JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
26 October 1993 *

In Joined Cases T-6/92 and T-52/92,

Andreas Hans Reinarz, a former official of the Commission of the European Communities, represented by Francis Herbert, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Carlos Zeyen, 67 Rue Ermesinde,

applicant,

v

Commission of the European Communities, represented by Hendrick van Lier, of its Legal Service, acting as Agent, assisted by Jules Stuyck, of the Brussels Bar, with an address for service in Luxembourg at the office of Nicola Annecchino, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of the Commission's memorandum of 27 March 1991, in so far as it concerns the procedure for future reimbursement of certain costs of nursing attendance incurred by the applicant in respect of his spouse (Case T-6/92) and of the Commission's decision of 5 July 1991 by which BFR 6 300 was withheld from the reimbursement of certain costs of nursing attendance incurred by the applicant in respect of his wife (Case T-52/92),

* Language of the case: Dutch.

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

composed of: C. W. Bellamy, President of the Chamber, H. Kirschner and A. Saggio, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 26 May 1993,

gives the following

Judgment

Facts, legislation and procedure

1 The applicant, Andreas Hans Reinarz, a former Commission official (in Grade A 2) left the service of the Communities on 1 May 1973. According to his Netherlands passport and a driving licence issued by the authorities of Wasa, British Columbia, Canada (Annex C 8 to the application in Case T-6/91 and Annex 1 to the reply in Case T-52/92), he is currently resident in Canada where, according to the personnel individual record sheets in his personal file, he has maintained his 'private address' since 1973.

2 In June 1988, whilst staying with his children in Dworp (Beersel), Belgium, his wife became seriously ill. Since then, she has been cared for in Dworp.

3 Because of that illness, the applicant applied for and obtained, under Article 72(1) of the Staff Regulations of Officials of the European Communities (hereinafter 'the Staff Regulations'), 100% reimbursement of the expenses incurred in respect of

nursing care for his wife. The reimbursement was granted, in the last instance, for the period from 15 May 1991 to 14 May 1994.

4 Until 31 December 1990, pursuant to the second subparagraph of Section IV(1) and Section X(2)(a) of Annex I to the Rules on sickness insurance for officials of the European Communities (hereinafter 'Annex I' and 'the insurance rules' respectively), adopted jointly by the Community institutions under Article 72(1) of the Staff Regulations, the reimbursements, paid after authorization from the settlements office, for services such as, in particular, nursing attendance, were subject to a ceiling — double the maximum amount of BFR 4 830 for each 24-hour period — whereby the applicant in fact received 100% reimbursement for nursing attendance.

5 Since 1 January 1991, the third subparagraph of Section IV(1) of Annex I has set new reimbursement ceilings which apply, *inter alia* to nursing attendance, as indicated in Section X. Under the new wording of Section X, reimbursement is available, subject to prior authorization, only up to a ceiling of BFR 2 415 per 24-hour period for an initial period of 90 days (Section X(2)(c)). After that period, reimbursement is limited to a ceiling equal to the basic salary of an official in Grade C 5, step 1, less an amount equal to 10% of the basic salary or pension of the insured person (Section X(2)(d)). Finally, according to the second subparagraph of Section XV(3) of Annex I, any part of the expenses considered excessive by the settlements office is not reimbursable. The rule for the interpretation of the latter provision indicates, essentially, that expenses exceeding by 50% the cost corresponding to 100% of the maximum rates laid down are to be considered excessive and not reimbursable.

6 On 29 March 1991, the applicant, who was staying in Belgium at the time, received at the address 'Hauwaertsraat 52, Dworp' a memorandum dated 27 March 1991, signed by the head of the settlements office of the Directorate General for Personnel and Administration of the Commission. In its first paragraph, that memorandum informed the applicant that he had obtained prior authorization, as annexed

to the memorandum, concerning reimbursement of the expenses of nursing attendance for his wife, for a period of 90 days. In the second and third paragraphs, it drew the applicant's attention to the new wording of Sections IV and X, imposing a ceiling of BFR 2 415 per 24-hour period for a period of 90 days, and informed him that 'at the end of that period, and subject to the grant of a further prior authorization, reimbursement is subject to a ceiling equal to the basic salary of an official in Grade C 5, step 1 (at present about BFR 72 000), less an amount equal to 10% of your basic pension'. The last paragraph of the memorandum reads as follows: 'This memorandum has been sent to you to enable you to make the necessary arrangements for the future'. An extract from the abovementioned provisions of the new sickness insurance rules was attached in French, the Dutch version not yet being available at the time.

7 On 30 March 1991, the applicant sent, from Dworp, a complaint which was received at the Secretariat General of the Commission on 4 April 1991, in which he claimed, essentially, that the sickness insurance rules in force since 1 January 1991 had the effect, contrary to Article 72(1) of the Staff Regulations, of substantially reducing the reimbursement available prior to that date to those who qualified for 100% reimbursement under the Joint Sickness Insurance Scheme for the institutions of the European Communities (hereinafter 'the Joint Scheme') and were suffering from an illness recognized as serious. The applicant referred to 'a decrease of over 70% for the period during which I am away from the place where my wife is staying', adding 'When I am in Dworp and therefore, of course, undertake the care which my wife needs, the reduction amounts to about one-half'. He also objected that the new rules affected, in a unilateral and discriminatory manner, the category of insured persons (mainly retired officials) for whom the costs of care or rehabilitation were very high and contended that the application of those rules prejudiced the rights acquired by him under the Staff Regulations.

8 On 9 July 1991, the Management Committee of the Joint Scheme (hereinafter the 'Management Committee') issued an opinion under Article 16(2) of the insurance rules on the applicant's complaint in which it expressed doubts as to its admissibility on the ground that it did not appear to concern an act adversely affecting him, since the memorandum of 27 March 1991 merely provided the applicant with infor-

mation concerning the new rules applicable. As regards the substance, the Management Committee considered that the rules did not infringe any right acquired by the applicant.

9 On 4 August 1991, the complaint was rejected by implied decision. Previously, in a letter of 12 June 1991 sent from 'Dworp, Hauwaertstraat 50', the applicant had amplified his complaint, giving the legal reasons for which, in his view, the 'decision of 27 March 1991 was unlawful'.

10 On 29 October 1991, the applicant received at 'Hauwaertstraat 50, Dworp' a memorandum dated 15 October 1991, signed by Mr Richardson, Director of the Rights and Obligations Directorate of the Directorate General for Personnel and Administration, in the following terms: 'Examination of your complaint has revealed that it was directed against information ... having at present no bearing on your legal situation and not yet adversely affecting you. In fact, the letter from the Administration is for your information ... (and) contains no specific decision concerning reimbursement ... on the basis of any claim submitted by you for that purpose'.

11 In those circumstances, by application received at the Registry of the Court of First Instance on 31 January 1992, the applicant brought an action for the annulment of the decision allegedly contained in the memorandum of 27 March 1991 and allegedly reducing the reimbursement of nursing attendance costs for his wife (Case T-6/92).

12 In the meantime, on 6 May 1991, the applicant had submitted to the settlements office a claim for reimbursement of nursing attendance costs amounting to BFR 78 750. On 7 July 1991, he received a payment from the Commission, dated 5 July 1991, amounting to BFR 72 450.

13 By letter of 30 September 1991, from 'Dworp, Beersel', the applicant lodged a complaint in which he claimed, first, that he had not received until August 1991 'the statement for (the payment) ... which had been sent, according to previous

practice, to his address in Canada' and, secondly, that, in addition to the first complaint which he had lodged on 30 March 1991 concerning changes to the sickness insurance rules, he also wished, as a matter of caution, to object to the deduction of BFR 6 300 made, under the new rules, from the amount which he had claimed by way of reimbursement.

14 That complaint was, initially, rejected by implied decision. However, on 12 March 1992 the Commission sent an express decision rejecting it to 'Hauwaertsraat 52, Dworp', which the applicant received on 16 March 1992. The main reason given for its rejection was that the reimbursement at issue had been calculated in accordance with the applicable rules and that there could be no question of discrimination against retired people since the conditions for the reimbursement of nursing costs were the same, whether or not the insured person was in active service.

15 In those circumstances, by application lodged at the Registry of the Court of First Instance on 13 July 1992, the applicant brought a second action for annulment, directed, essentially, against the decision of 5 July 1991 by which BFR 6 300 had been deducted from his claim for reimbursement (Case T-52/92).

16 The written procedure followed the normal course in both cases. By order of 30 October 1992, the President of the Fourth Chamber of the Court of First Instance joined the cases for the purposes of the oral procedure and the judgment.

17 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure without any preparatory inquiry. However, it put a number of questions to the Commission.

