JUDGMENT OF THE COURT OF FIRST INSTANCE (Appeal Chamber)

5 October 2009 *

In Case T-58/08 P,

Commission of the European Communities, represented by J. Currall and D. Martin, acting as Agents,

appellant,

the other party to the proceedings being

Anton Pieter Roodhuijzen, official of the Commission of the European Communities, residing in Luxembourg (Luxembourg), represented by É. Boigelot, lawyer,

applicant at first instance,

APPEAL against the judgment of the European Union Civil Service Tribunal (First Chamber) of 27 November 2007 in Case F-122/06 *Roodhuijzen* v *Commission*, not yet published in the ECR-SC, for that judgment to be set aside,

* Language of the case: French.

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

composed of M. Jaeger, President, V. Tiili, J. Azizi, A.W.H. Meij (Rapporteur) and M. Vilaras, Judges,

Registrar: E. Coulon,

gives the following

Judgment

1 By its appeal lodged pursuant to Article 9 of Annex I to the Statute of the Court of Justice, the Commission of the European Communities seeks to have set aside the judgment of the European Union Civil Service Tribunal of 27 November 2007 in Case F-122/06 *Roodhuijzen* v *Commission*, not yet published in the ECR-SC ('the judgment under appeal'), by which the Civil Service Tribunal annulled the Commission's decision refusing to recognise the cohabitation agreement between Mr Anton Pieter Roodhuijzen and Ms H as being a non-marital partnership for the purposes of Article 72(1) of the Staff Regulations of Officials of the European Communities ('the Staff Regulations') and, consequently, refusing to allow her to be covered by the Joint Sickness Insurance Scheme of the European Communities ('JSIS').

Legal context

2 The Civil Service Tribunal set out the legal context as follows in paragraphs 2 to 4 of the judgment under appeal.

3 Article 72(1) of the Staff Regulations states:

'An official, his spouse, where such spouse is not eligible for benefits of the same nature and of the same level by virtue of any other legal provision or regulations, his children and other dependants within the meaning of Article 2 of Annex VII are insured against sickness up to 80% of the expenditure incurred subject to rules drawn up by agreement between the institutions of the Communities after consulting the Staff Regulations Committee. …

The unmarried partner of an official shall be treated as the spouse under the sickness insurance scheme, where the first three conditions in Article 1(2)(c) of Annex VII are met.

…'

4 Article 1(2) of Annex VII to the Staff Regulations provides:

'The household allowance shall be granted to:

(a) …

(b) …

(c) an official who is registered as a stable non-marital partner, provided that:

(i) the couple produces a legal document recognised as such by a Member State, or any competent authority of a Member State, acknowledging their status as non-marital partners,

(ii) neither partner is in a marital relationship or in another non-marital partnership,

(iii) the partners are not related in any of the following ways: parent, child, grandparent, grandchild, brother, sister, aunt, uncle, nephew, niece, son-in-law, daughter-in-law,

(iv) the couple has no access to legal marriage in a Member State; a couple shall be considered to have access to legal marriage for the purposes of this point only where the members of the couple meet all the conditions laid down by the legislation of a Member State permitting marriage of such a couple;

…'

5 Article 12 of the rules on sickness insurance for officials of the European Communities ('the Joint Rules') is worded as follows:

'The following are covered by members' insurance under the conditions set out in Articles 13 and 14:

— …

— recognised partners of members of the Scheme even if they do not satisfy the last indent of Article 1(2)(c) of Annex VII to the Staff Regulations,

— spouses or recognised partners taking unpaid leave on personal grounds as provided for in the Staff Regulations.'

6 In the Netherlands, as is apparent from the brochure which the Commission has annexed to its appeal and which the parties agree was produced by the Netherlands authorities, alongside traditional marriages, national law provides for two types of union, namely a 'geregistreerd partnerschap' (registered partnership) and a 'samenlevingsovereenkomst' (cohabitation agreement). Whilst the first has legal, pecuniary and non-pecuniary consequences which are largely similar to those created by the bond of marriage, the second form of union arises, rather, from the free will of the parties and gives rise between them, in the main, only to those consequences which result from the rights and obligations for which the parties provide in the agreement. In particular, there is no legal requirement to include in a 'samenlevingsovereenkomst' certain undertakings or declarations, in particular with regard to the obligation to have a joint household. Provided the rules of public policy and public morality are not infringed, a

'samenlevingsovereenkomst' may, moreover, be entered into by two or more persons, and it is possible for such an agreement to be entered into by persons who are closely related. Furthermore, a 'samenlevingsovereenkomst' may be entered into either in the form of a private contract or in the form of a notarised act. Under Netherlands law, only the conclusion of an official 'samenlevingsovereenkomst' drawn up before a notary enables partners to become eligible under pension schemes and for various social benefits linked to employment. Such an agreement, drawn up before a notary, may also be required by third parties such as pension funds as evidence that a couple are cohabiting. However, even the informal conclusion of a 'samenlevingsovereenkomst' or mere cohabitation gives rise to certain consequences, in particular regarding tax and social security. In principle, a 'samenlevingsovereenkomst' has no consequences as regards third parties, but the courts are beginning to place couples bound by such agreements on the same footing as couples who are married or have entered into a 'geregistreerd partnerschap'.

Background to the dispute

7 The background to the dispute is set out as follows in the judgment under appeal:

'6 The applicant, a citizen of the Netherlands, has been an official in Eurostat since 15 February 2006. On 20 February 2006, he requested that his partnership with Ms [H], governed by a cohabitation agreement ("samenlevingsovereenkomst") entered into in the Netherlands before a notary on 29 December 2005, be recognised by the Commission in order to enable his partner to be covered by the JSIS.

7 By note of 28 February 2006, the Office for the Administration and Payment of Individual Entitlements (PMO) rejected his request on the ground that the cohabitation agreement which the applicant and his partner had entered into could

not be considered to be a partnership recognised by the legislation of the Netherlands (Law on "geregistreerd partnerschap", which entered into force on 1 January 1998), as required by Article 1(2)(c) of Annex VII to the Staff Regulations.

8 On 13 March 2006, the applicant challenged the decision to dismiss his request and provided a certificate from the Embassy of the Netherlands in Luxembourg, stating that the "samenlevingsovereenkomst" signed in the presence of a notary between the applicant and his partner was recognised by the Netherlands and, therefore, confirmed their status as non-marital partners.

9 However, by note of 20 March 2006, the Commission confirmed its decision of 28 February 2006. It contended that, although the cohabitation agreement constituted a formal confirmation of the status of the applicant and his partner as non-marital partners, the fact remained that it gave rise only to those rights and obligations to which the parties agreed in writing. The signature of the contract in the presence of a notary does not alter the fact that it is merely a private contract, with no legal consequences for third parties and not subject to the requirement of registration. Article 1(2)(c) of Annex VII to the Staff Regulations makes non-marital partnerships subject to such a requirement, as registration creates rights and obligations comparable to the legal consequences of a marriage.

10 On 31 March 2006, the applicant lodged a complaint in which he challenged what he claimed to be the overly strict interpretation by the Commission of Article 1(2) of Annex VII to the Staff Regulations. In that complaint, he claimed that the registration of the agreement before a notary was a sufficient condition and pointed to certain facts which demonstrated that there are few differences between his partnership and the institution of marriage. He submitted, in particular, that the relationship with his partner had existed for more than two years already, that together they had a child which he had officially recognised and they were expecting a second. The applicant added that he and his partner had made mutual wills and that he had taken out life assurance from which his partner would benefit.

