the High Authority of the European Coal and Steel Community on 10 February 1953 as a contract worker. With effect from 1 July 1956 he became an established official of the ECSC. Subsequently, as an official of the Commission of the European Communities, he reached Grade A3, Step 8, and has been head of the Personnel Division at the Commission in Luxembourg for over seven years.

4 By letter of 20 June 1989, the official informed the administration of his intention to terminate his service on 31 August 1989 under the measures provided for in Regulation No 3518/85. At the same time, he expressly stated that he wished to have Article 34 of the former Staff Regulations of the ECSC applied to him.

5 His request was granted and the applicant ceased working on 31 August 1989, having had his pecuniary rights settled in an 'avis de fixation des droits à l'indemnité mensuelle' (notice determining entitlement to the monthly allowance) of 23 August 1989 which was sent to his private address.

6 It should be stated at the outset that for certain former officials, including the applicant, who came under the Staff Regulations of the ECSC, Article 5 of Regulation No 3518/85 provided an option:

'... (they) shall be entitled to ask for their pecuniary claims to be settled in accordance with Article 34 of the Staff Regulations of the European Coal and Steel Community and Article 50 of the Rules and Regulations of the European Coal and Steel Community ... Nevertheless, Article 4(3) and (5) to (9) of this Regulation shall continue to apply to the officials referred to in this Article and their entitled beneficiaries'.

7 Article 34 of the Staff Regulations of the ECSC provides that '... [T]hose officials (having non-active status) shall receive for two years a monthly allowance corresponding to the remuneration provided for in Article 47(1) and for a further two years an allowance equal to one half of that remuneration. At the end of four years of non-active status, officials shall receive a proportional pension under the conditions laid down in the pensions scheme'.[1] Article 50 of the Rules and Regulations of the European Coal and Steel Community provides that '... in calculating the retirement pension rights of an official permitted to retire following a period of non-active status under Article 34 of the Staff Regulations, the number of actual years of service completed by that official until the time he is awarded a pension shall be doubled. The total number of reckonable years' service for the calculation of such an official's pension may not however be greater than 30 or greater than the number of years' service which he could have completed if he had remained in service until the age of 65'.[2]

8 Furthermore, it should be pointed out that Article 95 of the Rules and Regulations of the ECSC provides that an official in receipt of the allowance provided for in Article 34 or 42 of the Staff Regulations is to continue to pay contributions as provided for under Article 93 (that is to say contributions to the pension scheme), calculated on the basis of the full salary for his grade and step.

1 — Unofficial translation.
2 — Unofficial translation.

9 The conditions for the application of Regulation No 3518/85 to former officials who come under the Staff Regulations of the ECSC were explained in a special edition of *Administrative Notices* of the Commission of 23 January 1986, entitled 'Dégagement — régime CECA' (ECSC Rules for Termination of Service) distributed to staff. That document states in particular that 'those officials may choose to have one of the following applied to them:

either

(a) Article 4 of the "termination-of-service" regulation in its entirety;

or

(b) a combination of Article 34 of the former Staff Regulations of the ECSC and Article 50 of the former general regulations of the ECSC, in accordance with the terms of Article 5 of the "termination-of-service" regulation.

Alternative (a) entails:

the payment, from the date of the decision to terminate service, of an allowance equal to 70% of the basic salary at that date, with continued acquisition of pension rights, according to the ordinary rules of the Staff Regulations, during the period in which the allowance is received; payment of the allowance is to cease as soon as the official reaches the age of 65 or in any event as soon as he is eligible for the maximum retirement pension (70% of the basic salary).

Alternative (b) entails:

payment of an allowance which for two years is equal to the basic salary received at the date on which service was terminated and during the two following years equal to 50% of that basic salary. At the end of that period, the official may retire with the retirement pension to which he is entitled under Article 50 of the former general regulations of the ECSC (each year of service counting for two, up to the limit of the maximum retirement pension allowed). If, during that period of four years, the official attains the age of 65, the allowance is replaced by the pension calculated according to the same rules.

In both cases, the period during which the allowance is paid is taken into account as a period of service and gives rise to payment of the contribution to the pensions scheme.

A decision to opt for one set of rules or the other is irreversible. In other words, officials will not be able to claim application of a set of rules other than that which they have chosen and which has been granted to them. In particular, they will not be able to request that payment of the allowance under the ECSC scheme cease when they fulfil the conditions entitling them to the maximum retirement pension before they reach the age of 65.' [3]

10 On 23 August 1989 the head of the Commission's pensions unit sent the applicant a notice of assessment of entitlement to the monthly allowance, in conformity with Article 4 of Regulation No 3518/85. Only points B and C5 of that notice are relevant for the purposes of these proceedings. Point B, entitled 'période d'indemnisation et montant de base' (period in which the allowance is to be received and basic amount), referred to 'Article 34 CECA' and determined the applicant's rights to a monthly allowance as follows:

'— 100% of last basic salary from 1 September 1989 until 31 August 1991,

— 50% of last basic salary from 1 September 1991 to 31 August 1993'.

Point C5 stated that 'the recipient shall continue to contribute to the funding of the pension scheme of the European Communities during the period in which entitlement to the allowance exists. Contributions are to be calculated on the basis of 100% of salary'. That decision of 23 August 1989 thus defined the entitlement to a monthly allowance for 'dégagement' for the whole of the period of 'dégagement' of four years.