18 In response, the Commission produced, *inter alia*, the text of Opinion No 3/89 of the Management Committee dated 23 February 1989 concerning revision of the sickness insurance rules, but it did not send the text of the various proposals for amendments, in particular those relating to Sections IV, X(2) and XV of Annex I.

In the preamble to the Opinion, the Management Committee observed, among other things, that as a result of the increasing imbalance between contributions and expenditure under the Joint Scheme an operating deficit had been incurred in recent years and that, having regard to the forecasts, the scheme was liable to have exhausted the bulk of its accumulated surpluses by the end of 1991. It emphasized the need, therefore, to take steps to restore the balance between contributions and expenditure and, to that end, proposed measures including an increase in contributions from members and from the institutions. At the same time, it suggested various amendments to the sickness insurance rules, in particular to Section X in Annex I, concerning nursing services, and the second subparagraph of Section XV(3), concerning excessive expenditure.

19 Following the hearing on 26 May 1993, the applicant produced, at the request of the Court, the form annexed to the memorandum of 27 March 1991 in which he had applied for prior authorization and on which the administration had indicated its approval.

20 By decision of 2 July 1993, the President brought the oral procedure to a close.

Forms of order sought by the parties

21 In Case T-6/92, the applicant claims that the Court should:

primarily:

— take certain measures of organization of the procedure (issue a direction that the Commission clarify the new rules imposing ceilings and explain the reasons for them and the procedures for their application);

— declare the application admissible and well founded and, therefore,

(1) annul the decision, as notified in the memorandum of 27 March 1991, by which the reimbursements of the costs of nursing attendance incurred in respect of the applicant's spouse were drastically reduced;

(2) order the Commission to pay the costs in accordance with Article 87(2) of the Rules of Procedure;

in the alternative:

in the event of the application being declared unfounded, nevertheless order the Commission to pay the costs pursuant to Article 87(3) of the Rules of Procedure;

in the further alternative:

in the event of the application being dismissed, apply Article 88 of the Rules of Procedure.

The Commission contends that the Court should:

— declare the action inadmissible;

— in the alternative, declare it unfounded;

— order the applicant to pay the costs.

22 In Case T-52/92, the applicant claims that the Court should:

primarily:

— take the same measures of organization of the procedure as those sought in Case T-6/92;

— declare the application admissible and well founded and, therefore,

(1) declare invalid the third subparagraph of Section IV(1) of Annex I concerning the costs of nursing attendance referred to in Section X(2)(c) and (d) and, consequently, annul the decision by which the reimbursements of the costs of nursing attendance incurred in respect of the applicant's spouse were drastically reduced, as notified in the memorandum of 27 March 1991 and given effect by the decision of 5 July 1991 which effected a deduction of BFR 6 300;

(2) order the Commission to pay the costs in accordance with Article 87(2) of the Rules of Procedure;

in the alternative:

in the event of the application being declared unfounded, nevertheless order the Commission to pay the costs pursuant to Article 87(3) of the Rules of Procedure;

in the further alternative:

in the event of the application being dismissed, apply Article 88 of the Rules of Procedure.

The Commission contends that the Court should:

— declare the action inadmissible;

— in the alternative, declare it unfounded;

— order the applicant to pay the costs.

The admissibility of the action in Case T-6/92

Arguments of the parties

23 The Commission, without raising a formal objection of inadmissibility within the meaning of Article 114 of the Rules of Procedure, contests the admissibility of the application in two respects: compliance with time-limits and the existence of an act adversely affecting the applicant.

24 As regards compliance with time-limits, it contends that the action brought on 31 January 1992 against the memorandum of 27 March 1991 was not brought within the period of three months prescribed in Article 91(3) of the Staff Regulations, since that period started on 4 August 1991, the date of the implied rejection of the applicant's complaint. Mr Richardson's memorandum of 15 October 1991 cannot be described as an express rejection of the applicant's complaint since it merely repeats the Commission's view that the previous memorandum of 27 March 1991 merely provided information and contained no decision. As regards the letter of 12 June 1991 'sent ... in order to amplify the complaint' initially made by the applicant, the Commission considers that it has no significance in itself for the purposes of calculating time-limits.

25 As regards the legal nature of the memorandum of 27 March 1991, the Commission contends that it is not an act adversely affecting the applicant since any harm which he might have suffered stemmed directly from the amendment of the

applicable rules, which was an administrative measure of general application. It is obvious that the prior authorization granted by that memorandum was not detrimental to the applicant who, moreover, according to his application, perceived an act adversely affecting him only in the passage of the memorandum which informed him of the legal consequences of the new rules.

26 The Commission, referring to the case-law of the Court of Justice (Case 20/58 *Phoenix-Rheinrohr and Others* v *High Authority* [1959] ECR 75, Case 23/58 *Mannesmann and Others* v *High Authority* [1959] ECR 117 and Joined Cases 32/58 and 33/58 *Snupat* v *High Authority* [1959] ECR 127, and in Cases 19/69, 20/69, 25/69 and 30/69 *Richez-Parise and Others* v *Commission* [1970] ECR 325, paragraph 3, and Case 23/69 *Fiehn* v *Commission* [1970] ECR 547, paragraph 3), states that communications giving an interpretation of existing measures are not actionable, and that applies, *a fortiori*, to communications such as the memorandum at issue in this case in which the authority merely refers to rules which have been amended.

27 The Commission states that in reality the applicant is only claiming that the amended provisions of the sickness insurance rules are illegal. As those rules are not a decision addressed to him and cannot be regarded as constituting a decision of direct and individual concern to him within the meaning of the second paragraph of Article 173 of the EEC Treaty, his action for the annulment thereof is in any event, in the Commission's view, inadmissible, as is apparent from the consistent case-law of the Court of Justice following Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, at 108.

28 The applicant replies, with regard to time-limits, that all the indications are that the memorandum of 15 October 1991 from Mr Richardson does in fact constitute an express decision rejecting his complaint: first, his complaint was referred, pursuant to Article 16 of the sickness insurance rules, to the Management Committee for an opinion and was the subject of such an opinion, so the procedure chosen was the one laid down for the adoption of a decision on a complaint; secondly, the wording of the memorandum of 15 October 1991 and the administrative status and seniority of its signatory made it abundantly clear that the measure was an express rejection under the last sentence of the second indent of Article 91(3) of the Staff Regulations, which marked the start of a new time-limit for an action to be brought.

29 As regards the 'supplementary' complaint of 12 June 1991, the applicant confirms that it was lodged in order to amplify the first complaint within the time-limit laid down for that purpose by Article 90 of the Staff Regulations. Since, according to the applicant, the action against the rejection, by the memorandum of 15 October 1991, of his complaint, as supplemented, was lodged in due time, it is unnecessary, in his view, to consider the matter further.

30 As regards the question whether the memorandum of 27 March 1991 contains an actionable decision, the applicant considers that the case-law cited by the Commission is irrelevant. The contested memorandum contains an act adversely affecting him since it emanates from the head of the settlements office who, according to Article 20 of the sickness insurance rules, is responsible for receiving and settling claims for the reimbursement of medical expenses and for making the relevant payments, and for dealing with applications for prior authorization. Moreover, it is addressed to the applicant and specifically relates to the reimbursement of nursing attendance costs in respect of his wife, who is referred to by name. Finally, the applicant was informed of the changes made in the sickness insurance rules which had a direct impact on the reimbursement of costs of that kind, with effect from the first period of 90 days, in order to 'enable him to make the necessary arrangements for the future'.

31 The applicant considers that the existing case-law confirms that the contested memorandum is an act adversely affecting him. He refers to the judgment of the Court of Justice in Case 17/78 *Deshormes* v *Commission* [1979] ECR 189 and to the Opinion of Advocate General Caportorti in Case 167/80 *Curtis* v *Commission and Parliament* [1981] ECR 1499, at 1512, 1534 and 1535. The applicant infers that, if those principles are applied to this case, it must be concluded that the memorandum of 27 March 1991 actually informed him of the manner in which the new sickness insurance rules would be applied to him regarding the application, subject to prior authorization, of Section X of Annex I. He stresses that the fact that he might be adversely affected is confirmed by the clarification in the memorandum that the information given is intended to enable him to make the necessary arrangements for the future.

32 At the hearing, the applicant emphasized, with regard to the existence of an act adversely affecting him, that the memorandum of 27 March 1991, despite being presented as a general communication, was in fact of direct and individual concern to him. Indeed, in so far as it limits the prior authorization granted to 90 days, that memorandum constitutes a first implementing measure of the new rules, which had inserted in Section X(2)(c) of Annex I thereto a limitation which, when applied to the applicant, undermined his position. Since that limitation had not existed under the previous system, the fact that the prior authorization was granted to the applicant for only 90 days had an adverse effect.

