

interest if they are paid without undue delay after the adoption of the said regulation.

2. It follows from Article 65(2) of the Staff Regulations that decisions adjusting the weightings applicable to remuneration must be taken without unjustifiable delay. Accordingly, any inexcusable delay in enacting the regulations in that area must be regarded as constituting a fault. In considering the question whether a delay is unjustified, account must be taken of the fact that the institutions must have a reasonable

period, depending on the circumstances of the particular case and the complexity of the matter, in which to finalize their proposals or decisions.

When a regulation concerning the adjustment of weightings is drafted and then adopted within a period which is justified by the circumstances of the case, any loss resulting for the persons concerned from the loss of purchasing power of their arrears of remuneration cannot, in the absence of any fault on the administration's part, give rise to any entitlement to payment of compensation.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)  
26 February 1992 \*

In Case T-16/89,

**Hans Herkenrath and Others**, officials and other servants of the Commission of the European Communities, represented by B. Potthast and H. J. Rüber, Rechtsanwälte, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 4 Avenue Marie-Thérèse,

applicants,

v

**Commission of the European Communities**, represented by Henri Étienne, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Roberto Hayder, representing its Legal Service, Wagner Centre, Kirchberg,

defendant,

\* Language of the case: German.

APPLICATION for default interest and for compensation in respect of the loss that the applicants claim to have suffered as a result of the delay, following the 1986 five-yearly verification, in adjusting the weightings applicable to their remuneration,

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

composed of: A. Saggio, President, C. Yeraris, C. P. Briët, D. Barrington and B. Vesterdorf, Judges,

Registrar: B. Pastor, Administrator,

having regard to the written procedure and further to the hearing on 29 May 1991,

gives the following

## Judgment

### The facts

By application lodged at the Registry of the Court of Justice on 23 December 1986, Mr Herkenrath and other officials and servants of the Commission of the European Communities employed at the Joint Research Centre at Ispra (Varese, Italy), after having exhausted the preliminary administrative procedure, commenced an action for the annulment of some of their salary statements issued in 1986, and for the award of default interest and compensation in respect of the pecuniary loss which they claim to have suffered as a result of the delay, following the 1986 five-yearly verification, in the adjustment of weightings applicable to their remuneration.

As the rules concerning the periodical adjustment of officials' remuneration are complex, it is appropriate for the provisions applicable to be set out before the different proceedings prior to the five-yearly adjustment in question are described.

*The legal background*

- 2 Articles 64 and 65 of the Staff Regulations of Officials of the European Communities ('the Staff Regulations') provide for the periodical adjustment of officials' remuneration. Those provisions are applicable to temporary and auxiliary staff pursuant to Articles 20 and 64 of the Conditions of Employment of Other Servants of the European Communities.

In so far as they are relevant to the outcome of this case, the abovementioned articles of the Staff Regulations are worded as follows:

*'Article 64*

An official's remuneration expressed in Belgian francs shall, after the compulsory deductions set out in the Staff Regulations or in any implementing regulations have been made, be weighted at a rate above, below or equal to 100%, depending on living conditions in the various places of employment.

...

*Article 65*

1. The Council shall each year review the remunerations of the officials and other servants of the Communities. This review shall take place in September in the light of a joint report by the Commission based on a joint index prepared by the Statistical Office of the European Communities in agreement with the national statistical offices of the Member States . . .

During this review the Council shall consider whether, as part of economic and social policy of the Communities, remuneration should be adjusted. Particular account shall be taken of any increases in salaries in the public service and the needs of recruitment.

2. In the event of a substantial change in the cost of living, the Council shall decide, within two months, what adjustments should be made to the weightings and if appropriate to apply them retrospectively.

...'

In order to apply those rules in practice, the Council adopted a method of adjustment. The details of that method were enacted, for the period 1 July 1981 to 30 June 1991, in Decision 81/1061/Euratom, ECSC, EEC of 15 December 1981 amending the method of adjusting the remuneration of officials and other servants of the Communities (Official Journal 1981 L 386, p. 6, hereinafter referred to as 'the 1981 decision'). According to that decision, the weightings for countries of employment other than Belgium and Luxembourg are to be adjusted periodically in accordance with the changes in the cost of living in the different Member States (last indent of point II 4(c) of the Annex to the 1981 decision). It is apparent from the decision that the annual adjustments must be distinguished from the five-yearly adjustments. Under those rules, the Council makes annual adjustments on a proposal from the Commission based on data from national statistical departments. Those data reflect the consumption patterns of the general population and the prices applicable in the capitals of each Member State. However, as that method sometimes creates distortions with regard to the actual living conditions of European officials in their places of employment, the decision provides, in order to remedy this, that every five years the Commission is to conduct a survey of the consumption patterns of European officials and the prices that they pay, in order to establish the living conditions in the various places of employment as required by Article 64 of the Staff Regulations (second subparagraph of point II, 1.1 of the Annex). On a proposal from the Commission based on the results of those surveys, the Council then makes the five-yearly adjustment of the weightings.

