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DOCUMENT 1-87/81/Ann.

ANNEX

to the report drawn up by Mr Silvio LEGA
on behalf of the Committee on Budgets

on the proposals from the Commission of the European Communities
to the Council for:

- I. a Regulation introducing special and temporary measures applicable to the recruitment of officials of the European Communities in consequence of the accession of the Hellenic Republic (Doc. 1-637/80)
- II. a Regulation introducing special and temporary measures to terminate the service of officials of the European Communities in consequence of the accession of new Member States (1-369/80)
- Opinion of the Legal Affairs Committee

DRAFTSMAN: Mr A. TYRRELL

PE 72.290/fin./Ann.

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Letter containing the opinion of the Legal Affairs Committee for the Budgets Committee on the proposal for a regulation introducing special and temporary measures applicable to the recruitment of officials of the European Communities in consequence of the accession of the Hellenic Republic (Doc. 1-637/80)

The Legal Affairs Committee has already given its opinion (PE 67.896/fin) on one proposal linked to the accession of new Member States, the draft regulation (Doc. 1-369/80) introducing special and temporary measures to terminate the service of Community officials in order to enable Greeks to be recruited in their place. This proposal provides for that recruitment. Like the proposal on termination of service it aims to provide a practical solution to a short-term problem by derogations to the Staff Regulations for a limited period.

On 18 March 1981 the Legal Affairs Committee examined the draft regulation. In its discussion the Committee took account of the views of the Staff Regulations Committee⁽¹⁾ and of the Staff Representatives on that Committee⁽²⁾: it noted that the opinion of the Staff Regulations Committee raised general issues of relevance to the recruitment procedure of all Community officials and decided to give them further consideration when it next discusses amendments to the Staff Regulations.

(1) Opinion 11/80

(2) Set out in the minutes of the Staff Regulations Committee

The Legal Affairs Committee noted that the derogations proposed were to those Articles of the Staff Regulations which forbid recruitment on the basis of nationality (Articles 7(1) and 27(3) and those which normally give priority to suitably qualified internal candidates for vacant posts (Articles 4 and 29(1)(a), (b) and (c)). It considered⁽¹⁾ that the former were clearly necessary in order to recruit Greeks so that the Community staff would reflect "the broadest possible geographical basis" (Article 27) and that the latter would enable external recruitment to take place without delay. It noted with satisfaction that the regulation would only apply to a limited number of posts set aside for Greek nationals within the budgetary procedure and that it would remain in force only until 31 December 1982.

The proposal is for a Council regulation introducing 'special and temporary measures'. It is based on Article 24 of the 'Merger' Treaty. The only power given to the Council in this Article is to '...lay down the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of those Communities'. There is no mention of temporary measures or of regulations other than the Staff Regulations. The Commission's view is that it would be administratively impracticable to incorporate temporary regulations in the Staff Regulations. But in the interests of clarity and legal certainty the committee consider that it would be better for this proposal to take the form of an amendment to the Staff Regulations.

The Committee considers that the proposal should be approved.

MAURO FERRI

(1) Present: Mr Sieglerschmidt, acting chairman; Mr Tyrrell, draftsman; Mr de Gucht, Mr Fischbach, Mr Geurtsen, Mr Kappos (for Mr D'Angelosante); Mr Peters (for Mr Vetter); Mr Plaskovitis; Mr Price (for Mr Dalziel); Mr Prout; Mr Vardakas (for Mr Gondikas).

Opinion of the Legal Affairs Committee on the Commission proposals for a Council Regulation introducing special and temporary measures to terminate the service of officials of the European Communities in consequence of the accession of new Member States (Doc. 1-369/80)

By letter of 9 September the President of the Council of the European Communities requested the European Parliament to deliver an opinion on the proposal from the Commission of the European Communities to the Council for a regulation introducing special and temporary measures to terminate the service of officials of the European Communities in consequence of the accession of new Member States.

On 10 September 1980 the President of the European Parliament referred the proposal to the Committee on Budgets as the committee responsible and to the Legal Affairs Committee for its opinion.

On 1 October 1980 the Legal Affairs Committee appointed Mr TYRRELL draftsman for the opinion.

At its meeting on 20-21 October 1980 it considered the draft regulation on the basis of an introductory statement by the draftsman.

On 22 January 1981 it considered the draft opinion (PE 67.869/rev.) and adopted it unanimously.

Present : Mr Ferri, chairman; Mr Tyrrell, draftsman; Mr Dalziel, Mr Gondicas, Mr Goppel, Ms Macciocchi, Mr Megahy, Mr Peters (deputizing for Mr Vetter), Mr Plaskovitis, Mr Prout, Mr Turner, Ms Vayssade.