33 The applicant added, at the hearing, that his two actions should be treated as one and that it is to the very system established by the new rules, from the chronological point of view, that he objects. The memorandum of 27 March 1991, in inviting the applicant to 'make the necessary arrangements for the future', related not only to the first 90 days but to the whole period for which the applicant's spouse, whose state of health was unlikely to improve for quite some time, was unwell. Referring in that context to the statement of 20 May 1992, produced as Annex 2 to the reply in Case T-52/92, he claimed that it was a measure for the application of the new Section X(2)(d) of Annex I, concerning the period following the first 90 days, the legality of which must also be considered in the present proceedings. He cannot, he says, be required to challenge separately every individual measure for applying the rules — that is to say, all the statements of reimbursement. Such a requirement would run counter to any idea of keeping legal proceedings to a minimum and would certainly not make the work of the Commission or the Court of First Instance and the lawyers any easier.

34 The Commission, for its part, reiterated at the hearing its view that the memorandum of 27 March 1991 was merely a letter providing information. It added that, at the time, it could not give complete information on the new sickness insurance rules since the Dutch version was not yet available. It nevertheless took care to advise the applicant of the purport of the new provisions so as to draw his attention to the consequences that would be of direct concern to him. As regards the

prior authorization attached to the contested memorandum, the Commission states that its limitation to 90 days was not challenged in the course of the written procedure. The applicant mentioned it for the first time at the hearing.

Findings of the Court

35 It must be borne in mind that an action for annulment brought by an official against the Community institution by which he is employed is admissible, pursuant to Article 91(1) of the Staff Regulations, only if it is directed against an act adversely affecting him. It is settled case-law of the Court of Justice and the Court of First Instance that only acts capable of directly affecting the legal position of an official are acts adversely affecting him, which is not the case as regards mere letters containing administrative information (see, for example, the judgment of the Court of Justice in Case 32/68 *Grasselli* v *Commission* [1969] ECR 505, paragraph 7, the orders of the Court of First Instance in Case T-47/90 *Herremans* v *Commission* [1991] ECR II-467, paragraphs 21 and 22, and Case T-34/91 *Whitehead* v *Commission* [1992] ECR II-1723, paragraph 22, and the judgment of the Court of First Instance in Case T-135/89 *Pfloeschner* v *Commission* [1990] ECR II-153, paragraph 14). It is therefore necessary to examine the main terms of the contested memorandum of 27 March 1991 to determine its legal nature.

36 The first paragraph of the memorandum at issue refers to a prior authorization, annexed thereto, which was granted for a period of 90 days and concerned the reimbursement of nursing attendance costs to be incurred in respect of the applicant's wife. It must be stated, first, that, in so far as nursing attendance costs are reimbursable, pursuant to Section X(2)(c) of Annex I, only if authorized in advance, the grant of such authorization is a measure favourable to the person concerned which, as such, cannot be the subject of an action.

37 However, the applicant maintained at the hearing that the prior authorization mentioned in the contested memorandum constituted, for him, the first measure giving effect to the new sickness insurance rules in a particular instance and that that measure adversely affected him by reason of the limitation of 90 days which it imposed, whereas, under the previous rules, the same authorization had been granted to him

for the longer period of six months. In that connection, it must be observed that, whilst the authorization in question may have constituted, for the applicant, the first measure specifically applying the new rules, that measure did not yet determine the rate of actual reimbursement of the nursing attendance costs which he might incur. That rate was not yet known when the prior authorization was granted but was dependent on factors external to the administration. In those circumstances, the characteristics of the authorization in question are such that it is more in the nature of a preparatory measure preceding reimbursement at a later stage of nursing attendance costs not yet incurred.

38 However, it seems unnecessary to deal with that question. Even if the authorization in question were to be regarded as an act adversely affecting the applicant, the forms of order sought are not in any way directed against it and it does not therefore constitute the subject-matter of the proceedings within the meaning of Article 44(1)(c) of the Rules of Procedure. The applicant does not mention it, on page 6 of his application in Case T-6/92, as forming part of the subject-matter of the dispute, nor did he annex it to the application as a measure whose annulment is sought, as required by Article 44(4) of the Rules of Procedure. Finally, the authorization in question was not contested in the complaint lodged on 30 March 1991. It follows that the applicant's objection to it, made for the first time at the hearing, cannot have had the effect of extending the subject-matter of his action: the attempt to extend it was made outside all the relevant time-limits for bringing proceedings, without observance of the formalities laid down in the abovementioned provision of the Rules of Procedure or of the pre-litigation procedure laid down by the Staff Regulations.

39 As regards the second, third and fourth paragraphs of the contested memorandum of 27 March 1991, it is clear on closer scrutiny that they merely inform the applicant of the entry into force of the new sickness insurance rules and, in particular, of the provisions relevant to his situation. Moreover, that information was particularly appropriate in the applicant's case since, at the beginning of 1991, the Dutch version of the new rules was not yet available. The information given in the second and third paragraphs of the contested memorandum constitutes a notification, without any comment, of the actual text of the relevant provisions of the new rules. The only indication going further than a summary of the content of those provisions is the setting of a ceiling equal to the present basic salary of an official in

Grade C 5, step 1, referred to in Section X(2)(d) of Annex I. That detail, taken from the table of monthly remuneration given in Article 66 of the Staff Regulations, was of particular interest to a retired official. It follows that the passages analysed above were by no means in the nature of a decision, and merely contained information.

40 That legal assessment is supported by the judgments in *Grasselli*, paragraphs 1, 5, 6 and 7, and *Pfloeschner*, paragraph 14, in which it was held that administrative information provided, for guidance, in the form either of a table explaining the rights of the official concerned or of a provisional statement, cannot be classified as an act having an adverse effect.

41 Finally, the last paragraph of the memorandum of 27 March 1991 likewise contains no decisional element adversely affecting the applicant. Although that passage is addressed to the applicant directly and individually, in it the Commission confines itself to indicating the reasons why it gave him the abovementioned information, namely to enable him to make the necessary arrangements for the future. Far from having a positive or negative impact on the applicant's legal position, that sentence, read in context, is more in the nature of a complimentary close to the letter — which, moreover, would be superfluous for a careful and well-informed official who, apprised of the entry into force of new rules applicable to his personal situation, must, on his own initiative and in his own interests, consider whether it is possible or necessary to take certain steps regarding the future.

42 That conclusion cannot be affected by the case-law cited in that context by the applicant. The applicant in *Deshormes* was confronted with a memorandum from the administration which rejected his application for certain periods to be taken into account in calculating his pension rights (Facts, paragraph 1, at [1979] ECR 191). That memorandum therefore constituted an administrative measure of a decisional nature (paragraph 10 of the judgment) and in that respect it differed fundamentally from the memorandum at issue in this case.

43 The applicant also claims that it is against the scheme of the new sickness insurance rules as such that both his actions, which in his view should be treated as forming a whole, are directed. However, it need merely be pointed out that, under the system of remedies provided for by Article 179 of the EEC Treaty and Articles 90 and 91 of the Staff Regulations, a measure of general application, such as the sickness insurance rules adopted by the Community institutions pursuant to Article 72(1) of the Staff Regulations, cannot be the subject of an action for annulment.

44 It follows from the foregoing that the action in Case T-6/72 must be dismissed as inadmissible, without there being any need to consider whether the action was brought within the time-limit laid down by Article 91(3) of the Staff Regulations.

The admissibility of the action in Case T-52/92

Arguments of the parties

45 The Commission, without raising a formal objection of inadmissibility within the meaning of Article 114 of the Rules of Procedure, considers that the application is inadmissible through non-observance of the time-limits. Since the applicant received the decision expressly rejecting his complaint on 16 March 1992, his application, lodged on 13 July 1992, came more than three months after the notification of that decision (Article 90(3) of the Staff Regulations). Although the applicant claims that the normal period of three months should, because he is habitually resident in Canada, be extended by one month on account of distance pursuant to the combined provisions of Article 102(2) of the Rules of Procedure of the Court of First Instance and the last indent of Article 1 of Annex II to the Rules of Procedure of the Court of Justice, he has not shown that he (still) lives in Canada.

46 Since the applicant does not deny receiving at Dworp, his place of residence in Belgium, the decision of 12 March 1992 rejecting his complaint, he cannot, in the Commission's view, claim the benefit of an extension of the time on account of distance — particularly since the applicant himself sent to the President of the Commission a complaint on the same subject from Dworp (Beersel) on 30 September 1991. The Commission was therefore entitled to consider that he was agreeable

to receiving decisions concerning him at his address in Belgium. Consequently, it was entitled to expect that the applicant would not bring an action for annulment after 16 June 1992. The time-limit for bringing an action being a policy matter, the Commission considers that it cannot be disregarded in this case.