11 By internal memorandum dated September 1989 from the Directorate-General for Personnel and Administration of the Commission headed 'Dégagement selon les règlements nos 3518/85, 2274/87 et 1857/89 du Conseil' (termination of service

3 — Unofficial translation.

pursuant to Council Regulations Nos 3518/85, 2274/87 and 1857/89), the Commission endeavoured to make a number of basic points about the rules for the application of those three 'termination-of-service' regulations: conditions of admission, monthly allowance, family allowances, transfer of part of remuneration, expatriation allowance, crisis levy, sickness insurance, pension scheme, payment, income from other work, tax and accident insurance. Nevertheless, the Commission stressed right at the beginning of the memorandum that it was intended only for information purposes. In the event of dispute, only the Staff Regulations, Conditions of Employment of Other Servants and Regulations Nos 3518/85, 2274/87 and 1857/89 were to prevail. Under the heading 'indemnité mensuelle' (Monthly allowance), the information notice covering the three 'termination-of-service' regulations stated only the following:

'(a) 70% of the basic salary for the grade and step of the official on termination of service,

(b) payment of the allowance ceases at the age of 65 or between 60 and 65 years, when the maximum retirement pension is being received (70%)'. [4]

12 On 20 October 1989, the applicant, above all because at the time he terminated his service he had already completed thirty-five years of service, that is to say the number of years of service which entitled him to the maximum retirement pension by virtue of Article 77 of the Staff Regulations of Officials of the European Communities (hereinafter referred to as 'the Staff Regulations'), sent a registered letter with an acknowledgment of receipt to the head of the unit dealing with pensions and relations with former officials, which was received on 24 October 1989 by the addressee, in which he contested the notice determining his entitlement to a monthly allowance under Regulation No 3518/85, which had been sent to him on 23 August 1989 by the head of the Pensions Unit. In that letter he disputed only points B and C5 of the notice. He stated that the contents seemed to him to be not only 'diametrically opposed' to the spirit of the former Staff Regulations of the ECSC and, in particular, of Article 34, but also 'contrary to the letter of the Staff Regulations'.

As regards point B, the applicant considered that the periods in which he would receive the allowance should have been calculated as follows:

'(a) 100% of the last basic salary from 1 September 1989 to 31 August 1991,

4 — Unofficial translation

(b) 50% of the last basic salary from 1 September 1991 to 14 November 1991',

the last date being that on which the applicant reached the age of 60 years. In that letter he declared that he wished to claim his pension rights as from that date, particularly since he would then have completed 38 years of service, which would allow him to benefit from a retirement pension calculated at the rate of 70%. Thus, in his view, it was not from 1 September 1993 that he was to receive his retirement pension, as the notice wrongly indicated but from 15 November 1991.

As regards point C5, the applicant pointed out that by 1 September 1989 he had completed 36 years of service and that, in consequence, he asked the competent Commission officials to 'stop the deduction for pension, in conformity with the requirements of the abovementioned rules and Article 34 of the ECSC Staff Regulations, and repay the amounts deducted for the months of September and October 1989 in respect of pension'.

The two parties disagree as to the legal status that should be accorded to that letter of 20 October 1989: the applicant considers it to be a simple request for clarification; the Commission considers it to be a complaint.

13 By its letter of reply dated 16 January 1990, which the applicant received on 21 January 1990, the head of the pensions unit informed the official that, in his case, given the fact that he had chosen the 'ECSC option' for his termination-of-service period, contributions to the pensions scheme remained payable during the whole of the allowance period of four years 'even where (the official) receives an allowance equivalent to 50% of the last basic salary and has reached the age of 60 years or the maximum rate of retirement pension' and, secondly, that it was only 'if, during that period of four years, the official reaches the age of 65 years (that) the allowance is replaced by the retirement pension'. The head of the pensions unit added that that provision had been published in *Administrative Notices* of 23 January 1986, a copy of which he enclosed.

14 In the meantime, the applicant, before receiving the reply referred to above to his letter of 20 October 1989, reminded the appointing authority, by letter of 19 January 1990 which was received by the appointing authority on 22 January 1990, of his earlier letter of 20 October 1989. He requested the appointing authority to take a view on his earlier letter, of which he attached a copy. That letter of 19 January 1990 was forwarded to the Secretary General of the Commission, along with a copy of form No 2, in which the letter was expressly referred to by the applicant as a 'request', within the meaning of Article 90 of the Staff Regulations. Also on this point the two parties disagree on the legal status of that document, since the Commission considers it to be a second complaint.

15 By registered letter of 13 August 1990 the Commission sent the applicant 'the decision which the Commission adopted on 1 August 1990 in reply to your complaint No R/9/90', that reference appearing on the face of the registration document of the abovementioned letter of 19 January 1990, as returned to the applicant. Nevertheless, in that reply to the complaint, the Commission stated first of all that it considered that 'the letter from Mr Weyrich of 20 October 1989, in which he disputes the assessment of his entitlement to a monthly allowance under Regulation No 3518/85 can only be a "complaint" under Article 90(2) of the Staff Regulations because it is directed against an act which indisputably affects his legal position directly and immediately . . . it cannot be regarded as a "request" under Article 90(1) of the Staff Regulations because, according to that provision, the purpose of a request is for the appointing authority to take a "decision". In such a case, a decision in the form of notice of assessment of 23 August 1989 already exists. Moreover, the letter of 19 January 1990, in so far as it requests the appointing authority to take a position on the letter of 20 October 1989, must be considered a "second complaint", introducing no new facts in relation to the "complaint" of 20 October 1989 . . . Since the act adversely affecting the official within the meaning of Article 90(2) of the Staff Regulations is the notice of assessment of 23 August 1989, that act was challenged by Mr Weyrich by his complaint of 20 October 1989 received by the administration on 24 October 1989. Since the appointing authority did not reply within the four-month period provided for in Article 90(2) of the Staff Regulations a decision rejecting it was taken by implication on 24 February 1990. However, the lodging of the second complaint, received on 22 January 1990, cannot therefore have the effect of causing the period laid down in Articles 90 and 91 of the Staff Regulations to begin running afresh. Under those circumstances, the Commission draws the complainant's attention to the fact that, should that "reply" be challenged, it reserves the right to plead inadmissibility of the action on those grounds'.

Furthermore, the Commission rejected the substance of the two complaints submitted by the applicant concerning, first, the period during which the termination-of-service allowance was to be paid and the date for first receipt of a retirement pension and, secondly, the obligation to contribute to the pensions scheme.