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ANNEX: Opinion of the Staff Regulations Committee

I. PURPOSE OF THE PROPOSAL

1. The Commission states in the explanatory memorandum¹ to the proposal that its purpose is:

'to introduce special early retirement arrangements for a limited period in order

- to facilitate the recruitment of nationals of new Member States while obviating the need for radical changes in departmental structure,
- to help to establish a more balanced career profile for A officials.'

II. CONTENTS OF THE PROPOSAL

2. There are two principal articles in the proposal: Article 1, which sets out the scope and structure of the proposed scheme; and Article 2, which lays down the conditions which will apply to former officials affected by the scheme.

3. Article 1 provides that the Community institutions may adopt for officials in grades A3 and A4 who have been in the highest step in their grade for at least two years and are over 55 years old measures 'terminating their service within the meaning of Article 47 of the Staff Regulations.' The number of officials to whom the measures may be applied is fixed annually by the budgetary authorities. A list of officials to be affected is drawn up by the institution, after consulting the Joint Committee, and taking into account the official's 'ability, efficiency, conduct in the service, family circumstances and seniority'. An official on the list may opt for termination of service (under the proposed scheme) or for non-active status (under Article 41(3), (4) and (5) of the Staff Regulations). Requests for termination of service made by officials over 60 will be granted automatically. The measures, which are expressly stated to be 'in no way disciplinary' will have effect until the end of 1986.

4. Article 2 provides for an official whose service is terminated under the scheme to receive a monthly allowance of 70% of former basic salary until eligible for full pension, subject to the weighting fixed for his country of residence and subject to the deduction of gross income from any new employment in so far as that income and the allowance together exceed the official's last total gross remuneration. There are provisions for

¹ Paragraph 1

family allowances, sickness benefits, survivor's and orphans' pensions and for the acquisition of full pension rights by paying the appropriate contributions.

III. CONTEXT OF THE PROPOSAL

5. The proposal needs to be considered in the context of the institution's current personnel situation and also in the light of existing proposals and legislation.

(a) Greek Accession

6. The Commission has indicated to the Legal Affairs Committee that there will need to be twelve posts available at A3 and A4 level in the Commission to take account of Greek accession. It should be noted that this proposal applies only to those grades. Posts needed at other grades will have to be made available by other means.

(b) Spierenburg Report

7. The second purpose of the proposal, to improve the career structure of A grade officials, reflects the widespread preoccupations set out, for example, in the Spierenburg report, and the need to reduce the number of divisions in the Commission. Here it should be noted that the need for reorganisation and rationalisation is felt to be more acute in the Commission than in the other institutions.

(c) Existing provisions

8. At present, the provisions for the termination of Community officials' service are set out exclusively in the Staff Regulations, in Articles 42, Articles 41 and 50 are also relevant to a consideration of this proposal.

9. Article 47 lists the ways in which officials' service can be terminated as follows:

'Service shall be terminated by:

- (a) resignation;
- (b) compulsory resignation;
- (c) retirement in the interests of the service;
- (d) dismissal for incompetence;
- (e) removal from post;
- (f) retirement; or
- (g) death.'

Retirement in the interests of the service is provided on a permanent basis for Grades A1 and A2 in Article 50.

10. Although Article 41 does not strictly speaking fall within the provisions dealing with termination of service, it is analogous to them. It lays down the conditions for 'non-active status' in cases where officials become supernumerary. As indicated above, this is one of the options which would be open to officials affected by the present proposal. The article reads as follows:

'1. An official having non-active status is one who has become supernumerary by reason of reduction in the number of posts in his institution.

2. Reductions in the number of posts in a particular grade shall be decided by the appropriate budgetary authority under the budgetary procedure.

The appointing authority shall draw up a list of the officials to be affected by such measures; after consulting the Joint Committee, taking into account the officials' ability, efficiency, conduct in the service, family circumstances and seniority. Any official occupying one of the posts referred to in the preceding subparagraph who expresses the wish to be assigned non-active status shall automatically be entered on this list.

Officials whose names appear on this list shall be assigned non-active status by decision of the appointing authority.

3. While possessing this status an official shall cease to perform his duties and to enjoy his rights to remuneration or advancement to a higher step, but shall continue, for a period not exceeding five years, to accumulate rights to retirement pension based on the salary carried by his grade and step.

For a period of two years from the date of being assigned non-active status an official shall have priority for reinstatement in any post in his category or service corresponding to his grade which may fall vacant or be created, provided that he has the necessary qualifications.

