2. The concept of habitual residence at the time of recruitment, to which the general provisions for implementation of the Staff Regulations adopted by an institution refer for the purpose of determining an official's place of recruitment, in the absence of any definition in the Staff Regulations, must be taken to mean the place where the person concerned has established, and intends to maintain, the permanent or habitual centre of his interests. The fact of residing in a place for the sole purpose of pursuing studies there does not of itself, in the absence of other relevant factors, mean that the person concerned intended to transfer the centre of his interests to that place.

# JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
10 July 1992 *

In Case T-63/91,

**Elisabeth Benzler**, a former member of the auxiliary staff of the Commission of the European Communities, represented by Jean-Noël Louis, of the Brussels Bar, with an address for service in Luxembourg at the office of Fiduciaire Myson Sà rl, 1 Rue Glesener,

applicant,

v

**Commission of the European Communities**, represented by Joseph Griesmar, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of R. Hayder, of the Commission's Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the decision of 29 October 1990 determining Brussels as the applicant's place of recruitment and refusing her the daily subsistence allowance and the expatriation allowance,

* Language of the case: French.

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

composed of: B. Vesterdorf, President, A. Saggio and J. Biancarelli, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 19 May 1992,

gives the following

## Judgment

### Facts and procedure

1 The applicant, who was born in Belgium in 1964, is the daughter of a Commission official employed in Brussels. She is of German nationality and has never had Belgian nationality. According to her personal file, after her secondary education at the European School in Brussels she undertook training at the Institut Supérieur de Tourisme, Louvain-la-Neuve, from 1984 to 1986. It appears from the documents before the Court that in 1986 she commenced theoretical and practical training at the Fachhochschule, Düsseldorf, and then at the Kaufmännische Berufschule, Neuss, combining attendance at classes with vocational training under two training and apprenticeship contracts concluded successively with the undertakings L. B. und K. Werbeagentur, Düsseldorf, from 1 October 1986 to 31 May 1988, and Beste Accessoires, Neuss, from 6 June 1988 to 23 May 1990. During those periods, her father received a dependent child allowance and an education allowance. Subsequently, the applicant was employed as a 'Kauffrau' (holder of a diploma in commerce) by Elysian Accessoires, Neuss, from 1 July 1990 to 31 August 1990.

2 On 29 May 1990, the applicant terminated, with effect from 31 August 1990, the lease on the apartment in which she lived in Düsseldorf.

3 On 30 July 1990, whilst spending leave at her parents' house, the applicant ascertained that there was the possibility of a vacancy as a German-speaking member of the auxiliary staff of the Commission. The Commission administration contacted her on that date to invite her to undergo a pre-engagement medical examination the next day, in view of her imminent return to Düsseldorf. The applicant lodged her application on 1 August 1990, giving as her address for correspondence that of her parents in Belgium. She gave as her permanent residence ('ständiger Aufenthaltsort') the city of Düsseldorf. The applicant took up her duties with the Commission in Brussels on 1 September 1990.

4 By decision of 29 October 1990, the Commission determined the applicant's place of recruitment as Brussels. In the same decision it stated that the applicant was not entitled to the payment of a daily subsistence allowance since her employment did not necessitate a change of residence in order to satisfy the requirements of Article 20 of the Staff Regulations. It also declined to pay her an expatriation allowance in the view of what it regarded as the temporary nature of her absence from Belgium.

5 On 29 January 1991 the applicant lodged a complaint against the abovementioned decision. In the absence of an express decision rejecting the complaint, she sought, by an application lodged at the Registry of the Court of First Instance on 30 August 1991, annulment of the Commission's decision of 29 October 1990. The written procedure followed the normal course and was completed on 6 March 1992. Upon hearing the report of the Judge-Rapporteur, the Court decided, pursuant to Article 53 of its Rules of Procedure, to open the oral procedure without any preparatory inquiry. The parties presented oral argument at the hearing on 19 May 1992.

## Forms of order sought

6 The applicant claims that the Court of First Instance should:

— annul the decision of 29 October 1990 determining Brussels as the applicant's place of recruitment and place of origin and refusing to pay her a daily subsistence allowance and an expatriation allowance;

— annul, so far as necessary, the implied Commission decision rejecting her complaint of 29 January 1991;

— order the defendant to pay the costs.

The defendant contends that the Court of First Instance should:

— dismiss the application as unfounded;

— make an appropriate order as to costs.

