JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
24 June 1993 *

In Case T-92/91,

Helmut Henrichs, a former member of the temporary staff of the Commission of the European Communities, residing in Sankt Augustin (Federal Republic of Germany), represented by F. Montag, Rechtsanwalt, Cologne, with an address for service in Luxembourg at the Chambers of A. May, 31 Grand-Rue,

applicants,

v

Commission of the European Communities, represented by H. Étienne, Principal Legal Adviser, acting as Agent, and by Barbara Rapp-Jung, Rechtsanwalt, Frankfurt am Main, and, at the hearing, by Bertrand Wägenbaur, Rechtsanwalt, Cologne, with an address for service in Luxembourg at the office of Nicola Annecchino, of its Legal Service, Wagner Centre, Kirchberg,

defendants,

APPLICATION for annulment of the decisions of 25 April 1991 and 3 May 1991 by which the Commission determined the amount of the allowance due to the applicant under Council Regulation (Euratom, ECSC, EEC) No 2274/87 of 23 July 1987 introducing special measures to terminate the service of temporary staff of the European Communities and excluded him from the Joint Sickness Insurance Scheme, and for the award of damages,

* Language of the case: German

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

composed of: J. Biancarelli, President, B. Vesterdorf and R. García-Valdecasas, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 20 April 1993,

gives the following

Judgment

Facts and procedure

1 Until 31 December 1990, the applicant, Mr Helmut Henrichs, was a member of the Commission's temporary staff. On that date the two parties jointly agreed to terminate Mr Henrichs' contract of indefinite duration; he had completed 16 years of service. Since 3 January 1991 the applicant has been a civil servant in a ministry of the Federal Republic of Germany. As such he receives emoluments consisting of a basic salary and various bonuses and allowances.

2 On leaving the Commission, the applicant was covered by Council Regulation (Euratom, ECSC, EEC) No 2274/87 of 23 July 1987 introducing special measures to terminate the service of temporary staff of the European Communities (OJ 1987 L 209, p. 1, hereinafter 'the Regulation') as amended by Council Regulation (EEC) No 2168/89 of 18 July 1989 (OJ 1989 L 208, p. 4). Following the accession to the European Communities of the Kingdom of Spain and the Portuguese Republic, that Regulation provides that certain members of the temporary staff, with at least 15 years service, may, following their termination of service, qualify for the application of the provisions of the Regulation. In principle, the Regulation provides for the payment to eligible employees of an allowance equal to 70% of the salary

previously received as a member of the temporary staff and for the amount of remuneration received by the member of staff from his new post to be deducted from the allowance due.

3 To that end, Article 4 of the Regulation provides that:

'4. Gross income accruing to the former member of the temporary staff from any new employment shall be deducted from the allowance provided in paragraph 1, in so far as that income plus that allowance exceeds the total gross remuneration received by him, determined by reference to the salary scales in force on the first day of the month for which the allowance is payable. That remuneration shall be weighted as provided for in paragraph 3.

Gross income and total gross remuneration last received, as referred to above, mean sums paid after deduction of social security contributions but before deduction of tax.

The former member of the temporary staff shall provide any written proof which may be required and shall notify the institution of any factor which may affect his right to the allowance.

...

6. Recipients of the allowance shall be entitled, in respect of themselves and persons covered by their insurance, to the benefits provided under the sickness insurance scheme provided for in Article 72 of the Staff Regulations, provided they pay the relevant contribution, calculated on the basis of the allowance provided for in paragraph 1, and are not covered by another sickness insurance by virtue of legal or statutory provisions.'

4 On 23 April 1991, the applicant notified the Commission of his new administrative situation, forwarding a salary statement showing gross monthly remuneration of DM 8 681.66 received in the Federal Republic of Germany. That statement contained no indication of any social security contributions borne by the applicant. By

decision of 25 April 1991 the Commission reduced by DM 1 356.25 the amount of the allowance paid pursuant to the above Regulation. The basis of the Commission's decision is that the applicant's gross monthly remuneration in the Federal Republic of Germany plus the allowance paid by the European Communities under the Regulation exceeded the applicant's last salary as a member of the Communities' staff by that amount. On 28 May 1991 the applicant submitted a complaint pursuant to Article 90(2) of the Staff Regulations of Officials of the European Communities (hereinafter 'the Staff Regulations') against that decision. On 12 September 1991 the Commission, without expressly responding to the complaint, forwarded to the applicant the details of the calculations which purportedly justified its decision.

5 By decision of 3 May 1991 the Commission excluded the applicant from the Joint Sickness Insurance Scheme. On 23 May 1991 the applicant lodged a complaint against that decision which was rejected by implied decision.

6 It was against that background that, by application lodged at the Registry of the Court of First Instance on 23 December 1991, the applicant brought the present action.

Forms of order sought

7 The applicant claims that the Court should:

(1) annul the defendant's decisions of 25 April 1991 and 3 May 1991;

(2) order the defendant to pay damages of an amount to be decided by the Court;

(3) order the defendant to pay the costs.

8 The Commission contends that the Court should:

(1) dismiss the application;

(2) make an order as to costs in accordance with the relevant provisions of the Staff Regulations.

9 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure and to order certain measures of inquiry. Accordingly the Court asked the parties to reply to several written questions and produce various documents. The applicant and the defendant replied to those questions and produced the documents required on 29 January and 5 February 1993 respectively. The parties presented oral argument and answered the questions put to them by the Court at the hearing on 20 April 1993.

The claims for annulment of the Decision of 25 April 1991 concerning calculation of the amount of the allowance due to the applicant

10 The applicant relies on two pleas in support of his claims: first, he argues that the contested decision is formally defective in that it did not state the grounds on which it was based, as required by the second sentence of the second paragraph of Article 25 of the Staff Regulations; secondly, he argues that the decision infringes Article 4(4) of the Regulation.

The first plea: failure to state the grounds of the contested decision

Arguments of the parties

11 The applicant argues that the Commission informed him of neither the relevant rules nor the facts on the basis of which the contested decision was adopted. The explanation sent with that decision was no substitute for a proper statement of

grounds as it was a standard document and as such did not make clear what considerations had prompted the defendant to take its decision in that particular case. That explanation did not enable the applicant to verify the calculations used by the defendant institution to determine the amount of the allowance in issue (Case 1/69 *Italy* v *Commission* [1969] ECR 277). Indeed, the applicant argues, where, as in this case, decisions of the Community institutions have adverse financial consequences for the person concerned, they must take great care in their statement of grounds to describe clearly each stage in the calculations made (Case 9/56 *Meroni* v *High Authority* [1958] ECR 133 and Case 1/63 *Macchiorlati Dalmas & Figli* v *High Authority* [1963] ECR 303). In the absence of that information, the applicant argues, he was unable to assess the prospects of success of any legal action open to him against the contested decision. The defendant's letters of 25 April 1991 and 22 May 1991, or even that of 12 September 1991, did not, he claims, shed any light on the legal basis for its calculations. It was, therefore, misleading to speak, as the defendant did, of correspondence between the parties, when the applicant was not provided with the initial components of the disputed calculation until 12 September 1991.

