

rights until his active employment ends, since until then the basis of calculation of those rights is in principle indeterminate and subject to variation.

Only exceptionally, where a factor in that calculation can be definitively determined immediately and directly, will the administration be bound to adopt a decision which is to be implemented subsequently but which immediately and directly affects the legal situation of the person concerned, thus constituting an act adversely affecting him. In those circumstances, the official concerned has a legitimate, present and

vested interest in having an uncertain factor in his status determined in advance.

On the other hand, an official who is still in active employment cannot establish a present, vested interest in obtaining a decision on the weighting to be applied to his future retirement pension. That weighting, which is conditional on the official's choice of country of residence following the cessation of his employment and also on the rules in force when the pension rights are calculated, cannot be fixed by a decision taken in advance which immediately and directly affects the legal situation of the person concerned.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)  
12 February 1992 \*

In Case T-6/91,

**Fred Pfloeschner**, an official of the Commission of the European Communities, residing at Brussels, represented by G. Vandersanden, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Alex Schmitt, 62 Avenue Guillaume,

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 Roberto Hayder, a representative of its Legal Service, Wagner Centre, Kirchberg,

defendant,

\* Language of the case: French.

CONCERNING, at this stage of the proceedings, the admissibility of an application for the annulment of the Commission's decision of 30 October 1990 rejecting as devoid of purpose the applicant's complaint seeking to have the amount of his pension rights fixed and of the alleged implied decision of the Commission to continue to apply a weighting of 100 to the applicant's pension in the event that he retires to Switzerland,

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

composed of: B. Vesterdorf, President of the Chamber, A. Saggio and C. Yeraris,  
Judges,

Registrar: B. Pastor,

having regard to the written procedure and further to the hearing on 16 October 1991,

gives the following

## Judgment

### Facts and procedure

1 The applicant, Mr Pfloeschner, a Swiss national born in 1928, was appointed an official of the Commission in 1958 by way of derogation from the nationality clause under Article 28(a) of the Staff Regulations of officials of the European Communities (hereinafter referred to as 'the Staff Regulations').

2 On 18 July 1988 the weighting of 145.4 hitherto applicable to pensions paid in Switzerland was reduced by Council Regulation (ECSC, EEC, Euratom) No 2175/88 laying down the weightings applicable in third countries, Article 3 of which provides that 'the weighting to be applied to a pension where the recipient has established his residence in a third country shall be 100' (Official Journal 1988 L 191, p. 1).

- 3 Following the entry into force of the new rules, the Commission sent to Mr Pfloeschner at his request a provisional statement of his pension rights in a memorandum of 16 January 1989. On 18 September 1989 Mr Pfloeschner brought an action for the annulment of the 'Commission's decision of 16 January 1989 establishing (his) pension rights... in so far as the weighting applicable to (his) pension... if he retires to Switzerland is fixed at 100'. The Court of First Instance held that action inadmissible, essentially on the ground that an examination of the contested statement showed that it had been provided by way of information only and thus was not in the nature of an act adversely affecting him within the meaning of Article 90(2) of the Staff Regulations (judgment in Case T-135/89 *Pfloeschner v Commission* [1990] ECR-II 153).
  
- 4 On 3 May 1990 Mr Pfloeschner submitted a request for 'a decision pursuant to Article 90(1) of the Staff Regulations regarding the fixing of (his) pension rights and the details thereof at the age corresponding to the maximum rate', taking account of the fact that '(he is to) retire to Switzerland, of which country (he is) a national and where (he was) recruited'.
  
- 5 On 25 September 1990, having received no reply from the Commission within the prescribed period of four months, Mr Pfloeschner lodged a complaint within the meaning of Article 90(2) of the Staff Regulations against the implied decision rejecting his request.
  
- 6 By a letter of 30 October 1990 from the Director-General for Personnel and Administration, the Commission responded to that complaint, stating that the provisional statement of Mr Pfloeschner's pension rights would be sent to him as soon as possible. However, it drew his attention to the fact that that statement 'is for information purposes only and is not in the nature of a decision, save where it is drawn up following an application from (the person concerned) for retirement on a given date'. In conclusion, the Commission took the view that the complaint had become devoid of purpose.