47 The applicant states in reply that he has established his residence in Canada. That is apparent from his Netherlands passport and his Canadian driving licence, copies of which he has produced (Annex 1 to his reply); those documents had already been produced with the application in Case T-6/92. Indeed the Commission does not deny, for the purposes of the first case, that he lives outside Europe.

48 In response to a question put to it by the Court after the close of the written procedure, the Commission stated that it was not able to produce, in support of its contention that the applicant habitually resides in Belgium, any factual or legal information to supplement the facts set out in its pleadings and that, in that respect, it deferred to the judgment of the Court.

Findings of the Court

49 The action was brought on 13 July 1992, that is to say more than three months after receipt, on 16 March 1992, of the decision rejecting the applicant's complaint. Consequently, it cannot be admissible unless the period for bringing an action was — pursuant to the combined provisions of Article 102(2) of the Rules of Procedure of the Court of First Instance and the last indent of Article 1 of Annex II to the Rules of Procedure of the Court of Justice — extended by one month by reason of the fact that the applicant was, as he claims, habitually resident in Canada.

50 Since a decision as to the place or places where the applicant habitually resides — in Canada and/or Belgium — would require difficult factual assessments, and in

view of the fact that the question of the admissibility of the action would only have to be dealt with in the event of the action proving to be well founded, the Court considers that it is appropriate first to consider the substance of Case T-52/92.

The substance — Case T-52/92

The subject-matter of the application

51 In view of the rather broad terms used in setting out the forms of order sought in the application, it is necessary first to determine the subject-matter of the application. As it is an action for the annulment of an act adversely affecting an official, the Court can examine only the form of order sought by way of primary claim, namely the claim for annulment of the statement of 5 July 1991 in so far as it shows a deduction of BFR 6 300. The Court finds that, as the parties acknowledged at the hearing, that deduction relates only to the first period of 90 days referred to in the new sickness insurance rules. Consequently, it was made solely on the basis of Section X(2)(c) — and not (d) — of Annex I. Moreover, the fact that only paragraph (c) was relevant was already made clear in the decision of 12 March 1992 rejecting the applicant's complaint (pages 3 and 4).

52 Consequently, in Case T-52/92, the Court of First Instance can examine neither 'the decision by which the reimbursements of the costs of nursing attendance incurred in respect of the applicant's spouse were drastically reduced, as notified in the memorandum of 27 March 1991 and given effect by the decision of 5 July 1991' nor the applicant's claim that, under the new sickness insurance rules, the reimbursement of the nursing attendance costs incurred by him 'has been reduced to 35.77% for the first 90 days and to 21.72% thereafter' (p. 5 of the reply). Although it may sometimes happen that, as a result of the ceilings imposed, the reimbursement of costs incurred is in fact reduced to that extent, that did not happen to the reimbursement at issue in this case which, despite the contested deduction of BFR 6 300, amounts to 92% of the costs incurred. In that connection, the Court points out that it has already held (in Case T-110/89 *Pincherle* v *Commission* [1991] ECR II-635, paragraphs 30 and 33, and Case T-41/90 *Barassi* v *Commission* [1992] ECR II-159, paragraph 38) that the Community judicature has jurisdiction only to review the lawfulness of an act adversely affecting an official and cannot, in the

absence of an individual implementing measure, rule in the abstract on the legality of a provision of a general nature. It follows that the applicant's objection to the sickness insurance rules is inadmissible in so far as they do not concern the contested individual decision.

53 Nor can the Court of First Instance examine the legality of the statement of 20 May 1992, appended as Annex 2 to the reply. That document shows that — pursuant to the third subparagraph of Section IV(1), Section X(2)(d) and the second subparagraph of Section XV(3) of Annex I, Article 8(2) of the new sickness insurance rules and the provisions for the interpretation of the second subparagraph of Section XV(3) of Annex I — a second claim for the reimbursement of nursing attendance costs amounting to BFR 132 928 was submitted and that the reimbursement made on the basis of it was limited to BFR 41 881. However, that statement was not contested in the application. The provisions on which it was based are not the same as those underlying the statement of 5 July 1991, which was covered by the pre-litigation procedure and is expressly referred to in the application.

The applicant's pleas in law

54 In support of his application, the applicant puts forward five pleas in law, alleging: infringement of Article 72(1) of the Staff Regulations, breach of his acquired rights, breach of the general duty to have regard to the welfare of officials, breach of the principle of non-discrimination and breach of the principle of proportionality. In a sixth plea in law, he also raises an objection of illegality, asking the Court to hold that the provisions of the third subparagraph of Section IV(1) and Section X(2)(c) and (d) of Annex I are invalid for the reasons set out in the first five pleas and that those provisions cannot therefore serve as a legal basis for the contested decision.

55 The Commission considers that the sickness insurance rules constitute neither a decision addressed to the applicant nor an act of direct and individual concern to him within the meaning of the second paragraph of Article 173 of the Treaty. Nor, it submits, can the applicant object, under Article 184 of the EEC Treaty, that those rules are illegal. Such an objection of illegality cannot be raised independently but

only as a procedural issue. Moreover, it is clear that the applicant's arguments concerning the alleged illegality of the sickness insurance rules are not appropriate to an objection of illegality but, rather, represent a criticism of the judgment of the Court of First Instance in *Barassi* v *Commission*.

56 As regards the admissibility of the objection of illegality raised by the applicant under Article 184 of the Treaty with regard to the sickness insurance rules, it must be borne in mind that, as the Court of Justice has held (Case 92/78 *Simmenthal* v *Commission* [1979] ECR 777, paragraphs 39 to 41), the objection of illegality gives expression to a general principle conferring upon any party to proceedings the right to challenge, for the purpose of obtaining the annulment of a decision of direct and individual concern to that party, the validity of previous acts of the institutions which form the legal basis of the decision which is being contested. Consequently, such objections cannot be limited to measures in the form of a regulation, the only kind mentioned in Article 184 of the Treaty, but must be interpreted broadly as including all measures of general application. The sickness insurance rules which, having been adopted in implementation of Article 72(1) of the Staff Regulations, essentially cover the reimbursement of the various sickness expenses incurred by members of the Joint Scheme, were adopted, in their original version, in 1974 by the European Community institutions in an agreement recorded on 31 October 1974 by the President of the Court of Justice; they have been amended on several occasions, most recently in 1991, the agreement of the institutions having been recorded by the President of the Court of Justice on 28 November 1991. Those rules are of a general nature, in that they apply to situations that are determined objectively and have legal effects with regard to categories of persons referred to in a general and abstract manner (judgment of the Court of Justice in Joined Cases 44/74, 46/74 and 49/74 *Acton and Others* v *Commission* [1975] ECR 383, paragraph 7, and Case 206/87 *Lefebvre Frère et Soeur* v *Commission* [1989] ECR 275, paragraph 13). Consequently, although they are not in the form of a regulation, those rules may be the subject of an objection of illegality. Moreover, the Court of Justice itself has described them as 'provisions implementing the Staff Regulations' and has examined their compatibility with the relevant provisions of the Staff Regulations, in particular as to whether in certain respects they exceed the limits laid down by the Council in Article 72 of the Staff Regulations (Case 806/79 *Gerin* v *Commission* [1980] ECR 3515, paragraph 15, and Case 339/85 *Brunotti* v *Commission* [1988] ECR 1379, paragraph 13).

57 However, as the applicant has not limited his objection of illegality to Section X(2)(c) of Annex I, which is the only basis for the contested statement, but has extended it to Section X(2)(d), it must be borne in mind that the scope of an objection of illegality must be limited to what is necessary for determination of the dispute. The Court of Justice has held that Article 184 of the Treaty is not intended to enable a party to contest the applicability of any measure of general application in support of any action whatsoever. It has emphasized that the general measure claimed to be illegal must be applicable, directly or indirectly, to the issue with which the action is concerned and there must be a direct legal connection between the contested individual decision and the general measure in question (Case 21/64 *Macchiorlati Dalmas e Figli* v *High Authority* [1965] ECR 175, at 187 and 188, and Case 32/65 *Italy* v *Council and Commission* [1966] ECR 389, at 409). However, since in this case the contested statement was based only on paragraph 2(c) of the provision concerned, the objection of illegality, in so far as it relates to paragraph 2(d), extends to a provision having no bearing on the outcome of the dispute and displaying no direct legal connection with it. Accordingly, it must, to that extent, be rejected as inadmissible.

58 It is therefore necessary to examine, in relation to the first five pleas in law put forward by the applicant, only the legality of the statement of 5 July 1991 and, to the extent to which it is common ground that that statement was drawn up only in accordance with Section X(2)(c) of Annex I, the legality of those provisions.