**Pleas in law and arguments of the parties**

In support of her application for annulment, the applicant alleges:

— infringement of Article 7(3) of Annex VII to the Staff Regulations and of the Commission Decision of 15 July 1980 adopting general implementing provisions, more particularly Article 2(2) thereof;

— infringement of the provisions concerning determination of place of origin.

8 She claims first of all that the place of recruitment was defined by Article 2(2) of the abovementioned Commission decision of 15 July 1990 as the 'place where the official was habitually resident at the time of recruitment'. She also states that, for the purpose of granting the expatriation allowance, it is necessary to establish the habitual residence of the person concerned at the time of recruitment. She relies in

that regard on Case 201/88 *Atala-Palmerini* v *Commission* [1989] ECR 3109, paragraph 9, according to which 'the concept of expatriation also depends on the personal position of an official, that is to say on the extent to which he is integrated in his ... environment, which is demonstrated, for example, by habitual residence or by the main occupation pursued'.

9 Having regard to the above criteria, the applicant considers that at the time of her recruitment she was fully integrated in Düsseldorf, from both the 'objective' and 'subjective' points of view. That is evidenced, she says, by the nature of the vocational training — alternating theoretical classes and practical training in undertakings — which she undertook from 1986 to 1990 and by the fact that such training cannot be turned to account elsewhere than in Germany, which clearly shows her intention to establish herself permanently in that country. Indeed, she only agreed to pursue her training in an undertaking from 1988 to 1990 in the hope of being offered a post in that undertaking. Thus, on completion of her period of training, she remained in the service of her employer in order to embark on a career as a 'Kauffrau' with Elysian Accessoires. She states in her reply that she had not mentioned those two months' paid employment in her application for a post as a member of the Commission's auxiliary staff because she regarded it as 'a student's summer vacation job', in so far as she was not officially taken on by that undertaking until 1 July 1990, that is to say one month before she made her application and after she had decided to leave her employment. However, at the hearing she contended that the Commission did not take the view that it was a student job, in so far as it required repayment of the education and dependent child allowances received by her father for those two months, contrary to the practice of treating students in summer jobs as still dependent on their parents for the duration of such jobs.

The applicant also claims that until the date of her recruitment she occupied uninterruptedly an apartment rented by her in Düsseldorf which she 'duly registered as her official address'. Moreover, she had her own social security cover, being affiliated to a mutual fund and a pension scheme. Finally, she observes that her brother and sister undertook their higher education in Germany and have definitively settled there and that her parents will return there as soon as they retire.

10 The applicant claims that, according to the criteria laid down by the Court of Justice, her place of recruitment should be determined as Düsseldorf and then makes a linguistic analysis of the terms used to define place of recruitment in Article 2(2) of the general implementing provisions for giving effect to Article 7(3) of Annex VII to the Staff Regulations concerning place of origin. She states that in the German version, Article 2 refers to 'Hauptwohnsitz' ('place where the official was habitually resident' in the English version), as does Article 4 of Annex VII to the Staff Regulations concerning payment of the expatriation allowance. The applicant infers from this that 'by virtue of that provision, (her) place of recruitment ... should be determined as Munich. According to German case-law, a person has, by definition, only one "Hauptwohnsitz", which is where he exercises the right to vote'. She relies on the certificate issued by the Munich authorities on 3 January 1991 in support of that assertion. She concludes that 'the Commission is required to determine the applicant's place of origin as her "Hauptwohnsitz", namely Munich'. The applicant concludes that her place of recruitment must be determined as Düsseldorf and her place of origin as Munich, or in the remote alternative, as Düsseldorf.

11 Finally, in her reply and at the hearing, the applicant also maintained that, from 1984 to 1986, she stayed in Munich in order to pursue university education there, and that the studies which she undertook at the same time at Louvain-la-Neuve were merely supplementary.

12 The Commission, for its part, contends that the applicant's place of recruitment and place of origin cannot be determined as Düsseldorf and Munich respectively.

In the first place, it rejects the applicant's argument concerning determination of her place of origin as Munich. It states that, according to Article 2(1) of the general implementing provisions for giving effect to Article 7(3) of Annex VII to the Staff Regulations, 'When an official takes up his appointment, his place of origin shall be assumed to be the place where he was recruited'. It is only upon request by the official in the year following his entry into service that his place of origin can be determined as his centre of interests, on the basis of supporting documents, if it does not coincide with his place of recruitment. In that regard, it considers that the

place where voting rights are exercised is only one of the factors available to identify the centre of interests and therefore cannot, of itself, be substituted for the place of recruitment for the purposes of defining the place of origin.