16 By registered letter of 20 August 1990, the applicant wrote to the Director-General of Personnel and Administration at the Commission in order to explain his case again, to point out the 'inequity' of which he considered he had been the victim and to request an 'ad hoc decision', in view of the 'special nature of my case which was evidently not taken into consideration when Regulation No 3518/85 and its rules of application were drafted'. The applicant considers that letter to be a 'first complaint' while the Commission regards it as an attempt by the applicant to extend the pre-litigation discussion with the administration. The Commission took no view on the legal status to be accorded to the applicant's letter of 20 August 1990.

17 By a further letter of 9 November 1990, registered at the Commission's Secretariat General on 13 November 1990 and presented as a 'complaint under Article 90, duly submitted within the prescribed time-limit', the applicant asked the Commission to reconsider its decision of 1 August 1990, making express reference to his letters of 20 October 1989 and 19 January 1990 and continuing to dispute the contents of points B and C5 of the notice of 23 August 1989 and, finally, complaining that the situation he had been placed in was more of 'a punishment than a benefit' and that the administration had failed in its duty to have regard to his interests. On this point, too, the parties disagree on the legal status to be accorded to that letter of 9 November 1990, registered at the Secretariat General of the Commission as 'complaint No 293/90': the applicant regards it as a second complaint; the Commission regards it as a third complaint following those of 24 October 1989 and 19 January 1990.

18 By letter of 19 December 1990 the Director-General of Personnel and Administration informed the applicant that 'examination of your complaint No 293/90 as well as your memorandum of 20 August 1990 shows that they concern the same

matters as those raised in your complaint No 9/90. By memorandum of 13 August 1990 I informed you of the Commission's decision relating to those matters and of the reasons why it was not legally possible to grant your requests .... In view of the fact that no new factor appears in your complaint No 293/90 ... I can only confirm the position taken by the Commission in its reply referred to above' (the Commission's reply to 'complaint No R/9/90' of 21 January 1990). The applicant was also given in that same letter the judgment of the Court of First Instance in Case T-4/90 *Lestelle* v *Commission* [1990] ECR II-689, concerning the obligatory or optional nature of contributions to the pensions scheme in the context of an allowance paid on termination of service. On that point, in its decision of 1 August 1990, taken in reply to 'complaint No R/9/90', the Commission had, with regard to the maintenance of the obligation to make full and complete contributions to the pensions scheme, reserved its position in the following terms: 'Nevertheless, in view of the fact that the same matter, regarding the question of contributions, is at present the subject of an action before the Court of First Instance (Case T-4/90 *Lestelle* v *Commission*) which has still to give judgment, the complainant's situation will be re-examined, if necessary, in the light of the judgment to be given in that case'. Thus, in his reply of 19 December 1990 the Director-General of Personnel and Administration informed the applicant that the Court of First Instance had given its judgment in the *Lestelle* case and that 'it appears from it that payment of the contributions to the pensions scheme under Article 4(7) of Regulation 3518/85 is obligatory'.

Proceedings and forms of order sought

19 Consequently, Mr Weyrich brought the present action, received at the Registry of the Court of First Instance on 7 March 1991, against which the Commission raised an objection of inadmissibility pursuant to Article 91(1) of the Rules of Procedure of the Court, itself received at the Registry of the Court of First Instance on 10 April 1991, on which the applicant submitted his observations by a document lodged on 10 May 1991 at the Registry of the Court of First Instance.

20 In the proceedings concerning the objection of inadmissibility, the Commission claims that the Court should:

dismiss the action as inadmissible;

make an appropriate order as to costs.

The applicant contends that the Court should:

dismiss as unfounded the objection of inadmissibility put forward by the Commission;

declare the action brought by Mr Weyrich admissible;

for the rest, make an order in accordance with the forms of order previously sought.

21 According to Article 91(3) of the Rules of Procedure of the Court, unless the Court decides otherwise, the remainder of the proceedings on the objection is to be oral. The Court of First Instance (Fifth Chamber) considers that in the present case it is sufficiently informed by examination of the documents and that it is not necessary to open the oral procedure.

Admissibility

22 The Commission's primary submission is that it is the decision of 23 August 1989, that is to say the notice of assessment of entitlement to a monthly allowance, which constituted the first act open to challenge and which therefore caused time to run as provided for in the Staff Regulations. According to the Commission, it was an act in the nature of a decision determining, with the authorization of the appropriate authority, the extent of the rights granted to the applicant as a former official who was allowed to take advantage of measures terminating service. The Commission refers in this connection to the judgment of the Court of Justice in Case 23/80 *Grasselli* v *Commission* [1980] ECR 3709 and to the judgment of the

Court of First Instance in Case T-4/90 *Lestelle* v *Commission*, cited above. According to the Commission, it was for the applicant to submit a complaint against the decision of 23 August 1989 within three months of receiving it, and then perhaps to apply to the Court of First Instance, within the prescribed period in the event of the complaint being dismissed. That was the import of the letter which the applicant sent on 20 October 1989 of which only a reminder was given to the administration by the letter of 19 January 1990, since, in the earlier letter, he had clearly disputed points B and C5 of the decision of 23 August 1989 on the grounds that they infringed the Staff Regulations and were 'against the spirit of the former Article 34 of the ECSC Treaty'. According to the Commission, faced with the definition of his rights and obligations as determined in those two points, Mr Weyrich requested a new definition of his rights as he saw them.