11 By opinion of 1 June 2006, the JSIS Management Committee ("the management committee") — basing itself on the documents provided by the applicant, in particular his cohabitation agreement entered into before a notary and the certificate issued by the Embassy of the Netherlands in Luxembourg — recommended that the partnership at issue be recognised as fulfilling the conditions laid down by Article 12 of the Joint Rules, particularly the requirement provided for in Article 1(2)(c)(i) of Annex VII to the Staff Regulations.

12 Despite that positive opinion of the management committee, the appointing authority, by decision of 12 July 2006, dismissed the applicant's complaint. It contended that the provisions of the Staff Regulations had the purpose of limiting the right to be covered by the JSIS to partners who had committed themselves to a relationship similar to marriage entailing reciprocal rights and obligations, as defined by law. It held that the cohabitation agreement constituted a merely private contract, capable of being entered into by more than two persons, the content of which could be decided by the parties and that, although registered before a notary, that de facto partnership had no legal effect and thus could not be considered to be a non-marital partnership, within the meaning of Article 1(2)(c) of Annex VII to the Staff Regulations.

13 The decision of the appointing authority was notified to the applicant on 13 July 2006.'

Proceedings before the Civil Service Tribunal and the judgment under appeal

8 By application lodged on 23 October 2006, Mr Roodhuijzen brought an action before the Civil Service Tribunal for annulment of the Commission decision refusing to recognise his cohabitation agreement with Ms H as a 'non-matrimonial partnership' within the meaning of the Staff Regulations and, consequently, refusing to allow her to be covered by the JSIS.

9 In the judgment under appeal, the Civil Service Tribunal annulled that decision on the ground of infringement of Article 72 of the Staff Regulations, Article 1(2)(c) of Annex VII to the Staff Regulations and Article 12 of the Joint Rules.

10 In particular, the Civil Service Tribunal examined the Commission's argument that it was not the intention of the legislature to extend the right to be covered by the JSIS to all stable partners of officials once their partnership was 'recognised', but only to those whose partnership was to a very large extent treated as a 'marriage' in the Member State in which it was entered into.

11 The Civil Service Tribunal held, in paragraph 29 of the judgment under appeal, that in order to define the term 'unmarried partner of an official' the text of Article 72 of the Staff Regulations itself refers directly to the first three conditions of Article 1(2)(c) of Annex VII to the Staff Regulations, since the registration of the partnership, referred to in the introductory sentence of Article 1(2)(c) of Annex VII to the Staff Regulations, cannot be considered to be a prerequisite. It also observed that recital 8 in the preamble to Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 amending the Staff Regulations and the Conditions of Employment of Other Servants of the European Communities (OJ 2004 L 124, p. 1), concerning the extension of the benefits enjoyed by married couples to forms of union other than marriage, refers to '[o]fficials in a non-marital relationship recognised by a Member State as a stable partnership', without mentioning any conditions relating to the registration of the relationship in question.

12 With regard to the first of the three abovementioned conditions laid down in Article 1(2)(c) of Annex VII to the Staff Regulations ('the contested condition'), the Civil Service Tribunal held, in paragraph 32 of the judgment under appeal, that that condition has three parts:

— the first part concerns the production of a 'legal' document regarding the status of the persons;

— the second part adds the requirement that the legal document be 'recognised' as such by a Member State;

— the third part requires that the legal document acknowledge that the persons concerned have the status of 'non-marital partners'.

13 The Civil Service Tribunal held that in the case before it the first two parts of the contested condition were fulfilled since Mr Roodhuijzen had produced a cohabitation agreement entered into with his partner before a notary of the Netherlands and an attestation from the Embassy of the Netherlands in Luxembourg, certifying that that document was recognised in the Netherlands (paragraph 33 of the judgment under appeal).

14 As regards the third part, however, the Civil Service Tribunal held as follows:

'35 … The question whether two persons are "non-marital partners" within the meaning of the Staff Regulations cannot be solely a matter for the discretion of the national authorities of a Member State. Thus, with particular regard to the "samenlevingsovereenkomst", the requirements to be met in order to attain the status of "non-marital partners" cannot be satisfied by the mere fact that an official document, recognised as such by a Member State, asserts that such a status exists. The cohabitation agreement under the law of the Netherlands is merely a contract freely arranged between the parties, subject to respect for the rules regarding public policy and good conduct. It can be entered into by two or more persons and there is no legal requirement to include certain undertakings or declarations, in particular with regard to the obligation to have a joint household. In addition, as a rule, it binds the parties only in respect of the rights and obligations for which they have provided and its legal effects on third parties, which are in any event limited, require special declarations and procedures.

36 On the other hand, it must be accepted, thereby endorsing to a certain extent the Commission's position when it contends that Article 72 of the Staff Regulations and Article 12 of the Joint Rules refer to partnerships which are "capable of being treated as" marriage, that in order to fall within those provisions a partnership must have a certain resemblance to a marriage.

37 It is in the light of that criterion that the Tribunal considers that the third part of the contested condition must be understood as comprising three cumulative sub-conditions.

38 First, the third part of the contested condition presupposes, and the term itself as used in the provisions of the Staff Regulations applicable confirms that interpretation, that the partners must form a "couple", in other words a union of two persons, distinct from other unions of persons capable of being parties to the cohabitation agreement under the law of the Netherlands. Clearly, such is the case in this dispute and the parties are in agreement on that point.

39 Further, the use of the term "status" shows that the partners' relationship must have public and formal aspects. Linked in part to the first part of the contested condition …, the second sub-condition of the third part goes however beyond the mere requirement of an "official" document. It is nevertheless fulfilled in the present case. First, having been drawn up before a notary, without that being an actual requirement, the agreement which governs the cohabitation of the applicant and his partner benefits from the authentication conferred by its conclusion by notarial act; second, it governs the partners' cohabitation in a structured and detailed way, following the drafting style of legal documents.

40 Lastly, the term "non-marital partners" must be understood as referring to a situation where the partners' cohabitation is characterised by a certain stability and

they are linked, during that cohabitation, by reciprocal rights and obligations, relating to their cohabitation.'

15 In the case before it, the Civil Service Tribunal found that that third sub-condition, relating to the term 'non-marital partners', was also met, on the following grounds:

'42 First, in the preamble to their "samenlevingsovereenkomst", the applicant and his companion expressly declare that they will live together and run a joint household from 1 July 2004. In addition, as the applicant made clear at the oral hearing, Article 7 of the cohabitation agreement imposes on the couple the obligation to live together.

43 The Tribunal further notes that the cohabitation agreement of the applicant and his companion lays down extensive rules as to the rights and obligations concerning their life together as a couple. In particular, pursuant to Article 3 of the agreement, the partners grant one another mutual authority for legal acts entered into for the day-to-day running of the household. Article 4 of the agreement, for its part, states that all items of property serving daily household purposes are to be jointly owned, except where they are referred to in the annex to the agreement or where the parties have agreed in writing otherwise. Those jointly owned items are listed in Article 4(2) of the agreement. The partners also undertake at Article 5 of the agreement to contribute monthly in proportion to their respective net incomes from employment to a joint fund so that day-to-day household expenses can be met. Moreover, Article 8 of the agreement provides that, in all cases where the ownership of an item of property is in dispute, it is to be considered to belong to both of them, each having an undivided half share. It is necessary, lastly, to mention Article 9 of the agreement, according to which each of the partners designates the other as beneficiary of the "surviving partner's pension", provided that the rules of their respective pensions recognise such a pension.

