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

In Case T-164/95,

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

European Parliament, represented by Christian Pennera, Head of Division in its Legal Service, and Hans Krück, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the General Secretariat of the European Parliament, Kirchberg,

defendant,

APPLICATION for a declaration that the European Parliament 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 Meanwhile, on 31 January 1990, the applicant had lodged with the European Parliament a petition concerning her situation with respect to the Joint Sickness Insurance Scheme. By letter of 11 July 1994, the Petitions Committee expressed the view that, from a legal standpoint, there was no need to act on Mrs Kuchlenz-Winter's application.

8 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.

9 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.

10 On 7 February 1994 the applicant submitted to the Parliament, as the institution in which her former husband had served as an official, 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. The Parliament rejected that request by letter of 31 May 1994.

11 On 21 July 1994 the applicant submitted a complaint against that decision in accordance with Article 90(2) of the Staff Regulations. The Parliament rejected that complaint by letter of 21 November 1994.

12 By letter of 27 April 1995, the applicant, relying on the second paragraph of Article 175 of the EC Treaty, called upon the Parliament to take steps to bring about the amendment of the Staff Regulations in such a way as to resolve her problem. That letter was passed to the Petitions Committee. By letter of 20 July 1995, the chairman of that committee pointed out that the representations made to the Commission and to the competent German ministry had met with no success and stated that, apart from instigating political initiatives, there was nothing more that the Parliament could do. He therefore advised the applicant to have recourse to legal action.

13 The applicant addressed similar requests to the Council and the Commission. In the absence of any reply from the Council, and in the light of the Commission's negative response, the applicant brought actions for a declaration of failure to act (Cases T-167/95 and T-226/95).

14 On 28 August 1995 the applicant instituted the present proceedings against the Parliament under the third paragraph of Article 175 of the Treaty.

15 By document lodged on 27 October 1995, the Parliament raised an objection of inadmissibility.

16 On 18 December 1995 the applicant lodged her observations on that objection of inadmissibility.

Forms of order sought by the parties

17 The applicant claims that the Court should:

— declare that the Parliament 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.

18 In its objection of inadmissibility, the Parliament contends that the Court should:

— dismiss the action as inadmissible;

— order the applicant to pay the costs.

19 In her observations on the objection of inadmissibility, the applicant contends that the Court should reject that objection.

Admissibility

20 According to Article 114 of the Rules of Procedure of the Court of First Instance, 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 on the objection of inadmissibility must be oral, unless the Court decides otherwise.

21 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

22 The Parliament maintains, as a preliminary point, that, on a literal interpretation of the applicant's letter to it of 27 April 1995 and of the application, the applicant is

clearly calling upon the defendant to adopt an approach which is legally impossible and unlawful. The applicant has requested the Parliament to propose to the competent institutions an amendment to the Staff Regulations, and complains of the Parliament's unwillingness to do so. The Parliament contends, however, that it is not competent to submit to the other institutions proposals for the adoption or amendment of legal acts. The only provision which might be read as having that meaning is the second paragraph of Article 138b of the Treaty; however, the applicant has not called for the implementation of that provision.

23 The Parliament concedes, nevertheless, that the applicant's request may be interpreted as an attempt to prompt the institution to take such steps as may be appropriate in order that the applicant may be placed in a more favourable legal position. It leaves it to the Court to decide whether such an interpretation accords with the criteria of admissibility laid down in Article 175 of the Treaty.

24 The Parliament asserts, in any event, that, even if Article 175 of the Treaty can be used for that purpose, the action is still inadmissible. It advances in that regard one main plea and four alternative pleas.

25 As its principal argument, the Parliament pleads that it has not failed to act, inasmuch as the Parliament's position in relation to the applicant's request was expressly defined by the chairman of the Petitions Committee in his letter of 20 July 1995. The admissibility criteria laid down in Article 175 of the Treaty were therefore not fulfilled. Moreover, the fact that the Parliament defined its position after the expiry of the period of two months referred to in Article 175, but before the action was brought, and that it did not satisfy the applicant, is irrelevant to the question of admissibility (Case C-25/91 *Pesqueras Echebastar* v *Commission* [1993] ECR I-1719, paragraphs 11 and 12).