13 The Commission contends, secondly, that Düsseldorf cannot be regarded as the applicant's place of recruitment. It maintains that, in the period prior to 23 May 1990, she stayed in Germany solely for study and vocational training purposes, which cannot be regarded as constituting habitual residence within the meaning of Article 2(2) of the general implementing provisions of 15 July 1980. As to her paid employment in July and August 1990, the Commission considers that, because of its brevity, it likewise can provide no basis for the view that the applicant had her habitual residence in Düsseldorf. In that regard, certain circumstances show the applicant's intention not to establish herself in Germany at the end of her training period. At the end of May 1990, she terminated the lease on her apartment with effect from 31 August. She had also viewed her first paid employment as a mere 'student's summer vacation job' and made contact with the administration at the end of July to obtain employment in Belgium. In those circumstances, the applicant's residence in Düsseldorf must be regarded as temporary and cannot be taken into account in determining her place of recruitment.

## Legal assessment

14 There are four limbs to the claim for annulment of the contested decision, relating to the refusal to grant the applicant an expatriation allowance and the daily subsistence allowance and the determination of her place of recruitment and her place of origin as a place other than that of recruitment.

*The claim concerning the expatriation allowance*

15 Under Article 4(1)(a) of Annex VII to the Staff Regulations, the expatriation allowance is to be paid to officials who, like the applicant, are not and have never been nationals of the State in whose territory the place where they are employed is sit-

uated, and who 'during the five years ending six months before they entered the service did not habitually reside or carry on their main occupation within the European territory of that State. For the purposes of this provision, circumstances arising from work done for another State or for an international organization shall not be taken into account'.

16 In the present case, the applicant entered the service of the Commission on 1 September 1990. Her entitlement to the expatriation allowance is therefore conditional on her not having habitually resided or carried on her main occupation in Belgium during the five years between 1 March 1985 and 1 March 1990 (see Case 246/83 *De Angelis* v *Commission* [1985] ECR 1253, paragraph 14, and Case 201/88 *Atala-Palmerini* v *Commission*, cited above, paragraphs 6 to 11; see also Case T-18/91 *Costacurta Gelabert* v *Commission* [1992] ECR II-1655, paragraph 44).

17 That condition is not fulfilled in the present case. The documents before the Court — in particular the information given by the applicant herself in the application form submitted to the Commission — establish that at the start of the abovementioned reference period (from 1984 to 1986) the applicant underwent training at the Institut Européen de Tourisme, Louvain-la-Neuve, on completion of which, according to her statement at the hearing, she gained a diploma, with the highest distinction. On the other hand, the applicant's contention that she established her habitual residence in Munich from 1984 to 1986, with a view to undertaking university studies in economics, is not supported by any evidence relating, for example, to the actual pursuit of the studies referred to. In particular, the applicant did not refer to such university studies in the application that she submitted to the Commission. Nor has she produced to this Court any registration document or certificate showing that she regularly pursued those studies. Furthermore, the certificate from the City of Munich relied on by the applicant, showing that she has her habitual residence ('Hauptwohnung') there, relates, under the applicable legislation, to the residence which the person concerned — or his or her parents when the person concerned is a minor — has declared as his or her habitual residence within German territory, which does not exclude the possibility of actual habitual residence outside that territory (see paragraph 12(1) of the Melderechtsrahmengesetz (Framework law concerning declaration of residence) of 16 August 1980, BGBl. III, pp. 210-4). The concept of 'Hauptwohnung' under German law is thus to be distinguished from that of habitual residence contained in Article 4(1)(a) of

Annex VII to the Staff Regulations, which is a factual concept requiring the actual residence of the person concerned to be taken into account. That is confirmed by the fact that the abovementioned certificate, issued on 3 January 1991, establishes that on that date the applicant had maintained her 'Hauptwohnung' in Munich since 1 March 1972. However, it is not disputed that she then habitually resided, within the meaning of the Staff Regulations, in Brussels, following her recruitment as a member of the auxiliary staff on 1 September 1990. It is therefore clear from all these circumstances that, even if the applicant undertook — and it has not been shown that she did — university studies in Munich in 1984, those studies could only have been complementary to those undertaken at Louvain-la-Neuve. Moreover, it should be noted that before commencing her studies at Louvain-la-Neuve, the applicant already habitually resided in Belgium, and more specifically in Brussels, where her parents lived and she received her secondary education until taking her school-leaving examination in 1984. The applicant thus continued to reside habitually in Belgium during her studies at Louvain-la-Neuve, which overlapped to a considerable extent with the reference period, from 1 March 1985 to 30 September 1986.

