In Case 799/79

GÜNTER BRUCKNER, Euratom Centre, Ispra (Varese), Italy, represented by B. Potthast and H. J. Rüber of the Cologne Bar, assisted by Professor E. Steindorff of the University of Munich, with an address for service in Luxembourg at the Chambers of V. Biel, Advocate, 18a Rue des Glacis,

applicant,

v

(1) COMMISSION OF THE EUROPEAN COMMUNITIES, represented by J. Pipkorn, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of O. Montalto, Jean Monnet Building, Kirchberg,

(2) COUNCIL OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, J. Carbery, acting as Agent, with an address for service in Luxembourg at the office of D. Fontein, Director of the Legal Department of the European Investment Bank, Kirchberg,

defendants,

APPLICATION in the terms set out in the pleadings,

THE COURT (First Chamber)

composed of: G. Bosco, President of Chamber, A. O'Keeffe and T. Koopmans, Judges,

Advocate General: F. Capotorti
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

The facts of the case and the conclusions, submissions and arguments of the parties put forward during the written procedure may be summarized as follows:

I — Facts and written procedure

1. Background provisions

This case should be seen against the background of the following provisions:

(a) In the version in force until 31 March 1979, Article 63 of the Staff Regulations of Officials provided that:

"An official's remuneration shall be expressed in Belgian francs.

It shall be paid in the currency of the country in which the official performs his duties.

Remuneration paid in a currency other than Belgian francs shall be calculated on the basis of the par values accepted by the International Monetary Fund, and in force on 1 January 1965."

The relevant parity was BFR 12.50 to DM 1 and BFR 8 to LIT 100.

In accordance with Article 17 of Annex VII to the Staff Regulations, an official may have part of his emoluments transferred, either regularly or on an exceptional basis, to a country other than the one in which he performs his duties. Until 31 March 1979 Article 17 (4) provided that such transfers were to be made through the institution to which the official belonged "at the official rate of exchange in force at the date of the transfer". The "official rate of exchange" within the meaning of that provision was the last parity accepted by the International Monetary Fund, which had not been altered since 1 November 1969 (for example, BFR 13.66 to DM 1).

After the collapse in 1971 of the international system of fixed exchange rates, which is at the heart of those provisions, the parities came to reflect less and less the purchasing power of the currencies involved and their value on the international money market. Officials who made transfers to countries the value of whose currency had increased in relation to the parities notified to the International Monetary Fund were thus able to realize gains on the exchange rate, as compared with transfers made in normal market conditions.

In accordance with the legal position existing prior to 1 April 1979 the weighting provided for in Article 64 of the Staff Regulations to reflect the living standards at the place where the official performed his duties had to be applied to the whole of the remuneration including the part to be transferred to another country pursuant to Article 17 of Annex VII. This led to an increase in the weighting for officials assigned to countries such as Italy where the value of the currency had decreased in relation to the parities notified to the International Monetary Fund and to a reduction in the weighting for officials assigned to countries whose currency had gained in value in relation to the parities of the Fund. However, the applicant maintains

that the increase made in the weighting was very slight. For example, the weighting for Italy was increased, in figures, from 100 to 146.9, whereas the exchange rate had fallen from LIT 12.5 for BFR 1 to LIT 28 for BFR 1.

Pensioners were able to derive special advantages from these provisions. If they declared their domicile to be in a country whose currency had diminished in value, the weighting in respect of that country was applied to their pension in accordance with Article 82 (1) of the Staff Regulations. Article 45 of Annex VIII to the Staff Regulations gave them the opportunity of having their pensions paid in the strong currency of their country of origin or of that of the seat of the institution to which they belonged. This state of affairs was condemned by Mr Advocate General Mayras in his opinion in Case 28/74 *(Gillet,* [1975] ECR 475).

From 1974 onwards the Commission has submitted proposals to the Council with a view to abolishing the anomalies in the rules governing the payment of remuneration and pensions brought about by the breakdown in the international system of fixed exchange rates.

The proposal for a Council regulation amending the Staff Regulations of Officials, submitted to the Council by the Commission on 13 June 1974 (Official Journal C 88, p. 25) provided for an amended version of Article 17 (4) of Annex VII to the Staff Regulations as follows:

"Transfers provided for in paragraphs (2) and (3) shall be made on the basis of the par values referred to in the last paragraph of Article 63 of the Staff Regulations; the amounts transferred shall be multiplied by a coefficient representing the difference between the weighting for the country in whose currency the transfer is made and the weighting for the country in which the official is employed."

