

JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

14 December 1995 *

In Case T-285/94,

Fred Pfloeschner, a former official of the Commission of the European Communities, residing in Geneva, Switzerland, represented by G. Vandersanden, of the Brussels Bar, with an address for service in Luxembourg at the offices of Fiduciaire Myson SARL, 1 Rue Glesener,

applicant,

v

Commission of the European Communities, represented by Joseph Griesmar, Legal Adviser, and, in the oral procedure, by Ana Maria Alves Vieira, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: French.

supported by

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

intervener,

APPLICATION for annulment of the Commission decision contained in the applicant's retirement pension statement for December 1993, in so far as it applies a weighting of 100, and for an order that the Commission draw from the judgment annulling that statement all the appropriate conclusions in law regarding both the retirement pension and the survivor's pension,

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

composed of: B. Vesterdorf, President of the Chamber, D. P. M. Barrington and A. Saggio, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 15 September 1995

gives the following

Judgment

Facts and procedure

1 Mr Pfloeschner, a Swiss, is a former official of the Commission. He was recruited as an interpreter on 16 January 1958 and was compulsorily retired on 31 July 1993.

2 He has received a retirement pension since August 1993. At that time he was already in receipt of a survivor's pension because his wife, an official of the Council, had died in 1968.

3 In the statement which he made on 24 June 1993, preparatory to the calculation of his retirement pension, the applicant declared that he lived in Brussels, Belgium, and that he would subsequently establish his residence in Switzerland (paragraph (a) of the statement).

4 In its 'statement determining retirement pension rights' of 2 August 1993, the Commission decided that the pension payable to Mr Pfloeschner would be paid in Brussels and that the weighting for Belgium would be applied to it (Chapter C, paragraph (7), 'Increases and deductions').

- 5 By letter of 26 October 1993 to the Director-General for Personnel and Administration of the Commission, the applicant gave the address of his new residence in Switzerland and asked the Commission to amend the abovementioned statement of 2 August 1993 regarding both the place of payment of the pensions payable to him and the weighting applied to them.
- 6 By decision of 10 November 1993, the Directorate-General for Personnel and Administration of the General Secretariat of the Council made certain changes regarding, first, Mr Pfloeschner's address and bank account and, secondly, the currency in which the survivor's pension was to be paid to him. In particular, it was decided that, since 'the recipient of the pension has stated that he is to reside in a non-member country (Switzerland), the weighting applicable to the pension (will be) 100'. That decision was addressed to the department dealing with pensions and relations with retired employees of the Commission and a copy was sent to the applicant.
- 7 By its 'statement of amendment No 1 to the statement of 2 August 1993 determining retirement pension rights', dated 1 December 1993, the Commission informed the applicant of the changes affecting his rights, clearly indicating that that statement served as a decision.
- 8 On 3 January 1994, the applicant received his retirement pension and survivor's pension statements for December 1993. They show that the weighting used for calculating the pensions was 100.
- 9 On 2 February 1994, the applicant lodged a complaint under Article 90(2) of the Staff Regulations of Officials of the European Communities. The Commission rejected that complaint by decision of 20 June 1994.

- 10 The applicant therefore brought the present action by application of 14 September 1994.
- 11 By an application lodged at the Registry of the Court of First Instance on 16 January 1995, the Council sought leave to intervene in support of the forms of order sought by the defendant. By order of 22 February 1995, the President of the Second Chamber of the Court of First Instance granted the application to intervene.
- 12 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure without any preparatory inquiry. The hearing took place on 15 September 1995.

Forms of order sought by the parties

- 13 The applicant claims that the Court should:
- declare the action admissible and well founded;
 - consequently, annul the applicant's retirement pension statement for December 1993, in so far as it indicates a weighting for Switzerland of 100, the applicant, a Swiss national, having returned to his country for his retirement;
 - order the Commission to draw all the appropriate conclusions in law regarding calculation of both the retirement pension and the survivor's pension;

- apply default interest to the amounts due at the rate of 8%;
- order the defendant to pay the costs in their entirety.

14 The defendant contends that the Court should:

- declare the action inadmissible as regards the second claim and unfounded in all other respects;
- order the applicant to bear his costs.

15 The intervener claims that the Court should:

- declare that action inadmissible as regards the second claim and unfounded in all other respects;
- order the applicant to bear his costs.

Admissibility

16 The Commission and the intervener contend that the claim that the Court should order the Commission to ‘draw all the appropriate conclusions in law (from annulment of the contested measure) regarding calculation of both the retirement pension and the survivor’s pension’ is inadmissible.