*The administrative procedures followed, regulations adopted and legal proceedings brought prior to this action*

- 4 In the course of the five-yearly revision of weightings laid down for 1981, the Council adopted, on 26 November 1986, Regulation (EEC, Euratom, ECSC) No 3619/86 correcting the weightings applicable in Denmark, Germany, Greece, Ireland, Italy, the Netherlands and the United Kingdom of the remuneration and pensions of officials and other servants of the European Communities (Official Journal 1986 L 336, p. 1, hereinafter referred to as 'Regulation No 3619/86'), which departed in two respects from the proposal which had been submitted to it by the Commission in accordance with the procedure described above. On 15 January 1987 the Commission began an action against the Council before the Court of Justice for the annulment of Regulation No 3619/86.
  
- 5 By its judgment of 28 June 1988 in Case 7/87 *Commission v Council* [1988] ECR 3401, the Court annulled Regulation No 3619/86 on the ground that it was contrary to Article 64 of the Staff Regulations in so far as it
  - (a) fixed weightings for the 'accommodation' item by reference to the costs of that item for the population in general in each Member State as a whole, instead of measuring it by reference to the cost of accommodation borne by European officials only; and
  - (b) fixed 1 July 1986 as the date on which the new weightings took effect instead of 1 January 1981, the date to which the verification related.
  
- 6 The Council adopted the measures required to comply with that judgment by enacting, on the Commission's proposal of 5 July 1988, Regulation (ECSC, EEC, Euratom) No 3294/88 of 24 October 1988 correcting, with effect from 1 January 1981, the weightings applicable to the remuneration of officials and other servants of the European Communities, *inter alia*, in Italy (Official Journal 1988 L 293, p. 1, hereinafter referred to as 'Regulation No 3294/88'). By its Regulation (ECSC, EEC, Euratom) No 3295/88, also dated 24 October 1988, the Council amended,

with effect from 1 January 1986, the weightings applicable to the following five-year period as well (Official Journal 1988 L 293, p. 5, hereinafter referred to as 'Regulation No 3295/88'). It is the amendment of the weightings brought about by Regulation No 3295/88 that is the subject of the present dispute.

7 Following the Council's adoption of those two regulations, the Commission calculated and paid, in November 1988, the arrears of remuneration due as a result. In a friendly settlement made in a series of cases parallel to this case, the Commission agreed to pay default interest to the officials in respect of the period from December 1986 to the date of the actual payment of arrears, but solely with regard to the arrears owed by virtue of Regulation No 3294/88 and resulting from the five-yearly verification carried out in 1981.

### **The procedure before the Court of Justice and the Court of First Instance**

8 In the application itself, the applicants proposed that the proceedings be suspended until the Council had adopted a regulation following the Commission's proposal on the adjustment of the weightings in respect of the 1981 five-yearly verification. By letter of 21 January 1987, the Commission agreed to that proposal. In the same letter, it contended that the action should be dismissed and that the applicants should be ordered to pay the costs. On 27 January 1987, the Court of Justice, before which the case was then pending, decided to suspend the proceedings until the judgment in *Commission v Council*, Case 7/87, cited above, had been delivered. After the delivery of that judgment, the parties requested that the proceedings continue to be suspended until the Council had adopted the measures which it was required to take in order to comply with that judgment. On 30 November 1988, the Court decided to continue the suspension of the procedure until 16 January 1989.

9 At the end of that period, the parties informed the Court of the state of their negotiations for resolving the remaining issues, namely settlement of the applicants' claims for default interest and compensation. It was apparent that the parties had not been able to reach agreement.