On 1 April 1977 the Commission submitted to the Council a proposal for a Council regulation introducing the European unit of account (EUA) into the Staff Regulations of Officials (Official Journal C 99, p. 5). That proposal was rejected by the Staff Regulations Committee to which it had been referred. The Council obtained the opinion of the European Parliament and of the Court of Justice. By resolution of 7 July 1977 (Official Journal C 183, p. 55) the Parliament approved the proposal taking note of "the Commission's assurance that its proposal will in no way affect the real value of the payments made to officials in the form of remuneration, pensions and allowances". At the sitting the Commissioner responsible for administration, Mr Tugendhat, stated: "The object of the Commission's system is financial neutrality, and what we think that our system can achieve is an equality of purchasing power. What we want is that a Commission official of a given grade, whether he is working in Brussels or Luxembourg or London or any other part of the Community, should be able to buy exactly the same quantity of goods as his equal in another part of the Community . . . The problem of transfers is also one that has preoccupied the Commission. There is a proposal for an amendment of the Staff Regulations now under consideration. In our view, that amendment must be adopted no later

than the present draft regulation and that, I think, covers another point about which there has been concern."

The Council did not succeed in 1978 in adopting the regulation proposed by the Commission on 6 October 1976 (Official Journal C 271, p. 5) "on the procedure for applying the European unit of account (EUA) to the legal acts adopted by the institutions of the European Communities". The Commission therefore set to work to bring up to date, in the light of the situation thereby created, the exchange rates in respect of remuneration for officials which was envisaged by the proposal of 1 April 1977. In an annex to its report in 1978 on the yearly survey of the level of remuneration (COM. (78) 673 final of 29 November 1978) the Commission sent the following communication to the Council on which neither the Parliament, the Court of Justice nor the Staff Regulations Committee was consulted:

"... The first two paragraphs of Article 63 are to be replaced by the following: 'Officials' remuneration shall be expressed in Belgian francs. It shall be paid in the currency of the country in which the official performs his duties. Remuneration paid in a currency other than Belgian francs shall be calculated on the basis of the exchange rates used for the implementation of the general budget of the European Communities on ...' The Commission urges the Council to adopt the aforementioned article before the end of the year as well as Article 17 of Annex VII which is the result of the Council's studies relating to the amendments to the Staff Regulations ... The ... regulation should come into effect on 1 January 1979 ... and should apply from 1 April 1979. However, for pensioners in receipt of allowances whose net financial benefits will be less than those under the existing arrangements, the regulation will apply only from 1 October 1979."

(b) On 21 December 1978 the Council adopted Regulation No 3085/78 (Official Journal 1978 L 369, p. 6), amending, with particular reference to the monetary parities to be used, Regulation No 259/68 laying down the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of the Communities, Regulation No 2530/72 and Regulation No 1543/73 concerning certain special measures. The regulation embodies the wording of the communication from the Commission of 29 November 1978 and also the formula contained in the proposal of 1 April 1977 concerning the weighting to be applied to amounts transferred. The Council added, however: "From that date the difference between the net amounts resulting from the implementation of the regulation and those received in September 1979 shall be reduced by $^{1}/_{10}$ per month". The regulation fixes 1 July 1978 as the relevant date for calculating remuneration paid in a currency other than Belgian francs on the basis of the exchange rates used for the implementation of the general budget of the Communities and goes on to state that that date shall be changed at the time of the annual review of remuneration.

(c) Hand in hand with the bringing up to date of the rates of exchange, the Council adopted Regulation No 3086/78 of 21 December 1978 (Official Journal L 369, p. 8) adjusting the weightings applicable to the remuneration and

pensions of Officials and Other Servants of the European Communities following the amendment of the provisions of the Staff Regulations concerning the monetary parities to be used in implementing the Staff Regulations, which amended the value of the weightings according to the various places of employment. In order to do that the Commission and the Council of the European Communities used a formula the intended result of which was that in the case of each official or other servant employed outside Belgium or Luxembourg the remuneration for April 1979 would be maintained at the same level as that of the previous month. However, in the applicant's view, as far as the disposable amount of his remuneration is concerned, that formula resulted in a reduction of about 25%.