An official assigned on non-active status shall receive an allowance calculated in accordance with Annex IV.

Income received by the official from any new employment during this period shall be deducted from the allowance provided for in the preceding subparagraph if that income and the allowance together exceed the total remuneration last received by the official, calculated by reference to the table of salaries applicable on the first day of the month for which the allowance is to be paid.

The allowance and the total remuneration last received as referred to in the preceding subparagraph shall be weighted at the rate fixed for the place where the official was last employed.

4. At the end of the period of entitlement to the allowance the official shall be required to resign. He shall, where appropriate, receive a retirement pension as provided for in the pension scheme.

5. An official who before expiry of the two-year period specified in paragraph 3 has been offered a post corresponding to his grade and has declined it without good reason may, after the Joint Committee has been consulted, be deprived of his rights under the foregoing provisions and be required to resign.'

(d) Earlier provisions

11. There have also been temporary provisions similar to the present proposal before, in 1968 and 1972. In 1968 special, temporary measures¹

¹ See OJ No. L 56, 4.3.1968, p.33

were applied in order to rationalise the Commission administration. In 1972 measures¹ were taken to meet the requirements of the accession of Denmark, Ireland and the United Kingdom.

(e) Proposals currently before the Council

12. Finally, it should be remembered that the Council is at present examining a proposal² for amendments to the provisions in the Staff Regulations on pensions and social security, which, if adopted, would introduce on a permanent basis the possibility of voluntary early retirement for officials, with special arrangements during the period after accession of a new Member State³. It would also alter the provisions of Article 41 of the Staff Regulations on non-active status. Parliament has given its opinion⁴ on this proposal on the basis of the Lega report⁵.

IV. FORM OF THE PROPOSAL

13. The proposal is for a Council regulation introducing 'special and temporary measures' based on Article 24 of the 'Merger' Treaty⁶, which empowers the Council to 'lay down the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of those Communities'. That article requires the Council to consult 'the other institutions concerned'. In addition, the Staff Regulations Committee has been consulted in accordance with Article 10 of the Staff Regulations.

V. COMMENTS

(a) Aim of the proposal

14. In examining the proposal it is first necessary to consider whether its two-fold purpose - providing posts for officials from new Member States and improving the career structure of A grade officials - is valid. It is certainly legitimate, given the current budgetary constraints, to avoid creating new posts for officials from new Member States and to appoint them to existing ones. It is also clear that, in the Commission at least, action is needed to improve administrative structures.

15. But it is equally important to consider whether the means chosen to achieve the proposal's aims are legitimate. Particular attention needs to be taken in deciding whether the scheme should be made voluntary or compulsory.

1 See OJ No. L 272, 5.12.1972, p.12

2 Doc. 212/79

3 Doc. 212/79 at Article 52, and Annex VIII, Article 9

4 OJ No. C 34, 11.2.1980, p.33

5 Doc. 1-584/79

6 Treaty establishing a Single Council and a Single Commission of the European Communities

This point, which was emphasised in the opinion¹ of the Staff Regulations Committee, is discussed in more detail below.

(b) Form of the proposal

16. The proposal is for a Council regulation introducing 'special and temporary measures' (to have effect until 31 December 1986). It is based on Article 24² of the 'Merger' Treaty. The only power given to the Council in this Article is to '...lay down the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of those Communities'. There is no mention of temporary measures or of regulations other than the Staff Regulations. The Commission's view is that it would be administratively impracticable to incorporate temporary regulations in the Staff Regulations. Separate regulations were used in 1968 and 1972. But it should be remembered that the Staff Regulations are produced in a loose-leaf form which simplifies the task of bringing them up to date. In any case, in the interests of clarity and legal certainty it would be better for this proposal to take the form of an amendment to the Staff Regulations.

17. This is particularly true as regards appeals against decisions taken by the institution to administer the scheme. The procedure is said not to be disciplinary. But it appears to contain an element of compulsion (see paragraph 21 below). So it is surprising that there is no provision for appeal, for example, against the decision placing an official on the list. If the proposal were for an amendment to the Staff Regulations rather than for a special regulation, the appeal procedure in Articles 90 and 91 would apply. It is likely that it also applies to an official covered by a separate regulation, since such an official is a 'person to whom these Staff Regulations apply' within the meaning of Article 90 by reason of his employment with the Communities. However, if a separate regulation is used, it would be useful for the avoidance of doubt and in the interests of legal certainty to add an article, in order to anchor the provisions more firmly in the Staff Regulations framework:

'The provisions of Articles 90 and 91 of the Staff Regulations shall apply to decisions taken under this regulation.'