Arguments of the parties

- 17 The Commission, the defendant, contests the admissibility of the claim that the Court should order the Commission to 'draw all the appropriate conclusions in law (from annulment of the contested measure) regarding calculation of both the retirement pension and the survivor's pension'. In so doing, it puts forward the sole plea in law that the Court of First Instance lacks jurisdiction.
- 18 The defendant contends that it is settled case-law that the Community judicature may not issue directions to a Community institution without encroaching upon the powers of the administration. It refers in that connection to the judgments of the Court of First Instance in Case T-156/89 *Valverde Mordt v Court of Justice* [1991] ECR II-407 and Case T-22/92 *Weißenfels v Parliament* [1993] ECR II-1095 and the order of the Court of First Instance in Case T-72/91 *Moat v Commission* [1992] ECR II-1771.
- 19 It maintains that the applicant's claim would still be inadmissible even if it were to be interpreted as meaning that the Court is merely being requested to ensure that, in the event of annulment of the contested measure, the Commission takes all the action needed to comply with the judgment. No rule of law vests such power in the Community judicature and, as the Court of Justice has held, it cannot, 'without encroaching upon the prerogatives of the administration, order a Community institution to adopt the measures necessary for the enforcement of a judgment by which a decision ... is annulled' (Case 225/82 *Verzyck v Commission* [1983] ECR 1991, paragraph 19).
- 20 The Commission states, therefore, that, in the event of annulment of the contested measure, it will regularize the applicant's pension rights as from December 1993 in accordance with Article 176 of the EC Treaty. On the other hand, it has no

authority to take, in consequence of a judgment annulling a retirement pension statement, any action concerning Mr Pfloeschner's survivor's pension, since he has not contested the Council decision relating thereto.

- 21 The applicant replies that his claim is not that the Court should issue directions to the Commission but rather that it should ensure that the defendant takes the measures consequential upon any annulling judgment. Such measures consist of amending, as from the time at which the irregularity occurred, that is to say as from December 1993, the weighting applied to both his retirement pension and his survivor's pension. According to the applicant, it is precisely the annulling judgment which, by virtue of the principle of *res judicata*, makes such an amendment necessary.

Findings of the Court

- 22 As a preliminary point, the Court observes that it is settled case-law that if the Community judicature upholds an application for annulment, it may not dictate to the institution from which the contested measure emanated what action is to be taken in consequence of the judgment but must confine itself to referring the matter back to the institution concerned in view of the fact that, pursuant to Article 176 of the Treaty, it is the institution which adopted the contested act that must take the necessary measures to comply with it (see in particular Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* [1961] ECR 1).
- 23 Furthermore, even it is considered that, as he maintains, the applicant is merely asking the Court to oversee the measures to be taken by the Commission to

comply with the judgment, the Court still has no jurisdiction to do so. A supervisory function of that kind, which, in order to be effective, would call for the Community judicature to be empowered to direct the defendant as to what measures should be adopted, does not fall within the powers conferred on it by the Treaty. According to Article 176 of the Treaty, it is the institution from which the measure emanates that has both the duty and the power to adopt the measures necessary to give full effect to the judgment annulling the measure concerned.

24 It follows that the plea of inadmissibility is well founded and that the applicant's claim that the Commission should be ordered to draw, from the annulment of the pension statement, 'all the appropriate conclusions in law regarding calculation of both the retirement pension and the survivor's pension' is inadmissible.

Substance

A — *The claim for annulment*

5 In support of his claim for annulment, the applicant raises an objection of illegality against Council Regulation (ECSC, EEC, Euratom) No 2175/88 laying down the weighting applicable in third countries (OJ 1988 L 191, p. 1, hereinafter 'Regulation No 2175/88') and puts forward four pleas in law, alleging breach of the principle of the protection of legitimate expectations, breach of the principle of equal treatment, breach of the principle of estoppel and breach of the principle of good management and sound administration.