In fixing the weighting referred to in Article 64 of the Staff Regulations, the Council and the Commission have, since 1967, used the following procedure for comparing the level of prices between Brussels and the various other places of employment. The Statistical Office of the European Communities, in conjunction with the competent national offices, carries out regular price surveys in respect of goods and services considered as representing typical items of household expenditure for officials in the various places of employment. In respect of each item the relationship is calculated between the price in Brussels and the price prevailing in the town which is used as the point of reference for the place where the official performs his duties. By the use of this weighting it is possible to calculate the relative purchasing power of currencies in the countries where the officials of the Community perform their duties. For example, the index calculated using the "Fisher" method expresses in a single figure the relationship of prices in Brussels to those in Rome and *vice versa*. This figure is used for calculating the weightings within the Community because it expresses the relationship of prices from one town to another in a reversible manner and because it is therefore possible to make not only bilateral price comparisons but also multilateral ones. According to this method, the weighting is obtained by dividing the "Fisher" index calculated as described above, by the corresponding rate of exchange used to convert the remuneration of officials into the respective national currencies in accordance with Article 63 of the Staff Regulations. In October and November 1975 a comparative study of prices was carried out in all the capitals of the Community.

2. Facts

The applicant is an official of the Commission employed at the Euratom Joint Research Centre at Ispra in Italy.

The method applicable until 31 March 1979 was advantageous for officials employed in Italy. It may be seen from the application that in the case of, for example, two employees of German nationality employed in Brussels and Ispra, in Grade B 3, Step 3, and married with two children at secondary school, who transfer through the Commission to the BHW home-purchase savings scheme of their net salary (the maximum), the one employed at Ispra obtained in January 1976 12% more than his colleague in Brussels for the part of his salary transferred to the Federal Republic of Germany, whereas in March 1979 he obtained 46.8% more.

Therefore, the applicant claims, a privilege was removed but the disadvantages, which could have been to some degree offset by the advantages of the

method previously applied, remained. Those disadvantages stem for example from the fact that in Italy property values do not increase in the same way as in the Federal Republic of Germany or from the fact that officials employed in Italy have to use a bigger portion of their salary to purchase currency if they do not wish to spend their holidays in Italy.

3. Written procedure

On 21 June 1979 the applicant submitted a complaint under Article 90 (2) of the Staff Regulations contesting his salary statement for April 1979.

The Commission rejected that complaint by a letter of 28 September 1979.

The present application against that decision rejecting the complaint was submitted and registered at the Court on 12 November 1979 at the same time as three other parallel applications (Cases 800, 801 and 802/79). It was subsequently decided that this case should become a test case.

By a letter of 27 December 1979 the applicant amended his application to challenge, in addition to the calculation of salary for April 1979, that for January 1979.

By a letter of 11 February 1980 the Commission submitted its observations on the amendment of the application claiming that the time-limit for bringing an action to challenge the statement for January 1979 had expired in October 1979.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court (First Chamber) decided to open the oral procedure on the issue of admissibility without any preparatory inquiry.

II — Conclusions of the parties

The *applicant* claims that the Court should:

I. As against the first defendant:

1. Declare unlawful and annul the statement of allowances issued by the first defendant for January and April 1979 and its decisions of 12 July 1979 and 28 September 1979 on the applicant's complaint in so far as salary statements were drawn up on the basis of Regulation No 3085/78 of the Council of the European Communities.

...

(Claims 2 to 4 are deleted)

5. Rule that since April 1979 the applicant has been entitled to an allowance corresponding to at least that which the applicant received in lire up to and including March 1979 after making the same transfers under Article 17 of Annex VII to the Staff Regulations as up to March 1979 but increased by the percentage of the salary adjustment applied from April 1979 pursuant to Article 65 (1) of the Staff Regulations.

6. In the alternative to 5. rule that since April 1979 the applicant has been entitled to an allowance calculated on the basis of the legal provisions in force and applicable until March 1979, that is to say by not applying Council Regulations Nos 3085 and 3086/78, and thus of an amount equal to the sum payable in Italian lire after making the same transfers under Article

17 of Annex VII to the Staff Regulations as up to March 1979.