44 Regarding children, although nothing appears on the point in the cohabitation agreement, it is clear from the brochure annexed to the defence and mentioned at paragraph 5 of this judgment that, where the parents are simple partners, the law of the Netherlands permits the child's father, by recognising the child and by means of certain procedures, to acquire the same rights over him as if he had been married to the mother. In particular, he acquires joint parental responsibility with the mother; in addition, the child may take the name of the father. In the present dispute, the applicant declared, without the Commission disputing the point, that he recognised his first child at birth thereby acquiring a father's rights.

45 In addition, although the conclusion of a cohabitation agreement generally binds only the partners (see paragraph 35 of this judgment), it is appropriate to note that the abovementioned brochure, after indicating that the courts of the Netherlands have begun to treat couples who have entered into a cohabitation agreement in the same way as those who have entered into a registered partnership or a marriage ("courts are starting to put couples with a cohabitation agreement on the same footing as married and registered couples"), expressly accepts that, with regard to couples who have entered into a cohabitation agreement, implications for third parties may be recognised regarding, in particular, retirement pensions, precisely, as referred to at paragraph 43 in fine of this judgment, as each of the partners to this dispute has designated the other as the beneficiary of the "surviving partner's pension" provided that the rules of their respective pension schemes include such a pension.

46 All those factors demonstrate that, even if the consequences flowing from the cohabitation agreement entered into between the applicant and his partner are not as extensive as those which exist within a marriage or even a "geregistreerd partnerschap", they may be similar in numerous respects where the partners arrange things contractually, as is the case in the present dispute.'

16 The Tribunal concluded from this, in paragraph 50 of the judgment under appeal, that Mr Roodhuijzen's partner was entitled, pursuant to Article 72 of the Staff Regulations and Article 12 of the Joint Rules, to be covered by the provisions of the JSIS concerning the 'unmarried partner of an official' and 'recognised partners of members of the Scheme'.

17 Dismissing the Commission's arguments to the contrary, the Tribunal added the following:

'56 For the sake of completeness, the Tribunal observes that the Commission's contention that an agreement of the "geregistreerd partnerschap" type under the law of the Netherlands is required would lead to unequal treatment. Since many countries do not recognise forms of union comparable to that of "geregistreerd partnerschap", in the case of unmarried couples who, particularly by reason of their place of residence or nationality, are more closely connected to those countries, to require a "registered" partnership of that type, as the Commission does, would be to deprive partners of officials permanently of the right to be covered by the JSIS outside of marriage. On the other hand, were the Commission to accept partnerships concluded in the form of cohabitation agreements for those couples, its refusal to recognise "simple" cohabitation agreements for couples who have very close links, in the sense mentioned above, with countries recognising forms of union other than marriage or "registered" partnership, would mean that those couples were unequally treated; in other words, extending the entitlement to be covered by the JSIS to a partner would be refused, whereas it would be recognised for couples with connecting factors to countries which do not recognise "registered" partnerships. Such inequalities would be even more difficult to justify in view of the existence of partnerships which, although not "registered" in the sense used by the Commission, nevertheless resemble marriage more closely than "geregistreerd partnerschap" under the law of the Netherlands. Moreover, although, according to case-law, by prohibiting every Member State from applying its law differently on the ground of nationality, Articles 12 EC, 39 EC, 43 EC and 49 EC are concerned with any disparities in treatment which may arise between one Member State and another because of divergences existing between the laws of the different Member States, only if the latter affect all persons subject to them in accordance with objective criteria and without regard to their nationality (see, to that effect, Case 1/78 *Kenny* [1978] ECR 1489, paragraph 18; Joined Cases C-251/90 and C-252/90 *Wood and Cowie* [1992] ECR I-2873, paragraph 19; Joined Cases 185/78 to 204/78 *Van Dam en Zonen and Others* [1979] ECR 2345, paragraph 10; and Case C-177/94 *Perfili* [1996] ECR 161, paragraph 17), the inequalities of the type referred to in this paragraph do not come within that case-law; first, and contrary to the premisses on which the case-law in question is based, the inequalities of treatment referred to in this paragraph originate in the nationality of the persons concerned and in their place of residence, second, in the cases giving rise to the case-law cited above, the question of inequality of treatment arises in

respect of the rules of free movement, whilst the present case concerns the principle of equality of treatment as a principle of the law of the Community civil service.

57 In view of the foregoing, the Tribunal must uphold the applicant's pleas in law based on infringement of Article 72 of the Staff Regulations, Article 1(2)(c)(i) of Annex VII to the Staff Regulations and Article 12 of the Joint Rules and annul the contested decision, without there being any need to rule on the other pleas in law, which, moreover, as the Commission rightly contends, were raised in a disordered way in the application, and in some cases gave no detail.

58 The Tribunal's interpretation of Article 72 of the Staff Regulations, read in combination with Article 1(2)(c)(i) of Annex VII to the Staff Regulations and Article 12 of the Joint Rules could, in certain cases, lead those services called on to decide whether the right to be covered by the JSIS should be extended to the unmarried partner of an official to carry out investigations and reviews, despite the fact that, by adopting Regulation No 723/2004, the Community legislature sought to simplify the administrative management of the institutions. However, that objective is largely met by the new rules on expenses and allowances, which are the only areas to which Regulation No 723/2004, in recital 26 in the preamble thereto, refers on the subject of simplification, areas, moreover, not only distinct from that of extending the right to be covered by the JSIS, but also less sensitive than the latter from the social perspective. Moreover, the goal of simplification must, in any event, be reconciled with overriding principles of law and the rules of the Staff Regulations; the restrictions which may arise for the authorities from the interpretation upheld in the present case are merely the consequence of the application by the Tribunal of those principles and rules in order to determine the exact meaning of the term "unmarried partner" in Article 72 of the Staff Regulations.'

The appeal

Procedure and forms of order sought by the parties

18 By document lodged at the Registry of the Court of First Instance on 8 February 2008, the Commission brought the present appeal.

19 Mr Roodhuijzen lodged his response on 28 April 2008.

20 The Commission was granted leave, at its request, to submit a reply under Article 143(1) of the Rules of Procedure of the Court of First Instance. The reply was lodged at the Registry of the Court on 18 July 2008 and the rejoinder on 10 October 2008.

21 The Commission claims that the Court should:

— set aside the judgment under appeal;

— reject as unfounded the forms of order sought by Mr Roodhuijzen at first instance;

— order the parties to bear their own costs relating to the present proceedings and those before the Civil Service Tribunal.

22 Mr Roodhuijzen contends that the Court should:

— dismiss the appeal;

— order the Commission to pay the costs relating to the present proceedings in their entirety.

23 Acting on a report from the Judge-Rapporteur, the Court of First Instance (Appeal Chamber) held that no application for a hearing to be arranged had been submitted by the parties within the period of one month from notification of the closure of the written procedure and decided to rule on the appeal without an oral procedure, pursuant to Article 146 of the Rules of Procedure.

Law

24 In support of its appeal, first, the Commission contends that the Civil Service Tribunal acted not only *ultra petita*, but also *ultra vires* and that it infringed the rights of the defence. Secondly, it pleads an error of law in the interpretation of the term 'non-marital partnership'. Moreover, if the Court accepts the first or the second ground of appeal, the Commission pleads in the alternative a misinterpretation of the principle of equal treatment, which the Civil Service Tribunal considered for the sake of completeness in paragraph 56 of the judgment under appeal.