- 10 In this context, the applicants put forward, as an annex to its observations on the question of the resumption of the proceedings lodged on 13 January 1989, the file note of a meeting which took place on 29 November 1988 between their representative and the Commission's representative in this case. By letter received on 8 March 1989, the Commission asked the Court to resume the proceedings and to set a date for the filing of its defence. In that letter, the Commission contended nevertheless that the action was premature. Finally, it asked that the file note annexed to the observations lodged by the applicants on 13 January 1989 be removed from the case file on the ground that it had been acquired by them in an irregular manner.
- 11 By decision of 14 April 1989, the Court resumed the proceedings and gave the Commission until 22 May 1989 to lodge its defence. As that defence was not received within the prescribed period, the Court decided on 30 May 1989 to ask the applicants to state whether they were applying for judgment by default, in accordance with Article 94(1) of the Court's Rules of Procedure. A letter to that effect was addressed to the applicants on 2 June 1989. By order of 15 June 1989 the Court ordered the removal from the Court file of the file note submitted as an annex to the applicant's observations lodged on 13 January 1989.
- 12 By order of 15 November 1989, the Court assigned the case to the Court of First Instance pursuant to the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities.
- 13 By letter of 23 May 1990, the Registrar of the Court of First Instance, after having observed that the defendant had lodged a document commenting on the case on 8 March 1989 and that the applicants had not replied to the letter sent to them by the Court of Justice on 2 June 1989, informed the applicants that it had decided to set a time-limit for the lodging of a reply by the applicants.

By a pleading of 12 June 1990 the applicants requested that:

- (a) the document withdrawn from the file pursuant to the Court's order of 15 June 1989 be reinserted;
- (b) this case be joined with Cases T-17/89 *Brazzelli*, T-21/89 *Bertolo* and T-25/89 *Alex*;
- (c) judgment by default be pronounced if the Court did not uphold their (other) claims.

By letter of 22 June 1990, the Registrar of the Court of First Instance informed the applicants that a date had been fixed for the defendant to lodge its rejoinder. The Commission lodged its rejoinder within the prescribed period on 24 June 1990.

By order of 13 November 1990, the Court of First Instance dismissed the first two applications made by the applicants on 12 June 1990 and reserved its decision on their application for judgment by default.

Following a proposal by the Third Chamber, to which the case had been assigned, the Court of First Instance decided on 6 December 1990 to reassign the case to a chamber of five judges and to refer it to the Second Chamber.

Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure without any preparatory inquiry.

19 The parties presented oral argument at the hearing on 29 May 1991. At the end of the hearing the President declared the oral procedure closed.

### **Forms of order sought**

20 In their application, the applicants claimed that the Court should:

- (1) rule that the results of the five-yearly verification of the weightings for 1985 must be taken into account with effect from 1 January 1986;
- (2) declare unlawful and annul their salary statements with effect from 1 January 1986 in so far as they take no account of the results of the 1985 five-yearly verification of weightings;
- (3) order the defendant to pay to them the difference resulting from the calculations made pursuant to their second head of claim with effect from 1 January 1986;
- (4) order the defendant to compensate the applicants for the loss suffered as a result of the delay in applying the results of the 1985 five-yearly verification of weightings;
- (5) order the defendants to adjust the arrears of remuneration to take account of the change in the cost of living at the place of employment, and to pay default interest on that amount at the rate of 6%;
- (6) order the defendant to pay the costs.

At the hearing the applicants withdrew their first, second and third heads of claim and their application for judgment by default contained in their pleading of 12 June 1990.

The Commission contends that the Court should:

- (1) reject the application as inadmissible and, in the alternative, declare it to be unfounded;
- (2) order the applicants to pay the costs.

### **Admissibility**

The Commission contends that the action is inadmissible on the ground that on 23 December 1986, the date on which the application was lodged, the determination of the applicants' remuneration, without adjustment by reference to the weightings applicable to them on 1 January 1986, could not be an act adversely affecting the applicants. It states in this respect that the bringing of a 'provisional action' by the applicants is not compatible with Articles 90 and 91 of the Staff Regulations, which presuppose an act by the appointing authority adversely affecting them. The first head of claim in the application is not addressed to it as appointing authority, but to the institution as legislative organ. In the Commission's view the applicants could not therefore have any interest in a ruling by the Community judicature on a regulation not yet published. The first head of claim is, consequently, 'either an encroachment on powers which have not yet been exercised by the institutions or an application to lay down an abstract principle bearing no relation to an act adversely affecting an official.' Finally, the Commission states that, as the primary claim is inadmissible, the accessory claims must also be rejected as inadmissible.