18 In those circumstances, the Court finds that the requirement of no habitual residence in the country of employment throughout the reference period, which is a precondition for the payment of the expatriation allowance, is not fulfilled in the present case. The claim concerning the expatriation allowance must therefore be declared unfounded.

*The claim concerning the daily subsistence allowance*

19 Article 10(1) of Annex VII to the Staff Regulations provides for the payment of the daily subsistence allowance to 'an official [who] furnishes evidence that he must change his place of residence in order to satisfy the requirements of Article 20 of the Staff Regulations, which requires an official to reside either in the place where he is employed or at no greater distance therefrom than is compatible with the proper performance of his duties'.

20 In that regard, it must be made clear that the daily subsistence allowance, to which a newly recruited official is entitled only until such time as he removes in order to reside at his place of employment, is intended to cover the expense and inconvenience occasioned by the need to travel and establish a provisional residence at the place of employment, whilst retaining, likewise provisionally, his previous residence. That purpose has been constantly emphasized by the Court of Justice (see, in particular, Case 148/73 *Louwage* v *Commission* [1974] ECR 81, paragraph 25, and Case 280/85 *Mouzourakis* v *Parliament* [1987] ECR 589, paragraph 9).

21 In the present case, the Court finds that the applicant, who, on 29 May 1990, terminated the lease on her apartment in Düsseldorf with effect from 31 August 1990, as she confirmed at the hearing, did not bear any expenses arising from the need to move to a place different from that of her previous residence without being able to abandon the latter residence. Moreover, the applicant does not state to what expense or inconvenience she was exposed as a result of her obligation to reside at her place of employment when she entered the service of the Commission in Brussels.

22 In view of all the foregoing circumstances, the claim concerning the daily subsistence allowance must be dismissed.

*Determination of the place of recruitment*

23 In the absence of an express definition in the Staff Regulations of the place of recruitment referred to in Article 7(3) of Annex VII to the Staff Regulations, the place of recruitment is defined in Article 2(2) of the Decision of 15 July 1980 adopting general implementing provisions for giving effect to Article 7(3) as 'the place where the official was habitually resident at the time of recruitment. Places of temporary residence, e. g. for the purpose of study, military service, training periods or

holidays, shall not be regarded as places of habitual residence' (Administrative Notices, No 291 of 5 September 1980).

24 It must be borne in mind that the abovementioned general implementing provisions are merely an interpretation and clarification of Article 7(3) of Annex VII to the Staff Regulations (Case T-44/89 *Gouvras-Laycock* v *Commission* [1990] ECR II-217, paragraph 25). In the present case, the concept of habitual residence used in the general provisions for implementation of the Staff Regulations, and applied by the Commission in the present case, is relevant when defining the place of recruitment.

25 The concept of habitual residence has been consistently interpreted by the Court of Justice as meaning the place where the person concerned has established, and intends to maintain, the permanent or habitual centre of his or her interests (see Case 13/73 *Angenieux* v *Hakenberg* [1973] ECR 935, Case 76/76 *Di Paolo* v *Office National de l'Emploi* [1977] ECR 315 and Case 284/87 *Schäflein* v *Commission* [1988] ECR 4475; and in other areas of law, Case C-297/89 *Rigsadvokaten* v *Ryborg* [1991] ECR I-1943, paragraph 19).

26 In the present case, the Court finds that, the applicant did not, by residing in Düsseldorf from 1 October 1986 to 31 August 1990, break off her enduring links with Belgium. Indeed, it is apparent from the information before the Court that she resided in Düsseldorf in and after 1986 for the sole purpose of pursuing her studies and that she did not make Düsseldorf the permanent centre of her interests.

27 The fact that the applicant at that time retained all her contacts with Brussels, where she held a special residence permit and returned during vacations to her family, is clear from the following considerations. During her four years of study at the Fachhochschule in Düsseldorf, the applicant had the status of student and did not, according to the documents before the Court, engage in any stable occupation providing remuneration comparable to that habitually paid to persons thus employed, which would have allowed her to fit into the social and working life of the coun-

try. In that regard, the periods of training and apprenticeship with two undertakings between 1 October 1986 and 31 May 1988 in fact formed part of the specific studies pursued by the applicant, combining both theoretical and practical training, for which she received an allowance of between DM 150 and 350, depending on the period in question, as the parties stated at the hearing. Moreover, the applicant was not financially independent from her parents, who provided for her needs, in particular by financing her studies, and as a result received a dependent child allowance and an education allowance. Finally, as regards the applicant's argument concerning her affiliation to a sickness insurance and pension scheme in Germany, it must be pointed out that that affiliation derived from her status as a student and cannot therefore, in the absence of other relevant factors, be indicative of her integration in Germany.