Alleged infringement of the non *ultra petita* and non *ultra vires* rules and the rights of the defence

— Arguments of the parties

25 The Commission considers that the Civil Service Tribunal acted *ultra vires*, in the first place, by substituting its arguments for those of the applicant at first instance and, in the second place, by giving an interpretation of Netherlands law.

26 First, as regards the grounds on which the Civil Service Tribunal held that Article 72 of the Staff Regulations and Article 1(2) of Annex VII to the Staff Regulations had been infringed, the Commission submits that these are 'different' from the arguments put forward by Mr Roodhuijzen in his application and at the hearing at first instance. Indeed, the latter claimed that 'the Commission must accept that a partnership exists where the person concerned submits an official document "recognised" as such by a Member State, acknowledging his "non-marital partnership"'.

27 The Civil Service Tribunal rejected those arguments on the ground that the question whether two persons are 'non-marital partners' cannot be solely a matter for the discretion of the national authorities of a Member State. It therefore exceeded its jurisdiction and infringed the rights of the defence.

28 The Civil Service Tribunal also substituted its own arguments for those of the applicant at first instance when examining the plea alleging infringement of the principle of equal treatment.

29 In that regard, the procedure followed in the case at first instance here is different from that examined in the orders of the Court of Justice of 27 September 2004 in Case C-470/02 P *EBU* v *M6 and Others* (not published in the ECR), paragraphs 42 and 43, and of 13 June 2006 in Case C-172/05 P *Mancini* v *Commission* (not published in the ECR), paragraph 70, relied on by the applicant at first instance, in which the Court found that the Civil Service Tribunal had not exceeded its powers, in particular in the light of the parties' written answers to the Tribunal's questions.

30 Secondly, the Commission claims that the Civil Service Tribunal acted *ultra vires* in examining whether the 'samenlevingsovereenkomst' entered into between the applicant at first instance and Ms H had comparable effects in practice to those of a marriage or a 'geregistreerd partnerschap'. That examination entailed an interpretation of Netherlands law which the Civil Service Tribunal was not competent to give. Moreover, the interpretation given by the Civil Service Tribunal was contrary to that given by the Netherlands authorities themselves, since the latter drew a distinction between a marriage and a 'geregistreerd partnerschap', on the one hand, and a 'samenlevingsovereenkomst', on the other, so that the latter cannot be regarded as being comparable to the first two.

31 In its reply, the Commission claims that the Civil Service Tribunal exceeded its powers by giving an autonomous interpretation of the Community term 'non-marital partner' contained in Article 1(2)(c) of Annex VII to the Staff Regulations. That provision requires reference to national legislation for the purpose of determining, on the basis of the political choices made by each Member State, whether two people are living in a 'non-marital partnership', since the couple are required to provide an official document from the Member State concerned acknowledging such a relationship.

32 Mr Roodhuijzen does not accept that argument.

— Findings of the Court

33 In the first place, it should be noted, as a preliminary point, that when the Commission claims that the Civil Service Tribunal acted *ultra vires* by substituting its arguments for those of the applicant at first instance its criticism of the Tribunal is more specifically that it failed to remain within the framework of the dispute as defined by the parties, and that, by thus proceeding on the basis of an argument that had not been discussed between the parties, it infringed the rights of the defence.

34 In that regard, it should be observed that, since a Community Court before which an action for annulment has been brought cannot rule *ultra petita*, it is not entitled either to redefine the principal subject-matter of the action (see, to that effect, Joined Cases T-90/07 P and T-99/07 P *Belgium* v *Genette* [2008] ECR II-3859, paragraphs 72 to 75) or to raise a plea of its own motion except in particular cases where the public interest requires its intervention.

35 However, it is settled case-law that, within the framework of the dispute as defined by the parties, the Community Court, whilst it must rule only on the application submitted by the parties, cannot confine itself to the arguments put forward by the parties in support of their claims or it may be forced to base its decision on erroneous legal considerations (*EBU* v *M6 and Others*, paragraph 69; *Mancini* v *Commission*, paragraph 41, and judgment of 20 June 2007 in Case T-246/99 *Tirrenia di Navigazione and Others* v *Commission* (not published in the ECR), paragraph 102).

36 In particular, in a dispute between the parties, such as that in the present case, concerning the interpretation and application of a provision of Community law, the Community Court is required to apply to the facts put before it by the parties the relevant rules of law for the solution of the dispute (Opinion of Advocate General Léger in Case C-252/96 P *Parliament* v *Gutiérrez de Quijano y Lloréns* [1998] ECR I-7421, I-7422, point 36). According to the principle *iura novit curia*, determining the meaning of the law does not fall within the scope of application of a principle which allows the parties a free hand to determine the scope of the case and the Community Court is therefore not obliged to inform the parties of the interpretation it intends to give in

order to enable them to adopt a position on that subject (Opinion of Advocate General Cosmas in Joined Cases C-174/98 P and C-189/98 P *Netherlands and van der Wal* v *Commission* [2000] ECR I-1, I-3, points 95 and 96).

37 In this case, it is therefore sufficient to verify whether the contested grounds of the judgment under appeal, which led to the annulment of the decision at issue whilst rejecting the arguments put forward by the applicant at first instance, constitute an extension of the Civil Service Tribunal's argument concerning the grounds relied on at first instance or whether they relate to separate grounds (see, to that effect, the judgment in *Parliament* v *Gutiérrez de Quijano y Lloréns*, paragraphs 32 to 34).

38 The grounds of the judgment under appeal concerning the term 'non-marital partnership' within the meaning of the Staff Regulations and the provisions of the 'samenlevingsovereenkomst' entered into between the applicant at first instance and Ms H must, clearly, be considered in the context of the examination of the grounds alleging infringement of Article 72 of the Staff Regulations, Article 1(2)(c)(i) of Annex VII to the Staff Regulations and Article 12 of the Joint Rules, relied upon in the application at first instance. In fact, the Civil Service Tribunal, in the case before it, merely interpreted autonomously the term 'non-marital partnership' contained in Article 72(1) of the Staff Regulations and applied that term in the case when examining the abovementioned grounds.

39 Similarly, as regards the ground concerning the principle of equal treatment, considered merely for the sake of completeness in paragraph 56 of the judgment under appeal, that ground must also be considered in the context of the examination of the grounds mentioned in the preceding paragraph. The reference to the principle of equal treatment is in this case only an extension of the argument of the Civil Service Tribunal concerning the interpretation of the term 'non-marital partnership' as used in Article 72(1) of the Staff Regulations.

40 It should moreover be noted that Mr Roodhuijzen rightly states that the judgment under appeal is based solely on factual evidence that was put before the Civil Service Tribunal by the parties and was the subject of an exchange of arguments between the parties. The Commission does not moreover question the presence of that evidence in the case-file.

41 In those circumstances, the fact relied on by the Commission that the procedure at first instance examined in the present case differs from the procedures examined by the Court of Justice in *EBU* v *M6 and Others* and *Mancini* v *Commission* because in the present case the parties were not invited to reply to written questions from the Civil Service Tribunal is irrelevant since, in the judgment under appeal, the Civil Service Tribunal took into account only facts that were put before it by the parties and on which the parties were able to exchange arguments.

42 It follows that the Civil Service Tribunal did not rule *ultra petita* nor did it infringe the Commission's rights of defence.