12 The Commission admits that the contested decision makes no reference to its legal basis, which is to be found in Article 4(4) of the Regulation. However, it argues that it could reasonably assume that the applicant was familiar with all the rules concerning his entitlement to the allowance, which are to be found exclusively in Article 4 of the Regulation. The institution's obligation to state the grounds of its decision must be assessed in the light of the availability to the addressee of the decision of the information on which the Commission based its decision (Case 19/87 *Hecq* v *Commission* [1988] ECR 1681, paragraph 16). The Court has consistently held that the duty to state the grounds of a decision, within the meaning of the second paragraph of Article 25 of the Staff Regulations, is satisfied where the decision provides the addressee with all the information he needs to assess its significance and where it enables the Community judicature to carry out a judicial review (Case C-169/88 *Prelle* v *Commission* [1989] ECR 4335, paragraph 10; Case T-37/89 *Hanning* v *Parliament* [1990] ECR II-463, paragraph 39). It certainly did so in the case of the applicant, who was a specialist on the European civil service and the author of legal publications on the subject. In the contested decision the institution referred first to the gross monthly remuneration and the last salary received by the applicant whilst working at the Commission, then to his current salary and to the permissible difference between those two figures. Thus, the Commission argues, the decision includes all the information required to justify a reduction, pursuant to Article 4(4) of the Regulation, of the allowance paid by the Commission. The omission of details of the calculations was in line with administrative

practice based on the need for clarity and ease of judicial review. In fact the information given was readily understandable by an employee who had been in charge of personnel matters. The correspondence entered into after the contested decision was taken confirms this view, the Commission argues. Moreover, the applicant's argument is, essentially, that the grounds given were substantively erroneous. In fact, what is in issue is not so much the inadequacy of the grounds stated as a difference of opinion as to the amounts which should, or should not, be deducted from the income received in the Federal Republic of Germany. The defendant argues that there is no justification for the deductions which the applicant claims and that, accordingly, it is under no obligation to state the grounds for its 'omission' in that connection.

Findings of the Court

13 The grounds given for the decision of 25 April 1991 are as follows:

'Since your gross monthly remuneration exceeds the permissible difference (DM 7 325.41) between your last salary as an official of the European Communities and your current salary by DM 1 356.25 a month, we are obliged to reduce the allowance paid by the Commission by that amount.'

14 The Court observes that, contrary to the applicant's claim, the contested decision contains all the factual detail necessary for it to be understood, namely, in this case, the relevant figures enabling it to be established that the reduction made to the allowance was correct.

15 It is common ground that the statement of reasons for the decision of 25 April 1991 makes no reference to its legal basis, namely Article 4(4) of the Regulation, to which reference is made only by implication. However, in the circumstances of the case, that omission is not such as to affect the legality of the contested decision, given that it is sufficiently proven that there could be no doubt as to the legal basis

of the decision in the mind of its addressee. Indeed, inasmuch as it concerns the legality of the decision of 25 April 1991 by which the Commission determined the amount of the allowance due to the applicant pursuant to Article 4(1) of the Regulation, the dispute centres entirely on the interpretation of paragraph 4 of that Article. The applicant, who is a doctor of law and the author of specialized publications in his capacity as an expert on the Community civil service, cannot seriously argue before the Community judicature that he was unaware of the legal basis for the contested decision, taken pursuant to a provision in a Regulation whose application he had himself requested.

16 Moreover the objections raised by the applicant both in the complaint made to the administrative authority and subsequently about the contested decision reveal that, in the event, he had no difficulty in identifying the figures on which the Commission based its calculation. The applicant was thus never prevented from putting forward his defence, either in the pre-litigation procedure or before the Court, and the latter was able to carry out a full review of legality.

17 Accordingly, the first plea, alleging failure to state the grounds of the contested decision in breach of Article 25 of the Staff Regulations, must be rejected.

The second plea: breach of Article 4(4) of the Regulation

— *Preliminary observations*

Arguments of the parties

18 The applicant argues that the contested decision breaches Article 4(4) of the Regulation in that it overestimates the amount of the gross income he receives in his new post. That article, he argues, only authorizes a reduction of the allowance due pursuant to Article 4(1) of the Regulation if the gross income received by the person concerned in his new post, together with that allowance, exceeds the last total gross remuneration paid to him as a member of the temporary staff. Under Article 4(4) of the Regulation gross income and the last total gross remuneration should be

compared after deduction of social security contributions but before deduction of tax. Therefore, as the applicant argued repeatedly during the administrative procedure, the Commission applied Article 4(4) of the Regulation incorrectly in several respects. The applicable provisions were incorrectly interpreted, the applicant argues, in that no account was taken of certain social security contributions, or of the effect of Article 8 of the Bundesbesoldungsgesetz (Federal German law on the remuneration of civil servants, hereinafter 'the BBesG') or the solidarity levy for German unity, nor was there any analysis of the purpose of the Regulation.

19 The Commission denies that it interpreted Article 4(4) of the Regulation restrictively. According to its interpretation, the applicant could receive in the Federal Republic of Germany a maximum income of BFR 150 559 (DM 7 325.45), in addition to the allowance paid by the Communities of BFR 230 100. There is thus nothing to prevent the applicant receiving a total income equivalent to that which he was receiving on termination of his duties, namely BFR 380 660. He is merely precluded from receiving a total income higher than that amount. It was with that quite legitimate purpose in view that the Commission refused to deduct the disputed items from the gross income received in the Federal Republic of Germany (DM 8 681.66).

Findings of the Court

20 At this stage, the Court need merely observe that the dispute concerns the interpretation of Article 4(4) of the Regulation, which provides that the allowance paid by the Community institution pursuant to paragraph 1 of that article to a member of staff who has obtained new employment is to be calculated after deduction of social security contributions but before deduction of tax.

21 Accordingly, it is appropriate to consider in turn each of the four parts of the second plea put forward by the applicant: first, that the Community institution wrongly failed to take into account certain social security contributions in applying Article 4(4) of the Regulation; secondly, that, again wrongly, it failed to take

account of the effect of paragraph 8 of the BBesG or of paragraph 56 of the Beamtenversorgungsgesetz (Law on the civil servants' pension scheme, hereinafter 'the BeamtVG'); thirdly, that the defendant institution did not take into account the effect of the solidarity levy for German unity; and fourthly, that the defendant institution failed to interpret the Regulation according to its purpose.

22 In considering the various parts of this plea, it is appropriate for the Court to mention that it has held that 'where as the application of a rule of the Staff Regulations depends on the application of a legal rule applying in the legal system of one of the Member States, it is in the interest of the sound administration of justice and proper application of the Staff Regulations that its review should also extend to an examination of the way in which the appointing authority of a Community institution has applied the national law of one of the Member States' (Case T-85/91 *Khouri* v *Commission* [1992] ECR II-2637, paragraph 18).

— The first part of the plea: failure to take account of certain social security contributions

Arguments of the parties

23 The applicant argues, first, that, in contravention of the rule laid down in the Regulation, the defendant calculated the amount of the deduction it made without deducting from his gross income his payments of social security contributions. The defendant makes the incorrect assumption that, as a national civil servant, the applicant does not have to contribute either towards his pension or towards his sickness insurance. While it may be difficult to compare the system of capitalization under Community law with the 'maintenance' system under German law, it is none the