In reply, the applicants state that their action, in so far as it was for the annulment of their salary statements as issued from January 1986, was based on the fact that

an administrative act taken pursuant to a Council regulation becomes unlawful when the regulation upon which the act was based is defective. Although, in this case, it is true that that regulation was not defective for a number of years, they state that it nevertheless became unlawful from the moment when its provisions were no longer consistent with the rights of officials under the Staff Regulations, namely when, on 1 January 1986, the Council did not adjust the weightings which ought to have occurred on that date in accordance with the 1981 decision.

23 With regard to those arguments, this Court points out first of all that the Court of Justice has consistently held that the salary statement constitutes, in itself, an act adversely affecting an official and, therefore, may be the subject of a complaint and ultimately of an action pursuant to Articles 90 and 91 of the Staff Regulations, even if the defendant institution has only applied the regulations in force (see, for example, the judgment of the Court of Justice in Case 262/80 *Andersen v Parliament* [1984] ECR 195).

24 With regard to the question whether the action was premature, it should be noted that the action is not founded, as the defendant wrongly contends, on an (unlawful) failure to adopt a regulation, but on the infringement of Article 64 and 65 of the Staff Regulations and of the 1981 decision, in so far as it provides for a five-yearly adjustment of the weightings. It was therefore admissible for the applicants to request the annulment of their salary statements with effect from January 1986 by claiming that from that date the regulation on the basis of which they had been issued was defective in so far as it no longer conformed with the requirements of the 1981 decision, which required an adjustment of weightings on 1 January 1986.

It follows that the second and third heads of claim in the application were admissible and that, therefore, the fourth and fifth heads of claim which are linked to them and which are the subject-matter of these proceedings, must be declared admissible.

The action is therefore admissible.

## Substance

### *Default interest*

In support of their application for default interest, the applicants make a single submission based on the Commission's unjustified delay in paying them the arrears of remuneration owing to them.

In support of that submission, the applicants claim that in the legal systems of all the Member States the debtor is not entitled to profit from a delay in the payment of sums which are due. The creditor may not be deprived of interest produced by the sums which he could have used to meet his needs from the date on which they were due.

The Commission contends that the requirements for the grant of default interest are not satisfied for the period with which this dispute is concerned, namely from 1 January 1986 to November 1988, the date on which the arrears of remuneration due pursuant to Regulation No 3295/88 were paid. In this respect it states that the sums due pursuant to that regulation were paid less than three years after the date chosen as the reference date, namely 1 January 1986. The Commission contends that the inquiries necessary in connection with the 1986 five-yearly review were carried out within the prescribed period, in 1985, and that it submitted its proposal to the Council on 7 October 1987. It states that the period set for processing the data and preparing the draft regulation was not excessive. It adds that the fact that 'the authorities preferred to put forward an unchallengeable proposal also proved advantageous, because the proposal was accepted without amendment on 24/25 October 1988'.

- 29 In support of that argument, the Commission refers to the case-law of the Court of Justice which, as a condition for the award of default interest, requires that the amount of the principal sum be ascertained or ascertainable, unless the time expended in determining that sum is due to the wrongful conduct of the institution.
- 30 This Court notes first of all that prior to 24 October 1988, the date on which the Council adopted Regulation No 3295/88, no Community institution knew whether the weightings in force would be adjusted and, if so, what the new weightings would be. Consequently, before that date, the applicants had no acquired right to payment of arrears of remuneration and the Community institutions no correlative duty or possibility to pay those arrears. In those circumstances, until that date, there could not have been any delay in the payment of a debt fallen due.
- 31 That line of argument is confirmed by the judgment of the Court of Justice in Case 174/83 *Amman v Council* [1986] ECR 2647. In that judgment, the Court held, in plenary session, that an obligation to pay default interest can arise only where the amount of the principal sum is certain or can at least be ascertained on the basis of established objective factors. The Court held that the powers conferred on the Council by Article 65 of the Staff Regulations for adjusting the remuneration and pensions of officials and other servants and for fixing the weightings applicable to such remuneration and pensions involved the exercise of a discretion and, accordingly, that no certainty existed as to the amount by which the remuneration and pensions would be adjusted or the manner in which the weightings would be fixed until the Council had exercised its powers and adopted the regulation on the matter. The Court of Justice also stated that, although in a previous judgment (in Case 59/81 *Commission v Council* [1982] ECR 3329) in which it had annulled an initial unlawful regulation of the Council it had held that the Council had to take certain factors into consideration when exercising its discretion, it had nevertheless neither determined the amounts which would actually be paid to staff pursuant to Article 65 of the Staff Regulations nor established the objective factors enabling those amounts to be determined sufficiently precisely.