7. In the alternative to 6. rule that the applicant is entitled to an allowance which, after transfers of unchanging amounts under Article 17 of Annex VII to the Staff Regulations, leaves a disposable amount in lire corresponding to the amount in lire which the applicant had up to March 1979, with an adjustment to the new legal situation created by Council Regulations Nos 3085 and 3086/78 to be made during a transitional period in regard to actual increases in salary in the future but not in regard to adjustments made on the basis of Articles 64 and 65 (1) of the Staff Regulations.

8. In the third and final alternative to 6. and 7. rule that the applicant is entitled to an allowance pursuant to Article 4 of Council Regulation No 3085/78.

9. Rule that the first defendant must correct the applicant's statement in accordance with the obligations arising from claims 2. to 8. and pay the ensuing increased amount.

II. As against both defendants:

Order them to pay the difference in Italian lire resulting from the calculation referred to in I.9.

III. 1. Order the defendants to compensate the applicant for his pecuniary loss the amount of which is to be fixed by the Court at the amount of interest at 6% payable on the arrears from the date on which they fell due until the date of payment.

2. Order the defendants to pay the costs.

The *Commission* contends that the Court should:

— Dismiss the application as unfounded as far as it is concerned;

— Order the applicant to pay the costs;

— In the alternative:

Dismiss the claim at III.1. in so far as interest is claimed for a period prior to the submission of the applicant's complaint against the contested salary statements for January and April 1979;

— Subject to all necessary reservations.

In its application for a decision on its preliminary objection the *Council* claims that the Court should:

1. Dismiss the application in Case 799/79 as inadmissible in so far as it is directed against the Council;

2. Order the applicant to bear the costs.

In his observations on the application for a decision on the preliminary objection the *applicant* claims that the Court should:

— Dismiss the Council's application for a preliminary ruling on admissibility and only consider the admissibility of the application together with the substance as a whole.

III — Submissions and arguments of the parties

1. In his application the *applicant* claims that his action is admissible for the following reasons:

— *Jurisdiction of the Court:* the acts adversely affecting him are Council regulations. But the Council acts on proposals from the Commission which may not claim that it merely applies the provisions adopted by the Council. However, the applicant considers the primary act adversely affecting him to be the salary statements for January and April 1979. As an incidental matter the lawfulness of the provisions on which it is based must be examined.

— *Time-limit for bringing an action:* the complaint was submitted in good time as far as the Council regulations are concerned. Admittedly it does not expressly refer to the salary statement for April 1979. However the Commission rejected the complaint in so far as it was directed against the application of the regulations in question which shows that the complaint was indeed submitted on the lines indicated in the application and that it was so understood.

— *Nature of application:* head of claim I is concerned with the issue of legality, with alternative claims set out in I.5. to 8. As far as the claims set out in I.5. to 7. are concerned, they should be regarded as being in the nature of an application for a declaration. They are related to the claim for payment in I.8. Here it is a matter of settling a dispute concerning officials' rights of a finanical character within the meaning of Article 91 of the Staff Regulations. Finally, the claims formulated under II and III are claims against the Commission for damages.

— *Interest in bringing the action:* every official has a right to protection and assistance (see Articles 24, 58 and 76 of the Staff Regulations). That represents a written and unwritten subjective right. There should also be taken into consideration Article 62 of the Staff Regulations which contains the mandatory provision that an official may not waive his entitlement to remuneration. Conversely, the obligor *vis-à-vis* the official may not have the right to withhold or reduce the amount of an official's remuneration. From Article 64 of the Staff Regulations, which deals with the weighting and appears to flow from officials' general right to assistance, the applicant can also derive a subjective right to have the same living conditions as other officials, irrespective of his place of employment. Individual officials are entitled to expect living conditions to be continually monitored and determined, at any rate at regular intervals. Article 65 makes provision for a procedure to determine the variations which have occurred in any one year in the cost of living and thereby to determine the purchasing power of a currency in each Member State; it therefore has a compensating function on the one hand and, on the other, is the basis for genuine salary increase. To that extent the Council's discretion is reduced to only one possible decision. Under Article 65 (2), in the event of a substantial change in the cost of living, the Council must decide what adjustments should be made and "if appropriate to apply them retrospectively". The principle that acquired rights should not be infringed is also a subjective right; that right has been infringed by the amendment of Article 63 of the Staff Regulations and Article 17 of Annex VII.

