

- matter of an action, therefore, is defined solely by the application, provided that it remains within the limits laid down by the complaint. It follows that the substance of the complaint cannot be subsumed into the application other than by unambiguous reference.
2. An application for annulment which does not appear, even implicitly, in the application, but was first submitted in the reply, constitutes an amendment of the conclusions in the application and is therefore inadmissible under Article 19 of the Statute of the Court of Justice and Article 38 of the Rules of Procedure.
3. The Court has no jurisdiction to entertain an action in which the conclusions do not seek to contest the legality of an act of the appointing authority adversely affecting them, but to have the Commission ordered to use the powers which it possesses as an institution under, on the one hand, Article 155 of the Treaty and Article 64 of the Staff Regulations, and, on the other hand, Articles 173(1) and 175(1) of the Treaty.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
17 October 1990 *

In Case T-134/89,

Erich Hettrich, an official of the Commission of the European Communities,

Gabrielle Krumm, an official of the Commission of the European Communities,

Helmut Steinell, a member of the temporary staff of the Commission of the European Communities, residing at Munich,

* Language of the case: German.

represented by Dieter Rogalla, Rechtsanwalt, Münster, with an address for service in Luxembourg at the Chambers of Nicolas Decker, 16 avenue Marie-Thérèse,

applicants,

v

Commission of the European Communities, represented by Henri Étienne, Principal Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Guido Berardis, a member of its Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION concerning the fixing of a specific weighting for Munich

THE COURT OF FIRST INSTANCE (Third Chamber)

composed of: A. Saggio, President of Chamber, C. Yeraris and K. Lenaerts, Judges,

Registrar: P. van Ypersele de Strihou, Legal Secretary,

having regard to the written procedure and further to the hearing on 11 July 1990, gives the following

Judgment

Facts and Procedure

By a letter received by the Commission on 3 November 1988, the staff employed at Munich, of which the three applicants are members, complained to the competent Member of the Commission that the Commission had not, in its proposal to the Council of 19 September 1988 for a five-yearly adjustment of weightings, proposed a specific weighting for Munich, pursuant to Article 64 of the Staff Regulations of Officials of the European Communities (hereinafter

referred to as 'the Staff Regulations'). By Regulation (ECSC, EEC, Euratom) No 3295/88 of 24 October 1988 (Official Journal 1988 L 293, p. 5) the Council followed that proposal, correcting the weightings applicable to the pensions of officials and other servants of the European Communities in, *inter alia*, the Federal Republic of Germany.

- 2 By a letter of 12 December 1988 addressed to the staff employed at Munich, Mr R. Hay, Director-General of Personnel and Administration, explained the statistical reasons for which the Commission had decided not to propose a specific weighting for Munich.

- 3 On 15 March 1989, the applicants submitted a complaint against their first salary statements calculated on the basis of Regulation No 3295/88, and specifically against the salary statements dated 22 December 1988 and 25 January 1989. Their complaint was also made against Director-General Hay's letter of 12 December 1988. The applicants claimed that their salary statements were void because the Council regulation on which they were based was illegal; that regulation infringed Article 64 of the Staff Regulations and the general principle of equal treatment of officials and other servants of the Communities — assessed in terms of purchasing power — irrespective of their place of employment. In their complaint, the applicants alleged that the cost of living in Munich was much higher than in Bonn (weighting: 99.5) and even Berlin (weighting: 109.2) because rents were generally higher in Munich than in Berlin, and replied to the statistical arguments contained in the letter of 12 December 1988.

- 4 On 7 June 1989, Director-General Hay announced, in reply to the complaint, that the Commission would submit a proposal to the Council for the introduction of a specific weighting for Munich, with retroactive effect from 1 January 1988.

- 5 On 9 June 1989 the Commission's proposal was finalized, and on 20 June 1989 it was forwarded to the Council by letter from the competent Member of the Commission.

- 6 On 18 July 1989 the Council adopted Regulation (EEC, Euratom, ECSC) No 2187/89 correcting the remuneration and pensions of officials and other servants of the European Communities with effect from 1 July 1988 and adjusting the weightings applied thereto with effect from 1 January 1989 (Official Journal 1989 L 209, p. 1), but that regulation did not include a specific weighting for Munich.
- 7 By an application lodged at the Registry of the Court of Justice on 7 September 1989, therefore, the applicants brought the present proceedings before the Court of Justice.
- 8 By order of 15 November 1989, pursuant to Article 14 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities, the Court of Justice referred the case to the Court of First Instance. The written procedure took place before the Court of First Instance as from the lodging of the defence with the Registry of the Court of First Instance on 17 November 1989.
- 9 Upon hearing the report of the Judge-Rapporteur, the Court (Third Chamber) decided to open the oral procedure without any preparatory inquiry. The oral arguments of the representatives of the parties and their answers to the questions put by the Court were heard at the hearing on 11 July 1990.