less clear that the applicant does not acquire rights to social security benefits in the Federal Republic of Germany without paying any contributions. That fact cannot be ignored in any comparison between the two systems pursuant to Article 4(4) of the Regulation. Otherwise the official's 'own contribution' resulting from his acceptance of a lower salary could not be subject to any deduction pursuant to that article. The applicant is not asking the Commission to make the necessary calculations itself, and the Commission cannot evade the issue by alleging that the burden of proof is shared, in which connection the comparison with Article 11(2) of Annex VIII to the Staff Regulations is not relevant, or by claiming that it is not its role to assess on its own initiative the amount of the contributions in issue. The applicant merely wished to stress that the 'maintenance principle' under German law in respect of the remuneration of civil servants precludes a separate assessment of social security contributions and that it is necessary to take into account the particular features of each of the two systems. Accordingly, the applicant suggested in his letters of 3 May and 12 July 1991 that the parties should proceed by consulting an expert with thorough knowledge of the two systems concerned. Only an independent expert who was thoroughly acquainted with both systems could draw conclusions with any authority on this subject. It was clear that, in case of doubt, Article 4(4) of the Regulation should be interpreted flexibly in favour of the applicant and restrictively as against the defendant, which, as legislator, must bear the responsibility for any difficulties of interpretation of the provisions in question. The Regulation is undoubtedly not drafted entirely to the applicant's advantage. However, while he was not unaware of the resultant 'strangulation effect', he had to resist any interpretation of the Regulation which would reduce the amount of his remuneration to a lower level than its previous level, particularly as it was already, at that stage, undervalued. Finally, a comparison with salaried workers in the private sector, as suggested by the defendant, is not relevant. The German civil service consists not only of permanent officials but also of contractual workers, whose social security contributions, paid partly by the employer and partly by the workers themselves, are a matter of public knowledge. For the same grade and step, they receive higher salaries than permanent officials because of the difference between their circumstances and those of officials. In the absence of other information, the two parties thus have a means of comparison, enabling them to assess whether, under the so-called maintenance system, a civil servant has to pay social security contributions within the meaning of Article 4(4) of the Regulation.

24 The Commission argues that, in accordance with the Staff Regulations of German civil servants, who do not make specific payments which could be considered as social security contributions (judgments of the Bundesverfassungsgericht (German

Constitutional Court) of 7 May 1963, NJW, 1963, 1395; of 30 March 1977, NJW, 1977, 1869; and of 13 November 1990, NJW, 1991, 743), the salary statement it received made no mention of social security contributions. Moreover, the salaries paid to German civil servants are set at a level which allows for any expenditure required for that purpose (judgment of the Bundesverfassungsgericht of 13 November 1990, cited above). Accordingly, even if the applicant took out supplementary sickness insurance on his own account, that insurance would not count as a deductible 'social security contribution' and consultation of an expert, as requested by the applicant, is unnecessary. The defendant argues, further, that there is no basis in either the letter or the spirit of Article 4(4) of the Regulation for the defendant's alleged obligation to calculate on its own initiative whether a former official is paying social security contributions and, if appropriate, the level of those contributions. Pointing out that the notion of 'gross income' is defined in Article 4(4) of the Regulation as 'sums paid after deduction of social security contributions but before deduction of tax', the defendant infers that the notion of 'social security contributions' implies, as the wording of the article suggests, a specific sum which has actually been paid. The applicant bears the burden of proving payment of those social security contributions and their amount. It is not incumbent upon the defendant to calculate any social security contributions paid by the applicant, as is clear from the rule regarding proof set out in the third subparagraph of Article 4(4) of the Regulation. The Commission's obligations are confined to duly attested social security contributions. Where national civil servants take up a post with the European Communities, the calculation of the social security contributions eligible to be taken into account is exclusively a matter for the national authorities (Joined Cases 75/88, 146/88 and 147/88 *Bonazzi-Bertottili and Others* v *Commission* [1989] ECR 3599, paragraph 17). Accordingly, the defendant institution cannot be required, in the stead of the national authorities, to calculate the amount of the social security contributions paid by the applicant.

Findings of the Court

25 The dispute between the parties as to how Article 4(4) of the Regulation should be applied in the present case stems from the national social security system concerned. Under that system, social security is guaranteed for civil servants and several other categories of employees irrespective of any personal contribution from the beneficiaries, the latter being excluded from the application of the Sozialgesetzbuch (Social Security Code, hereinafter 'SGB').

26 The exclusion of civil servants from the national social security system derives from a number of provisions in the SGB, as both parties expressly admitted in their replies to the written questions put to them by the Court. Paragraph 2(1) of Book IV of that code makes membership a precondition for cover. Thus, it provides that 'social security covers those who are insured by virtue of law or statute (obligation to insure) or by voluntary membership or voluntary continuation of insurance (right to insurance)'. Paragraph 2(2) lists those who are insured: it is not disputed that that paragraph does not include civil servants as insured persons. Books V and VI, which relate to the various risks covered, exclude civil servants from each of those risks: Paragraph 5 of Book VI excludes them from the pension scheme, whilst Paragraph 6 of Book V excludes them from the sickness insurance scheme. Paragraph 541 of the Reichsversicherungsordnung (Law of the Reich on social insurance) excludes them from accident insurance.

27 As the defendant institution explains quite correctly, the German system of social protection deriving from the above provisions of the SGB does not apply to civil servants whom the German state is deemed to have a duty to assist, which takes the form, amongst other things, of the payment of 'Beihilfe' (assistance given to the civil servant in cases of sickness, birth or death).

28 Accordingly, the Court considers that the applicant's argument that it should assess his personal contribution to the social security system which covers him goes beyond the powers of interpretation of the Community judicature in this case. Such an argument presupposes that the Member States make choices in regard to the balance between taxation and personal insurance, voluntary or compulsory, in the funding of their social security budgets. Since it is common ground that the applicant, being excluded by national law from the social security system governed by ordinary law, does not, by reason of his exclusion, pay any social security contributions for the purpose of acquiring entitlement to protection which is available to him by virtue of specific legislation, it is not for the Court to assess part of a notional personal contribution for which the applicant, moreover, is unable to suggest even an approximate basis, seeking to have the matter referred to an expert for assessment.

Furthermore, the Court considers in any case that the Commission is correct in its view that, pursuant to the rule of proof set out in the third subparagraph of Article 4(4) of the Regulation, it is for the applicant to furnish proof of payment of the social security contributions that he wishes to be taken into account and of their amount. In that respect, it is common ground that the applicant has not provided the Commission or the Court with any evidence of the social security contributions he claims to have to pay.

30 Finally, without its being necessary for the Court to decide whether or not such payments, assuming they were made, were of a compulsory nature, the applicant has no grounds for requesting that any supplementary insurance premiums paid by him be taken into account as social security contributions since, as mentioned above, he has not furnished any documentary evidence of actually having made the alleged payments.

31 It follows from the foregoing that the first part of the applicant's second plea, alleging breach of Article 4(4) of the Regulation in that the contested decision failed to take account of certain social security contributions, must be rejected, and the Court need not order that an expert's report be obtained.

— *The second part of the plea: failure to take account of Paragraph 8 of the BBesG*

Arguments of the parties

32 The applicant claims, secondly, that the defendant refuses to take account in its comparison between his income in the Federal Republic of Germany and his salary received in the Communities of the mandatory reduction of his entitlement under national law — Paragraph 8 of the BBesG — as a direct result of the sums paid to him by the defendant institution. Under those provisions, a civil servant's remuneration is reduced if he receives an allowance by virtue of activities that he has pursued in an international or supranational organization.

33 The applicant argues that since the sums that he receives by way of remuneration have been reduced in absolute terms by Paragraph 8 of the BBesG, the comparison to be made in application of Article 4(4) of the Regulation can be effected only in relation to a sum likewise reduced. In other words, Paragraph 8 of the BBesG and Article 4 of the Regulation each lay down a rule requiring a deduction, but in a conflicting manner. In making the comparative calculation pursuant to Article 4(4) of the Regulation, the defendant has made a deduction of DM 1 335.60, which is, coincidentally, almost identical to the total deduction at issue, namely DM 1 356.25. From that point of view, it is clearly incorrect to compare a gross income incorporating social security contributions with a gross income exempt from such contributions. As regards the Commission's argument that the applicant is invoking a loss of income which has not yet occurred, since, as yet, the applicant's employer is not making the deduction at issue, the applicant makes the preliminary point that, if it does not apply the provisions of Paragraph 8 of the BBesG to his remuneration, his employer will in any case rely on those provisions or on those of Paragraph 56 of the BeamtVG to reduce the pension rights he will have acquired under the German system. Consequently, the allowance to which he is entitled under Article 4(1) of the Regulation will in any case entail a reduction of his income under German law. He adds that it is perfectly possible to quantify the amounts in issue by making a simple actuarial calculation. The applicant cannot be expected to initiate further proceedings in this matter, if called for, following his retirement. Moreover, the defendant is incorrect in asserting that national legislation enacted unilaterally cannot be relied upon against it. All the factors to be taken into account pursuant to Article 4(4) are determined unilaterally by national laws concerning employment, the civil service or pensions.