The applicant further relies on the principle of the equal treatment of officials. It follows from that principle that all officials in the service of the European institutions should receive the same pay for the same work. In any event it is not permissible for an official at Ispra to be in effect treated worse than

his colleagues in Brussels or Luxembourg just because he has to stay in Ispra and not Brussels or Luxembourg. There is no other reason however for the unequal treatment. Moreover acquired rights of the applicant have been infringed as well. For many years he has received a salary on the basis of valid provisions of Community law. It was the adjustments in 1978 which first diminished his disposable salary. There was no cause for that reduction. The applicant contends that he is entitled to have his salary maintained at its present level.

A reduction in the applicant's remuneration could have been made only on the basis of the provisions contained in the Treaty (Articles 51 (2), 86 (2) and 102 of the Staff Regulations). Relevant procedural provisions were not observed either; the regulations eventually adopted were not placed before the institutions and the various committees.

Council Regulation No 3085/78 was adopted without consultation with other institutions as is required. The obligation to consult them follows from the first and second subparagraphs of Article 24 (1) of the Treaty establishing a single Council and a single Commission of the European Communities. Regulation No 3085/78 also expressly refers to Article 24. The effect of the breach of that obligation to enter into consultation is that the regulation is invalid. In this connection the applicant points out that Regulation No 3085/78, which was adopted by the Council was not the subject of any consultation and was not and could not be considered by the institutions which were required to be involved and with whom consultation was a condition precedent to its adoption in its final form with the possible consequences.

The applicant further bases his claim on the solemn undertaking given by the Commission of the European Communities to the Parliament for the benefit of officials and therefore of the applicant that the real value of remuneration, pensions and allowances would not be in any way affected by the 1978 regulations. In the applicant's opinion such an undertaking alone opens the way to an action for payment or damages without its first being necessary to bring an action for annulment.

Finally the applicant believes that the breach of the duty of assistance, of the principles of equal treatment and the protection of acquired rights and of the undertaking represents a breach of duty on the part of the defendants in disregard of their obligations and, in the case of the weighting as applicable to Italy, an omission which they are obliged to make good.

2. In its application for a decision on a preliminary objection, the *Council* contends that an application based on Article 91 of the Staff Regulations is admissible only if it complies with the rules laid down in Articles 90 and 91 of the Staff Regulations, which this application does not. First, the applicant has never submitted to the Council a complaint within the meaning of Article 90 (2). Secondly, the Council cannot be regarded as the appointing authority. Therefore Regulations Nos 3085 and 3086/78 do not amount to acts adversely affecting the applicant which may be challenged by way of the action provided for in Article 91. Nor can an action for a

declaration that they are void be founded on Article 146 of the EAEC Treaty. Regulations Nos 3085 and 3086/78 apply to all Community officials whilst Regulation No 3087/78 applies to all officials employed in Italy. Therefore it may not be maintained that they are "decisions" addressed to the applicant or decisions which although in the form of a regulation are of "direct and individual concern" to him. In any case the application was out of time.

The Council considers the applicant's claim concerning non-contractual liability likewise inadmissible and recalls that the criteria which have been laid down in the decisions of the Court (judgment of 20 October 1975 in Case 9/75 *Meyer-Burckhardt* [1975] ECR 1171) as regards actions for damages between the Communities and their servants justify its conclusion that the action for damages is inadmissible for the same reasons as those in the case of an action for annulment based on Article 91 of the Staff Regulations.

As to the request for a declaration that the regulations are inapplicable the Council takes the view that an objection of illegality under Article 156 of the EAEC Treaty (Article 184 of the EEC Treaty) is not in itself sufficient to enable the Council to be sued solely on the ground that it is the institution which adopted the measure alleged to be unlawful. A declaration that a regulation is inapplicable consequent upon an objection of illegality is merely an incidental remedy the effects of which are limited. The Court has already stated that the annulment of an individual decision based on the finding that the general decisions on which it is based are defective affects the consequences of the general decision only in so far as the latter are given specific expression in the individual decision which has been annulled. Thus, in cases concerning the Staff Regulations the Court has annulled individual decisions pursuant to Article 184 without declaring that the provisions of the Staff Regulations of Officials which constituted their legal basis were themselves void (judgments of 7 June 1972 in *Sabbatini née Bertoni,* Case 20/71 [1972] ECR 345 and *Chollet, née Bauduin,* Case 32/71 [1972] ECR 363).