The objection as to the illegality of Regulation No 2175/88

Arguments of the parties

- 26 The applicant submits that Regulation No 2175/88 is illegal in that Article 3 thereof provides that 'the weighting to be applied to a pension where the recipient has established his residence in a third country shall be 100'. He bases that objection of illegality on three grounds of challenge: *ultra vires*, breach of the principle of non-discrimination and infringement of Article 82 of the Staff Regulations.
- 27 In support of his first ground of challenge the applicant claims that, by adopting the contested regulation, the Council acted *ultra vires* because that regulation, which lays down the rules for calculating pensions, extends, for no valid reason, the scope of the basic regulation, namely Council Regulation (Euratom, ECSC, EEC) No 3019/87 of 5 October 1987 laying down special and exceptional provisions applicable to officials of the European Communities serving in a third country (OJ 1987 L 286, p. 3, hereinafter 'Regulation No 3019/87'). That regulation, which added Annex X to the Staff Regulations, relates, in his view, only to serving officials and not to pensioners.
- 28 The applicant's second ground of challenge is based on breach of the principle of non-discrimination. In his view, since, as the Commission stated in its reply to his complaint, the benefit of the weighting granted by Regulation No 3019/87 to officials employed in a non-member country is justified by 'their special situation' and 'the cost of living in the country of employment', that benefit should also be available to pensioners in view of the fact that both those factors affect pensioners too. It follows, according to the applicant, that the difference of treatment as between officials and pensioners is unjustified.

- 29 The applicant's third ground of challenge is that the fixing of a weighting of 100 for all non-member countries where pensioners live is contrary to Title V of the Staff Regulations, in particular Article 82. As most recently amended, by Council Regulation (EEC, Euratom, ECSC) No 2074/83 of 21 July 1983 amending the Staff Regulations of officials and the conditions of employment of other servants of the European Communities (OJ 1983 L 203, p. 1, hereinafter 'Regulation No 2074/83'), that article provides that a recipient of a pension residing inside or outside the Community is entitled to have a weighting applied to his pension and that it is only where no figure has been fixed that the weighting is 100. Therefore, contrary to Article 3 of Regulation No 2175/88, Mr Pfloeschner is entitled to application of the weighting fixed for Switzerland, which is 144.5. He also maintains that no reasons are given in Regulation No 2175/88 for such a departure from the text of the Staff Regulations.
- 30 The Commission contends that that objection has no basis in law. Contrary to the applicant's view, Regulation No 2175/88 cannot be regarded merely as a regulation for the implementation of Regulation No 3019/87. The reference in it to, in particular, Article 13 of Annex X to the Staff Regulations is not sufficient to justify such a conclusion. According to the defendant, the legal basis of that regulation is not merely Regulation No 3019/87 (in other words, Annex X to the Staff Regulations) but rather the Staff Regulations in their entirety.
- 31 Furthermore, according to the Commission, Regulation No 2175/88 contains only rules derogating from Council Regulation (Euratom, ECSC, EEC) No 3784/87 of 14 December 1987 adjusting the remuneration and pensions of officials and other servants of the European Communities and the weightings applied thereto (OJ 1987 L 356, p. 1, hereinafter 'Regulation No 3784/87'). They derogate in particular from the rules governing the weightings applicable to the pensions of officials residing in non-member countries. Since a measure can be repealed or amended by the authority that issued it, the Council did not act *ultra vires*.

- 2 As regards the applicant's allegation of infringement of Article 82 of the Staff Regulations, the Commission observes that he draws no inference from that observation, which is of an entirely incidental nature. More specifically, he did not allege in his application that Regulation No 2175/88 was unlawful by reason of infringement of the Staff Regulations. According to the Commission, the plea to that effect advanced by the applicant in his reply is a new plea and is therefore inadmissible.

As to the merits of that plea, the Commission submitted, at the hearing, that, contrary to the applicant's assertion, Regulation No 2175/88 is entirely compatible with the Staff Regulations. The provision which sets the weighting at 100 for pensioners residing in non-member countries is consistent with Article 82 of the Staff Regulations, which does not require the application to pensions of the weightings fixed for remuneration. The Commission maintains in that connection that such treatment is in conformity with settled case-law to the effect that the circumstances of a serving official differ considerably from those of a retired employee, so that it is not discriminatory for the Community legislature to provide for treatment of pensioners that is not the same as that accorded to serving officials.

- 33 The Council, as intervener, supports the Commission's analysis: like the Commission, it considers that the measure regarded by the applicant as illegal is not merely a regulation for the implementation of Regulation No 3784/87. It adds that, in any event, the real issue is whether the regulation against which the objection of illegality was raised is in conformity with the Staff Regulations.

- 34 The Council states, first, that the regulation in question did not, as claimed by the applicant, repeal the third subparagraph of Article 82(1) of the Staff Regulations but only Regulation No 3784/87: that provision of the Staff Regulations does not prohibit the fixing of a neutral weighting like the one at issue, which affects the pensions of all those residing in non-member countries. In its answer to the questions put to it by the Court, the Council explained that, before the adoption of Regulation No 2175/88, there were for several years weightings specifically applicable to pensioners. The contested regulation abolished those specific weightings by

providing, in accordance with the wording of Article 82, for the application to those pensions of a weighting of 100.