34 The Commission maintains that, though Paragraph 8 of the BBesG may have a bearing on the amount of remuneration paid to the civil servant in question, that provision has not so far been applied in respect of the applicant's remuneration. The decision of 25 April 1991 was taken in the light of the only information appearing on the applicant's salary statement at a date when the national authorities had not applied Paragraph 8 of the BBesG in respect of the applicant's remuneration. The fact is that the applicant has not shown that the national administrative authority has reduced his salary in the meantime pursuant to Paragraph 8. Although that question may be premature, it is legitimate to ask whether the Commission is required to take account of reductions in remuneration decided unilaterally by a Member State which takes account of remuneration paid by the Communities. At

all events, Article 4(4) of the Regulation and Paragraphs 8 of the BBesG and 56 of the BeamtVG pursue different objectives. The aim of the Regulation is to prevent a member of staff who has left the Communities from receiving higher remuneration than that which he received while working for the Communities. The aim of Paragraph 56 of the BeamtVG is to prevent a retired official who returns to the national civil service from receiving higher total remuneration than that of an official who has remained in the national civil service.

Findings of the Court

35 Paragraph 8 of the BBesG states:

'Where an official ... receives an allowance by virtue of his activities in the service of an international or supranational institution, his salary shall be reduced. That reduction shall amount to 1.875% (2.14% until 31 December 1991) for each full year spent working for the international or supranational institution; however, he shall retain at least 40% of his salary.'

36 The Court considers that it is factually incorrect for the applicant to argue that the contested decision is legally defective in that no account was taken of the effect of the above legislation.

37 The legality of the contested decision must be assessed in the light of the evidence available to the administrative authority when the decision was taken. Accordingly, the Commission quite correctly took no account in its assessment of the effect of Paragraph 8 of the federal Law in issue since it was not apparent from the salary statement submitted by the applicant, whose responsibility it is, as already stated, to provide proof of the contributions he pays and wishes to be taken into account by the defendant institution, that a deduction had been made from the applicant's remuneration by the Federal Ministry for Industry and Research. The applicant has moreover expressly admitted, in his written submissions to the Court, in particular in paragraph 11 of the application and in his replies to the written questions put to him by the Court, that his new employer has to date not taken any decision as to the application of Paragraph 8 of the BBesG to his remuneration. Accordingly, even

if the payment provided for by Article 4 of the Regulation may be regarded as an allowance within the meaning of Paragraph 8 of the above federal Law, the applicant's argument must in any event be rejected.

38 The applicant's argument that the financial implications of that legislation can be established simply by means of an actuarial calculation is unsound. It is possible, at a given moment in time, to calculate the deduction, which will vary from time to time, by a process of capitalization but that leaves unanswered the questions of the applicable law and whether the deduction was actually made, which are the only ones relevant in this case. Accordingly, the Court considers that the defendant institution did not err in law, when, on the basis of the file as submitted to it, it took no account of Paragraph 8 of the BBesG, which, to date, has still not been applied to the applicant's remuneration.

39 The applicant also argues that, as his new employer has not applied Paragraph 8 of the BBesG to his remuneration, Paragraph 56 of the BeamtVG should be applied. It provides:

'Where a retired official receives a pension by virtue of his activities in the service of an international or supranational institution, his German pension shall be reduced by 2.14% for each full year spent in the service of that international or supranational institution ... For the purposes of the first sentence, any period during which an official, while not active in the service of an international or supranational institution, none the less acquires rights to remuneration or any other allowance and pension rights, shall count as a period spent in the service of that international or supranational institution; the same shall apply to the period following termination of service where such period is taken into account for the calculation of a retirement pension.

The first sentence ... shall also apply where, on termination of his duties in an international or supranational institution, an official, whether working or retired, receives a lump sum in lieu of a pension by way of an allowance or payment from a pension fund ...'

40 Like Paragraph 8 of the BBesG, the above legislation provides for a deduction from the pension paid to civil servants where they receive a pension or a capital payment from an international or supranational institution. However, as in the case of Paragraph 8 of the BBesG, it is, in any event, premature to invoke that legislation as it is not referred to in the file and it is not pleaded that it has been applied in the particular case of the applicant. Accordingly, even if the allowance provided for in Article 4 of the Regulation could be regarded as a capital sum received in lieu of a pension within the meaning of Paragraph 56 of the federal Law, the applicant's argument on that point can, in any event, only be rejected.

41 It follows that the second part of the plea, namely that the administrative authority wrongly failed to take account of the effect on the applicant's remuneration of Paragraph 8 of the BBesG or of Paragraph 56 of the BeamtVG, must, in any event, be rejected.

— The third part of the plea: failure to take account of the solidarity levy for German unity

Arguments of the parties

42 The applicant argues, thirdly, that the defendant failed to deduct from his gross remuneration, under German law, the 'solidarity levy for German unity' which he is obliged to pay. In his view, that contribution does not constitute a tax and must

be defined as a 'social security contribution' within the meaning of Article 4(4) of the Regulation. Accordingly, the applicant argues, it should be deducted from his gross remuneration. In any event, even if it could be considered a tax, that contribution could not be taken into account as such for the purposes of Article 4(4) of the Regulation without infringing the principle of non-discrimination. It is of little relevance that it may be a tax or comparable to a tax. It is, in any event, so specific and atypical a payment, when compared with levies under other national tax systems, that it cannot be brought within the general scheme of comparison set out in Article 4(4) of the Regulation, with the result that the principle of equal treatment precludes any account being taken of so specific, and, moreover, temporary, a measure. Furthermore, the defendant institution concedes that the 'solidarity levy' is linked to income tax. In assessing gross income, account should be taken only of income derived from a salary, to the exclusion of taxes levied on other sources of revenue, such as income from securities or property.

43 The Commission argues in response that it took its decision approximately two months before the levy at issue was introduced under German law. Following the introduction of that levy, the defendant institution would not have had cause to change its decision since the levy at issue was supplementary to income tax pursuant to Paragraph 1(1) of the Gesetz zur Einführung eines befristeten Solidaritätszuschlag und zur Änderung von Verbrauchssteuer und anderen Gesetzen of 24 June 1991 (Law on the introduction of a temporary solidarity levy and the amendment of consumer taxes and other laws, BGBl. 1991 I, p. 1318, hereinafter 'the Law of 24 June 1991'). According to Paragraph 1(3) of that Law, the solidarity levy is to be determined on the basis of income tax for a given tax period. That levy, which could have taken the alternative form of an increase in the basic rates of tax, is thus a supplementary tax within the meaning of Paragraph 51(1) of the Einkommensteuergesetz (Law on income tax, hereinafter 'the EStG'), as amended by the Steueränderungsgesetz 1991 of 24 June 1991 (Law amending 1991 tax provisions, BGBl. 1991 I, p. 1322, hereinafter 'the StÄndG 1991'). As such it cannot be taken into account in determining the gross income received by the applicant in his new post. The fact that that contribution is described as a 'solidarity levy' and is paid on a temporary basis does not affect that definition. Finally, to consider that payment, the definition of which derives solely from national law, as a tax is in no sense a breach of the principle of non-discrimination and, as the allowance paid by the Commission is not subject to national tax, it has no impact on the latter's progressive nature.