Conclusions of the parties

10 The applicants claim that the Court should:

- '(1) require the Commission of the European Communities to propose to the Council, in connection with the fixing of the remuneration and pensions of officials and other servants pursuant to the Staff Regulations of Officials and

the Conditions of Employment of Other Servants of the European Communities, a specific weighting for the calculation of the remuneration and pensions of officials and other servants whose place of employment is Munich, and to reiterate that proposal if necessary;

- (2) alternatively, declare that, in accordance with Articles 63 and 64 of the Staff Regulations of Officials, the Commission of the European Communities must take the necessary steps to achieve recognition by the Council of the applicants' right to an appropriate weighting since the relevant unpublished decision of the Council (the "calculation method") was adopted on 26 June 1976, if necessary by bringing an action for failure to act or an action for a declaration that any conflicting decisions of the Council are void; and
- (3) order the Commission to pay the costs.'

In the defence, the Commission contends that the Court should:

'in accordance with Article 81 of the Rules of Procedure:

- (i) declare the action inadmissible;
- (ii) order the applicants to pay the costs.'

In the rejoinder, the Commission contends that the Court should:

- ' (i) declare the application inadmissible; or
- (ii) if it should be held admissible, declare it unfounded;
- (iii) order the applicants to pay the costs of the proceedings.'

The substance of the conclusions in the application

11 Before considering whether the action is admissible, it is necessary to define the scope of the conclusions contained in the application since, in the reply, the applicants interpret those conclusions in a way which the Commission contests.

12 In the reply, the applicants maintain that the conclusions contained in the application to the effect, primarily, that the Court should require the Commission to propose to the Council a specific weighting for Munich and to reiterate that proposal if necessary and, alternatively, that it should declare that the Commission must take the necessary steps to achieve recognition by the Council of the applicants' right to an appropriate weighting since the relevant decision of the Council was adopted on 26 June 1976, if necessary by bringing an action for failure to act or an action for a declaration that conflicting decisions of the Council are void, must be interpreted in the light of the claims which they made in their complaint of 15 March 1989, since the application is the sequel to that complaint. However, the complaint was directed against the decisions affecting the applicants individually, expressed in the salary statements for December 1988, which were the first to have been based on Regulation No 3295/88, and the illegality of that regulation on the ground that it did not fix a specific weighting for Munich was alleged in both the complaint and the application. The applicants conclude that the alternative conclusion contained in the application, which is expressed in very general terms, also covers the annulment of those individual decisions as a consequence of the declaration that the regulation on which they are based is void, sought in the application.

13 In the rejoinder, the Commission claims that the salary statements issued to the applicants for December 1988 do not constitute the subject-matter of the proceedings and that, since no separate weighting is applied to Munich, their annulment cannot form the subject-matter of the alternative claim, to the effect that the Commission is required merely to ensure compliance with the decision of the Council of 26 June 1976.

14 It must be pointed out, first, that although the complaint is indeed directed against the salary statements issued to the applicants in December 1988 and January 1989, on the implied ground that Regulation No 3295/88, their legal basis, is illegal,

there is no mention of those statements or even of the regulation in the conclusions or submissions contained in the application.

- 15 The application, moreover, contains no reference to the substance of the complaint as regards the nullity of the salary statements or the illegality of Regulation No 3295/88. Although the application does contain a reference to the arguments used in the pre-litigation procedure, it must be stressed that that reference is confined to the arguments in favour of fixing a specific weighting for Munich and does not extend to the legal consequences to be drawn from the absence of such a weighting in the regulation.
- 16 It must be borne in mind that although the administrative complaint provided for in Article 90(2) of the Staff Regulations is an essential prerequisite for bringing an action against an act adversely affecting a person covered by the Staff Regulations, it is a separate step from the action provided for in Article 91(2) of the Staff Regulations and determines the purpose and subject-matter of that action to a negative extent only, in the sense that it precludes an extension, but not a curtailment, of the purpose or subject-matter of the complaint in the action. The subject-matter of an action, therefore, is defined solely by the application, provided that it remains within the limits laid down by the complaint. It follows that the substance of the complaint cannot be subsumed into the application other than by unambiguous reference.
- 17 Furthermore, it must be emphasized that the alternative conclusions in the application do not seek an examination by the Court of the legality of Regulation No 3295/88, as the applicants claim in the reply, but a declaration that the Commission itself must, if necessary, bring an action for the annulment of conflicting decisions of the Council. Such an action would necessarily be distinct from the present proceedings, since neither the parties nor the subject-matter would be the same. It would be an action by the Commission against the Council and could concern only future regulations, since the period within which an action could have been brought in respect of past regulations has expired.
- 18 It follows from the foregoing that the request for the annulment of the salary statements does not appear, even implicitly, in the application; it was therefore first