3. In his observations on the Council's objection the *applicant* points out that the application directed against that institution is not an application for annulment but only a claim for damages. There may be doubt whether the applicant is entitled to proceed against the Council under Articles 90 and 91 of the Staff Regulations which as a *lex specialis* cannot prevent the application of Article 151 and the second paragraph of Article 188 of the EAEC Treaty. The applicant is therefore entitled to base his claims on the latter and in so doing is not obliged to fulfil the conditions laid down by Article 91.

If, however, it is assumed that the conditions of Article 91 (2) must be fulfilled in every case, then the applicant must be considered as having fulfilled them by submitting to the appointing authority a complaint against the regulations adopted by the Council. That is the most that can be required of an official who, under the complaints procedure, is acting without legal representation. He should be able to assume that he is acting in accordance with the requirements of the law in relying on the terms of the Staff Regulations (Case 50/74 *Asmussen* [1975] ECR 1003). To preclude actions against the Council to establish liability for a wrongful act or omission on its part would amount in many cases to excluding altogether any judicial remedy

for officials aimed at obtaining compensation for the damage they have suffered.

The applicant's claim that the regulations are inapplicable is purely an incidental one. Therefore the Council's observations on the request for a declaration that they are inapplicable are devoid of purpose.

4. In its defence the *Commission* raises no objection to the admissibility of the application as far as it is concerned, particularly in regard to the procedural provisions contained in Article 91 of the Staff Regulations.

5. In its rejoinder the *Commission* points out discrepancies in the amendment of the application.

IV — Oral procedure

The parties presented oral argument at the sitting on 19 and 20 February 1981.

The Advocate General delivered his opinion at the sitting on 14 May 1981.

Decision

1 By application lodged at the Court Registry on 12 November 1979 Günter Bruckner, an official of the Commission employed at the Joint Research Centre at Ispra in Italy, brought an application under Article 91 of the Staff Regulations of Officials (hereinafter referred to as "the Staff Regulations") against the Council and Commission of the European Communities.

2 In the version in force until the end of 1978 Articles 63 and 64 of the Staff Regulations provided that: "An official's remuneration shall be expressed in Belgian francs. It shall be paid in the currency of the country in which the official performs his duties. Remuneration paid in a currency other than Belgian francs shall be calculated on the basis of the par values accepted by the International Monetary Fund and in force on 1 January 1965. An official's remuneration expressed in Belgian francs ... shall be weighted at a rate above, below or equal to 100%, depending on living conditions in the various places of employment. The weighting applicable to the remuneration of officials employed at the provisional seats of the Communities shall be equal to 100% as at 1 January 1962."

3 In accordance with Article 17 of Annex VII to the Staff Regulations an official may have part of his emoluments transferred, either regularly or on

an exceptional basis, to a country other than the one in which he performs his duties. Until 31 March 1979, Article 17 (4) provided that such transfers were to be made through the institution to which the official belonged "at the official exchange rate ruling on the date of transfer". The "official exchange rate" within the meaning of that provision was the last parity accepted by the International Monetary Fund, which had not been altered since 1 November 1969 (for example, BFR 13.66 to DM 1).

4 On 21 December 1978 the Council adopted Regulation (Euratom, ECSC, EEC) No 3085/78 (Official Journal L 369, p. 6), Article 1 of which stated that Article 63 of the Staff Regulations is replaced by the following:

"Officials' remuneration shall be expressed in Belgian francs. It shall be paid in the currency of the country in which the official performs his duties.

Remuneration paid in a currency other than Belgian francs shall be calculated on the basis of the exchange rates used for the implementation of the general budget of the European Communities on 1 July 1978.

This date shall be changed, at the time of the annual review of remuneration provided for in Article 65, by the Council acting by a qualified majority upon a proposal from the Commission as provided in the first indent of the second subparagraph of Articles 148 (2) of the EEC Treaty and of 118 (2) of the Euratom Treaty.

Without prejudice to the application of Articles 64 and 65, the weightings fixed pursuant to these articles shall, whenever the above date is changed, be adjusted by the Council, which, acting in accordance with the procedure mentioned in the third paragraph, shall correct the effect of the variation in the Belgian franc with respect to the rates referred to in the second paragraph."

5 Article 2 of the regulation provides:

"Article 17 of Annex VII shall be replaced by the following:

Article 17

1. Payment shall be made to each official at the place and in the currency of the country where he carries out his duties.