Findings of the Court

44 Under Paragraph 1(1) of the law of 24 June 1991:

'A solidarity levy shall be levied on income tax and on tax on the profits of companies (legal persons) by way of supplementary contribution.'

45 Under Paragraph 1(2) the levy is to be paid by individuals subject to income tax and legal persons subject to tax on their profits. Under Paragraph 1(3), in the case of individuals the contribution is based either on the amount of tax paid on the income of each of the years 1991 and 1992 (first case) or, in the case of liability to tax on earnings, on the amount of that tax (second case). The contribution is 3.75% in the first of those two cases and 7.5% in the second. In reply to the written questions put to him before the hearing, the applicant informed the Court that a levy of 7.5% had been applied to his taxable income for the period from 1 July 1991 to 30 June 1992, in other words 3.75% for each of the tax years 1991 and 1992.

46 Finally, as the defendant argued in its replies to the written questions put by the Court, the amendments made to that system by the Law of 25 February 1992 are, in any event, of no relevance to the outcome of this dispute.

47 Moreover, under Paragraph 51a(1) of the EStG, as amended by the StÄndG 1991, on which the defendant relies:

'the provisions of this law shall be applicable, by analogy, to the determination of the level of and collection of taxes calculated on the basis of income tax (additional taxes)'.

48 The effect of that provision is thus to make all the rules applicable to income tax applicable to the levy at issue.

49 The Court takes the view that it is clear from all the above legislation that the solidarity levy for German unity is a tax. First, that contribution, which is in fact defined as an additional tax, is levied as a supplement to income tax or corporation tax, and, secondly, under Paragraph 51a of the EStG, it is governed by the legislation applicable to taxation. Accordingly, the applicant is mistaken in arguing that that levy should be considered a social security contribution within the meaning of Article 4(4) of the Regulation, and that, consequently, pursuant to that Article it should be deducted from the gross income he receives in the Federal Republic of Germany.

50 The applicant argues, further, that even if the contribution at issue is a tax, account should be taken of the fact that it is levied on aggregate taxable income. In reply to written questions put by the Court, the applicant indicated that, because tax is payable on a progressive basis, the amount of the solidarity levy due in respect of the part of his remuneration to be deducted under Article 4 of the Regulation, the remaining part of his national salary and all other unearned income is proportionally greater than the amount in question would otherwise warrant.

51 That argument is unsound: first, the Regulation clearly provides that the allowance in issue should be calculated before tax and, secondly, the applicant does not claim that it was taken into account in setting the rate of tax applied to any other income accruing to him.

52 It follows that the third part of the plea, namely that the Commission did not take account of the effect of the solidarity levy for German unity, must be rejected and the Court need not give any decision as to whether, in view of the fact that the

contested decision predates the introduction of the solidarity levy, the Commission was bound to take account of the existence of that levy in the calculations made pursuant to the Regulation in order to determine the amount of the allowance due to the applicant.

— The fourth part of the plea: failure to adopt a purposive interpretation of the Regulation

Arguments of the parties

53 The applicant argues, fourthly, that the interpretation of Article 4 must take account of the fact that German law burdens his remuneration with heavier taxes than Community law makes provision for and that any other approach disregards the purpose of the Regulation. As a result, the amount to be deducted under Article 4(4) of the Regulation is increased to such an extent that, after that deduction, the applicant receives income after tax much lower than that which he received when he was working for the Community, which cannot have been the intention of the Community legislature. In view of the fundamental differences between the Community system and the German legal system, the overriding principle in the interpretation of Article 4(4) must be consideration of the purpose of the Regulation. The aim of the Regulation was to ensure that, after termination of his duties, a former official who is working in a new post, is no better or worse off than he was before the termination of his duties. In the light of that intention on the part of the legislature, it is appropriate to compare, for each post and taking account of the particular features of each system, all the benefits which can be quantified in pecuniary terms provided for under each system. If that were done, Article 4(4) of the Regulation could be applied wholly in accordance with its purpose, notwithstanding its unfortunate drafting and the fact that its provisions are not appropriate to all cases. The German system stands out amongst the tax systems of the Community because it imposes the highest rates of direct taxation, alleviated by an extensive system of abatements, deductions for expenses and tax reliefs which can be set against income to calculate the amount of 'taxable income'. The defendant's interpretation not only calls for the inclusion in a former official's 'gross remuneration' of elements other than taxes deriving from his paid work and giving rise to deductions but also prevents the applicant from achieving the level of remuneration he was receiving before he left the Commission, even though he is in full-time employment.

54 The applicant argues, further, that as the defendant did not give its opinion on two points raised in the complaint and the application, they must be taken to be admitted. Those points concern, first, the deduction and graduated rates of tax and, secondly, the social security contributions linked to sickness insurance. As to the first point, the applicant states that it appears from his December 1991 salary statement that part of his application has ceased to be relevant because the defendant is no longer levying Community tax on the disputed part of his remuneration and is reimbursing the amount overpaid. However a decision still has to be made on the question of the effect of graduated rates of national tax on the comparison to be made pursuant to Article 4 of the Regulation.

55 The Commission contends that the applicant's claim that the financial situation of a former official must be no worse after termination of his duties than before is not compatible with either the letter or the spirit of Article 4(4) of the Regulation. Moreover, in determining the amount of the allowance that the applicant can claim pursuant to Article 4(4) of the Regulation, the Commission did take account of the national tax system. It is not its role to assess or amend the tax systems of the Member States so as to bring them into line with the Community tax system. To argue to the contrary, as the applicant does, is a mistaken interpretation of Article 4(4) of the Regulation and would lead ultimately to harmonization of the system of tax allowances enjoyed by former officials, which is not within the Commission's terms of reference.

56 In conclusion, the Commission contends that it quite rightly took the sum of DM 8 681.66 as the basis for gross income pursuant to Article 4(4) of the Regulation. It argues that the complaint that it levied Community tax on the part of the allowance it reduced is mistaken in fact. While conceding that the contested decision did not make that clear, it states that it duly discounted Community tax — 10% — from the amount of the reduction made.

Findings of the Court

57 First, the Court finds that the parties have admitted, both in their replies to the written questions put by the Court and at the hearing, that, in the light of the further information provided by the defendant, the application has not become devoid of purpose in so far as it concerns the contribution to Community tax levied on the part of the allowance in issue. It is therefore appropriate for the Court to rule on the whole of the fourth part of the plea submitted by the applicant.

58 The Court takes the view that, as the relevant legislation, namely Article 4(4) of the Regulation, provides that the amount to be paid to the applicant pursuant to that Article must be based on remuneration before tax, the applicant's argument that account should be taken of the cumulative effect of graduated rates of tax must be rejected. Indeed, notwithstanding the applicant's arguments on the subject of the steeply progressive nature of the German system, the application of the Regulation is necessarily dependent in part on the national tax systems, widely divergent though they may be.

59 The Court also considers that the Community legislature did not contravene the principle of equal treatment in providing that the allowance to be paid pursuant to Article 4(4) of the Regulation was to be calculated before any deduction of tax, as that provision must be read in conjunction with Article 13 of the Protocol on the Privileges and Immunities of the European Communities on exemption from national income tax. Accordingly, the argument that the defendant institution's interpretation of the Regulation gives rise to discrimination must be rejected.

60 It follows that the fourth and last part of the second plea seeking annulment of the decision of 25 April 1991, to the effect that the defendant institution was wrong not to consider the purpose of the Regulation in applying it to the facts of the case, must be rejected.