(c) Relationship to proposals currently before the Council

18. As pointed out above, the Council is currently considering a proposal on pension and social security provisions which was the subject of the Lega report. It is however unclear whether this proposal is to be seen as an addition to or as a substitute for the earlier proposal. In some ways the

1 Opinion No. 10/80: see Annex

2 See Lega report (Doc. 1-584/79) and Parliament's opinion OJ No. C 34, 11.2.1980, p.33

the earlier proposal can be seen as having an entirely separate purpose (e.g. in providing on a permanent basis for early retirement at 60); in others, it overlaps with this one (by making special arrangements for the period after accession). It is important to clarify this point, not least because the earlier proposal provides for a voluntary scheme whereas this one appears to be compulsory.

(d) Procedure to be followed by the institutions to implement the scheme

19. The procedure for choosing the officials is that the institution, after consulting the Joint Committee, will draw up a list of officials on the basis of the officials' 'ability, efficiency, conduct in the service, family circumstances and seniority'. The officials on the list may opt for the application of these special provisions or for non-active status under Article 41 of the Staff Regulations. Priority will be given, if the interests of the service permit, to those on the list who ask to have their service terminated under the special provisions; those over 60 will automatically be allowed to benefit

20. This is the same procedure as used in 1968 and 1972. But the precedents are somewhat unsatisfactory. For three points remain unclear:

- whether the official's agreement is needed before his name is put on the list,
- how the selection criteria are to be applied, and
- how the option between termination of service and non-active status is to be exercised.

21. The proposal does not provide for the official concerned to agree to being placed on the list. The implication is that no agreement is necessary, in other words, that the scheme is compulsory. The choice of a voluntary or a compulsory scheme is a political one, which must be made by the committee responsible. But if the scheme is intended to be voluntary, it is essential that it should be explicitly stated to be so, for example by following the Staff Regulations Committee's proposal to amend Article 1(1) to require the agreement of the official concerned.

22. The proposal sets out the criteria by which officials are selected for the scheme. But it is unclear how the criteria should be applied. Is it ability or lack of ability, efficiency or inefficiency, good or bad conduct, seniority or lack of seniority which will lead to the official being chosen? It is even less clear how family circumstances can be evaluated. The criteria are surprisingly obtuse and should be redrafted.

23. Under Article 1(3) the official has the right to opt for termination of service or for non-active status, presumably in order to benefit from the arrangements which he considers to be most advantageous to him. It is also clear (from Article 1(6)) that the institution cannot impose non-active

status on an official covered by the regulation during the period in which it is in force. But it is unclear how the option is to be exercised.

24. Article 1(3) states that the official may opt for one arrangement or the other. It then sets a deadline of two months for officials wishing to opt for non-active status, but not for those wishing to opt for termination of service. This suggests that the termination of service arrangements will apply unless the official opts for non-active status. If so, it could be stated much more clearly. Further confusion arises from the final phrase of Article 1(3). If the official does not exercise his right to opt before the deadline 'he shall forego the right to opt'. This provision is ambiguous. It is unclear whether this means forego the right to opt for non-active status' or 'forego the right to opt for non-active status or termination of service (i.e. to benefit from the scheme). Clarification is essential here.

25. Article 1(4) is also unclear. In its present position in Article 1, it suggests merely that priority will be given for those choosing the termination of service option. This would be in line with an interpretation of Article 1(3) according to which termination of service would apply unless the official chose otherwise. If so, the right to opt loses much of its value. An alternative interpretation, which would be in line with a scheme providing for compulsory termination of service, would be that priority would be given to volunteers but that officials' service could still be terminated on a compulsory basis. As it stands the text is ambiguous.

26. A final aspect of the procedure which may give rise to problems is the budgetary authorities' annual decision fixing the number of officials to be affected. We understand from the Commission that this provision is designed not merely as a reflection of financial preoccupations but as a safeguard against abuse of the scheme by the institutions. It is therefore surprising that the proposal lays down no criteria for the decision. As it stands the decision can only be taken as part of the normal budgetary procedure. This is not a satisfactory way of safeguarding against abuse.

(e) Officials' entitlements under the scheme

27. As to entitlements under the scheme, the following points should be made:

- (i) The allowance is calculated on the basis of basic salary at the time of departure: this corresponds to the method used under Articles 41 and 50, but contrasts with that used in 1968 and 1972, when it was based on the 'last remuneration';

- (ii) The allowance is subject to deductions in respect of 'gross income',¹ in so far as that income plus the allowance exceed the 'total gross remuneration',¹ last received; this contrasts with the other provisions (1968, 1972, Articles 41 and 50), none of which specify whether 'income' or 'total remuneration last received' are gross or net.
- (iii) Sickness insurance contributions are calculated, during the period of the allowance, on the basis of the allowance; this corresponds to the provisions in respect of Articles 41 and 50, but contrasts with the earlier provisions, which calculated contributions on the basis of former basic salary.