26 The first plea in the alternative alleges that the act which the institution is said to have failed to address to the applicant is not one which would have been addressed to her. The defendant observes that the third paragraph of Article 175 of the Treaty

permits a person to apply for a ruling against an institution for failure to address an act to that person. By contrast, applications for the adoption of legal acts to be addressed to third parties are inadmissible (Case 246/81 *Lord Bethell* v *Commission* [1982] ECR 2277, paragraph 13 et seq.; order in Case T-3/90 *Prodifarma* v *Commission* [1991] ECR II-1, paragraphs 33 and 34). In the present case, the action should be declared inadmissible in so far as the applicant's request called for steps to be taken in relation to other institutions.

27 The second plea in the alternative concerns the nature of the act. Article 175 of the Treaty cannot be relied upon to obtain a ruling against an institution which has declined to adopt a measure of general application, in particular a regulation (Case 15/71 *Mackprang* v *Commission* [1971] ECR 797, paragraph 4, Case 134/73 *Holtz & Willemsen* v *Council* [1974] ECR 1, paragraph 5, and Case 90/78 *Granaria* v *Council and Commission* [1979] ECR 1081, paragraph 14; order in Case 60/79 *Fédération Nationale des Producteurs de Vins de Table et Vins de Pays* v *Commission* [1979] ECR 2429). In so far as the present action indirectly seeks the adoption of a regulation relating to the Staff Regulations, it should also be declared inadmissible.

28 The third plea in the alternative concerns the binding nature of the act. The Parliament maintains that it is apparent from the third paragraph of Article 175 of the Treaty that the measure sought must be an act which is legally binding on the person calling for its adoption. Non-binding acts do not fall within the scope of the third paragraph of Article 175 (Case 15/70 *Chevalley* v *Commission* [1970] ECR 975, paragraph 13; order in Cases 83/84 and 84/84 *N. M.* v *Commission and Council* [1984] ECR 3571, paragraph 10). A measure taken by the Parliament in the procedure for adopting or amending the Staff Regulations would be an act of that kind as regards the applicant. The action should thus be declared inadmissible.

29 The fourth plea in the alternative relates to the Parliament's discretion in the exercise of its powers. Even on the assumption that it was under an obligation to act — which it denies — it enjoyed a wide discretion. This is apparent from the fact that

there were several different ways of resolving the applicant's problem, of which amendment of the Staff Regulations was but one. The Parliament is covered, therefore, by the case-law on the inadmissibility of actions for failure to act brought by individuals against a refusal by the Commission to initiate infringement proceedings against a Member State, which is designed to safeguard the discretion enjoyed by the Commission in that sphere (order in Case C-371/89 *Emrich* v *Commission* [1990] ECR I-1555, paragraph 4 et seq.; orders in Case T-13/94 *Century Oils Hellas* v *Commission* [1994] ECR II-431, paragraph 12 et seq., and Cases T-479/93 and T-559/93 *Bernardi* v *Commission* [1994] ECR II-1115, paragraph 31).

30 In her observations on the objection of inadmissibility, the applicant states, in response to the Parliament's preliminary observation concerning the impossibility of acting on her request, that the aim of that request was to prompt the institution to use all its powers to bring about the amendment of the Staff Regulations. Consequently, her request also related to Article 138b of the Treaty. The second subparagraph of Article 24(1) of the Treaty establishing a Single Council and a Single Commission must therefore be construed as conferring on the Parliament the right to request the Commission to submit appropriate proposals concerning the Staff Regulations.

31 In response to the Parliament's main plea, the applicant claims that the conduct of that institution constitutes an unlawful failure to act, inasmuch as it did not take sufficient action with regard to her right to present a petition and disregarded its obligations under the Treaty in relation to cooperation with a view to amending the Staff Regulations. In any event, in the interests of protecting the rights of individuals, the adoption by the Parliament of an act rejecting the applicant's request is not enough to displace her legal interest in bringing proceedings.