43 Secondly, in support of the ground of appeal alleging infringement of the non *ultra vires* rule, the Commission claims in essence that the Civil Service Tribunal gave an autonomous interpretation of the term 'non-marital partnership', in the light of which it examined the 'samenlevingsovereenkomst' entered into between the applicant at first instance and Ms H, 'interpreting' the Netherlands law for that purpose. In the view of the Commission, only the Netherlands legislature was competent to define that type of cohabitation agreement.

44 Clearly, in that regard, contrary to the Commission's claims, the Civil Service Tribunal did not exceed its jurisdiction by giving an autonomous interpretation of the term 'non-marital partnership' as used in Article 72(1) of the Staff Regulations, Article 1(2)(c)(i) of Annex VII to the Staff Regulations and Article 12 of the Joint Rules, and by taking into

account the relevant national law and the content of the 'samenlevingsovereenkomst' at issue in order to apply that term to the situation at issue here.

45 In fact, it was for the Civil Service Tribunal to interpret and apply the term 'non-marital partnership' as used in the contested provisions of the Staff Regulations, in so far as those provisions do not require a decision that comes solely within the remit of the Member State concerned and is subject to judicial review under the legal system of that State (see, as an example of national responsibility, as regards calculation of the amount of national pension rights to be transferred under the Staff Regulations, *Belgium* v *Genette*, paragraph 57, and case-law cited).

46 In that context, the Civil Service Tribunal was required to resolve the question whether the term 'non-marital partnership' could be interpreted autonomously or whether that term should be interpreted by reference to national law instead. In the first case, the application by the institution concerned, subject to review by the Community Courts, of an autonomous Community term may, where appropriate, require national law to be taken into account as factual evidence. In that case, the specific features of national law must be taken into account irrespective of the legal classifications contained in that law (see, to that effect, judgment of 20 February 2009 in Joined Cases T-359/07 P to T-361/07 P *Commission* v *Bertolete and Others*, not yet published in the ECR-SC, paragraph 46). In the second case, however, it is for the institution concerned, subject to review by the Community Courts, to apply the relevant rules of national law as interpreted by the national courts (see, to that effect, Case 24/71 *Meinhardt* v *Commission* [1972] ECR 269, paragraphs 6, 7 and 12; Case T-43/90 *Díaz García* v *Parliament* [1992] ECR II-2619, paragraphs 37 to 41; Case T-85/91 *Khouri* v *Commission* [1992] ECR II-2637, paragraphs 33 to 41; and Case T-172/01 *M* v *Court of Justice* [2004] ECR II-1075, paragraphs 72 to 75 and 112).

47 In those circumstances, even if the autonomous interpretation of the term 'non-marital partner' used in the judgment under appeal is incorrect, as the Commission claims, the Civil Service Tribunal cannot be criticised for exceeding its jurisdiction by referring to the specific features of the relevant national law. Moreover, the assessment of the lawfulness, first, of such an interpretation of the term 'non-marital partner' and, secondly, of the application of the term thus defined in the present case must be

examined in the context of the ground of appeal alleging an error of law in the interpretation of the term 'non-marital partnership'.

48 For all those reasons, the grounds of appeal alleging infringement of the non *ultra petita* and non *ultra vires* rules and the rights of the defence must be rejected as unfounded.

The alleged error of law in the interpretation of the term 'non-marital partnership'

— Arguments of the parties

49 The Commission's main submission is that the Civil Service Tribunal erred in law in interpreting the term 'non-marital partnership' as entitling the partner of an official to cover under the JSIS.

50 It criticises it in that regard for finding, in paragraph 29 of the judgment under appeal, that registration of the partnership referred to in the introductory sentence of Article 1(2)(c) of Annex VII to the Staff Regulations is not a prerequisite. It states that, by referring to Article 1(2)(c) of Annex VII to the Staff Regulations rather than giving a definition of the term 'unmarried partner' in Article 72 of the Staff Regulations, the Community legislature was referring not to the formality of the registration of a partnership as such but to the effects of that formality on the type of partnership that may be taken into account. The conditions laid down in Article 1(2)(c) of Annex VII to the Staff Regulations cannot therefore be read separately from the introductory sentence of that provision.

51 According to the Commission, this means that the only type of 'non-marital partnership' referred to in Article 1(2) of Annex VII to the Staff Regulations is one which, under national law, is designed to have effects similar to those of a marriage. The Civil Service Tribunal thus erred in law by interpreting the Community term 'non-marital partnership' as being capable of including other types of partnerships which, under national law, are not designed to have such effects but which may none the less have 'consequences [that] may be similar in numerous respects [to those of a marriage] where the partners arrange things contractually' (paragraph 46 of the judgment under appeal).

52 A partnership such as the 'samenlevingsovereenkomst', however the details of it are arranged contractually, could never be deemed equivalent to a marriage and confer entitlement under Article 1(2) of Annex VII to the Staff Regulations, since it was not intended by the Netherlands legislature to have effects similar to those of a marriage. Indeed, from the legal point of view it is not a partnership intended exclusively for persons wishing to form a 'couple'.

53 The Commission claims that the Community legislature extended entitlement to certain benefits under the Staff Regulations previously reserved for a spouse to just one type of partnership,'a stable registered partnership'. This is confirmed by recital 8 in the preamble to Regulation No 723/2004, which reads: 'Officials in a non-marital relationship recognised by a Member State as a stable partnership who do not have legal access to marriage should be granted the same range of benefits as married couples.' The Civil Service Tribunal's argument amounts to a contention that the type of partnership giving entitlement to certain benefits varies depending on the benefit concerned.

54 According to the Commission, the requirement that the partnership be registered and stable, within the meaning of the first sentence of Article 1(2)(c) of Annex VII to the Staff Regulations, is the only truly substantive condition laid down in that article. First, the requirement laid down in subparagraph (i), to produce a legal document recognised as such by the Member State concerned, does not mean that the partnership should be 'recognised' by that State, as Article 12 of the Joint Rules might misleadingly imply. It is sufficient for the document provided to certify that the non-marital partnership has been recognised as being official. Secondly, the conditions laid down in subparagraphs (ii) and (iii), which exclude, on the one hand, partners who are married or in another

non-marital partnership and, on the other hand, partners who are closely related to the official, are similar to the conditions of marriage and of a 'geregistreerd partnerschap'.

55 A 'samenlevingsovereenkomst', however, may be entered into by several persons and between close relatives. The Commission observes in that regard that the European Court of Human Rights dismissed the claim in respect of inheritance tax, made by two sisters living in a 'stable, committed and mutually supportive relationship' (see *Burden v. the United Kingdom*, judgment of 29 April 2008, no. 13378/05, § 10), of discrimination compared with civil partners under the United Kingdom's Civil Partnership Act, in particular on the ground that 'one of the defining characteristics of a marriage or Civil Partnership Act union is that it is forbidden to close family members' (§ 62 of the judgment).

56 In the present case, by taking the view that registration before a notary met the requirements of the 'registration' condition, the Civil Service Tribunal misinterpreted the term 'registration' used in the introductory sentence of Article 1(2)(c) of Annex VII to the Staff Regulations. That term means that the partnership must be 'regulated by law' in the same way as a marriage. A 'cohabitation' contract under private law, which may be 'formalised' before a notary at the discretion of the parties, does not fulfil that condition.