First plea in law: infringement of Article 72(1) of the Staff Regulations

Arguments of the parties

59 The applicant maintains that, under that provision, he is entitled to reimbursement of 100% of the expenses which he has actually had to incur. In his case, the costs of nursing attendance, under the new sickness insurance rules, are reimbursed at a much lower rate (35.77% for the first 90 days and 21.72% thereafter). That constitutes a manifest breach of the right conferred by the Staff Regulations to 100% reimbursement in the event of serious illness.

60 In its decision rejecting the applicant's complaint, the Commission lays emphasis on the fact that the reimbursement he received on 7 July 1991 amounted to 92% of the expenses actually incurred; however, the applicant regards that argument as wholly irrelevant. First, reimbursement at the rate of 92% is still insufficient compared with the 100% provided for by the Staff Regulations and, secondly, the question of legal principle raised in this case cannot be influenced by the fact that, as a result of the efforts made by the applicant to cut down the expenses to be reimbursed, they were defrayed, in an isolated case, at a rate close to 100%.

61 Moreover, reimbursement at the rate of 100% manifestly implies, by comparison with the general rules, an additional element justified by the seriousness of the illness. Under the previous rules, that element was reflected by the fact that the ceiling prescribed in the event of reimbursement at the rate of 100% was fixed at double the level applicable where reimbursement was available only at the rate of 80%. By contrast, under the new rules set out in Section IV of Annex I, the ceiling prescribed for reimbursement at the rate of 80% also applies to reimbursement at the rate of 100%. There is thus no longer any difference as between the two ceilings. The fact that the new sickness insurance rules also provide for a decrease of that ceiling, by 10% of the basic salary or pension of the insured person, shows even more clearly how the principle of 100% reimbursement has been contravened.

62 Furthermore, the French text of Article 72(1) of the Staff Regulations refers to reimbursement 'dans la limite de 80%' whereas the Dutch text provides for reimbursement of 'up to a maximum of 80%'. The word 'limite' means that reimbursement is limited to 80% of the expenses incurred. Moreover, it is apparent from a comparison of the Dutch text of the rules for the interpretation of the sickness insurance rules relating to Section XV of Annex I with the other language versions that, for the application of Article 8(2) of those rules, the 'ceiling' must in fact be converted to a basis of 100 (Annex C11 to the application in Case T-52/92) which confirms that, *a fortiori*, it is necessary to make a conversion of the basis of 100 in the case of a reimbursement formally fixed at the rate of 100%.

63 In response to the Commission's argument based on the *Pincherle* and *Barassi* judgments, in which the Court of First Instance laid down the principle that the reimbursement rates provided for in Article 72(1) of the Staff Regulations constitute maximum rates and recognized, in *Barrassi,* that a reimbursement amounting

to only 31% of the expenses incurred was lawful, the applicant alleges a manifest breach of the principle of social insurance underlying Article 72 of the Staff Regulations where, although reimbursement is in principle provided for at the rate of 100%, the actual reimbursement is reduced, as in this case, to a rate of 35% for the first 90 days and 21% thereafter. The Court of First Instance's reasoning in Barassi, based on Article 72(3) of the Staff Regulations, which provides for special reimbursement in cases where the expenditure not reimbursed is particularly high, is, according to the applicant, irreconcilable with a systematic and teleological interpretation of that provision. First, that provision applies only to exceptional situations, as is apparent from the specific procedure laid down and the discretion allowed to the appointing authority in that connection: the Court's statement that that provision justifies implementing measures which, structurally, lead to an extremely low reimbursement rate, thus entails a total reversal of the general scheme of Article 72 (see Case 115/83 *Ooms* v *Commission* [1984] ECR 2613, paragraph 14). Furthermore, the Court's reasoning is not valid under the particular system of 100% reimbursement in cases of serious illness: it is not permissible for reimbursement to be limited to less than one-quarter by means of implementing provisions on the ground that, in such a case and under the conditions laid down in Article 72(3) of the Staff Regulations, the appointing authority may grant an application for special reimbursement.

64 The applicant also points out that the Court's reasoning concerning Article 8(5) of the sickness insurance rules (paragraph 38 of *Barassi*) must be viewed cautiously and cannot in any event be transposed to the present case. The finding that, according to that provision, the application of Article 8(2) of the sickness insurance rules and therefore of Article 72(3) of the Staff Regulations is necessarily linked with an application, would have the effect of compelling an insured person himself to advance funds over a long period. According to the administrative practice followed in that matter (Annex 3 to the reply), an insured person can make such an application only after a minimum reference period of 12 months, whilst being allowed a further 12 months for that purpose. Such long periods, above all in the case of old insured persons, are scarcely consistent with the general principles of good administration, particularly since applications made in that way are then subject to the time-limits laid down in Article 90 of the Staff Regulations, which means that it may take a further 14 months to examine them in the event of a refusal, having regard to the time-limit for bringing an action.

65 The applicant also maintains that, in his specific case, the possibility of obtaining special reimbursements is limited, according to the rules for the interpretation of Section XV of Annex I, to expenses not exceeding by a maximum of 50% the ceilings laid down in Annex I for the reimbursement of nursing attendance costs. That limitation is particularly surprising because it aggravates the discriminatory treatment of such costs. In that connection, the applicant again refers to the statement of 20 May 1992, appended as Annex 2 to his reply, in support of his claim that that provision was in fact applied to him.

66 In reply, the Commission states that Article 72(1) of the Staff Regulations provides only in general terms that sickness expenses are to be reimbursed up to certain percentages (80, 85 or 100% as the case may be) and on the basis of rules laid down by common agreement of the Community institutions. There is therefore nothing to prevent the Communities from limiting sickness insurance benefits to lower percentages. Moreover, those ceilings are not the sole criterion, since Article 72(1) of the Staff Regulations expressly provides for specific rules to be drawn up. As regards the wording of Article 72 of the Staff Regulations, the Commission, pointing out that the French version referred to by the applicant does not take precedence, does not see how the expression 'dans la limite de 80%' departs from its interpretation according to which that rate constitutes a maximum rate.

67 The Commission then refers to the judgments in *Pincherle* and *Barassi* in which the Court of First Instance held that the reimbursement rates fixed by Article 72 of the Staff Regulations as 80% or 85% of the costs incurred lay down the maximum reimbursable rate, that in the absence of a reimbursement ceiling laid down by the Staff Regulations the institutions are empowered to determine appropriate ceilings having regard to the principle of social insurance cover underlying Article 72 of the Staff Regulations and that the maximum limits applied in this case were neither illegal nor unfair. In the Commission's view, the same reasoning applies to the rules on 100% reimbursement.

68 The Commission adds, in the alternative, that the insurance rules have the same legal force as the Staff Regulations themselves. The general rule that a later provision may amend an earlier provision is therefore applicable (*lex posterior derogat lege priori*).

69 In response to the last-mentioned plea in defence, relied on by the Commission in the alternative, the applicant — referring to Articles 212 of the EEC Treaty and 24 of the Treaty establishing a Single Council and a Single Commission of the European Communities, to Article 72 of the Staff Regulations, and also to the publication requirements laid down for Council regulations — maintains that the Commission's contention that the sickness insurance rules have the same legal force as the Staff Regulations is incorrect.

70 At the hearing, the applicant stated that he could accept an interpretation of Article 72(1) of the Staff Regulations, according to which reimbursement of sickness expenses should be at a rate of 'around' 80, 85 or 100% as the case may be.

Findings of the Court

71 Article 72(1) of the Staff Regulations provides that it may be supplemented by 'rules drawn up by agreement between the institutions of the Communities'. The Council, as author of the Staff Regulations, therefore proceeded on the basis that the rules which it adopted itself — the Staff Regulations — do not contain all the rules applicable to social security for officials. It created — in addition to the possibility of formal amendment of the Staff Regulations by means of a regulation — a second and separate means of legislating in this field, which it entrusted to the institutions acting in agreement. The institutions, including the Council itself, are thus empowered by Article 72(1) of the Staff Regulations to adopt provisions operating in conjunction with the Staff Regulations.

72 That power is in conformity with the Treaty. There is no transfer to the other institutions of legislative competence properly so called since the adoption of the rules presupposes agreement between the institutions, including, therefore, that of the Council, which granted that power. The Council thus retains the power to prevent the adoption of any provision which it considers inappropriate.

73 It must also be borne in mind that the Court of Justice has held in general terms that by providing that an official and his spouse are covered against sickness up to a given percentage of the expenditure incurred, subject to rules common to all the institutions, Article 72 of the Staff Regulations leaves it to the authors of those rules to define the scope of the insurance cover in question, in keeping with the Staff Regulations and the objectives which they pursue (Case 339/85 *Brunotti*, cited above, paragraph 10). The Court thus recognized that the sickness insurance rules may contain additional provisions, provided that they do not exceed the limits laid down by Article 72 of the Staff Regulations, and rejected the argument that the Council was not authorized to delegate its powers to deal with the matter (*Brunotti*, paragraphs 12 and 14).