submitted in the reply and thus constitutes an amendment of the conclusions in the application. Under Article 19 of the Statute of the Court of Justice of the European Communities, applicable to procedure before the Court of First Instance by virtue of the first paragraph of Article 46 thereof, and under Article 38 of the Rules of Procedure of the Court of Justice, therefore, it is inadmissible (judgments in Case 232/78 *Commission v France* [1979] ECR 2729, at p. 2737, and in Case T-64/89 *Automec v Commission* [1990] ECR II-367, paragraph 69).

- 19 It follows that the salary statements do not form the subject-matter of these proceedings and that it must be determined whether the action is well founded solely in the light of the conclusions contained in the application.

Admissibility

- 20 The Commission contends that the conclusions contained in the application are inadmissible in so far as they seek either a declaration to the effect that the Commission must propose to the Council a specific weighting for Munich and reiterate the proposal if necessary or a declaration that the Commission is required to take the necessary steps to achieve recognition by the Council of the applicants' right to an appropriate weighting, if necessary by bringing an action for failure to act or an action for a declaration that conflicting decisions of the Council are void. It maintains that the procedure laid down in Articles 90 and 91 of the Staff Regulations applies to decisions of the appointing authority which adversely affect the rights of officials under the Staff Regulations, since the disputes referred to in Article 179 of the EEC Treaty concern the application of existing law to officials by the appointing authority. That procedure does not apply to claims that rights should be created, a matter in which the appointing authority as such has no competence, since it is for the Council to adopt, on a proposal from the Commission, the necessary regulation in accordance with Article 64 of the Staff Regulations. It adds that the applicants' conclusions assume that the Commission's legislative functions are open to challenge by means of a complaint or court proceedings. In that connection, the Court of First Instance has no jurisdiction to declare whether or not the Commission has correctly carried out the duties imposed upon it by Article 155 of the Treaty.

- 21 In order to define the jurisdiction of the Court of First Instance, it is necessary to refer to Article 168a(1) of the Treaty, which forms the constitutional basis of the

aforementioned Council Decision of 24 October 1988. Article 3(1)(a) of that decision provides that the Court of First Instance has jurisdiction in disputes between the Communities and their servants referred to in Article 179 of the Treaty. Article 179 provides that that jurisdiction is to be exercised within the limits and under the conditions laid down in the Staff Regulations or the Conditions of Employment. Under Article 91(1) of the Staff Regulations, the Court has jurisdiction in any dispute between the Communities and any person to whom those Staff Regulations apply regarding the legality of an act adversely affecting such a person within the meaning of Article 90(2). Article 90(2) provides that any person to whom the Staff Regulations apply may submit to the appointing authority a complaint against an act adversely affecting him, either where the said authority has taken a decision or where it has failed to adopt a measure prescribed by the Staff Regulations.

- 22 In the present case, it must be pointed out that the applicants' conclusions, both the main and the alternative, do not seek to contest the legality of an act of the appointing authority adversely affecting them, but to have the Commission ordered to use the powers which it possesses as an institution under, on the one hand, Article 155 of the Treaty and Article 64 of the Staff Regulations, and, on the other hand, Articles 173(1) and 175(1) of the Treaty.
- 23 It follows that the Court has no jurisdiction to entertain the application, which must therefore be dismissed as inadmissible.

Costs

- 24 Under Article 69(2) of the Rules of Procedure of the Court of Justice, applicable *mutatis mutandis* to the Court of First Instance under the third paragraph of Article 11 of the Council Decision of 24 October 1988, cited above, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleading. However, Article 70 of those Rules provides that institutions are to bear their own costs in proceedings brought by servants of the Communities.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

- (1) Dismisses the application as inadmissible;**
- (2) Orders the parties to bear their own costs.**

Saggio

Yeraris

Lenaerts

Delivered in open court in Luxembourg on 17 October 1990.

H. Jung
Registrar

C. Yeraris
President