23 The Commission goes on to state that, whatever legal status is conferred on the applicant's letters of 20 October 1989 and 19 January 1990, one arrives at the same conclusion, namely that the applicant allowed the time-limit to expire and is now barred from bringing an action. According to the Commission, there are two conceivable outcomes:

Either:

the letter of 20 October 1989, recalled in the letter of 19 January 1990, is indeed, as it believes, a 'complaint' within the meaning of Article 90(2) of the Staff Regulations, the aim of which was to obtain, after rectification of the clerical error which Mr Weyrich alleged had been committed, a new definition of his rights as he saw them; in such a case, failing a reply from the Commission within the four-month period laid down by Article 90(2) of the Staff Regulations, which expired on 24 February 1990, the applicant should have brought an action before the Court of First Instance within the three-month period laid down in Article 91(3), which he failed to do;

or:

the letter of 20 October 1989 was only a 'request' within the meaning of Article 90(1) of the Staff Regulations, confirmed by a new 'request' dated 19 January 1990. In that case, according to the Commission, the failure to reply within four months to those letters constituted in any event a rejection by implied decision. It is accepted that in the absence of a complaint submitted within the time-limit that rejection became definitive, so that an action brought by the applicant before the Court of First Instance on 7 May 1991 was likewise inadmissible.

24 The Commission states, in the alternative, that its decision in reply to complaint No R/9/90, notified on 13 August 1990, could not set the period for commencing the pre-litigation procedure running again. Here again, two outcomes are conceivable:

either:

that decision of the Commission is an express rejection of the 'complaint' of 19 January 1990, already implicitly rejected on 22 May 1992, after an earlier implicit rejection in February 1990 of the 'complaint' of October 1989. It would not therefore be conceivable for the explicit rejection of a complaint to give rise to a new pre-litigation complaint such as that submitted on 13 November 1990, whose rejection would cause the period for bringing an action to run again. In any event, the Commission's reply of 19 December 1990 to the applicant's third complaint, which also confirmed the decision, notified on 13 August 1990, does not constitute an act open to challenge, as the Court held in its judgment in Joined Cases 33/79 and 75/79 *Kühner* v *Commission* [1980] ECR 1677, and in its order in Case 371/87 *Progoulis* v *Commission* [1988] ECR 3091. In that case, the present action was brought well after the expiry of the time-limit;

or:

the decision which was notified on 13 August 1990 merely rejected Mr Weyrich's previous request of 19 January 1990, recalling and confirming his earlier claims as expressed in his letter of 20 October 1989. However, in that case, his claims, expressed once more in that 'request', had already been impliedly rejected much earlier and since no complaint had been lodged within the time-limit it is consistent case-law that the rejection by express decision, communicated on 13 August 1990, was not capable of starting time to run again for the commencement of the pre-litigation procedure. Article 91(3) of the Staff Regulations, according to which 'where a complaint is rejected by express decision after being rejected by implied decision but before the period for lodging an appeal has expired, the period for lodging the appeal shall start to run afresh', only relates to the time-limit for bringing an action before the Court and is not applicable to pre-litigation procedures. In any event, the decision which was notified on 13 August 1990, even if it is accepted that it should be considered a rejection of a 'request', can only be regarded as merely confirming the earlier rejection by implied decision, as well as confirming the decision of 23 August 1989 and, consequently, does not constitute, on its own, an act which may be challenged within the meaning of the order of the Court of 16 June 1988 in Case 371/87 *Progoulis*, cited above.

25 In reply to the objection of inadmissibility thus raised by the Commission, the applicant claims first of all that the present case should be clearly distinguished from the case giving rise to the judgment of the Court of First Instance of 22 November 1990 (T-4/90 *Lestelle*, cited above). In the present case, the notice determining his entitlement to the monthly allowance, accepted as an act adversely affecting an official in the judgment in *Lestelle*, cannot be considered in the same way since a few days later it was followed by another document sent by the Commission, headed 'Termination of service pursuant to Council Regulations Nos 3518/85, 2274/87 and 1857/89'. This new information notice, distributed in September 1989, amended the notice determining the applicant's rights to the monthly allowance which had been communicated to him a few days earlier since it explains very clearly that the allowance ceases at 65 years of age or between 60 and 65 years when the official benefiting from a measure of 'termination of service' had become entitled to the maximum possible pension rights. It was as a result of that contradictory and confused informatory notice that the applicant had sought by his letter of 20 October 1989 to obtain clarification from the head of the pensions unit at the Commission, thinking that a clerical error had slipped into the notice determining his entitlement to the monthly allowance drawn up by the Commission on 23 August 1989.

26 The applicant claims, in the second place, that the notice of 23 August 1989 determining his entitlement to the monthly allowance was totally unclear and imprecise and that therefore there was no definitive act which could be considered capable of affecting him adversely and against which there could be a complaint. Furthermore, the *Administrative Notices* of September 1989 are also of doubtful legal status and could be described as a 'provisional or preparatory act'.

27 In the third place, the applicant, referring to Article 92 of the Rules of Procedure of the Court of Justice under which the Court of First Instance may of its own motion consider whether there exists an absolute bar to proceeding with a case, states that he retains an interest in obtaining a decision on the substance of his application in so far as he has also called into question the lawfulness of certain regulatory provisions, taken on manifestly improper legal bases, since he has expressly relied on the unlawful nature of Articles 5 and 4(7) of Regulation No 3518/85.

28 In the fourth place, the applicant claims that his application is not out of time at all. According to him, the sequence of events is as follows:

— his letter of 20 October 1989 was only a simple request for information and cannot be described either as a request or as a complaint; its purpose was to have a clerical error corrected;

— the letter of 19 January 1990 constituted the applicant's first 'request' for the purposes of Article 90(1) of the Staff Regulations and the Commission was obliged either to take an express decision within four months from the date on which the request was made, which it did not do, or to take an implied decision rejecting it, by failing, as it did, to promise the applicant, firmly and verbally, that an express reply would soon be sent to him;

— that 'explicit and provisional' decision was not in fact taken until 13 August 1990 for it was subject to a reservation in relation to the judgment to be delivered in the *Lestelle* v *Commission* case;

— until that date, it was the Commission alone which was responsible for the alleged suspension of the time-limit, in so far as it was the Commission itself which, by its conduct, caused that suspension of the time-limit laid down in the Staff Regulations;

— the 'explicit and provisional' decision of the Commission, dated 13 August 1990, clearly set time running afresh by expressing its intention to pursue the pre-litigation procedure;

— following that decision, the applicant immediately lodged his 'first complaint' on 20 August 1990;

— that first complaint was followed, within the prescribed period on 9 November 1990, by a 'second complaint';

— the judgment in *Lestelle* v *Commission* was delivered on 22 November 1990 and the Commission took its definitive decision on 19 December 1990, so that an application lodged on 7 March 1991 against that sole definitive decision is perfectly admissible.