57 The Commission adds that recital 5 in the preamble to and Article 2(2)(b) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77) confirm that, under Community law, a 'registered partnership' is exclusively a partnership which, on the basis of the national law under which it was contracted, has effects equivalent to marriage. It is also apparent from paragraph 33 of the judgment in Joined

Cases C-122/99 P and C-125/99 P *D and Sweden* v *Council* [2001] ECR I-4319 that 'registered partnership' must be taken to mean exclusively a partnership which has the same legal effects as a marriage.

58 Furthermore, case-law confirms that a term such as 'non-marital partners', which relates to the civil status of persons and thus falls within the exclusive competence of the Member States, cannot be given an autonomous interpretation (see *D and Sweden* v *Council*, paragraphs 34 and 35, and Case C-267/06 *Maruko* [2008] ECR I-1757, paragraphs 59, 67 to 69 and 72).

59 Moreover, the approach taken by the Civil Service Tribunal is at odds with the intention of the Community legislature to simplify administrative management. As the Civil Service Tribunal acknowledges, in paragraph 58 of the judgment under appeal, that approach means that in each case of a 'contractual' partnership which under the relevant national law is not equivalent to a marriage, the Commission must analyse the provisions of the contract concerned in order to decide whether it has 'similar' effects to a marriage.

60 In the alternative, if the Court of First Instance upholds the Civil Service Tribunal's interpretation, according to which Article 72 of the Staff Regulations does not refer to the introductory sentence of Article 1(2)(c) of Annex VII, the Commission claims that the judgment under appeal should be set aside on the ground of misinterpretation of the conditions laid down in subparagraphs (i) to (iii) of that provision.

61 In that case, the only possible interpretation of Article 72 of the Staff Regulations and Article 1(2)(c) of Annex VII to the Staff Regulations is that proposed by Mr Roodhuijzen at first instance. Therefore, since a non-marital partnership, even though it is under private law, was entered into with one person, who is not closely related to the official and neither of the partners is in a marital relationship or in another partnership, and since the Commission has been provided with a document acknowledging the partnership, that partnership should be accepted by the Commission for the purposes of the partner being covered under the JSIS. He cannot therefore be required to prove, as the judgment under appeal requires him to do, that the partnership has a certain

resemblance to a marriage and a 'certain stability'. The condition laid down in subparagraph (i) cannot be interpreted as meaning this.

62 Mr Roodhuijzen, for his part, contends that the second ground of appeal is inadmissible since the Commission does not challenge the reasoning on the basis of which the Civil Service Tribunal rejected his arguments, but merely seeks reconsideration of the application at first instance.

63 Moreover, that ground of appeal is unfounded. The Civil Service Tribunal did not err in law by giving an autonomous interpretation of the term 'non-marital partners' contained in Article 1(2)(c)(i) of Annex VII to the Staff Regulations to the effect that such a partnership must have a certain resemblance to a marriage (see paragraph 52 of the judgment under appeal).

64 In this case, the Civil Service Tribunal did verify whether the cohabitation agreement at issue was a 'non-marital partnership' within the meaning of the Staff Regulations. In that regard, the question whether Netherlands law regards a 'samenlevingsovereenkomst' as being equivalent to a marriage or a 'geregistreerd partnerschap' is irrelevant.

65 In those circumstances, the finding of the Civil Service Tribunal that the only partnerships to be taken into account for the purposes of the JSIS are 'couples', which was the case of Mr Roodhuijzen and his partner, could not be called in question by the fact that a 'samenlevingsovereenkomst' could, in the abstract, be entered into by two or more persons or by persons who were related. A different interpretation which does not take the specific partnership in which they are living into account would result in discrimination between officials by reason of the abstract form of their partnership.

66 In the alternative, Mr Roodhuijzen contends that the term 'an official who is registered as a stable non-marital partner', used in the introductory sentence of Article 1(2)(c) of Annex VII to the Staff Regulations, does not relate to a 'geregistreerd partnerschap'. The Court of Justice held in Case 59/85 *Reed* [1986] ECR 1283, paragraphs 12 and 13, that 'any interpretation of a legal term on the basis of social developments must take into account the situation in the whole Community, not merely in one Member State' (see also the Opinion of Advocate General Mischo in *D and Sweden* v *Council*, point 43).

67 Furthermore, if the Community legislature had intended to cover solely 'registered' partnerships, governed by law, the effects of which are equivalent to those of a marriage, it would have referred to the 'legal status' of non-marital partners.

— Findings of the Court

68 In the context of the second ground of appeal, the Commission challenges the interpretation of the term 'non-marital partnership', as used in the Staff Regulations, adopted in the judgment under appeal. Hence, contrary to Mr Roodhuijzen's contention, that ground of appeal does not seek reconsideration of the application at first instance and cannot therefore be declared inadmissible.

69 Consequently, it is necessary to ascertain whether, as the Commission claims, the Civil Service Tribunal erred in law by giving an autonomous interpretation of the term 'non-marital partnership' used in the second subparagraph of Article 72(1) of the Staff Regulations.

70 According to settled case-law, the terms of a provision of Community law which makes no express reference to the laws of the Member States for the purpose of determining its

meaning and scope must normally be given an independent interpretation which must take into account the context of the provision and the purpose of the relevant rules (Case 327/82 *Ekro* [1984] ECR 107, paragraph 11). However, in the absence of an express reference, the application of Community law may sometimes necessitate a reference to the laws of the Member States where the Community Court cannot identify in Community law or in the general principles of Community law criteria enabling it to define the meaning and scope of such a provision by way of independent interpretation (*Díaz García* v *Parliament*, paragraph 36, and *Khouri* v *Commission*, paragraph 32).

71 In this instance, it is appropriate to consider whether Community law, and in particular the Staff Regulations, provide the Community Court with sufficient information to allow it to clarify, by giving an autonomous interpretation, the meaning of the term 'non-marital partnership' contained in the second subparagraph of Article 72(1) of the Staff Regulations, or whether, on the other hand, the relevant provisions of the Staff Regulations refer in that regard implicitly to national law.

72 To that end, it is appropriate to analyse the relevant provisions of the Staff Regulations. Such analysis leads, first, to rejection of the Commission's main argument that the Civil Service Tribunal failed to take into account the requirement of a 'registered partnership' allegedly laid down in the first sentence of Article 1(2)(c) of Annex VII to the Staff Regulations (see, in particular, paragraphs 50 to 52, 54 and 56 above). Taking the wording of the second subparagraph of Article 72(1) of the Staff Regulations as its basis, the Civil Service Tribunal rightly held that, in order to define the term 'unmarried partner of an official', Article 72 of the Staff Regulations refers solely to the first three conditions laid down in Article 1(2)(c) of Annex VII to the Staff Regulations.

73 Furthermore, the two articles mentioned above have separate purposes. Whilst Article 1(2) of Annex VII to the Staff Regulations lays down the conditions for entitlement to the household allowance, Article 72 of the Staff Regulations makes provision, under certain less strict conditions, which partly overlap with those relating to entitlement to the household allowance, for cover under the JSIS for the unmarried partner of an official. It is thus clear from the abovementioned provisions of the Staff Regulations that the latter relate to a single meaning for the term 'non-marital

partnership', whilst making entitlement to the household allowance for an official living in such a partnership subject to an additional condition.

74 In that context, the absence of a reference in Article 72 of the Staff Regulations to the first sentence of Article 1(2)(c) of Annex VII to the Staff Regulations is due to the fact that, in any event, that sentence does not give any precise information about the term 'non-marital partnership'.