2. Under the terms laid down in rules drawn up by common agreement by the institutions of the Communities, after consultation of the Staff Regulations Committee, an official may:

(a) through the institution which he serves, regularly have part of his emoluments transferred up to a maximum amount equal to his expatriation or foreign residence allowance:

— either in the currency of the Member State of which he is a national,

— or in the currency of the Member State in which either his own domicile or the place of residence of a dependent relative is located,

— or in the currency of his previous country of employment or of the country in which his institution has its seat, provided that the official in question has been assigned to a post outside the territory of the European Communities;

(b) have regular transfers made in excess of the maximum stated at the beginning of paragraph (a) provided that they are intended to cover expenditure arising in particular out of commitments proved to have been regularly undertaken by the official outside the country where the institution has its seat or outside the country where he carries out his duties;

(c) be authorized, in very exceptional circumstances and for good reasons supported by evidence, to have transferred, apart from the aforementioned regular transfers, sums which he may wish to have available in the currencies referred to in paragraph (a).

3. The transfers provided for in paragraph (2) shall be made at the exchange rate specified in the second paragraph of Article 63 of the Staff Regulations; the amounts transferred shall be multiplied by a coefficient representing the difference between the weighting for the country in which the official is employed."

6 Article 4 of the regulation provides that the regulation is to enter into force on 1 January 1979 and that it is to apply from 1 April 1979.

7 On 21 December 1978 the Council also adopted Regulation (Euratom, ECSC, EEC) No 3086/78 adjusting the weightings applicable to the remuneration and pensions of Officials and Other Servants of the European

Communities following the amendment of the provisions of the Staff Regulations concerning the monetary parities to be used in implementing the Staff Regulations. Article 1 (1) of the regulation fixes *inter alia* the weighting applicable to remuneration at 74.3 for Italy and at 98.7 for the Federal Republic of Germany.

8 The applicant had regularly transferred, pursuant to Article 17 of Annex VII to the Staff Regulations, a specific part of his remuneration to the Federal Republic of Germany, applying the exchange rate in force on 1 November 1969. As a result of the application of the new provisions cited above, after 1 April 1979 the cost of those transfers, expressed in Italian lire, increased by LIT 284 463.

9 On 21 June 1979 the applicant submitted to the Commission pursuant to Article 90 (2) of the Staff Regulations a complaint against the increase in the cost of those transfers. The Commission replied on 28 September 1979 stating on the one hand that it could not, without exceeding its powers, refrain from applying Council regulations which had duly entered into force and on the other hand that it approved in substance the amendments which had been made to the Staff Regulations.

10 The applicant thereupon brought this action against the Council and the Commission. In substance he asks the Court to:

(1) Annul the salary statements for January and April 1979 and the Commission's decisions of 12 July and 28 September 1979 on his complaint in so far as those statements contain particulars of salary calculated on the basis of Council Regulations Nos 3085/78 and 3086/78.

(2) Declare that since April 1979 the applicant has been entitled to remuneration corresponding to at least that which the applicant received in lire up to and including March 1979 after making the same transfers under Article 17 of Annex VII to the Staff Regulations as up to March 1979 but increased by the percentage of the salary adjustment applied from April 1979 pursuant to Article 65 (1) of the Staff Regulations.

(3) Declare that Regulations Nos 3085/78 and 3086/78 are inapplicable to the transfers regularly made by the applicant.

(4) Order the defendants to pay damages together with interest thereon for the financial loss suffered by the applicant as a result of the application of the regulations in issue.

11 By a submission dated 11 January 1980 the Council made an objection as to the admissibility of the application. According to the Council the following three actions are discernible in the application: (1) an action for the annulment of Regulations Nos 3085/78 and 3086/78, (2) an action for damages for non-contractual liability and (3) a claim that the regulations are inapplicable.

12 As far as the action for annulment is concerned, the Council sees two possibilities, namely (a) an action based on Article 91 of the Staff Regulations and (b) an action based on Article 146 of the EAEC Euratom Treaty which corresponds to Article 173 of the EEC Treaty. In the first case the application is admissible only if it complies with the rules laid down by Articles 90 and 91 of the Staff Regulations, which this application does not. The applicant has never submitted to the Council a complaint within the meaning of Article 90 (2) of the Staff Regulations. Secondly the Council cannot be regarded as the appointing authority in the applicant's case. Article 91 of the Staff Regulations permits an action to be brought only against acts adversely affecting officials which can emanate only from the appointing authority.