29 In the fifth place, the applicant maintains that he cannot be time-barred since the Commission had infringed the principles of legal certainty, legitimate expectations and the duty to have regard to his interests. With reference to the judgment of the Court of First Instance of 7 February 1991 in Joined Cases T-18/89 and T-24/89 *Tagaras* v *Court of Justice* [1991] ECR II-53, he claims that the principle of legal certainty requires that every measure of the administration having legal effects must be clear and precise and must be drawn to the attention of the person concerned in such a way that he can ascertain exactly the time at which the measure comes into being and starts to produce its legal effects, particularly in order to allow the person for whom it is intended to initiate all the appropriate pre-litigation and litigation procedures. The Commission's position was unclear and imprecise and the Commission intentionally allowed a great deal of uncertainty to creep into the case in order to subsequently base an argument on its 'own culpable negligence'. Thus, the notice of determination of 23 August 1989 was contradicted by the information given by the Commission in September 1989; the letter of 20 October 1989 was only replied to after three months had elapsed; and the request of 19 January 1990 was only replied to expressly after nearly eight months later, on 13 August 1990, when the Commission had only taken a 'provisional decision', subject to the reservation relating to the outcome of the *Lestelle* case, pending before the Court of First Instance, and erroneously describing the request as a 'complaint'.

30 The applicant also claims that an official from the Staff Regulations department had verbally promised him on several occasions that the Commission would take a decision shortly. It did not do so and the applicant claims that not only did it not take an express decision within the four-month period following the date on which his request had been submitted, which was 19 January 1990, but also that it could not reject the request by implied decision while promising the applicant, firmly and verbally, that he would soon receive an express reply. In that respect, the applicant offers to prove, either by personal appearance of the parties, or by witnesses, that those verbal promises were actually made. Finally, the applicant also refers to the judgment of the Court of First Instance of 7 February 1991 in Joined Cases T-18/89 and T-24/89 *Tagaras*, above, to argue that it is, above all, for the administration to adopt an attitude which allows its officials to exercise their rights and not for it to avail itself 'at random' of certain rules of procedure, in particular those relating to prescribed time-limits, provided for in Articles 90 and 91 of the Staff Regulations, which were laid down in order to ensure clarity and legal certainty in relations between Community officials and the institutions.

31 In view of the foregoing facts and faced with the opposing arguments of the parties set out above, the Court of First Instance considers that it must (i) describe the general scheme of the pre-litigation procedure provided for in Articles 90 and 91 of the Staff Regulations, (ii) investigate and define in the present case the act which must be considered as having adversely affected the applicant, (iii) attach a legal classification to each of the various letters sent by the applicant, (iv) examine the effects on the admissibility of this action of the replies given by the Commission to each of those letters, and, finally, (v) consider certain specific pleas relied upon by the applicant in his observations submitted on the objection of inadmissibility.

32 First of all, as a reading of Articles 90 and 91 shows and as the Court of Justice held in its order of 4 June 1987 in Case 16/86 *GP* v *Economic and Social Committee* [1987] ECR 2409, Articles 90 and 91 make the admissibility of an action brought by an official against the institution to which he belongs conditional on the proper observance of the preliminary administrative procedure laid down thereunder. If the official wishes the appointing authority to take a decision relating to him, the administrative procedure must be opened by a request from the person concerned asking the authority to take the decision which he seeks, in accordance with Article 90(1). It is only against a decision rejecting that request, which, in the absence of a reply from the administration, is deemed to have been made after a period of four months, that the person concerned may, within a further period of three months, submit a complaint to the appointing authority in accordance with Article 90(2). On the other hand, where a decision has already been taken by the appointing authority and it adversely affects the official, it is clear that a request, within the meaning of Article 90(1) of the Staff Regulations, would not make sense and that the official must then use the complaint procedure provided for in Article 90(2) when he seeks the annulment, reversal or the withdrawal of the decision which adversely affects him.

33 It is established in case-law that under Article 90(1) of the Staff Regulations any official may submit to the appointing authority a request that it take a decision relating to him. However, that does not enable an official to evade the time-limits prescribed in Articles 90 and 91 of the Staff Regulations for the lodging of complaints and appeals by using such a request as a means of contesting an earlier decision which was not challenged within the time-limits. Those time-limits are a matter of public policy since they were laid down with a view to ensuring clarity and legal certainty and the parties are absolutely bound by them (see, in particular, the judgments of the Court of Justice in Case 232/85 *Becker* v *Commission* [1986]

ECR 3401, and in Case 161/87 *Muysers and Others* v *Court of Auditors* [1988] ECR 3037, as well as the judgment of the Court of First Instance in Case T-58/89 *Calvin Williams* v *Court of Auditors* [1991] ECR II-77).

34 It must therefore be concluded that, since the competent authority took, with regard to an official, a decision which adversely affected him, he may no longer open the pre-litigation procedure at the stage of a request, but must submit directly to the appointing authority a complaint directed against the act adversely affecting him, as required by Article 90(2).

35 The Court of First Instance must accordingly investigate and determine in the second place whether in the present case a measure adversely affecting the applicant was in fact taken, thus setting time running for the purposes of the pre-litigation stage, as provided for in Article 90(2). In that respect, it has been consistently held that only actions directed against an act adversely affecting the applicant, in the sense that it directly and immediately affects the applicant's legal situation, are admissible (see the judgment of the Court of Justice in Case 204/85 *Stroghili* v *Court of Auditors* [1987] ECR 389, and the order of the Court of Justice in Case 371/87 *Progoulis* v *Commission* [1988] ECR 3091).