These are all primarily financial questions which can best be examined by the Committee on Budgets. There are, however, two essentially legal points which need to be considered:

- (iv) The proposal provides for a survivor's pension for both widows and widowers; it apparently takes account of Parliament's amendment² to the proposal on pensions at present before the Council, which brought attention to the present scheme which provides for widows' pensions but only for widowers in the limited circumstances set out in Article 23 of Annex VIII to the Staff Regulations, and which is probably illegal under the equal pay provisions of Article 119 EEC³. The Commission has stated that the proposal only aims to treat widows and widowers of officials affected by the scheme in the same way as if the officials had not been affected by it. But the provisions proposed would not do so. Article 1(8) would give 60% of the retirement pension to both widows and widowers, without restriction. This is welcome.
- (v) Article 2(10) provides for a resettlement allowance and states: 'the official concerned shall not be required to satisfy the condition regarding length of service referred to in the first subparagraph of Article 6(1) of Annex VII of the Staff Regulations.' That condition is for four years of service. This provision is redundant in a regulation designed to facilitate early retirement for end of career officials who have been at least two years in the highest step in their grade⁴.

1 Both terms are defined in Article 2(4) (2)

2 OJ No. 34, 11.2.1980, p.60

3 'Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer...

This article is the subject of Case 69/80 (Worringham) at present before the European Court of Justice.

4 i.e. who have normally served at least 18 years, there being eight two-year steps for each of the grades concerned.

VI. CONCLUSIONS

28. The following conclusions can be drawn:

- (a) The proposal should take the form of an amendment to the Staff Regulations to ensure clarity, legal certainty and safeguards such as an appeal procedure (see paragraph 17 above).
- (b) The relationship between this proposal and the proposal on pensions and social security currently before the Council should be clarified (see paragraph 18 above).
- (c) It is essential for the regulation to show clearly whether the arrangements are voluntary or compulsory (see paragraph 21 above).
- (d) The procedure to be followed is far from clear on the following points:
 - whether the official's agreement is needed before his name is put on the list,
 - how the selection criteria are to be applied, and
 - how the option between termination of service and non-active status is to be exercised.
 - on what criteria the budgetary authorities' annual decision fixing the number of officials affected is to be based.(See paragraphs 21-26 above.)
- (e) The introduction of a widower's pension is essential both in this and under the Staff Regulations in general, since the present scheme may contravene the equal pay provisions of Article 119 EEC (see paragraph 27(iv) above).
- (f) The provision on the resettlement allowance is inappropriate in the context of early retirement of end of career officials (see paragraph 27(v) above). It should however be retained should it be decided to enlarge the proposed scheme.

STAFF REGULATIONS COMMITTEE

NOTICE No. 10/80

from the Staff Regulations Committee

on the draft proposal for a regulation introducing special and temporary measures to terminate the service of officials of the European Communities in consequence of the accession of new Member States

1. By letter of 8 July 1980 Mr C. TUGENDHAT, Member of the Commission, submitted the draft proposal referred to above to the Staff Regulations Committee, for its opinion.
2. The committee considered this draft proposal for a Council regulation at its 64th meeting on 15 and 22 July 1980 in Brussels.
3. On 22 July 1980 it delivered a favourable opinion on the text of the draft proposal reproduced in the attached annex, subject to the insertion in Article 1(1), after the words 'over 55 years of age', of the following phrase: '... , subject to the agreement of the officials concerned'.
4. The committee took note of the Commission's intention to propose extending these same termination of service measures, where appropriate, to cover certain end-of-career grades of other categories of staff, including officials paid out of the research budget.
5. The Members designated by the Staff Committees consider that, without the modification indicated above, the Commission's proposal would be unacceptable.

By making it possible for termination of service measures to be taken without observing the procedural safeguards applicable to official resignations (either following disciplinary proceedings or in the case of professional inadequacy), the Commission's proposal would encourage the Council to disregard certain inalienable guarantees laid down in the Staff Regulations.

The procedure envisaged would have the effect of divesting the Staff Regulations of that guarantee of security without which they would no longer be distinguishable from a simple contract.

Notwithstanding the Commission's assurances that it intends to safeguard the voluntary nature of the termination measures, nothing can justify derogations which threaten to undermine the guarantees laid down in the Staff Regulations by severing the link between the job and its holder.