13 In the second case an action for annulment cannot be founded on Article 146 of the EAEC Treaty. Regulations Nos 3085 and 3086/78 apply to all Community officials. Therefore it is not possible to contend that they are decisions addressed to the applicant or decisions of direct and individual concern to him although in the form of a regulation. The Council furthermore claims that the action was not brought within two months of the publication of the regulations in question as required by the third paragraph of Article 173.

14 The action for damages is not admissible either. According to the case-law of the Court, where such a claim originates in the relationship of employment

between the persons concerned and the institution, it lies outside the scope of Articles 178 and 215 of the Treaty as far as its admissibility in particular is concerned.

15 The claim that the regulations are inapplicable appears to be founded on Article 156 of the EAEC Treaty which corresponds to Article 184 of the EEC Treaty. That provision enables any party to invoke before the Court the inapplicability of a regulation in proceedings in which it is in issue and in order to do so to plead the grounds specified in the first paragraph of Article 173 of the EEC Treaty. However, it is apparent from the decisions of the Court that a declaration of inapplicability under Article 184 of the Treaty is an incidental remedy of limited effect. The mere possibility of a declaration of inapplicability does not open the way to proceedings against the Council just because it is the institution which adopted the act alleged to be unlawful.

16 In reply to that objection the applicant claims that the action against the Council is not an action for annulment but only for damages. If Articles 90 and 91 of the Staff Regulations are not applicable to the relationship between the applicant and the Council, even as a *lex specialis* those provisions cannot exclude the application of Article 151 and the second paragraph of Article 188 of the EAEC Treaty. The applicant therefore takes the view that he may base his claim for damages on those articles.

17 The applicant believes that, if it is assumed that the requirements of Article 90 (2) of the Staff Regulations must be fulfilled in every case, then it must be said that the applicant fulfils those conditions because he submitted a complaint to the appointing authority against the regulations adopted by the Council. He claims that the Council is contradicting itself when it rules out Articles 90 and 91 of the Staff Regulations for an action for annulment and yet wishes them to apply to an action for damages. The applicant invokes the inapplicability of the regulations only as an incidental claim.

18 The objection raised by the Council must be upheld. An action for annulment of Regulations No 3085/78 and No 3086/78 of the Council is inadmissible, since the regulations in question are of general application and

cannot be assimilated to decisions which, although taken in the form of regulations, are of direct and individual concern to the applicants. Moreover, even if such an action against the Council were admissible in that respect it would nevertheless be inadmissible because it is out of time, having been lodged after the expiry of the period laid down in the third paragraph of Article 173 of the EEC Treaty, which corresponds to the third paragraph of Article 146 of the EAEC Treaty.

19 The applicant's claim for compensation seeks to obtain precisely the same results as those which he would obtain from the annulment of the regulations. The Court has held on a number of occasions, in particular in its judgment of 15 December 1966 *(Schreckenberg,* Case 59/65 [1966] ECR 543) that although a party may take action by means of a claim for compensation without being obliged by any provision of law to seek the annulment of the illegal measure which causes him damage, he may not by this means circumvent the inadmissibility of an application which concerns the same illegality and which has the same financial end in view. The claim for compensation is therefore inadmissible.

20 In the circumstances the application is inadmissible in so far as it is directed against the Council and must therefore be dismissed.

21 The Commission does not challenge the admissibility of the application in so far as it is directed against it. The proceedings concerning the substance of the case will therefore continue.

Costs

22 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs.

23 However, under Article 70 of the Rules of Procedure the costs incurred by the institutions in proceedings brought by employees of the Communities are to be borne by those institutions.

On those grounds,

THE COURT (First Chamber)

hereby:

1. **Dismisses the application as inadmissible in so far as it is directed against the Council.**

2. **Orders the applicant and the Council to bear their own costs.**

Bosco O'Keeffe Koopmans

Delivered in open court in Luxembourg on 12 November 1981.

A. Van Houtte
Registrar

G. Bosco
President of the First Chamber

OPINION OF MR ADVOCATE GENERAL CAPOTORTI

(see Case 167/80, [1981] ECR 1512)