36 From that point of view, the Court of First Instance considers that it is indisputably the notice of assessment of entitlement to the monthly allowance which the Commission sent to the applicant on 23 August 1989 which constitutes the act adversely affecting him and which thereby set time running for the submission of a complaint. According to established case-law, a statement of the pecuniary rights of an official which is a sufficiently integral part of a decision placing him on early retirement may be considered as an act adversely affecting him (judgment of the Court in Case 23/80 *Grasselli* v *Commission*, cited above); likewise, notices stating definitively pecuniary rights which officials have under provisions and making apparent the appointing authority's intention to determine the amounts which it undertakes to pay the official on specified dates constitute measures capable of adversely affecting officials (judgments of the Court in Joined Cases 19, 20, 25 and 30/69 *Richez-Parise and Others* v *Commission* [1970] ECR 325 and in Case 23/69 *Fiehn* v *Commission* [1970] ECR 547). More precisely, in a case identical to the present case, the Court of First Instance ruled, also in the context of a measure to terminate service based on Regulation No 3518/85, that it was the notice of assessment of entitlement to the monthly allowance which constituted the act

adversely affecting the official concerned and set time running for lodging a complaint (judgment of the Court of First Instance in Case T-4/90 *Lestelle*, supra; see also, in that respect, the judgment of the Court of Justice in Case 79/70 *Müllers* v *Economic and Social Committee* [1971] ECR 689 and in Case 783 and 786/89 *Venus and Obert* v *Commission and Council* [1981] ECR 2445 and, *a contrario*, the judgment of the Court of Justice in Case 17/78 *Deshormes* v *Commission* [1979] ECR 189, as well as the judgment of the Court of First Instance in Case T-135/89 *Pfloeschner* v *Commission* [1990] ECR II-153).

37 Moreover, in the present case, the notice determining entitlement to the monthly allowance drawn up by the competent Commission department on 23 August 1989 was a sufficiently integral part of the decision to allow the applicant to take advantage of Council Regulation No 3518/85, since it was prepared eight days before the applicant's definitive termination of service. Furthermore, that notice consists of two full pages, containing implementing provisions which are extremely precise and unconditional, regarding the administrative position of the applicant, the period during which the allowance is to be paid and the basic amount of the monthly allowance, the various supplements and deductions to be made, the actual methods of payment of benefits and the obligations incumbent upon the applicant, in particular in the event of a change of circumstances affecting entitlement to an allowance. Thus, the very contents of the notice demonstrate, if confirmation be needed, its decisional nature and set it clearly apart from provisional statements of entitlement to financial benefits, such as those referred to in the judgment of the Court of Justice in *Deshormes*, cited above, and in the judgment of the Court of First Instance in *Pfloeschner*, above.

38 In this regard, the applicant's argument that the notice determining his entitlement lacked clarity and precision, leading him to consider that a clerical error had slipped into the notice, should be rejected immediately. It is apparent from reading the document that it is perfectly clear and devoid of any ambiguity and it is clear that the reference in the margin to Article 34 of the ECSC Treaty excludes the possibility of any clerical error. Moreover, contrary to the applicant's argument, the internal information notice dated September 1989, headed 'Termination of service pursuant to Council Regulations Nos 3518/85, 2274/87 and 1857/89', considered above at paragraph 11, is not in any event capable of changing the legal nature of the notice determining entitlement to the monthly allowance of 23 August 1989 from that of an act adversely affecting the official concerned; nor can it affect the lawfulness of that notice. That information notice, which is very general and purely internal, is likewise not capable, as the applicant maintains, of amending the notice determining entitlement to the monthly allowance, having regard, first, to its actual contents, which consist only of a brief summary of three

Council regulations on termination of service and not a decision determining the individual allowances of officials to whom the regulations were to apply and, secondly, to its opening statement explaining that the information which followed was for information purposes only and that in the event of a dispute the Staff Regulations, the Conditions of Employment of other Servants of the European Communities and the three termination-of-service regulations in question prevailed. It follows that the Commission is right to refer to the decision of the Court of First Instance in the *Lestelle* case, cited above.

39 Thirdly, the Court of First Instance must attach a legal classification to the various letters sent by the applicant to the Commission. As the Court of First Instance held in its judgment in Case T-1/90 *Pérez Mínguez Casariego* v *Commission* [1991] ECR II-143, the classification of an applicant's letter as a request or a complaint is a matter for the Court alone and not for the parties. In that respect, it should be noted that it has been consistently held that a letter from an official which does not expressly request the withdrawal of the decision in question but is clearly intended to achieve an amicable settlement of his complaints constitutes a complaint (judgments of the Court of Justice in Case 30/68 *Lacroix* v *Commission* [1970] ECR 301 and Case 19/72 *Thomik* v *Commission* [1972] ECR 1155), or likewise a letter which clearly expresses the applicant's will to challenge the decision which adversely affects him (judgment of the Court of Justice in Joined Cases 23 and 24/87 *Aldinger and Another* v *Parliament* [1988] ECR 4395). Finally, according to a consistent line of decisions, an official cannot by lodging a request challenge a previous decision which was not challenged within the time-limits laid down in Articles 90 and 91 of the Staff Regulations for lodging a complaint or appeal. Only the existence of a substantial new fact capable of adversely affecting the person concerned can lead to the reopening of those time-limits and justify consideration of such a request (judgment of the Court of Justice in Case 231/84 *Valentini* v *Commission* [1985] ECR 3027, judgment of the Court of First Instance in Case T-6/90 *Petrilli* v *Commission* [1990] ECR II-765).