75 Given the wide differences between national legislations with regard to the introduction of statutory arrangements granting legal recognition to various forms of union other than marriage, the term 'official registered as a stable non-marital partner' contained in the first sentence of Article 1(2)(c) of Annex VII to the Staff Regulations cannot, as such, be interpreted as referring to a 'registered partnership' arrangement clearly identified throughout all Member States, to which, in the present case, the 'geregistreerd partnerschap' under Netherlands law corresponds. From that point of view, and at this stage in the evolution of the various national legal systems, 'registered partnership' is thus different from 'marriage', whose outlines are clearly defined throughout all Member States, which enabled the Community Court to define marriage as used in the Staff Regulations as meaning a relationship based on civil marriage within the traditional meaning of the term (Case T-264/97 *D* v *Council* [1999] ECR-SC I-A-1 and II-1, paragraph 26).

76 It follows from this that the term 'registered partnership' used in the Staff Regulations can be defined only with regard to all the relevant provisions of the Staff Regulations, in particular in the light of the information contained in the conditions laid down in Article 1(2)(c) of Annex VII to the Staff Regulations. In the absence of a generally accepted meaning for the term 'registered partnership', a mere reference to such a partnership in the first sentence of that article does not provide sufficient information regarding the term's definition.

77 Contrary to the Commission's claims (see paragraph 56 above), that reference cannot therefore be interpreted as imposing a specific condition of 'registration' or as requiring that partnership should be 'regulated by law', in the same way as marriage. The word 'registered' used in the first sentence of Article 1(2)(c) of Annex VII to the Staff Regulations refers solely to certain formal aspects that are set out in the first condition laid down in Article 1(2)(c) of Annex VII to the Staff Regulations.

78 In this context, the Civil Service Tribunal cannot be criticised for not considering that the first sentence of Article 1(2)(c) of Annex VII to the Staff Regulations meant in this case the requirement of a 'geregistreerd partnerschap'.

79 Secondly, it is appropriate to consider whether, since the concept of marriage has been interpreted as being in principle a Community concept (see *Reed*, paragraph 15, and *D and Sweden* v *Council*, paragraph 26) it is possible also to derive a Community concept of 'non-marital partnership' from all the relevant provisions of the Staff Regulations or whether, in the absence of sufficient information, the Staff Regulations refer implicitly to national laws.

80 In that regard, it is necessary to make clear first of all that, contrary to the approach suggested by the Commission based on *D and Sweden* v *Council* (see paragraph 57 above), the Community Court is not called upon to consider in the present dispute whether a 'registered partnership' can be deemed equivalent to marriage and confer entitlement to benefits granted by the Staff Regulations to married couples because, as between the persons concerned and as regards third parties, it has effects in law akin to those of marriage. In the present case, the Community Court is required merely to resolve the completely different matter of interpreting the term 'non-marital partnership' expressly used in the Staff Regulations.

81 As the Civil Service Tribunal observed, it is made clear in recital 8 in the preamble to Regulation No 723/2004 that the Community legislature intended, under certain conditions, to extend to 'officials in a non-marital relationship recognised by a Member

State as a stable partnership' the same benefits as are granted to married couples. The concept of 'non-marital partners' on whom, in pursuance of the abovementioned objective, the Staff Regulations confer certain rights may be inferred from the conditions laid down in Article 1(2)(c) of Annex VII to the Staff Regulations, in the light of that recital in particular.

82 It is clear from the abovementioned conditions that the existence of a non-marital partnership, within the meaning of the Staff Regulations, implies, on the one hand, a union between two persons and, on the other hand, certain formal aspects.

83 In that regard, the Civil Service Tribunal rightly held first of all, in paragraph 38 of the judgment under appeal, that the requirement of a union of two persons — as opposed to other types of partnerships also recognised in these circumstances by Netherlands law under the 'samenlevingsovereenkomst' arrangement (see paragraph 6 above) — stems from the term 'couple' used in particular in the first condition laid down in Article 1(2)(c) of Annex VII to the Staff Regulations. That interpretation is confirmed by the second and third conditions laid down in the abovementioned article, excluding, on the one hand, situations in which one or other of the partners is married or living in another non-marital partnership and, on the other hand, those in which the partners are closely related.

84 That requirement of a union between two persons means that, in the same way as the spouse, the 'unmarried partner' of an official, to use the words of Article 72 of the Staff Regulations, or his 'stable partner', to use the words of recital 8 in the preamble to Regulation No 723/2004, is clearly distinct from his dependants, that is to say, children of the official concerned and other persons dependent on him within the meaning of Article 2 of Annex VII to the Staff Regulations, whose rights are guaranteed under other provisions of the Staff Regulations, in particular under the first subparagraph of Article 72(1) of the Staff Regulations. That requirement leads more generally to the exclusion from the concept of 'non-marital partnership', as used in the Staff Regulations, of all situations which, although no union exists between two persons, are, where appropriate, likely to be covered by a partnership recognised under the relevant national law, such as a 'samenlevingsovereenkomst'. On this point, the concept of 'non-marital partnership' contained in the Staff Regulations thus converges with the

definition adopted by the European Court of Human Rights in *Burden v. the United Kingdom*, relied on by the Commission (see paragraph 55 above).

85 As regards the formal requirements, these also stem from the first condition laid down in Article 1(2)(c) of the Staff Regulations, which states that 'the couple [must produce] a legal document recognised as such by a Member State, or any competent authority of a Member State, acknowledging their status as non-marital partners'. It is clear from the actual wording of that provision that what is required is, on the one hand, production of an official document acknowledging that the persons concerned are non-marital partners and, on the other hand, recognition of the official nature of that document by the Member State concerned. In this case, in view of the variety of legal situations that may be covered by a 'samenlevingsovereenkomst' under Netherlands law (see paragraph 6 above), the Civil Service Tribunal rightly held, in paragraphs 33, 39 and 54 of the judgment under appeal, that production of such a legal document drawn up before a notary met the requirement of an official document concerning the status of the persons concerned, as a result of the authenticity conferred on that document by its conclusion by a notarised act. As for recognition of the official nature of that legal act by a Member State, the Civil Service Tribunal made no error of law in stating that it resulted in this instance from the attestation from the Embassy of the Netherlands in Luxembourg, certifying that the status of the persons concerned as non-marital partners was recognised in the Netherlands.

86 It follows from all the above considerations that it is possible on the basis of the relevant provisions of the Staff Regulations to define the term 'non-marital partnership' as having a certain resemblance to a marriage, as the Civil Service Tribunal held in paragraph 36 of the judgment under appeal. Those provisions do not however require the 'non-marital partnership' to be equivalent to marriage. In that regard, the Civil Service Tribunal rightly held that such a requirement amounted to adding an additional condition that was not laid down in the Staff Regulations (paragraph 52 of the judgment under appeal).

87 Contrary to the Commission's claims (see paragraph 58 above), an autonomous interpretation of the term 'non-marital partnership' does not affect the exclusive competence of Member States with regard to the civil status of persons and determination of the benefits deriving therefrom. In so far as the definition given relates

to a term used in the Staff Regulations, its scope is necessarily circumscribed by the framework of the Staff Regulations. It governs solely the award of certain social benefits granted by the Staff Regulations to officials or other servants of the European Communities, and has no effects in the Member States, which are free to introduce statutory arrangements granting legal recognition to forms of union other than marriage, in accordance with established case-law (see, to that effect, *Reed*, paragraphs 13 to 15, and *Maruko*, paragraphs 59 and 73).

