ORDER OF THE COURT OF FIRST INSTANCE (First Chamber)
26 November 1996 *

In Case T-167/95,

Hedwig Kuchlenz-Winter, the divorced spouse of a former official of the European Parliament, residing at Kehlen, Luxembourg, represented by Dieter Rogalla, Rechtsanwalt, Sprochkövel, with an address for service in Luxembourg at the Chambers of Armin Machmer, 1 Rue Roger Barthel, Bereldange,

applicant,

v

Council of the European Union, represented by Diego Canga Fano and Jan-Peter Hix, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Bruno Eynard, Director-General of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

APPLICATION for a declaration that the Council has infringed Article 175 of the EC Treaty by failing to propose to the competent institutions of the European Union amendments to the Staff Regulations of Officials of the European Communities which would have enabled the applicant to remain covered by the Sickness Insurance Scheme common to the institutions of the European Communities,

* Language of the case: German.

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

composed of: A. Saggio, President, V. Tiili and R. M. Moura Ramos, Judges,

Registrar: H. Jung,

makes the following

Order

Facts and procedure

1 The applicant, a German national, entered the service of the Court of Justice of the European Coal and Steel Community in 1956. In 1957 she married Mr Kuchlenz, another German national, and in 1958 she was transferred to the Commission of the European Atomic Energy Community in Brussels. Her husband meanwhile became an official of the European Parliament and was transferred to Luxembourg in 1963. After seven years in the service of the Communities, the applicant thereupon left the service and accompanied her husband to Luxembourg.

2 Upon leaving the Commission, the applicant ceased to be covered in her own right by the Sickness Insurance Scheme common to the institutions of the European Communities ('the Joint Sickness Insurance Scheme') but remained insured by virtue of her husband, who, as an official, was a member of the Scheme.

3 By judgment of 10 December 1993, which became final on 1 April 1994, the Luxembourg Cour d'Appel (Court of Appeal) pronounced a decree of divorce dissolving the marriage between the applicant and Mr Kuchlenz. Following delivery of that judgment, the applicant and her former husband agreed, pursuant to the provisions of the Bürgerliches Gesetzbuch (German Civil Code, hereinafter 'the BGB') providing for the adjustment of pension rights in the event of divorce (Paragraph 1587 et seq. of the BGB), to share the retirement pension received by Mr Kuchlenz from the Community. That agreement was ratified by the Luxembourg Tribunal de Paix (Magistrates' Court) by act of 5 January 1995.

4 Under Article 72(1b) of the Staff Regulations of Officials of the European Communities ('the Staff Regulations'), the divorced spouse of an official may continue to be insured against sickness for a maximum of one year from the date of the decree absolute of divorce.

5 The documents in the case show that, as a resident of Luxembourg, Mrs Kuchlenz-Winter is entitled to Luxembourg social security. On the other hand, since she has not completed the requisite periods of insurance in Germany, she is not entitled to cover under the German State sickness insurance scheme. Nor does she fulfil the criteria for voluntary membership of the German scheme; and, since she suffers from a serious illness, the private sickness insurance schemes have refused to cover her. In any event, the social security which she receives in Luxembourg is conditional on her residing in that country. The applicant therefore maintains that she can no longer return to Germany, since she has no social security protection there and her departure from Luxembourg would cause her to lose the only sickness insurance available to her.

6 By letter of 26 April 1994, the claims office of the Joint Sickness Insurance Scheme informed the applicant that her cover under the Scheme would expire on 31 March 1995, one year after the date of her divorce.

7 On 7 February 1994 the applicant submitted to the Commission a request under Article 90 of the Staff Regulations, seeking permission to remain covered under the Joint Sickness Insurance Scheme after the expiry of the one-year period laid down by Article 72 of the Staff Regulations. Following the rejection of that request, the applicant submitted a complaint in accordance with Article 90(2) of the Staff Regulations against the decision rejecting it.

8 By letter of 11 January 1995, the Commission rejected that complaint. On 24 February 1995 the applicant brought an action (Case T-66/95) for annulment of that decision.

9 By letter of 8 May 1995, the applicant, relying on the second paragraph of Article 175 of the EC Treaty, called upon the Council to request the Commission, in accordance with Article 152 of the Treaty, to propose an amendment to the Staff Regulations which would prevent divorced spouses who have acquired their own pension entitlement from being excluded from the Joint Sickness Insurance Scheme.

10 The applicant addressed similar requests to the Parliament and to the Commission. Having received a negative response from those institutions, the applicant brought actions for a declaration of failure to act (Cases T-164/95 and T-226/95).

11 In the absence of any reply to her letter from the Council, the applicant instituted the present proceedings on 5 September 1995.

12 By document lodged on 27 November 1995, the Council raised an objection of inadmissibility in accordance with Article 114 of the Rules of Procedure. The applicant did not lodge any observations on that objection within the prescribed time-limit.

Forms of order sought by the parties

13 The applicant claims that the Court should:

— declare that the Council has failed to act, inasmuch as it has failed to exercise its powers by proposing to the institutions of the European Union such amendments to the Staff Regulations as would prevent her exclusion from the Joint Sickness Insurance Scheme;

— order the defendant to pay the costs.

14 In its objection of inadmissibility, the Council contends that the Court should:

— dismiss the action as inadmissible;

— order the applicant to pay the costs.

Admissibility

15 According to Article 114 of the Rules of Procedure, where a party applies to the Court for a decision on admissibility not going to the substance of the case, the remainder of the proceedings concerning the objection of inadmissibility must be oral, unless the Court decides otherwise.