40 In view of those principles, it must be considered, as the Commission argues, that the registered letter sent on 20 October 1989 by the applicant to the Commission does constitute a complaint within the meaning of Article 90(2) of the Staff Regulations and not, as the official claims, merely a request for information or a request for the correction of a clerical error. In that letter the applicant, without expressly requesting that the whole of the decision in question be withdrawn, is clearly

seeking an amicable settlement of his complaints, and he also clearly expresses his view that paragraphs B and C5 of the notice determining his entitlement to a monthly allowance are unlawful and must be rectified, according to his expressed wishes, as well as with regard to the duration of the periods during which he will receive the allowance, the date on which he will be allowed to claim his retirement pension and his obligation to continue to pay contributions to the pensions scheme. Furthermore, in that letter, the applicant does not request any information and does not ask for any clerical error to be rectified. It is therefore this letter of 20 October 1989 which constitutes the only complaint validly submitted by the applicant, since, as the Court of Justice has ruled, while the periods prescribed for instituting proceedings are a matter of public policy and are not subject to the discretion of the parties or of the Court, this also applies to the periods for lodging complaints which, from the procedural point of view, precede them and are of the same nature since they both contribute, with the objective of ensuring legal certainty, to the regulation of the same remedy (judgment of the Court of Justice in Joined Cases 122 and 123/79 *Schiavo* v *Council* [1981] ECR 473). It should be added that there was no new fact subsequent to the notice of 23 August 1989 determining rights to an allowance. As was said above, the information notice of 1989 cannot constitute such a new fact in view of its content and its purpose.

41 It follows from the foregoing that all the other letters sent by the applicant to the Commission, namely the letter of 19 January 1990, described by the applicant as a 'request' and registered at the Commission as a 'complaint' (referred to above, see paragraph 14), the applicant's letter dated 20 August 1990, described by him as a 'first complaint' (referred to above, see paragraph 16), the applicant's letter dated 9 November 1990, presented by him as his 'second complaint' and considered by the Commission to be a 'third complaint' (referred to above, see paragraph 17), may not constitute either requests or complaints but must be regarded as purely reiterative of the complaint of 20 October 1989, and may not therefore prolong the pre-litigation procedure. It follows from the foregoing that the complaint dated 20 October 1989 was replied to, by an authority competent to do so, only by the decision adopted on 1 August 1990 by the Commission and sent the following 13 August to the applicant. The head of the unit responsible for pensions and relations with former officials did in fact reply to the applicant on 16 January 1990, but he had no capacity to reply to the complaint submitted on 20 October 1989. It follows that pursuant to the last paragraph of Article 90(2) of the Staff Regulations, according to which '[t]he authority shall notify the person concerned of its reasoned decision within four months from the date on which the complaint

was lodged. If at the end of that period no reply to the complaint has been received, this shall be deemed to constitute an implied decision rejecting it against which an appeal may be lodged under Article 91', an implied decision rejecting the complaint was taken before the end of February 1990. Consequently, the appeal, lodged at the Registry of the Court of First Instance on 7 March 1991, was out of time.

42 Fourthly, the Court of First Instance must consider the effects on the outcome to the present case of the replies given by the Commission to the various letters which the applicant sent to it and which he described as either 'requests' or as 'complaints'. First of all, it should be recalled that it has been consistently held that the fact that an institution, for reasons related to its staff policy, replies to the substance of an administrative complaint submitted out of time does not have the effect of derogating from the system of mandatory time-limits laid down in Articles 90 and 91 of the Staff Regulations or of depriving the administration of its right, at the stage of judicial proceedings, to raise an objection of inadmissibility on the ground that the complaint was out of time (judgment of the Court of Justice in Case 227/83 *Moussis* v *Commission* [1984] ECR 3133; judgment of the Court of First Instance in Case T-130/89 *B.* v *Commission* [1990] ECR II-761; judgment of the Court of First Instance in Case T-6/90 *Petrilli*, cited above). It is also established case-law that rejection of a complaint by means of a communication confirming an earlier decision is not a measure adversely affecting an official within the meaning of Article 91 of the Staff Regulations. It cannot therefore set the period for commencing proceedings running afresh and revive a right of action which is already extinct. Likewise, the express rejection of a complaint, after the prescribed period for bringing an appeal against the implied decision rejecting the complaint has elapsed, and which does not contain any new elements in relation to the legal or factual situation existing at the time of the implied rejection, is purely confirmatory and not capable of having an adverse effect (see also the judgments of the Court of Justice in Case 58/69 *Elz* v *Commission* [1970] ECR 507, Case 79/70 *Müller* v *Economic and Social Committee*, cited above, and Case 23/80 *Grasselli*, cited above).

43 It follows that, since the complaint of 20 October 1989 had been rejected by implied decision before the end of February 1990, neither the letter dated 13 August 1990, by means of which the Commission sent the applicant the decision adopted on 1 August 1990 in reply to complaint No R/90, nor the letter dated 19 December 1990, by means of which the Director-General of Personnel and Administration informed the applicant that examination of his complaint No

293/90 of 9 November 1990, as well as of his letter of 20 August 1990, revealed that they related to the same matters as those already raised in his complaint No 9/90 and that it was not necessary to change the Commission's reply on those points, did not produce the slightest legal effect on which the applicant could rely, in particular that of setting time running afresh for bringing proceedings. Furthermore, it has been consistently held that any implied or express decision rejecting a complaint, if it adds no new facts, merely confirms the act or omission of which the applicant complains and does not constitute on its own a measure against which an action lies (judgment of the Court of Justice in Joined Cases 33/79 and 75/79 *Kuhner*, above, and the order of the Court of Justice in the *Progoulis* case, cited above).

44 Finally, in this regard, it should be added in any event that the Commission was right in its reply of 13 August 1990 to the applicant, not only in drawing his attention to the fact that in the event of a challenge to that reply it reserved the right to plead inadmissibility of the action for being out of time, but also with regard to the question of the continued obligation to pay contributions to the pensions scheme, in making its decision subject to the judgment to be delivered in the *Lestelle* case which was then still pending before the Court of First Instance, while explaining that the applicant's situation might be re-examined, if necessary, in the light of the judgment to be given in that case. Contrary to what the applicant maintains, such a decision is not thereby rendered 'provisional' in nature since it simply reflects a clearly understood interpretation of Article 176 of the EEC Treaty.