61 It follows from all the foregoing that all four parts of the applicant's second plea must be rejected and that, accordingly, the claim for annulment of the decision of 25 April 1991 must itself be rejected.

The claim for annulment of the decision of 3 May 1991 excluding the applicant from the Joint Sickness Insurance Scheme

62 The applicant was excluded from the Joint Sickness Insurance Scheme by the decision of 3 May 1991. In the written procedure the applicant advanced three pleas in support of his claim for annulment of that decision. He argued that no grounds were stated for the decision and that it infringed the principle of the protection of legitimate expectations and the terms of Article 4(6) of the Regulation. At the hearing the applicant expressly abandoned the plea alleging breach of the principle of legitimate expectations. Accordingly it falls to the Court to consider the two pleas in annulment relied on by the applicant.

The plea alleging failure to state the grounds of the contested decision

Arguments of the parties

63 The applicant maintains that the contested decision contains no statement of its grounds, in breach of the second paragraph of Article 25 of the Staff Regulations. The defendant institution based the contested decision excluding him from the Joint Sickness Insurance Scheme on the fact that the applicant was allegedly covered by another compulsory sickness insurance scheme by virtue of the assistance guaranteed to civil servants under national law. The applicant takes issue with the decision on that point and disputes the allegation that 'the payments made to German state officials under that system are equivalent to those made under a normal sickness insurance scheme'. He argues that it is easy to prove, on the basis of the applicable provisions, that the payments made by way of guaranteed assistance to civil servants under national law are not equivalent to those made under a sickness insurance scheme under the ordinary law. Moreover, as the contested decision did no more than reproduce the terms of Article 4(6) of the Regulation, the defendant institution did not make clear how it reached its conclusions. In view of the significant additional expenditure for the applicant resulting from the Commission's

decision, the obligation to state grounds should in this case be at least the same as in the case of a decision leading to direct financial loss, so that the contested decision must be considered not to contain a sufficient statement of its grounds.

64 The Commission admits that the contested decision does refer in error to Article 4(6) of Council Regulation (ECSC, EEC, Euratom) No 3518/85 of 12 December 1985 introducing special measures on the occasion of the accession of Spain and Portugal to terminate the service of officials of the European Communities (OJ 1985 L 335, p. 56, hereinafter 'Regulation No 3518/85'). However, as the content of that article is the same as that of Article 4(6) of the relevant regulation, that was clearly only a clerical error. Subject to that reservation, the purpose of the obligation to state the reasons for decisions incumbent on the Community authorities is to permit the person concerned to determine whether a decision is well founded and to enable it to be reviewed by the Community judicature (*Hanning* v *Parliament*, cited above). The Commission contends that the contested decision satisfies those two requirements.

Findings of the Court

65 The decision which is the subject of the second head of claim in the application reads as follows:

'It is clear from the salary statement dated 10 April 1991 which you have sent to us that you are employed as an official in the Ministry for Research and Technology of the Federal Republic of Germany.

By reason of your employment you are covered by the sickness insurance scheme provided for under national law.

As a result, I regret to inform you that you cannot continue to be covered by the Joint Sickness Insurance Scheme.

Council Regulation No 3518/85 (Article 4(6)) provides for cover under the Joint Sickness Insurance Scheme only for those who "are not covered by another sickness insurance by virtue of legal or statutory provisions".

As far as the appointing authority is aware, the cover provided by the legal assistance scheme (primarily sickness insurance cover) is equivalent to that provided by normal social insurance, so that the conditions for cover by the Joint Sickness Insurance Scheme are not met.'

The decision concludes by informing the applicant that a memorandum, taking effect on 1 June 1991, would be sent to him subsequently by the relevant department.

66 On reading the contested decision, the Court finds that it sets out clearly the measure adopted, the date of its coming into effect and its legal basis. Whilst it cannot be disputed that the decision erroneously refers to Regulation No 3518/85, that is a clerical error which, though regrettable, is immaterial because, in the event, it did not prevent the applicant from exercising his rights in any way. As has been pointed out already, the relevant legislation was familiar to the applicant, who had applied for the benefits provided for under it, and the legislation to which the contested decision erroneously refers contains provisions identical to the provisions relevant to this case. The two pieces of legislation differ only in their field of application, their content and layout being identical. The legislation applicable to the applicant covers members of the temporary staff only whereas that referred to in the contested decision covers officials only, to the exclusion of members of the temporary staff. The relevant provisions in each of the two regulations are otherwise wholly identical and even appear in the same place in each document. The clerical error is thus, in the circumstances, irrelevant.

67 The reference to the equivalence of insurance cover is not relevant to the question whether a statement of grounds was given or whether it was adequate; it relates, rather, to the merits of the decision. As such it will be considered by the Court when it considers the second plea in annulment.

68 It follows that the first plea relied on in support of annulment of the decision of 3 May 1991 excluding the applicant from the Joint Sickness Insurance Scheme, namely that the contested decision contained no statement of grounds, must be rejected.

The second plea: breach of Article 4(6) of the Regulation

Arguments of the parties

69 The applicant argues that he only forfeits his rights under Article 4(6) of the Regulation if three conditions are satisfied: he must be covered by another sickness insurance scheme; that scheme must be of a legal or statutory nature; and it must be equivalent to the sickness insurance scheme of the European Communities, in the terms used by the defendant institution itself in arguing that 'grounds' were stated for the contested decision.

70 In this case, the applicant argues, none of the three conditions listed above is satisfied: as a national civil servant the applicant is excluded from the national social security system under Paragraph 6 of Book V of the SGB. He is not bound to join that sickness insurance scheme and moreover cannot join it even if he pays the relevant contributions. On the other hand, the German system of assistance for civil servants is not equivalent to a sickness insurance scheme within the meaning of Article 4(6) of the Regulation since it does not afford complete protection. In describing the assistance given to German civil servants as sickness insurance, the defendant institution is misconstruing the terms of the second sentence of Paragraph 1(1) of the Allgemeine Verwaltungsvorschrift über die Gewährung von Beihilfen in Krankheits-, Geburts-und Todesfällen (general administrative provisions concerning the assistance given to civil servants in the event of sickness, birth or death, hereinafter the 'general administrative provisions'), which is the only relevant legislation, to the exclusion of Paragraph 79 of the Bundesbeamtengesetz (Law on Federal civil servants, hereinafter 'the BBG'), on which the defendant erroneously relies. The general administrative provisions expressly provide that 'the assistance supplements ... the private cover which must be financed out of current remuneration'. Thus, the applicant argues, the system or protection available to him under national law is merely supplementary, in the form of assistance which the

employer pays to cover the risk of sickness against which the applicant must in principle insure on his own behalf, out of his own resources, and not full insurance of the kind provided for in Article 72 of the Staff Regulations, which is in practice comprehensive. Accordingly, the two systems cannot be considered to be equivalent and the defendant itself describes the system covering the applicant under German law as involving a 'contribution' to medical expenses by the employer and not as a 'sickness insurance scheme'. The attempt by the defendant institution to interpret Article 4(6) of the Regulation literally is doomed to failure, if only because in the course of a long history of litigation on the subject the Community legislature has constantly modified the terms used, without ever intending to endow them with a different meaning, as is demonstrated by the changes in the wording of the first subparagraph of paragraph 1*a* of the only article of Annex IV of the Staff Regulations on the availability of the allowance under Articles 41 and 50 of the Staff Regulations.