In a letter sent on 16 November 1990 to Mr Hay, the Director-General for Personnel and Administration, Mr Pfloeschner disputed the contention that his complaint had become devoid of purpose. He pointed out that he had not yet

obtained any response to his request of 3 May 1990, referred to above, seeking from the Commission a decision in respect of him pursuant to Article 90(1) of the Staff Regulations.

The provisional statement of his pension rights with effect from 1 January 1991 was sent to Mr Pfloeschner on 18 December 1990. It was drawn up on the basis of a weighting of 100 for pensions paid in Switzerland.

7 In those circumstances Mr Pfloeschner, by an application lodged at the Registry of the Court of First Instance on 29 January 1991, brought this action for the annulment of the 'decision of Mr Hay dated 30 October 1990 rejecting (his) complaint seeking the fixing of the amount of his pension rights at the age corresponding to the maximum rate' and, consequently, the annulment of the 'implied decision to retain at 100 the weighting applicable to the applicant's pension upon his retirement to Switzerland'.

8 Without lodging any defence as to the substance of the case, the Commission raised an objection of inadmissibility in respect of all the heads of claim in the action. The applicant lodged observations seeking the rejection of the objection raised by the Commission. Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided, pursuant to Article 114(3) of its Rules of Procedure, to open the oral procedure as to the question of admissibility without any preparatory inquiry. The oral procedure regarding the objection of inadmissibility took place on 16 October 1991 and at the end of the hearing the President declared the oral procedure closed.

#### Forms of order sought by the parties

9 The defendant contends that the Court of First Instance should:

- dismiss this application as inadmissible;
- make an appropriate order as to costs.

The applicant claims that the Court of First Instance should:

- reject the objection of inadmissibility raised by the defendant, or at least reserve its decision on admissibility for the final judgment;
- consequently, order the re-opening of the procedure regarding the substance of the case;
- order the defendant to pay all the costs.

### **Arguments of the parties and legal assessment**

#### *Arguments of the parties*

- 10 The Commission asserts that the application is inadmissible in that it seeks the annulment, first, of the alleged implied decision to retain at 100 the weighting which will apply to the applicant's pension if he retires to Switzerland, and secondly, of the letter of 30 October 1990 rejecting his complaint.
- 11 In support of the objection of inadmissibility raised in relation to the first head of claim referred to above, the Commission alleges that its implied refusal to accede to the request submitted by the applicant on 3 May 1990 does not constitute an act adversely affecting him.
- 12 The Commission draws attention, first of all, to the legal context of this dispute. It points out that an official who is still in active employment cannot call for the adoption of a decision calculating his pension rights in advance. It states that pension rights do not arise until the person concerned ceases to be actively employed and cannot be calculated until that date. That is apparent from Article 40 of Annex VIII to the Staff Regulations, which provides that a detailed statement of the calculation of retirement pension rights is to be communicated at the same time as the decision awarding the pension, and from Article 10 of the same annex, which provides that the right to receive payment of retirement

pension is to have effect from the first day of the calendar month following that in which the official, whether automatically or at his own request, becomes eligible for that pension.

According to the Commission, an official who is still in active employment is *a fortiori* unable to demand a decision in an isolated case relating to an operation — in this instance the fixing of the weighting — forming an integral part of the calculation of the pension.

In the light of those rules in the Staff Regulations, the Commission rejects the interpretation put forward by the applicant, to the effect that the absence of any response to his request of 3 May 1990 constitutes an advance decision to retain at 100 the weighting applicable to his future pension if it is paid in Switzerland. The Commission considers that the absence of a response can only mean that no decision can be made on the determination of the weighting to be applied to the calculation of the applicant's pension rights until he goes into retirement.

The Commission points out that, inasmuch as it has not failed to adopt a measure laid down by the Staff Regulations, its implied refusal to adopt a decision relating to the fixing in advance of the applicant's pension rights does not constitute an act adversely affecting him which is capable, as such, of forming the subject-matter of a complaint and an application (order of the Court of First Instance in Case T-119/89 *Teissonnière v Commission* [1990] ECR-II 7, paragraph 17). It alleges that the applicant does not rely on any special circumstance warranting, by way of derogation, the calculation in advance of pension rights to which there is as yet no entitlement and, in particular, the fixing in advance, by means of a decision, of the weighting to be applied to future rights.