45 Finally, the Court of First Instance must consider whether the specific pleas put forward by the applicant in his observations on the objection of inadmissibility may possibly overcome the time bar.

46 First of all, the applicant claims that he retains an interest in obtaining judgment on the substance of his appeal in so far as he has also called in question the lawfulness of certain regulatory provisions adopted on manifestly incorrect legal bases, since he has expressly claimed that two articles of Regulation 3518/85 are unlawful. That plea cannot be accepted. It has been consistently held that, although in the context of the right of action made available by Article 91 of the

Staff Regulations and in the case of a measure of a general nature designed to be implemented by means of a series of individual decisions affecting all or a large proportion of the officials of an institution, an official, taken individually, cannot be deprived of his right to invoke the illegality of that measure in order to challenge the individual decision which allows him to ascertain with certainty the manner in which and the extent to which his individual interests are affected, it is no less true that, according to Article 91(2) of the Staff Regulations, actions brought by officials under Article 179 of the EEC Treaty must be directed against the appointing authority and relate to acts or omissions of that authority which adversely affect the applicant, and not directly seek annulment of the whole or part of a Council regulation (judgment of the Court of Justice in Joined Cases 44, 46 and 49/74 *Acton* v *Commission* [1975] ECR 383 and order of the Court of Justice in Case 48/79 *Ooms* v *Commission* [1979] ECR 3121; see also the judgments of the Court of Justice in Case 153/79 *Bowden* v *Commission* [1981] ECR 2111 and Case 154/79 *Biller* v *Parliament* [1981] ECR 2125). It follows that the applicant may not challenge directly before the Court of First Instance the lawfulness of certain provisions of Regulation 3518/85; he may only do so by way of a plea of illegality, provided that his appeal is itself admissible.

47 Finally, the applicant claims that no time bar can be raised against him since the Commission had itself acted in breach of the principles of legal certainty, legitimate expectations and the duty to have regard to his interests.

48 With regard to the principle of legal certainty, which, according to established case-law, is part of the Community legal order, this requires that every measure of the administration producing legal effects must be clear and precise and brought to the attention of the person concerned so that he can ascertain with certainty the time at which the measure comes into being and begins to produce its legal effects, particularly as regards the availability of the remedies provided for by the relevant provisions, in this case the Staff Regulations (judgment of the Court of Justice in Joined Cases 205 to 215/82 *Deutsche Mischkontor* v *Germany* [1983] ECR 2633; judgment of the Court of First Instance in Joined Cases T-18/89 and T-24/89 *Tagaras*, cited above). In this regard, the applicant's arguments alleging that the Commission adopted a position which was imprecise and unclear in order, subsequently, to 'take advantage of its own culpable negligence' cannot be

accepted because they are too general and also wrong. As was stated above (paragraphs 37 and 38), the notice determining his entitlement to the monthly allowance sent to the applicant on 23 August 1989 was particularly clear, precise and comprehensible. As regards the information notice intended solely for internal distribution and distributed in September 1989, it could not, as was stated above, lead to any confusion, above all in the mind of an official who had carried out the duties of Head of the Personnel Division of the Commission at Luxembourg. Finally, even supposing it to be right, the argument that the applicant on several occasions received verbal promises to the effect that the Commission was about to take a position likewise cannot be accepted since the device of the implied rejection provided for in Article 90 of the Staff Regulations is designed precisely to avoid this type of administrative delay and to clarify legal situations by enabling officials to assert their rights effectively, despite administrative inertia. It is not therefore necessary to take up the offer to furnish evidence made in this regard by the applicant.

49 With regard to the principle of legitimate expectations, which, likewise, is part of the Community legal order, the applicant relies on that principle essentially in order to criticize the slowness with which the Commission replied to the various letters which the applicant sent to it. It is true that any official who submits a request or a complaint has a right to expect a reply. Nevertheless, while the Court of Justice has held that 'it is to be regretted that the Commission did not consider it necessary to reply to that complaint in accordance with the principle of good administration . . .' (judgment in Case 23/80 *Grasselli*, above) and considered that 'the course of bringing a second action against an express decision rejecting an official's complaint after the time-limit for so doing has expired originates in the Commission's bad practice of not replying to officials' complaints within the period of four months prescribed by Article 90 of the Staff Regulations', it has still not censured such practice with regard to the principle of legitimate expectation. Indeed, yet again the Commission's silence at the expiry of the prescribed period constitutes a rejection by implied decision and enables the official concerned to pursue his pre-contentious or contentious action.

50 Finally, with regard to the duty to have regard to officials' interests, the Court of Justice has held that this duty as well as the principle of good administration mean, in particular, that when the authority takes a decision concerning the situation of

an official it should take into consideration all the factors which may affect its decision and that when doing so it should take into account not only the interests of the service but also those of the official concerned (judgments of the Court of Justice in Case 321/85 *Schwiering* v *Court of Auditors* [1986] ECR 3199 and in Case 417/85 *Maurissen* v *Court of Auditors* [1987] ECR 551). In the present case, and in any event, as regards the admissibility of the action, none of the documents before the Court indicates that the Commission failed in its duty to have regard to the interests of the applicant in the conduct of the pre-litigation procedure. In the first place, the delay in replying to the applicant's letters may not be regarded, on its own, as constituting such a failure and, secondly, the Commission replied, in substance, to all the letters from the official concerned, even when the Commission considered, rightly, that judicial proceedings would certainly be inadmissible in this case.

51 On the basis of all of the foregoing the action must be dismissed as inadmissible.

Costs

52 Under Article 69(2) of the Rules of Procedure of the Court of Justice the unsuccessful party is to be ordered to pay the costs. However, Article 70 of those rules provides that institutions are to bear their own costs in proceedings brought by servants of the Communities.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

(1) Dismisses the action as inadmissible;

(2) Orders the parties to bear their own costs.

Luxembourg, 7 June 1991.

H. Jung
Registrar

C. P. Briët
President of the Fifth Chamber