35 Secondly, the Council stated at the hearing that the rules in force before those introduced by Regulation No 2175/88 provided for the application to the pensions of retired persons residing in a non-member country of the weighting fixed for officials employed in those same countries. It explained that when the provision at issue was adopted the view prevailed that those rules, introduced by Regulation No 2074/83, were very advantageous and could not therefore be transposed *mutatis mutandis* to an exceptional situation, like that of pensioners residing in a non-member country.

36 Thirdly, the Council stated, again at the hearing, that in any event the weighting fixed by Regulation No 2175/88 is suitable for most pensioners because only 30% of countries have a weighting higher than 100, the figure applicable to Belgium and Luxembourg.

Findings of the Court

(a) The admissibility of the third ground of challenge in support of the objection of illegality: infringement of the Staff Regulations

37 According to the Commission, the third ground of challenge in support of the objection of illegality, namely infringement of the Staff Regulations and in particular Article 82 thereof, is out of time since, it contends, the applicant did not include it in his application.

38 Article 44(1)(c) of the Rules of Procedure provides that the application must state the subject-matter of the proceedings and ‘a summary of the pleas in law on which the application is based’ and Article 48(2) prohibits, as a general rule, the introduction of new pleas in the course of the proceedings.

39 It is clear from the documents before the Court that, in his application, Mr Pfloeschner expressly raised an objection of illegality against Regulation No 2175/88 and, in so doing, referred to a conflict between that regulation and Article 82 of the Staff Regulations. Moreover, in his reply he emphasized that the defendant had not replied to that objection.

40 It follows that the Commission’s argument is unfounded and must be rejected.

(b) The merits of the objection of illegality

41 It should be noted, as a preliminary point, that the first and third grounds of challenge in support of the objection of illegality, alleging *ultra vires* and infringement of the Staff Regulations, are closely linked in that they both concern the determination of the legal basis of Regulation No 2175/88.

42 According to the applicant, that regulation is based solely on Regulation No 3019/87, whereas, according to the Commission and the Council, it is based on both the latter regulation and the Staff Regulations, in particular Article 82 thereof; the applicant, on the other hand, alleges infringement of the latter provision.

43 In the second reference in the preamble to Regulation No 2175/88, the Council expressly refers to the Staff Regulations and in particular Article 13 of Annex X thereto, that annex having been added by Regulation No 3019/87. In Article 1 and the annex thereto, Regulation No 2175/88 lays down the weightings referred to in Articles 12 and 13 of Annex X to the Staff Regulations. Articles 3 to 9 of that regulation provide that those weightings are not applicable to the pecuniary rights of persons living in third countries who are not in active employment. Article 3, in particular, provides that 'in accordance with the third subparagraph of Article 82(1) of the Staff Regulations, the weighting to be applied to a pension where the recipient has established his residence in a third country shall be 100'. The reasons for that provision are given in the fourth recital in the preamble to the contested regulation, as follows: 'principally because of the new provisions governing the weightings which apply specifically and exclusively to the remuneration of staff serving in third countries in so far as they are payable in local currency, these weightings, which are applied by way of derogation, cannot apply to the pecuniary rights of persons living in third countries who are not in active employment'.

44 It follows from the foregoing that Regulation No 2175/88 both fixes the weightings referred to in Regulation No 3019/87 and expressly provides that those weightings are not applicable to the pecuniary rights of those no longer in active employment, and in particular, as is apparent from Article 3, to pensions.

45 Since Regulation No 3019/87, which is a regulation amending the Staff Regulations, relates only to officials employed in non-member countries, the legality of the provision at issue, namely Article 3 of Regulation No 2175/88, which sets at 100 the weighting applied to the pensions of retired persons residing in non-member countries, must be examined in the light of Article 82 of the Staff Regulations, which lays down the relevant general provisions.

46 Article 82(1) of the Staff Regulations provides that pensions are to be 'weighted at the rate fixed for the country inside or outside the Community where the recipient proves he has his residence' (second subparagraph) and that 'If the recipient

establishes his residence in a country for which no weighting has been fixed, the weighting of 100 shall apply' (third subparagraph).

It follows from the very wording of that provision that pensioners are entitled to have applied to their pensions the weighting laid down for the country in which they reside, even if they are established outside the Community. It is only where no weighting has been fixed for their country of residence that a figure of 100 must be applied to their pensions, so that the pensioners concerned do not benefit from any weighting.