74 Furthermore, those additional provisions may, in principle, also include maximum limits of reimbursement. As the Court of First Instance held in *Barassi, cited above*, paragraph 33, in the absence of ceilings for reimbursement laid down in the Staff Regulations, the institutions are empowered to set such ceilings in the common implementing provisions. The Court emphasized, however, that the institutions cannot, when adopting provisions for the implementation of Article 72(1) of the Staff Regulations, and in particular when setting the ceilings for reimbursement, exceed the limits to which their power is subject by virtue of the principle of social insurance cover underlying that provision of the Staff Regulations.

75 In the present case, which concerns the reimbursement of nursing attendance costs, it must be noted that Article 72 of the Staff Regulations contains no specific rules on the subject. However, the matter is particularly complex and important. For one thing, the nursing attendance costs may be very high and the services required may, depending on the nature of the illness, be of many different kinds. Consequently, it is obvious that the joint rules must contain specific provisions in that regard.

76 The applicant considers that the sickness insurance rules cannot lawfully set a limit for reimbursement where 100% reimbursement is available, as is the position under Article 72(1) of the Staff Regulations for cases of particularly serious illnesses. That

assertion misapprehends the scope of Article 72(1) of the Staff Regulations. It must be borne in mind that, in *Pincherle*, paragraph 25, and *Barassi*, paragraph 32, this Court has already held that the reimbursement rates of 80% or 85% provided for in Article 72(1) of the Staff Regulations must, in view of the terms of that provision, be regarded as constituting the maximum reimbursable amount and do not therefore imply an obligation to reimburse members and persons covered by their insurance at those rates in every case. Furthermore, that reasoning remains entirely valid where the 100% rate provided for by that same provision is applicable.

77 That conclusion necessarily follows from the very way in which the Joint Scheme is organized. Its resources are limited to the contributions of members and of the institutions and, to ensure its financial equilibrium, there must be a correlation between expenditure and contributions. Since no minimum threshold for reimbursement is laid down by Article 72(1) of the Staff Regulations, it is for the Community institutions, acting by agreement, to deal with the reimbursement of nursing attendance costs, having regard only to the available resources and to the abovementioned principle of social insurance cover. It follows that in the case of nursing attendance costs for a serious illness, the rate of reimbursement may be lower than the 100% rate provided for as a maximum limit in Article 72(1) of the Staff Regulations.

78 As regards the contested statement of 5 July 1991, the Court has already determined that the amount reimbursed corresponds to 92% of the nursing attendance costs incurred by the applicant, only the ceiling provided for by Section X(2)(c) of Annex I being applied. The Court considers that a difference between the actual rate of reimbursement and the maximum rate of reimbursement of only eight percentage points cannot be regarded as a breach of the principle of social insurance cover. This assessment is supported by the fact that the applicant himself stated that he could accept a reimbursement of 'around' 100%. The provisions of the new sickness insurance rules on which the contested statement was based do not therefore go beyond the limits laid down by Article 72(1) of the Staff Regulations and it is unnecessary in this case to determine the specific rates of reimbursement below which those limits should in general, for all reimbursements of nursing attendance costs, be regarded as not having been observed.

79 Finally, it must be borne in mind that the reimbursement rates which the applicant fears may in certain circumstances in the future be applied to him, which he puts at 35.77% and 21.72%, bear no relation to the statement of 5 July 1991 to which these proceedings relate. The circumstances of this case do not therefore allow those rates to be examined. The same applies to the argument that the applicant purports to base on the exceptional nature of the special reimbursement provided for in Article 72(3) of the Staff Regulations and the administrative difficulties connected with the implementation of that provision. Since the applicant did not apply for any such special reimbursement, that argument is irrelevant to the decision to be given in this case (see *Pincherle*, cited above, paragraph 30).

80 It follows from the foregoing considerations that the plea as to infringement of Article 72(1) of the Staff Regulations must be rejected.

Second plea in law: breach of vested rights

Arguments of the parties

81 The applicant claims that an official can claim a vested right if the events giving rise to that right occurred under a particular set of staff regulations prior to an amendment decided upon by the Community authority (Case 28/74 *Gillet* v *Commission* [1975] ECR 463, at 473). In this case, the relevant events were the onset of his wife's illness and its recognition as a serious illness, both of which took place under the sickness insurance rules previously in force. The reimbursement procedures, as laid down under the former rules, cannot therefore be amended to the disadvantage of the applicant who, on those occasions, was induced to take certain decisions as to how to deal physically and financially with the sickness in question. In order to be able to determine the financial consequences of an illness whose duration was, by definition, unforeseeable, the applicant maintains that he could obviously act only by reference to the legal situation with which he was familiar, namely the principle of 100% reimbursement under the implementation procedures which he knew about at the time, namely reimbursement of double the maximum amount then in force. The applicant's entitlement to 100% reimbursement, under the abovementioned procedures, therefore arose at that time and thus constitutes a vested right. That analysis, he claims, is supported by the fact that the principle of 100% reimbursement has not been changed, but in practice it has been nullified solely as a result of the new rules.

82 In reply, the Commission states that the decision cited by the applicant is not applicable to this case since the events giving rise to the right in question post-dated the entry into force of the new rules. The applicant was covered by the former rules for the expenses incurred in respect of his wife's illness before 1 January 1991. On the other hand, the new rules are applicable only to expenses incurred after that date.

83 In that connection, the Commission refers to the judgments of the Court of Justice in Case 112/80 *Dürbeck* v *Hauptzollamt Frankfurt am Main-Flughafen* [1981] ECR 1095, paragraph 48, and in Case 127/80 *Grogan* v *Commission* [1982] ECR 869, paragraph 15, whose relevance to this case is, however, disputed by the applicant. Finally, the Commission considers that the position taken by the applicant would give rise to an absurd situation. It would mean that, in the event of a protracted illness, the procedures for reimbursement of the medical expenses incurred would have to be regarded as a vested right as from the onset of the illness, with the result that a review of the basis of reimbursement after a certain period, in particular by reference to the duration of the illness, would become impossible.

Findings of the Court

84 It need merely be observed that since neither Article 72(1) of the Staff Regulations nor the sickness insurance rules provide for fixed reimbursement rates for nursing attendance costs but only for maximum rates, the mere fact that that article has been applied by the Community institutions for a certain time in a manner that was particularly favourable to those concerned is not such as to confer on them a vested right. The applicant, who has enjoyed an advantage consisting in the favourable application, over a certain period, of Article 72(1) of the Staff Regulations, which also, according to its terms, allows for a less favourable application, cannot therefore claim a vested right to maintenance of that advantage (judgment of the Court of Justice in Cases 133/85 to 136/85 *Rau and Others* v *Balm* [1987] ECR 2289, paragraph 18).

85 Furthermore, the Court of Justice held in Case 84/78 *Tomadini* v *Amministrazione delle Finanze dello Stato* [1979] ECR 1801, paragraph 21, and in *Dürbeck*, cited above, paragraph 48, in relation to observance the principle of the protection of legitimate expectations, that new rules cannot be prevented from applying to the

future effects of situations which arose under the earlier rules, particularly in a field involving constant adjustment to the variations in the economic situation. The application to this case of the view expressed in that case means that the future effects — in this case the expenses incurred in the future — of a protracted illness which started whilst a given set of rules was in force are, if necessary, governed as from a specified time by new rules, which may be less favourable than the earlier rules; it should also be noted that the reimbursement of expenses associated with illness is precisely one of those areas which entails constant adjustment of the applicable rules in order to take account of the available resources and the need to maintain financial equilibrium.

86 Consequently, the plea as to the infringement of vested rights must be rejected.

Third plea in law: breach of the general duty to have regard for the welfare of officials

Arguments of the parties

87 The applicant relies on Article 24 of the Staff Regulations and the relevant case-law of the Court of Justice, according to which the purpose of that provision is to provide officials and other servants in active employment with protection both at the present time and in the future (Case 229/84 *Sommerlatte* v *Commission* [1986] ECR 1805). That reference to protection for the future is, in the applicant's view, particularly relevant to this case. The adoption, without any collective or individual consultation beforehand with the retired people concerned, of measures which seriously and unilaterally undermine their rights runs counter to the duty to have regard for the welfare of officials.