In support of the objection of inadmissibility raised against the application for the annulment of Mr Hay's letter of 30 October 1990, the Commission asserts that 'the applicant was notified in that letter that his request for the fixing of his pension rights would shortly be dealt with, but on the basis that the statement to

be sent to him would be for information purposes only, inasmuch as the applicant had not yet retired'. The Commission further considers that it is in any event 'pointless and irrelevant' to examine whether that letter constitutes a decision rejecting the complaint of 25 September 1990, inasmuch as that complaint was directed at a non-existent act. According to the Commission, the complaint was against the alleged implied decision to retain at 100 the weighting applicable to the applicant's pension if he retires to Switzerland, and not the implied decision not to calculate his pension in advance, which is the only decision capable of resulting from the absence of a response to the request of 3 May 1990 and, consequently, of giving rise to the complaint and the application. Moreover, the inadmissibility of the claims for the annulment of the aforementioned implied decision necessarily results in the claim for the annulment of the letter of 30 October 1990 being likewise inadmissible.

- 16 The applicant contends, for his part, that the application is admissible. He points out, first, that he expressly and formally requested the Commission on 3 May 1990, pursuant to Article 90(1) of the Staff Regulations, to take a decision as to the amount of the weighting to apply to his pension rights following the entry into force of Council Regulation No 2175/88, having regard to his intention of retiring to Switzerland, of which country he is a national and where he was recruited.
- 17 The applicant asserts that the Commission's refusal — initially an implied refusal by reason of the lack of any response to his request for a decision pursuant to Article 90(1) of the Staff Regulations, and subsequently an express refusal, in the form of the statement of his pension rights which was sent to him on 18 December 1990 — to apply the weighting to the calculation of his pension rights constitutes a clear and unconditional decision by the competent authority fixing at that time the amount of his pension rights and showing that he will not have the benefit of a weighting higher than 100. It is immaterial in that regard that the effect of that right is suspended until the date when he actually retires, since that date is already certain. That certainty is increased by the proximity of his retirement age and the very strong probability that the contested regulations will not be changed in the mean time. Furthermore, the setting of the date of his retirement has no effect on the amount of his pension entitlement, which is calculated at the maximum rate. Lastly, the applicant points out that the form in which the contested decision was communicated to him does not alter the fact of its being an act adversely affecting him.

18 The applicant asserts in support of his argument that it is illogical to require an official to set the date of his retirement or departure, for whatever reason, before letting him know what his administrative and financial situation will be on that date. Relying on the judgment of the Court of Justice in Case 17/78 *Deshormes v Commission* [1979] ECR 189, he claims that he has a 'legitimate, present, vested and sufficiently clear interest in having an uncertain factor in (his) status decided forthwith by the Court'. He adds in that regard that he already fulfils the requisite criteria to apply for retirement and that 'the date on which (he) will wish to retire depends essentially on (his) knowing in advance the amount of his future pension entitlement'.

19 The applicant points out that his interest in having his legal situation fixed is all the greater because the contested decision alters his initial situation. He says that in a previous statement of his pension rights, drawn up in 1988 prior to the entry into force of Regulation No 2175/88 discontinuing the application of the weighting to the amount of pensions paid in a third country, the weighting of 145.4 had been applied to the amount of the pension which would be paid to him in Switzerland.

20 As regards the Commission's letter of 30 October 1990, the applicant maintains that despite its deliberate ambiguity that letter clearly constitutes a rejection of the complaint submitted on 25 September 1990 against the implied decision rejecting his request.

### *Legal assessment*

21 In order for a ruling to be given on the objection of inadmissibility raised by the Commission, an examination must be made, as required by Article 91(1) of the Staff Regulations, into the question whether the contested acts are capable of adversely affecting the applicant within the meaning of Article 90(2).