The applicant's paid employment in July and August 1990, that is to say at the very time of her recruitment, must be regarded as a 'holiday job', as it is described in the reply itself. The applicant states that she was recruited on 1 July 1990, 'that is to say one month before she submitted her application to the Commission and after she had decided to leave her employment'. That statement is corroborated by the application for re-registration with the Düsseldorf Fachhochschule made by the applicant for the period September 1990 to February 1991, as evidenced by the registration certificate for the semester in question, annexed to the application. Furthermore, the fact that the applicant engaged in paid employment, confined to the holiday period and only in order to obtain pocket money, is also evidenced by the fact that, during those two months, the applicant's father received dependent child and education allowances.

28 In those circumstances, and having regard to the general provisions for implementation of the Staff Regulations, the Court considers that the fact of staying in Düsseldorf with a view to undertaking vocational training there does not, of itself and in the absence of other relevant factors, provide any basis for the view that the applicant intended to move the permanent centre of her interests from Brussels to Düsseldorf. Her claim for annulment of the contested decision, in so far as it determines her place of recruitment as Brussels, must therefore be declared unfounded.

*Determination of the place of origin*

29 According to Article 7(3) of Annex VII to the Staff Regulations, 'An official's place of origin shall be determined when he takes up his appointment, account being taken of where he was recruited or the centre of his interests. The place of origin as so determined may by special decision of the appointing authority be changed while the official is in service or when he leaves the service. When he is in the service, however, such decision shall be taken only exceptionally and on production by the official of appropriate supporting evidence'. It must be borne in mind that, when an official takes up his duties, his place of origin is assumed to be that of his recruitment, according to the general decision for the implementation of Article 7(3) of Annex VII to the Staff Regulations. However, pursuant to that same provision, if an official so requests within one year after he takes up his appointment and on production of appropriate documentary evidence, his centre of interests shall be determined as his place of origin if his centre of interests is not the same as his place of recruitment.

30 In the present case, it was in her complaint of 29 January 1991 against the decision of 29 October 1990, that the applicant requested, for the first time, under the general implementing decision and the abovementioned provisions of the Staff Regulations, that her place of origin should be determined as Munich, that is to say a place other than the place of her recruitment, which was determined as Brussels by that same decision. In that respect, the complaint must be interpreted as a request within the meaning of Article 90(1) of the Staff Regulations, addressed to the appointing authority with a view to its determining the applicant's place of origin as a place other than that of her recruitment, having regard to the centre of her interests, which she declares as Munich.

31 Under Article 90(1) of the Staff Regulations, the lack of an express reply to a request is to be deemed, on the expiry of four months after it is lodged, to constitute an implied rejection, against which a complaint may be lodged within a further period of three months under Article 90(2).

32 In the present case, the applicant did not lodge a complaint against the appointing authority's implied refusal to accede to her request within the period prescribed by the Staff Regulations. Accordingly, the present action must be declared inadmissible in so far as it relates to the determination of the applicant's place of origin as a place other than that of her recruitment.

33 It follows that the present action, of which three claims are unfounded and one is inadmissible, must be dismissed.

## Costs

34 At the hearing, the defendant requested that, in view of what it regarded as the derisory amount at issue in the present proceedings, the applicant should be ordered to pay the costs in their entirety pursuant to the second subparagraph of Article 87(3) of the Rules of Procedure. By virtue of that provision, the Court of First Instance may order a party, even if successful, to pay costs which it considers that party to have unreasonably or vexatiously caused the other party to incur.

35 In the present case, the Court finds that the defendant's appraisal of the amount at issue is manifestly incorrect, in view of the financial implications of the contested decision. Moreover, since the determination of the applicant's habitual residence at a particular time called for a delicate appraisal based on a complex set of factual considerations, the applicant's claim cannot be regarded as unnecessary or vexations. Accordingly, the defendant institution's request cannot be upheld.

36 Pursuant to Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs. However, Article 88 of those rules provides that, in proceedings brought by servants of the Communities, the institutions are to bear their own costs. The parties should therefore be ordered to pay their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

**1. Dismisses the application;**

**2. Orders the parties to bear their own costs.**

Vesterdorf Saggio Biancarelli

Delivered in open court in Luxembourg on 10 July 1992.

H. Jung B. Vesterdorf

Registrar President