88 The applicant, referring to the judgment of the Court of Justice in Cases 33/79 and 75/79 *Kuhner* v *Commission* [1980] ECR 1677, also observes that the duty to have regard for the welfare of officials reflects the balance between the reciprocal rights and obligations in relations between the public authority and civil servants. That duty is bound up with a fundamental principle of employment law, namely that a protracted employment relationship entails a special duty to protect the employee and to provide for his welfare (see the Opinion of Advocate General Reischl in Case 191/81 *Plug* v *Commission* [1982] ECR 4250, at 4256). In this case, that duty

to have regard for the welfare of officials was breached as a result of the fact that, when the contested economy measures were adopted, no account was taken of the interests of the persons particularly concerned, namely those for whom the nursing attendance costs constitute a significant item of expenditure (retired people above all, but also recipients of an invalidity pension): when those measures were being drawn up, it was not thought at any stage to consult people in those categories even though the measures in question would affect retired people to a substantially greater extent than officials in active service.

89 The Commission, on the other hand, considers that it is settled law that Article 24 of the Staff Regulations is not concerned with the defence of officials by an institution against acts of the institution itself, since their defence is governed by other provisions of the Staff Regulations (Case 178/80 *Bellardi-Rici and Others* v *Commission* [1981] ECR 3187, paragraph 23). The general duty to have regard for the welfare of officials does not prevent the administration from introducing certain restrictive measures in matters of social security, particularly since the Commission is under an obligation in that connection to the whole of its staff and must therefore ensure the proper functioning of the system of social protection.

90 Finally, the Commission contends that, in so far as the applicant claims that the duty to have regard to the welfare of officials was breached by the adoption of the economy measures in question, the alleged breach is based on the assumption that the Commission should have adopted special rules for retired people. However, that premise derives from the view that retired people are in a special situation which calls for distinct rules. To that extent, it is subsumed by the fourth plea in law.

Findings of the Court

91 In response to the applicant's reference, in this context, to Article 24 of the Staff Regulations in support of the view that the new sickness insurance rules should not have been adopted by the Community institutions until after consultation with the representatives of retired officials, the Commission is right to point out that it is settled law that that article is not concerned with the defence of officials by the Community institutions against acts of the institutions themselves, the review of which is governed by other provisions of the Staff Regulations (Case 98/81 *Munk*

v *Commission* [1982] ECR 1151, paragraph 21, *Plug* v *Commission*, cited above, paragraph 21, and *Bellardi-Rici and Others* v *Commission*, cited above, paragraph 23). This part of the third plea in law must therefore be rejected.

92 The applicant claims that there was a breach of the duty to have regard for the welfare of officials because, when the sickness insurance rules were amended, no account was taken of the interests of retired officials, for whom nursing attendance expenses constitute a more significant outgoing than for officials in active service. It must be remembered that the duty of the administration to have regard for the welfare of its officials reflects the balance provided for by the Staff Regulations between the reciprocal rights and obligations in relations between the public authority and civil servants. It is true that that duty implies in particular that, when taking a decision concerning the situation of an official, the authority must take account of all the factors liable to shape its decision and that, in so doing, it takes account not only of the interests of the service but also of the interests of the official concerned (see, for a summary of the settled case-law, the judgment of the Court of First Instance in Joined Cases T-33/89 and T-74/89 *Blackman* v *Parliament* [1993] ECR II-249, paragraph 96).

93 However, as the Commission was right to point out, the applicant's complaint in this case is really a claim that when the new sickness insurance rules were adopted special arrangements should have been made for retired officials alone, which presupposes that such officials are in a special situation which calls for distinct rules. Thus, this part of the third plea in law essentially overlaps with the fourth plea alleging a breach of the principle of non-discrimination and will therefore be considered in conjunction with that plea.

Fourth plea in law: breach of the principle of non-discrimination

Admissibility

94 The Commission contends that this plea should be declared inadmissible in so far as the applicant criticizes it, essentially, for applying the same reduction in the rate

of reimbursements to officials in active service and retired officials, even though the latter have far more limited financial resources than the former (material discrimination). That charge was not contained in the applicant's complaint.

95 In reply, the applicant states that his complaint of 30 September 1991 expressly refers to the complaints which he made previously on 30 March and 12 June 1991. The latter complaint, he says, mentions material discrimination. The Commission was therefore in a position to determine with sufficient precision the tenor of the applicant's complaint, having examined it, moreover, in its decision of 12 March 1992 rejecting the abovementioned complaint of 30 September 1991.

96 In that connection, it must be borne in mind that the aim of the requirement, laid down in settled case-law, that the charges contained in a complaint must be consistent with the pleas put forward in an application is to permit and encourage the amicable settlement of differences which have arisen between officials and the administration and that, in order to comply with that requirement, it is essential that the administration should be in a position to ascertain with a sufficient degree of certainty the complaints or wishes of the persons concerned (Case 52/85 *Rihoux and Others* v *Commission* [1986] ECR 1555, paragraph 12, and Case T-1/91 *Della Pietra* v *Commission* [1992] ECR II-2145, paragraph 24). In this case, the complaint of 30 September 1991 contains no express submission but refers twice to the complaints of 30 March and 12 June 1991, following which the action was brought in Case T-6/92. The supplementary complaint of 12 June 1991 alleges, *inter alia*, material discrimination. The Commission took note of that supplementary complaint in the present context, as is apparent from its decision of 12 March 1992 rejecting the complaint of 30 September 1991, in which it expressly examined and rejected it. It is therefore apparent that the Commission was able to ascertain with a sufficient degree of certainty the complaints or wishes of the applicant on this point. Consequently, in so far as it concerns alleged material discrimination, the plea alleging breach of the principle of non-discrimination is admissible.

Substance

— Arguments of the parties

97 The applicant alleges that, in so far as the circumstances of retired officials and those of officials in active service differ greatly as regards their financial resources, it is discriminatory to treat those two categories in the same way regarding the reduction in the rate of reimbursement of expenses associated with illness. It is thus precisely because the reductions at issue were decided on in the same way for those in active service and retired officials that they constitute a breach of the principle of non-discrimination, since they take no account of the difference in circumstances of the persons concerned.

98 Furthermore, such discrimination is aggravated by the fact that it appears, at first sight, probable that the specific case of expenses in respect of long-term nursing attendance in cases of serious illness affects more of those in a higher age bracket and therefore affects retired officials to a greater extent than officials in active service, which raises a presumption of disguised discrimination. It is clear that the risk of sickness increases with age, with the result that recourse to nursing attendance, above all in cases of serious and long-term illness, is proportionally more frequent on the part of non-active officials than it is on the part of those in active service.

99 The applicant further states that most legal systems take account of income in relation to the level of taxes and social security contributions. Moreover, the Commission itself gives an example of that attitude where it states (p. 14 of its defence) that, when it decided to maintain for the reimbursement of certain expenses the rule that the maximum amount would be doubled, it did so by virtue of the principle that certain expenses represent a heavy burden for officials in general and must therefore be reimbursed to a greater extent than expenses which normally constitute less of a burden. The Commission thus recognizes, in the applicant's view, that the way in which economy measures are borne should take account of the financial burden resulting from the medical services concerned.

100 As regards the alleged presumption of disguised discrimination, the applicant regrets that he is unable to provide further figures in support of his analysis which, he says, is based on common sense, whereas the Commission, by using existing electronic calculation methods, could easily provide a reply on that point. The Commission's statement (p. 12 of its defence) that the sickness insurance deficit is caused not only by officials in active service but also by retired officials confirms that the relevant administrative authority is in a position to provide further information. The applicant therefore considers that, applying the judgment of the Court of Justice in Case 109/88 *Danfoss* [1989] ECR 3199 by analogy, it is for the Commission to rebut that presumption.

101 In reply, the Commission states that, whilst there are important differences between officials in active service and retired officials, particularly as regards their financial resources, it does not follow that a general scheme applicable on certain occasions, for example cases of illness, in respect of which those categories do not differ at all, is thereby discriminatory. The applicant's thesis would also mean that any general social security scheme providing for reimbursement of medical expenses would have to be regarded as incompatible with the principle of non-discrimination whenever it disregarded differences of income between certain categories of insured persons. If that reasoning is taken to its conclusion, in the Commission's view, the scheme would also have to take account of the difference in resources between categories of officials by reason of their different remuneration.

102 Furthermore, even if the applicant were able to show that older people, and therefore retired officials, more often incur the expenses in question, there would still be no basis for any presumption of disguised discrimination. It should not be forgotten, in that context, that retired persons do not constitute a separate category but are officials who have reached a certain age and have stopped working. In other words, all officials are liable to be confronted, at a more advanced age, with higher expenses caused by a long illness.

Findings of the Court

103 Before the Court considers whether the contested statement and the provisions of Section X(2)(c) of Annex I, on the basis of which the statement was prepared, are discriminatory as regards the applicant, as a retired official, it must be borne in mind that it is settled law that the principle of non-discrimination prohibits treating in an identical manner situations which are different or treating in a different manner situations which are identical (see, for example, Case 817/79 *Buyl and Others* v *Commission* [1982] ECR 245, paragraph 29, and Case 1253/79 *Battaglia* v *Commission* [1982] ECR 297, paragraph 37).