47 Contrary to the contentions of the defendant and the intervener, that provision does not allow a specific weighting, of 100, to be fixed for pensioners residing outside the Community. The effect of such a weighting, in a case such as this, is equivalent to no weighting at all. In that regard, it must be noted, first, that weightings are a means of adjusting salaries and emoluments, being specifically intended to ensure equivalence of purchasing power for officials in the various countries where they are established. Secondly, it must be borne in mind that, according to the Staff Regulations, the weighting is 100 for Brussels and Luxembourg and that, for other countries, it is to be determined 'by the Council, acting by a qualified majority on a proposal from the Commission as provided for in the first indent of the second subparagraph of Articles 148(2) of the Treaty establishing the European Economic Community and 118(2) of the Treaty establishing the European Atomic Energy Community' (second paragraph of Article 64 of the Staff Regulations and Article 13 of Regulation No 3019/87).

48 Article 82(1) of the Staff Regulations, although not expressly referring to that procedure, refers to the weightings fixed for each country on the basis of the criteria mentioned here. As has been conceded by the Commission and the Council, the second and third subparagraphs of Article 82(1) of the Staff Regulations, as

amended by Regulation No 2074/83, were applied, until the entry into force of Regulation No 2175/88, in such a way that a retired person, once established in a non-member country for which a weighting had been fixed, was entitled to the application of that weighting.

49 The regulation whose legality is contested therefore restored the situation existing before the entry into force of Regulation No 2074/83, whereby no weighting was applied to the pensions of retired persons residing outside the Community. Before the entry into force of Regulation No 2074/83, Article 82(2) of the Staff Regulations provided that pensions were to be 'weighted in manner provided for in Article 64 and Article 65(2) for the country of the Communities where the person entitled to the pension declares his home to be'.

50 It follows from all the foregoing considerations that Article 3 of Regulation No 2175/88, in so far as it sets at 100 the weighting applicable to the pension of a person who proves that he resides in a non-member country, is incompatible with the second and third subparagraphs of Article 82(1) of the Staff Regulations.

51 The Court finds that, by virtue of the principle of the hierarchy of norms, a regulation of the kind under review which, as is apparent from the references in its preamble and as was confirmed by the Council at the hearing, was adopted without the procedure laid down for the amendment of the Staff Regulations having been followed (second subparagraph of Article 24(1) of the Treaty establishing a single Council and a single Commission of the European Communities and Article 10 of the Staff Regulations), cannot amend a provision of the Staff Regulations. Accordingly, Article 3 of Regulation No 2175/88 is unlawful.

52 The provision at issue having thus been found to be unlawful, it is not necessary to examine the second ground of challenge put forward in support of the objection of illegality, namely breach of the principle of non-discrimination.

53 The pension statement at issue must therefore be annulled in so far as it applies a weighting of 100 and it is unnecessary to consider the other pleas in law and arguments put forward by the parties.

B — *The claim for default interest*

54 In his application, the applicant claims that default interest at the rate of 8% should be paid on the arrears due to him.

55 It is settled case-law that an obligation to pay default interest can arise only where the amount of the principal sum is certain or can at least be ascertained on the basis of established objective factors (see in particular Case 174/83 *Ammann and Others v Council* [1986] ECR 2647, paragraphs 19 to 22, and Joined Cases T-17/89, T-21/89 and T-25/89 *Brazzelli Lualdi and Others v Commission* [1992] ECR II-293, paragraphs 23 to 26).

56 In this case, since at the end of 1993 there was a weighting for Switzerland exceeding 100, Mr Pfloeschner, once established in Switzerland, in December 1993, was entitled, under the second subparagraph of Article 82(1) of the Staff Regulations, to application of that weighting. The applicant's claim was therefore, as from December 1993, due and certain as to its amount. In those circumstances, the defendant institution is required to pay default interest on the arrears due, to be set at a fixed rate of 8% per annum, payable from the various dates on which the amounts payable under the pension scheme should have been paid until the date of actual payment.

Costs

57 Pursuant to Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they are applied for in the opposite party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs.

58 Pursuant to Article 87(4), institutions which intervene in proceedings are to bear their own costs. The Council must therefore bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Annuls the applicant's pension statement for December 1993 in so far as it applies a weighting of 100;
2. Orders the Commission to pay the applicant default interest at the rate of 8% per annum on the arrears of pension; that interest shall be calculated with effect from the various dates on which the amounts payable under the pension scheme should have been paid until the date of actual payment;
3. Orders the Commission to pay the costs;

4. Orders the Council to bear its own costs.

Vesterdorf

Barrington

Saggio

Delivered in open court in Luxembourg on 14 December 1995.

H. Jung

B. Vesterdorf

Registrar

President