71 The applicant argues that, according to its everyday meaning in German, the 'assistance' given to civil servants is not sickness insurance by virtue of legal or statutory provisions. In everyday language, just as in legal terminology, the expression 'sickness insurance by virtue of legal or statutory provisions', in the final analysis, implies a distinction between 'legal' sickness insurance and 'private' sickness insurance, and the assistance given to civil servants under national law must quite clearly be classed as private sickness insurance. It must be admitted that in the context of Article 4(6) of the Regulation the legislature had in mind a State system of social insurance which is available to all and in principle affords complete cover, not a scheme of assistance internal to an organization, even if the employer in question is the State itself. To determine the scope of Article 4(6) of the Regulation, account should be taken not of its literal wording, which, in any case, will vary from one language version of the Regulation to another, but of the objective of the legislation. In that respect the defendant's interpretation, according to which the article in issue is merely a specific application of the second paragraph of Article 72(4) of the Staff Regulations, is mistaken. That article covers the potential duplication of sickness insurance but not the possibility of exclusion from the Joint Sickness Insurance Scheme which is in issue here. Similarly, neither the reference to the judgment of the Court in Case C-163/88 *Kontogeorgis* v *Commission* [1989] ECR 4189 nor the defendant's interpretation of the Regulation by reference to Article 72(1a) of the Staff Regulations — which has a different purpose from the Regulation — and by analogy with Council Regulation (EEC, Euratom, ECSC) No 259/68 of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and

instituting special measures temporarily applicable to officials of the Commission (OJ, English Special Edition Series-I 68(I) p. 30, hereinafter 'Regulation 259/68') is of any relevance, as the measures taken pursuant to that regulation were compulsory measures, imposed in some cases against the will of those concerned.

72 Under Paragraph 14(1) of the general administrative provisions, the rate at which assistance is paid is, as the defendant itself admits, 50% in principle, whereas, under the Joint Sickness Insurance Scheme it is between 80% and 100%. Moreover, under the Community scheme there is a compensatory provision in Article 72(3) of the Staff Regulations; it applies another ceiling which is far less rigid. Finally, the applicant argues, the obligation to take out supplementary insurance under national law and the position of those entitled to assistance show clearly that the two systems are not comparable at all.

73 The Commission contends that, in keeping with the spirit and objective of Article 4(6) of the Regulation, consideration should be given to the question whether the system of assistance for civil servants under German social legislation is 'another sickness insurance' within the meaning of those provisions. The objective of the provisions is to prevent former employees from automatically remaining members of the Joint Sickness Insurance Scheme provided for under Article 72 of the Staff Regulations. Firstly, the defendant disputes the applicant's claim that other compulsory systems of insurance, within the meaning of Article 4(6), can only be interpreted as meaning national social security schemes. The system of sickness insurance provided for by the German Law on the civil service is thus a 'sickness insurance by virtue of legal or statutory provisions' within the meaning of Article 4(6) of the Regulation since the assistance given to the applicant is provided for by law, namely by Paragraph 79 of the BBG, in conjunction with the general administrative provisions relating to that paragraph. According to information provided by the Federal Minister of the Interior, the assistance provided for civil servants under national law is 'sickness insurance specifically for civil servants, which takes account of the fact that civil servants are not covered by sickness insurance by virtue of legal or statutory provisions'. Secondly, the defendant maintains that the applicant's argument that the two systems of protection to be compared must be equivalent is not tenable either. The term 'covered' used in Article 4(6) of the Regulation does not necessarily imply that the two systems of sickness insurance must provide the former employee with the same level of cover. If it had been intended

that the systems of protection in issue should be equivalent, that could and should have been made apparent in the Regulation. By contrast, the first sentence of Article 72 of the Staff Regulations provides that an official's spouse can be covered by the Joint Sickness Insurance Scheme if such spouse 'is not eligible for benefits of the same nature and of the same level by virtue of any other legal provision or regulations'. Article 4(6) of the Regulation does not contain a provision to that effect and nor does other legislation applicable to former employees, such as Article 2(6) of Council Regulation (ECSC, EEC, Euratom) No 2150/82 of 28 July 1982 introducing special and temporary measures to terminate the service of officials of the European Communities consequent upon the accession of the Hellenic Republic (OJ 1982 L 228, p. 1).

74 The Commission submits that the provisions at issue should be interpreted in the light of Regulation No 259/68, according to which the important fact is that the official concerned is not 'covered against sickness by another scheme'. Similarly, under Article 11 of Council Regulation (EEC) No 422/67 of 25 July 1967 determining the emoluments of the President and members of the Commission and of the President, Judges, Advocates-General and Registrar of the Court of Justice (English Special Edition Series-I 67 p. 222, hereinafter 'Regulation No 422/67'), as amended by Council Regulation (ECSC, EEC, Euratom) No 2163/70 of 27 October 1970 (English Special Edition Series-I 70(III) p. 646), Article 72 of the Staff Regulations does not apply 'in order to cover risks already covered by another social security scheme under which the former member of the Commission or of the Court may benefit'. In *Kontogeorgis*, the Court held that former employees cease to be covered by the Communities' sickness insurance scheme 'when they are insured against the risk of sickness under another social security scheme regardless of the level and conditions of cover under that latter scheme'. That judgment also applies to the interpretation of Article 4(6) of the Regulation, which has the same objective as Article 11 of Regulation 422/67 despite its slightly different wording.

75 Moreover, according to the Commission, the legal position of former employees has improved as, under Article 5(6) of Regulation 259/68, an employee was excluded from the Joint Sickness Insurance Scheme if he had the option of joining another sickness insurance scheme. Other regulations also contain identical provisions to those, for example Article 3(6) of Council Regulation (Euratom, ECSC, EEC) No 2530/72 of 4 December 1972 introducing special and temporary measures

applicable to the recruitment of officials of the European Communities in consequence of the accession of new Member States, and for the termination of service of officials of those Communities (OJ 1972 L 272, p. 1, hereinafter 'Regulation 2530/72'). Furthermore, the Commission points out, the applicant's exclusion from the Joint Sickness Insurance Scheme will cease as soon as he starts to draw his pension.

Findings of the Court

76 Under Article 4(6) of the Regulation, those covered by the Regulation are also entitled to cover under the Joint Sickness Insurance Scheme provided, first, that they pay the relevant contributions and, secondly, that they are not 'covered by another sickness insurance by virtue of legal or statutory provisions'.

77 As stated above, German civil servants are excluded from the application of the social security code. However, by virtue of the duty of assistance and protection which the Federal State owes to its own employees, they are covered by a system of social security which takes the form of the payment of 'Beihilfe'. The question before the Court is whether such a system, under which, while no contributions are payable, it is argued that the benefits paid are less than those normally paid under a legal system of social security (in particular the Community system), to such an extent that, according to the applicant, personal insurance is also required, constitutes sickness insurance by virtue of legal or statutory provisions within the meaning of Article 4(6) of the Regulation.

78 The relevant legislation is, first, Paragraph 79 of the BBG and, secondly, Paragraph 1(1) of the general administrative provisions relating to that paragraph.

79 Under Paragraph 79 of the BBG:

'As part of a relationship based on service and confidence, the employer shall look after the interests of the official and his family even after termination of his service. The employer shall provide him with protection as regards both his work and his position as an official.'

80 According to Paragraph 1(1) of the general administrative provisions:

'This provision covers the grant of assistance in the case of sickness, birth and death and for medical screening or preventive vaccination. In such cases this assistance shall supplement private cover, which must be paid for out of current remuneration.'

81 Under Paragraph 1(3) the right in question is non-transferable and non-hereditary and it cannot be used to furnish security or be subject to attachment. Under Paragraph 14 the assistance amounts to 50% of the expenses incurred by the beneficiary and rises to 70% if the beneficiary has at least two dependent children, and to 70% of his spouse's expenses and 80% of expenses incurred in respect of dependent children. In the present case, the applicant admitted, in his replies to the written questions put by the Court, that his family circumstances meant that 70% of his and his wife's actual expenses and 80% of his children's were reimbursed. However, in those replies the applicant stressed that the ceilings for reimbursement in the Community system and the 'Beihilfe' system were not comparable.