32 In opposition to the first of the Parliament's pleas in the alternative, the applicant argues that the parallel, emphasized in the relevant case-law, between the forms of action provided for in Articles 173 and 175 of the Treaty, together with the need to protect the individual, may justify upholding the admissibility of an action

concerning an act addressed to a third party. She refers in that regard to the Opinion of Advocate General Dutheillet de Lamothe in *Mackprang* v *Commission*, cited above. In addition, the applicant claims that the action does not seek the adoption of an act addressed to a third party, inasmuch as it is she who is its potential addressee. The applicant denies that the case-law cited by the defendant is applicable to the present case. This case is concerned with cooperation between the Community institutions, whereas the action in *Lord Bethell* v *Commission* concerned the initiation of an investigation in relation to the Member States and the dispute in *Prodifarma* v *Commission* related to the mandatory provisions of Article 15 of Regulation No 17 of the Council of 6 February 1962: First Regulation implementing Articles 85 and 86 of the EEC Treaty (OJ, English Special Edition 1959-1962, p. 87), of which Prodifarma was not a potential addressee.

33 In response to the second of the pleas in the alternative, the applicant claims that the term 'act' in the third paragraph of Article 175 of the Treaty includes regulations, provided that they constitute individual measures. In view of the fact that the act which has not been adopted would be of direct and individual concern to the applicant, inasmuch as the amendment of the Staff Regulations would be directly beneficial to her, that amendment constitutes an individual decision by implication, thus rendering the action admissible.

34 As regards the third plea in the alternative, the applicant claims that she is seeking to bring about a legal effect which will directly influence her situation, with the result that the act in question must be binding.

35 With regard to the fourth alternative plea advanced by the defendant, the applicant denies that the principles elicited in the case-law on the Commission's discretion

with regard to the initiation of infringement proceedings against a Member State are applicable. The Commission and the Parliament perform different functions in the legislative process, and the Commission's discretion cannot therefore be compared with that of the defendant institution. In the present case, the Parliament has no discretion and must, in accordance with the Treaty, choose the most effective means of enabling the applicant to remain covered by the Joint Sickness Insurance Scheme.

Findings of the Court

36 Where an institution to whom a request has been made pursuant to the second paragraph of Article 175 of the Treaty defines its position, even if it does so after the period of two months laid down by the Treaty has expired, the conditions prescribed by that article are not fulfilled (judgment in *Pesqueras Echebastar* v *Commission*, paragraph 11).

37 In the present case, the Court notes that on 20 July 1995 the Parliament, in the person of the chairman of the Petitions Committee, replied to the applicant's letter of 27 April 1995. In its reply, the Parliament described the representations made to the Commission and the German authorities with a view to resolving the applicant's problem, and stated that there was nothing further that it could do. Having regard to that letter, which set out the steps which had been taken and defined the position of the defendant institution in relation to the applicant's request, the Parliament cannot be said to have failed to act. The fact that the Parliament's reply did not satisfy the applicant is immaterial in that regard. Article 175 of the Treaty refers to failure to act in the sense of failure to take a decision or to define a position, not the adoption of a measure different from that desired or considered

necessary by the persons concerned (Joined Cases 166/86 and 220/86 *Irish Cement* v *Commission* [1988] ECR 6473, paragraph 17, and Joined Cases C-15/91 and C-108/91 *Buckl & Söhne and Others* v *Commission* [1992] ECR I-6061, paragraph 16).

38 In those circumstances, it must be stated, without there being any need to determine whether the Parliament was empowered in the present case to adopt the measures sought by the applicant, that there has been no failure to act on its part.

39 In any event, and for the sake of completeness, the Court observes that natural or legal persons may have recourse to the third paragraph of Article 175 of the Treaty only for a declaration that the institution has failed to adopt acts of which they are the potential addressees, thereby infringing the Treaty (*Bernardi* v *Commission*, cited above, paragraph 31). The acts which, according to the applicant, the Parliament failed to adopt would not in any event have been addressed to her.

40 The action must therefore be dismissed as inadmissible.

Costs

41 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