16 According to Article 111 of the Rules of Procedure, where an action is manifestly inadmissible, the Court may, by reasoned order and without taking further steps in the proceedings, give a decision on the action. In the present case, the Court considers that it has sufficient information from the documents before it, and finds that there is no need to take any further steps in the proceedings.

Arguments of the parties

17 The Council advances two pleas in support of its objection of inadmissibility.

18 The first plea concerns the nature of the act to be amended, namely the Staff Regulations, which are in the form of a regulation. As is apparent from the relevant case-law (Case 15/71 *Mackprang* v *Commission* [1971] ECR 797, Case 134/73 *Holtz & Willemsen* v *Council* [1974] ECR 1, and Case 90/78 *Granaria* v *Council and Commission* [1979] ECR 1081; order in Case 60/79 *Fédération Nationale des Producteurs de Vins de Table et Vins de Pays* v *Commission* [1979] ECR 2429), where the only legal instrument which would have satisfied the request made to the Council is a regulation, the action is inadmissible, since an instrument of that kind cannot be described as an act capable of being addressed to the applicant within the meaning of the third paragraph of Article 175 of the Treaty. The Council further states that the amendment of the Staff Regulations sought by the applicant would take the form of a request to the Commission under Article 152 of the Treaty, calling upon it to submit the appropriate proposals to the Council. Thus the applicant's request does not call upon the Council to address an act to her, contrary to the third paragraph of Article 175 of the Treaty. The action should therefore be declared inadmissible.

19 The second plea concerns the wide discretion enjoyed by the Council in the exercise of its power under Article 152 of the Treaty to request the Commission to

submit proposals. That power does not entitle individuals to require it to adopt a specific position. Consequently, an action seeking a declaration of failure to act where the Council declines to avail itself of its power under Article 152 is inadmissible. The case-law on the Commission's powers in such matters must therefore apply, by extension, to the Council (order in Cases T-479/93 and T-559/93 *Bernardi* v *Commission* [1994] ECR II-1115).

Findings of the Court

The plea that a regulation is not an act falling within the third paragraph of Article 175 of the Treaty.

20 First of all, the act which the applicant requires to be adopted is not one which would be addressed to her, since she is calling upon the Council to take the necessary measures in order to bring about an amendment of the Staff Regulations. That act, which would take the form of a request to the Commission calling upon it to submit appropriate proposals, would therefore be addressed to that institution alone and could not, by its nature, take effect in relation to the applicant. Consequently, in so far as the action seeks a declaration of failure to act in regard to the adoption of such a measure, it is inadmissible.

21 Next, the Court observes that, even if an act were to be adopted amending the Staff Regulations in the manner envisaged by the applicant, such a measure could not be described, by reason either of its form or of its nature, as an act which could be addressed to a natural person within the meaning of the third paragraph

of Article 175 of the Treaty, since it would constitute a regulation (see the judgments in *Holtz & Willemsen* v *Council*, cited above, paragraph 5, and in *Granaria* v *Council and Commission*). In those circumstances, the action is inadmissible in so far as it is capable of being interpreted as seeking a declaration of failure to act in regard to the adoption of that measure.

22 Even on the assumption that an individual may complain that an institution has failed to adopt an act which, whilst not addressed to him, is of direct and individual concern to him (judgment of the Court of Justice in Case 247/87 *Star Fruit* v *Commission* [1989] ECR 291, paragraph 13, and judgment of the Court of First Instance in Case T-277/94 *AITEC* v *Commission* [1996] ECR II-351, paragraph 58 et seq.), the present action is still inadmissible, since the applicant has not shown that an act amending the Staff Regulations in the manner sought by her would place her in a situation of that kind.

23 This plea must therefore be accepted.

The plea concerning the existence of a wide discretion in the exercise of the power conferred by Article 152 of the Treaty

24 As regards the second plea, the Court points out, for the sake of completeness, that an action for a declaration of failure to act cannot lie in respect of the failure by a Community institution to exercise a discretionary power, such as the power to institute infringement proceedings (order in Case C-371/89 *Emrich* v *Commission* [1990] ECR I-1555; *Star Fruit* v *Commission*, cited above; orders in Case T-13/94 *Century Oils Hellas* v *Commission* [1994] II-431, *Bernardi* v *Commission*, cited above, and Case T-126/95 *Dumez* v *Commission* [1995] ECR II-2863).

25 The application in the present case is for a declaration that the Council has failed to act in regard to the exercise of a power involving the procedure for the adoption of regulations. The applicant alleges a failure by the Council to request the Commission to submit proposals for the amendment of the Staff Regulations. In that regard, even though the case-law cited in the preceding paragraph relates only to the exercise by the Commission of its supervisory powers in respect of breaches of the competition rules or of its procedural powers under Article 169 of the Treaty in respect of infringements of the Treaty, the same *ratio decidendi* applies to the exercise by the Council of the power conferred by Article 152 of the Treaty, since that institution enjoys a wide discretion in that context.

26 In those circumstances, the second plea must also be accepted.

27 Consequently, the Council's objection must be upheld and the action must be dismissed as inadmissible.

Costs

28 Since the object of the applicant's action is to bring about the amendment of the Staff Regulations in such a way as to extend her rights thereunder in her capacity as the divorced spouse of an official, the dispute is based on the relationship between the official and the institution. It is appropriate, therefore, to apply the principle laid down in Article 88 of the Rules of Procedure, according to which, in proceedings between the Communities and their servants, the institutions are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby orders:

1. The action is dismissed as inadmissible.

2. The parties are ordered to bear their own costs.

Luxembourg, 26 November 1996.

H. Jung — Registrar

A. Saggio — President