82 Having regard to all the legislation referred to above, as applied and applicable to this case, the Court concludes that 'Beihilfe' has all the characteristics of insurance by virtue of legal or statutory provisions within the meaning of Article 4(6) of the Regulation. First, the system is based on provisions of public law and, secondly, the applicant is not, in any event, justified in maintaining that the benefits are not equivalent to those of a social security system under the ordinary law, given that he has two dependent children and therefore, on his own admission, depending on the circumstance has either 70% or 80% of his expenses reimbursed without paying any contribution whatsoever; moreover, he expressly confirmed that that is the case in his replies to the written questions put by the Court.

83 As the Commission rightly points out, the legislation to be interpreted can be compared to Article 5(6) of Regulation No 259/68 and to Article 3(6) of Regulation No

2530/72. It can also be compared to the version of Regulation No 422/67 in force at the date of the contested decision.

84 In interpreting the latter provisions, the Court of Justice has held:

'the second paragraph of Article 11 of Regulation No 422/67/EEC does not allow former members to be affiliated to the Community health insurance scheme if they are insured against sickness under another social security scheme, regardless of the level and conditions of cover under that latter scheme. The term "risks" which appears in the second paragraph of Article 11 must be understood as referring to the three categories of risks (sickness, occupational disease and industrial accident) mentioned in the first paragraph of the article.

The second paragraph of Article 11 thus has the same scope as Article 72(2a) of the Staff Regulations, which provides that the Community health insurance scheme is to apply to officials who left the service of the Communities before the age of 60 years "provided they cannot obtain cover under any other public scheme of sickness insurance". It follows that ... the scheme applicable to former members ... is the same as the scheme applicable to officials who have left the service of the Communities before the age of 60 years.

The second paragraph of Article 11 ... could only be interpreted in the way suggested by the applicant if it contained a criterion of equivalence, as regards the level and conditions of cover, between the Community scheme and the applicable national social security scheme, such as that which the Community legislature inserted in Article 72(1) of the Staff Regulations which provides that the spouse of a serving official is to be covered by the Community scheme where such a spouse is not eligible for benefits of the same nature and of the same level by virtue of any other legal provisions or regulations' (*Kontogeorgis*, paragraphs 7 to 9).

85 Accordingly, the principles of interpretation outlined by the Court of Justice in that judgment are, the Commission argues, applicable by analogy to the present case, in view of the similarity of the legislation in issue, which serves to refute the applicant's argument that there should be a rule that benefits must be equivalent.

86 It follows that the second plea relied on by the applicant in support of annulment of the decision of 3 May 1991 excluding him from the Joint Sickness Insurance Scheme must be rejected.

87 It follows from all the foregoing that, as the Court has rejected all the pleas relied on by the applicant in support of his claim for annulment of the decision of 3 May 1991 excluding him from the Joint Sickness Insurance Scheme, that claim must itself be rejected.

The claim for damages

Arguments of the parties

88 The applicant seeks compensation for loss resulting from the wrongful conduct of the defendant (Joined Cases 7/56 and 3/57 to 7/57 *Algera and others* v *Common Assembly of the ECSC* [1957] ECR p. 39). The applicant makes clear that the loss for which he seeks compensation is material loss and not non-material damage as stated in error in his application. The preconditions for compensation are that loss has been suffered, that there is a causal link between that loss and the conduct of

which the institution is accused and that that conduct is illegal (Case 4/69 *Lütticke* v *Commission* [1971] ECR p. 325). The fact that the grounds of the decision of 25 April 1991 were not stated prevented the applicant from adapting the action taken by him in relation to his employment in order to reflect his situation and led him to pay certain contributions unnecessarily. Subsequently the applicant became entitled to claim reimbursement of those contributions. The uncertainty regarding his position in respect of sickness insurance over several months exposed him to the risk of either taking out supplementary insurance which would subsequently have proved superfluous or being left without full social insurance cover. That uncertainty was particularly difficult to cope with as it came at a time when his son had to undergo two very expensive operations and the applicant had to register his two children for university. To do so he had to prove he belonged to a sickness insurance scheme or take out his own insurance. Accordingly, he argues, he is entitled to compensation for that loss. The defendant's contention that the applicant supplied it with information concerning his new administrative situation belatedly is inaccurate, inasmuch as he could only supply information concerning his salary where such was available to his new employer and was passed on by the latter with sufficient certainty. Moreover, he argues, the alleged delay had no effect on the causal link between the wrongful conduct and the loss claimed, as the conduct in question lay in the decisions in issue and could not therefore predate them. Finally, in reply to the written questions put by the Court, the applicant argued that the two objections of inadmissibility put forward by the Commission were unfounded.

89 The Commission contends that the claim for compensation for loss is inadmissible: first, that claim was not included in the applicant's complaint and, secondly, the substitution of material loss for the non-material damage pleaded initially represents a significant alteration in the forms of order sought in the application, with the result that the application no longer meets the criteria set out in Article 44(2) of the Rules of Procedure. The Commission argues that the right to compensation for non-material damage depends on the existence of an illegal act, which has not occurred in this case since the grounds for the contested decision were properly stated. Moreover, no loss was suffered at the hands of the defendant which it is obliged to make good. Had the applicant informed the Commission in good time of the details of his new situation, he could have arranged to comply with the requirements imposed by the national system from the outset. However, as he provided that information late he caused the delay in the adoption of the Commission's decision. Similarly, the applicant could have clarified his position with regard to sickness insurance if he had supplied the Commission in time with information about his new situation.

Findings of the Court

90 The third head of claim in the application, seeking the award of damages to compensate for the loss allegedly suffered, is based on the illegality of the contested decisions which, the applicant argues, constitute a wrongful act for which the Community institutions are liable, particularly because no grounds were stated, with the result that the applicant was placed in a position of legal uncertainty and induced to incur certain expenses.

91 Since the Court has rejected all the claims and pleas in the application for annulment of the decision of 25 April 1991 adopted pursuant to Article 4(4) of the Regulation and of the decision of 3 May 1991 excluding the applicant from the Joint Sickness Insurance Scheme, and in particular the pleas alleging failure to state the grounds of those decisions, the applicant has no right to plead maladministration giving rise to non-contractual liability on the part of the European Communities. In any event, the alleged loss, even if it were proven, is in fact due to the applicant's delay in informing the Commission of his new situation; there has been no loss which was caused by the Commission or which it is obliged to redress or reimburse. Accordingly the claim for damages must be rejected and it is unnecessary for the Court to give a decision on the objections of inadmissibility raised in reply to it by the defendant institution.

92 It follows from all the foregoing that the claim for compensation and, consequently, the whole application, must be rejected.

Costs

93 At the hearing the applicant sought the application to his case of Article 87(3) of the Rules of Procedure, according to which 'the Court may order even the

successful party to pay costs which the Court considers that party to have unreasonably or vexatiously caused the opposite party to incur.' In this case the costs incurred by the applicant cannot be regarded as attributable to unreasonable or vexatious conduct on the part of the defendant. That article cannot therefore be applied in any event.

94 Under Article 87(2) of the Rules of Procedure, 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 between the Communities and their servants the institutions are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Dismisses the application;

2. Orders the parties to bear their own costs.

Biancarelli Vesterdorf García-Valdecasas

Delivered in open court in Luxembourg on 24 June 1993.

H. Jung J. Biancarelli

Registrar President