22 According to that provision, the concept of an act adversely affecting a person covers both decisions and failures to adopt a measure prescribed by the Staff Regulations. The absence of a decision may thus adversely affect the person concerned, where the institution in which he is serving does not take either a

decision for which express provision is made by a specific rule in the Staff Regulations or a decision which is implicitly required by the Staff Regulations in order to safeguard the rights of officials.

23 It must thus be established whether the Commission, by not responding to the applicant's request of 3 May 1990 for a decision on the weighting applicable to his future retirement pension in the event of his taking up residence in Switzerland, has failed to adopt a measure which the applicant was entitled to call for under the Staff Regulations.

24 The Court notes in that regard that there is no provision in the Staff Regulations expressly requiring the institution in which an official is serving to fix in advance, before his retirement, certain detailed arrangements for calculating the amount of his pension rights. On the contrary, the relevant provisions of the Staff Regulations state that the pension rights of an official are to be calculated at the time when he goes into retirement. Under Article 40 of Annex VIII to the Staff Regulations, relating to the pension scheme arrangements, 'the institution in which the official was serving at the time when his active employment ended shall be responsible for calculating the amount of retirement...pension. A detailed statement of the calculation shall be communicated to the official...at the same time as the decision awarding the pension'. Article 10 of Annex VIII provides that 'The right to receive payment of retirement pension shall have effect from the first day of the calendar month following that in which the official...becomes eligible for that pension'.

25 The abovementioned rule in the Staff Regulations, whereby an institution can proceed to calculate an official's pension rights only when his active employment ceases, is necessitated by the requirements relating specifically to a right which is accruing, the basis of calculation of which is generally indeterminate and subject to variation until the person concerned goes into retirement. The factors governing the calculation of the amount of an official's pension rights, taken as a whole, cannot therefore in general be fixed before his active employment ceases.

26 However, such a rule is no longer warranted where, exceptionally, a factor in that calculation can be definitively determined immediately and directly. In those circumstances, the provisions of the Staff Regulations must be interpreted as implicitly requiring the institution concerned to adopt a decision forthwith. The

Court of Justice so held in paragraphs 10, 11 and 12 of its judgment in Case 17/78 *Deshormes v Commission*, cited above, relating to a decision regarding the taking into account, for the purpose of the calculation of years of pensionable service, of periods of employment prior to the recruitment of an official. That judgment shows that where it is possible to adopt, on the basis of determinate and invariable factors, a decision which is to be implemented subsequently but which may immediately and directly affect an official's legal situation, the person concerned has a legitimate, present, vested interest in having an uncertain factor in his status determined in advance (see also paragraph 19 of the order of the Court of First Instance in Case T-119/89 *Teissonnière v Commission*, cited above).

7 As regards this case, the Court of First Instance notes that the weighting to be applied depends, first, on the place of residence of the person concerned following the cessation of his employment, and secondly, on the rules in force when the calculation is made. It should be noted in that regard that the choice of place of residence must be made by the person concerned when he applies for retirement or automatically goes into retirement. It follows therefore that an official who is still in active employment cannot establish a present, vested interest in obtaining a decision on the weighting to be applied to his future retirement pension. By reason of the condition referred to above, which is contingent on the choice of country of residence and which can be determined only upon the cessation of the employment of the person concerned, the weighting cannot be fixed by a decision taken in advance which immediately and directly affects the legal situation of the person concerned.

8 On all those grounds, the Court finds that by not responding to the request of 3 May 1990 the Commission did not fail to adopt a measure expressly or implicitly required by the Staff Regulations.

9 It follows that the implied decision of rejection arising, by virtue of Article 90(1) of the Staff Regulations, from the Commission's failure to respond to the applicant's request of 3 May 1990 within four months from the date on which that request was lodged cannot adversely affect the applicant. The application must therefore be declared inadmissible.

## Costs

- 30 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, Article 88 of those Rules provides that in proceedings brought by servants of the Communities, the institutions are to bear their own costs. a.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Dismisses the application as inadmissible;
2. Orders the parties to bear their own costs.

Vesterdorf

Saggio

Yeraris

Delivered in open court in Luxembourg on 12 February 1992.

H. Jung  
Registrar

B. Vesterdorf  
President