104 As regards the charge of material discrimination against retired officials, it must be emphasized that the relevant point of comparison for consideration of this allegation is not the personal remuneration of those concerned, which depends on their grade, which may be anywhere between D4, step 1, and A1, step 6, but the amount laid down for reimbursement of nursing attendance costs. It is common ground that the provisions of the new sickness insurance rules draw no distinction, in that respect, between officials in active service and retired officials. Moreover, as is illustrated by the case of the applicant, whose pension amounts to around BFR 300 000, it cannot be stated generally that retired officials have at their disposal more limited financial resources than active officials in all cases in accordance with a fixed pattern.

105 As regards the disguised discrimination alleged by the applicant deriving from the fact that old people, including retired officials, are more often afflicted by long illnesses and necessarily incur, in particular, greater nursing attendance costs, it must be observed that retired officials cannot be regarded as a separate category of insured persons which, merely because it comprises former officials, is particularly susceptible to the risk of incurring such expenses. That is a general risk inherent in life, which can befall any official, whether active or retired, at any time, for example following a traffic or sports accident.

106 In that context, the Commission was right to emphasize that retired officials must be regarded as officials who have reached a certain age and stopped working. While it is true that officials are liable, at a more advanced age, to incur higher expenses resulting from long illnesses, it is reasonable to expect them, in due time, that is to say whilst in active service, to have taken proper precautions, such as setting up a savings fund, acquired real property or taken out a supplementary private sickness insurance policy to enable them, if necessary, to meet the expenses of illness more particularly associated with old age. In view of the wording of Article 72(1) of the Staff Regulations, which lays down only maximum rates of reimbursement, the adoption of such precautionary measures was and continues to be advisable since a reduction in the rate of reimbursement is possible at any time. Failure to take such measures cannot, in those circumstances, be imputed, in the form of an allegation of discrimination, either to the authors of the Staff Regulations or to those of the sickness insurance rules.

107 The plea alleging breach of the principle of non-discrimination, which encompasses the second part of the plea alleging breach of the duty to have regard for the welfare of officials must, therefore, be rejected as unfounded.

Fifth plea in law: breach of the principle of proportionality

Arguments of the parties

108 The applicant maintains that, in so far as the limitation of reimbursements under the joint scheme was inspired by the concern to reduce and eliminate any deficit in the sickness insurance system, the Community institutions should have observed the principle of proportionality. By virtue of that principle, a balance must be maintained between the legitimate objectives of a measure, on the one hand, and the resultant burdens for all the persons affected or some of them, on the other. In choosing between the various means available, preference should have been given to the less burdensome possibilities, which would have made it necessary, at the very least, to consider whether the deficit might not be limited by other means (for example, by the introduction of appropriate control measures to reduce fraud, an increase in members' contributions or an additional contribution from the Member States) and not solely by a discriminatory reduction relating to a single group of services. Moreover, observance of the principle of proportionality would have

required account to be taken of the medical benefits of the expenditure in question compared, for example, with the expense of cures at watering places.

109 The Commission regards that plea as irrelevant. The applicant is in fact challenging the sickness insurance rules as a whole. However, that is not the purpose of an action for annulment and cannot be, since an application alleging the illegality of the sickness insurance rules, as amended, is inadmissible.

110 At the hearing, the applicant asked the Court to order the Commission to produce the minutes of the Management Committee meetings preceding the latter's adoption of its Opinion No 3/89 or, in the event that — as the Commission has stated — such minutes do not exist, a list of the proposals made by the Management Committee in that connection. Finally, he stated that if Article 72(1) of the Staff Regulations is to be interpreted as meaning that the rates of reimbursement provided for therein are not fixed rates, officials are not in a position to judge whether it is necessary, and if so to what extent, to take out supplementary private insurance. He admits, however, that he took out additional insurance of that kind in Canada.

Findings of the Court

111 It is settled law that the principle of proportionality requires that the acts of the Community institutions, particularly where they impose financial burdens, must not exceed what is appropriate and necessary to attain the objective pursued, on the understanding that, where there is a choice between several appropriate measures, the least onerous measure must be used (see, for example, Case 15/83 *Denkavit Nederland* [1984] ECR 2171, paragraph 25, and Case 265/87 *Schräder* v *Hauptzollamt Gronau* [1989] ECR 2237, paragraph 21).

112 The first point to note is that for determination of the rates and procedures for reimbursement of expenses associated with illness, and in particular nursing

attendance costs, the Community institutions enjoy considerable latitude when adopting, by agreement, the rules provided for in Article 72(1) of the Staff Regulations. This area, the complexity of which, in view of the requisite financial balance of the joint scheme, has already been noted, calls for constant adjustment to variations in the financial situation (see paragraph 75 above). Therefore, the legality of new measures reducing the rates of reimbursement could be affected only if they were manifestly inappropriate. However, it is common ground that, with the adoption of the new sickness insurance rules, the rates of reimbursement of certain medical expenses, including nursing attendance costs, were reduced in order to achieve economies and thus curb the deficit of the joint scheme and it is undeniable that the reduction in the reimbursement of such costs is, in principle, a means appropriate to the aim pursued, namely reduction of that deficit.

113 Furthermore, as is apparent from the actual wording of Article 72(1) of the Staff Regulations and in particular the second and third sentences of the first subparagraph, that provision allows the Community institutions, acting in agreement, to draw distinctions, regarding the conditions for and the amount of reimbursement of medical expenses, between the various types of illness, which may also involve a distinction between several categories of costs and, consequently, different rates and upper limits of reimbursement. Accordingly, in so far as the applicant purports to compare the reimbursement of nursing attendance costs with that of other medical expenses, his arguments are irrelevant.

114 Finally, the Court considers that in a case such as this, in which the rules at issue allowed reimbursement of 92% of the nursing attendance expenses incurred and the amount borne by the applicant was a mere BFR 6 300, there can be no question of any breach of the principle of proportionality. In any event, the circumstances of this case have not disclosed any factor of such a kind as to demonstrate any such breach.

115 In response to the applicant's claim that the authors of the rules should, with a view to reducing the deficit of the joint scheme, have chosen other, less onerous, measures than the imposition of a ceiling for the reimbursement of nursing attendance

expenses, it must be stated that such reasoning calls for an examination of the entire system of reimbursement of expenses for all illnesses covered by the new sickness insurance rules. Such an assessment would go beyond the limits of judicial review of the relevant provisions, the application of which, in this case, yielded a result particularly favourable to the applicant.

116 Since it is unnecessary to make an overall assessment of the new sickness insurance rules, the applicant's request for a measure ordering the production of certain internal documents of the Management Committee of the joint scheme concerning the various proposals for amendments to those rules must be rejected as irrelevant.

117 Consequently, the plea alleging breach of the principle of proportionality likewise cannot be upheld.

118 Thus, since consideration of the five pleas in law put forward by the applicant has disclosed no factor of such a kind as to affect the legality of the relevant provisions of the new sickness insurance rules, the objection of illegality raised by the applicant under Article 184 of the Treaty must also be rejected as unfounded.

119 It follows from all the foregoing that, in Case T-52/92, the applicant has not been able to establish that his entitlement to the reimbursement of nursing attendance costs exceeded the amount awarded to him by the contested decision. Consequently, the action must be dismissed in its entirety as unfounded. In the interests of economy of procedure, it is therefore unnecessary to consider the admissibility of the action.

Costs

120 The applicant claims, in the alternative, that the second subparagraph of Article 87(3) of the Rules of Procedure should be applied on the ground that, in Case T-6/92, the Commission confined itself, in the decision rejecting his complaint, to contesting its admissibility and that, in Case T-52/92, the decision rejecting his complaint was excessively laconic. For those reasons, he claims, he was unable to prepare any defence on the substance in full knowledge of the facts.

121 The Commission defers to the judgment of the Court of First Instance to decide whether or not it caused costs to be incurred by its own conduct. In any event, the applicant has provided no proof whatsoever that such conduct was vexatious.

122 Under the first subparagraph of 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. The Court considers that, in the circumstances of this case, those provisions should be applied. The administrative files and other documents before the Court have not disclosed anything to show that the Commission unreasonably or vexatiously caused the applicant to incur costs within the meaning of the second subparagraph of Article 87(3) of the Rules of Procedure. Consequently, the parties must be ordered to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Dismisses the action in Case T-6/92 as inadmissible;

2. Dismisses the action in Case T-52/92 as unfounded;

3. Orders the parties to bear their own costs.

Bellamy Kirschner Saggio

Delivered in open court in Luxembourg on 26 October 1993.

H. Jung C. W. Bellamy

Registrar President