88 In that context, it is necessary also to reject the Commission's argument based on certain provisions of Directive 2004/38 (see paragraph 57 above). Unlike the term 'non-marital partnership' as used in the Staff Regulations, those provisions have effects in all Member States and therefore seek not to encroach on the competence of the latter as regards civil status and rights deriving therefrom.

89 Moreover, contrary to the Commission's claims, the term 'non-marital partnership' as used in the Staff Regulations cannot be interpreted as covering solely partnerships exclusively designed, under national law, to have effects similar to those of a marriage (see paragraphs 51 and 52 above). In that regard, the Commission's position is not supported by the provisions of the Staff Regulations or the objectives they pursue, and amounts to an intention to add an additional condition that is not justified by the objectives pursued by the Community legislature.

90 It is apparent from the preceding analysis (see paragraphs 82 to 86 above) that, under the relevant provisions of the Staff Regulations, the existence of a 'non-marital partnership' requires merely a union between two persons and certain formal aspects. Consequently, it is sufficient for those conditions to be met in the case under consideration, irrespective of whether they are laid down in mandatory terms by the relevant national legislation or whether the latter leaves them to the discretion of those concerned. In that regard, the fact that the relevant national legislation permits different legal situations to be brought together under the same term, depending on the wishes of the parties, who are free to determine the content and form of their

cohabitation agreement, is completely irrelevant, provided the partnership entered into fulfils the conditions laid down in the Staff Regulations.

91 Furthermore, as Mr Roodhuijzen contends (see paragraph 65 above), the introduction of the additional condition as suggested by the Commission would lead to discrimination against some officials on the ground of the abstract form of their partnership, even though the relevant national legislation recognises that partnership and the necessary conditions contained in the Staff Regulations are fulfilled. Such an outcome would not only infringe the relevant provisions of the Staff Regulations but would also be based on a misinterpretation of the relevant national legislation. In that regard, it should be noted that Netherlands law recognises that a 'samenlevingsovereenkomst' may have certain effects similar to those of a marriage.

92 Thirdly, it is necessary to examine the Commission's arguments put forward in the alternative concerning interpretation of the first condition laid down in Article 1(2)(c) of Annex VII to the Staff Regulations (see paragraphs 60 and 61 above), according to which, since the partnership under consideration was entered into with a person who is not closely related to the official, neither of the partners is married or in another partnership and the conditions with regard to the formalities have been complied with, it is not for the Community institution concerned to verify whether that partnership has a certain resemblance to a marriage and a certain stability.

93 In that regard, it should be noted that the concept of 'non-marital partnership' in the Staff Regulations does have a certain resemblance to that of marriage. However, apart from the formal requirements, the only substantive condition contained in the relevant provisions of the Staff Regulations concerns the existence of a union between two persons, as was held above (see paragraphs 82 to 86).

94 In so far as certain types of 'non-marital partnership' recognised in Member States, such as the 'samenlevingsovereenkomst' in the Netherlands, may, where appropriate,

cover legal situations that do not meet the abovementioned criteria defining the term 'non-marital partnership' as used in the Staff Regulations, as was held above (see paragraphs 83 to 85 and 90), it is incumbent on the Community institution concerned in such a situation to verify, subject to review by the Community Courts, whether the conditions laid down in the Staff Regulations are met.

95 The Civil Service Tribunal was therefore correct to hold, in paragraphs 35 and 52 of the judgment under appeal, that recognition of a 'non-marital partnership' within the meaning of the Staff Regulations is not solely a matter for assessment by the Member State concerned, an assessment made in the present case by the attestation contained in the certificate issued by the Embassy of the Netherlands in Luxembourg.

96 However, although the Staff Regulations require, for the purposes of recognition of the existence of a 'non-marital partnership', evidence of cohabitation characterised by a certain stability, they do not require the partners to be bound by specific reciprocal rights and obligations. The resemblance to a marriage required by the Staff Regulations results precisely from such cohabitation and from the requirement of certain formal aspects (see paragraphs 82 to 86 above). Hence, since the official concerned has demonstrated that the partnership he has entered into meets both those conditions, it is not for the institution concerned — contrary to what the Civil Service Tribunal held in paragraph 39, in fine, of the judgment under appeal — to examine in addition whether the reciprocal rights and obligations stipulated by the partners in their agreement govern their cohabitation in a structured and detailed way. Without any evidence to that effect in the Staff Regulations, exercise of such review would have the effect of making recognition of a 'non-marital partnership' subject to conditions that were not laid down in the Staff Regulations.

97 In this case, the Civil Service Tribunal correctly verified, in the light of the documents which Mr Roodhuijzen had supplied to the authorities, that he and Ms H were living together in a stable relationship (paragraph 42 of the judgment under appeal). That point is not moreover disputed by the Commission.

98 However, the Civil Service Tribunal erred in law in verifying in detail, on the basis of an examination both of the 'samenlevingsovereenkomst' between the applicant at first instance and Ms H and of the provisions of the Netherlands legislation, the reciprocal rights and obligations relating to the cohabitation of Mr Roodhuijzen and his companion. Contrary to the approach adopted in paragraphs 43 to 46 of the judgment under appeal, the Staff Regulations do not require verification of whether the consequences stemming from the partnership entered into by the official concerned are 'similar in numerous respects' to those stemming from a marriage, or indeed a 'geregistreerd partnerschap'.

99 Therefore, the judgment under appeal is vitiated by an error of law in so far as the Civil Service Tribunal conducted the abovementioned examination in paragraphs 43 to 46, in breach of the relevant provisions of Article 72 of the Staff Regulations and Article 1(2)(c) of Annex VII to the Staff Regulations.

100 However, in so far as, apart from the review referred to in paragraphs 98 and 99 above of the additional conditions not contained in the Staff Regulations, the Civil Service Tribunal correctly held that all the conditions of the Staff Regulations concerning both the existence of cohabitation and the formal aspects were met, the abovementioned error of law is not such as to invalidate the judgment under appeal (see, to that effect, Case C-282/05 P *Holcim (Deutschland)* v *Commission* [2007] ECR I-2941, paragraph 33, and Case C-113/07 P *Selex Sistemi Integrati* v *Commission* [2009] ECR I-2207, paragraph 81).

101 The ground of appeal alleging an error of law in the interpretation of the term 'non-marital partnership' must therefore be rejected.

102 In those circumstances, there is no need to examine the ground of appeal put forward in the alternative alleging misinterpretation of the principle of equal treatment, a plea included in the judgment under appeal purely for the sake of completeness (see paragraph 24 above). That ground of appeal is irrelevant since the operative part of the judgment under appeal appears to be based on the error of law in the interpretation of the term 'non-marital partnership'.

103 The appeal must therefore be rejected as unfounded.

Costs

104 Pursuant to the first paragraph of Article 148 of the Rules of Procedure, where the appeal is unfounded, the Court of First Instance is to make a decision as to costs.

105 Under the first subparagraph of Article 87(2) of the same rules, which apply to the procedure on appeal pursuant to Article 144 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful and Mr Roodhuijzen has applied for costs, the Commission must be ordered to pay its own costs and those incurred by Mr Roodhuijzen in the course of the present proceedings.

On those grounds,

THE COURT OF FIRST INSTANCE (Appeal Chamber)

hereby:

1. **Dismisses the appeal;**

2. **Orders the Commission of the European Communities to pay its own costs and those incurred by Mr Anton Pieter Roodhuijzen in the course of the present proceedings.**

Jaeger Tiili Azizi

Meij Vilaras

Delivered in open court in Luxembourg on 5 October 2009.

[Signatures]