This Court notes, secondly, that after the Council adopted Regulation No 3295/88 on 24 October 1988, the Commission calculated and paid, in November 1988, the arrears of remuneration due under that regulation. The Commission therefore promptly performed its duty to make payment as from the time when it was certain that those arrears were to be paid and when their amount had been determined. Accordingly, no delay can be attributed to the Commission.

It follows that the applicants' claim for default interest must be rejected.

*The alleged loss of purchasing power*

With regard to this claim, the applicants make one submission based on the infringement of Articles 64 and 65 of the Staff Regulations. In support of that submission, they argue that the Staff Regulations guarantee equivalence of remuneration paid to staff of the institutions in real value terms and that the Commission, in paying only the numerical amount corresponding to the arrears of remuneration as calculated, and no more, infringed Articles 64 and 65 of the Staff Regulations because those arrears were paid only at their nominal value, which did not ensure the equivalent purchasing power of the remuneration. The applicants claim that as a result they have suffered loss by not having at their disposal, on the fifteenth of each month following 1 January 1986, a part of the remuneration due to them. In order to quantify that loss, they claim that with the part of the remuneration subsequently paid to them as arrears they could have purchased Italian State bonds bearing an interest rate, on 1 April 1986, of 12.5%.

In reply, the Commission contends that the weightings, as adjusted in accordance with the 1981 decision, take into account the monetary depreciation and settle all the matters needing to be resolved in view of the fact that the adjustment is necessarily retrospective. The new weightings therefore cover the disadvantages which could possibly arise from that situation. The requirements of the Staff Regulations have therefore been observed in this case.

- 36 With regard to the applicants' claim for an award of damages for the loss they claim to have suffered due to not having purchasing power of the arrears paid to them pursuant to Regulation No 3295/88, the Court points out first of all that 'a dispute between an official and the institution to which he is ... answerable ... is pursued, where it originates in the relationship of employment between the person concerned and the institution, under Article 179 of the Treaty and Articles 90 and 91 of the Staff Regulations' (judgment of the Court in Case 9/75 *Meyer-Burckhardt v Commission* [1975] ECR 1171, 1181). The Court has consistently held that in order for the applicants to be able to claim compensation they must demonstrate that the institution has committed a fault, that a definite and quantifiable loss has occurred and that a causal link exists between the fault and the alleged loss (judgment of the Court of First Instance in Case T-20/89 *Moritz v Commission* [1990] ECR II-769).
- 37 The Court notes that, although the Council's 1981 decision does not fix a period within which the five-yearly adjustment that it envisages is to take place, Article 65(2) of the Staff Regulations, stipulating a maximum period of two months for deciding the adjustments to be made to the weightings, must be interpreted as being an expression of a general principle according to which decisions on this matter must be taken without unjustifiable delay. Any inexcusable delay in enacting the regulation authorizing the adjustment of the remuneration of officials and other servants must therefore be considered to constitute a fault.
- 38 In considering the question when delay arises and whether such delay is unjustified, account must be taken of the fact that the institutions must have a reasonable period, depending on the circumstances of the particular case and the complexity of the matter, in order to finalize their proposals or decisions. It is not therefore possible to lay down, in a general manner, a period within which a regulation like the one in question must be adopted.
- 39 In the present case, the Commission's draft regulation was submitted to the Council on 7 October 1987, that is to say less than two years after the beginning of the five-yearly revision concerned. In view of the complexity of the matter and having regard to the consultation with staff which is an integral part of the adjustment procedure, that delay cannot be regarded as unduly long.

With regard to the Council's adoption of the Commission's proposal, it must be recalled that at the material time a case between the Commission and the Council was pending before the Court of Justice concerning the method of calculating the weightings. The calculation of the new weightings in the framework of the 1986 five-yearly adjustment also depended on the outcome of that case.

In those circumstances, having regard to the fact that the Commission's draft regulation was submitted in October 1987, that the judgment of the Court of Justice in the Commission's action against the Council was given on 26 June 1988, and that, under the Council's procedure for examining and adopting draft legislation, the examination of a draft regulation from the Commission entails scrutiny at several levels within the Council, that latter institution cannot be criticized for not having adopted the Commission's proposal before it actually did so, in October 1988. The time elapsing between the reference date for the five-yearly adjustment (1 January 1986) and the date on which the relevant regulation was adopted (24 October 1988), taken as a whole, cannot, in view of the circumstances of the case, be considered excessive. It must therefore be held that it has not been demonstrated that the Commission or the Council committed a fault.

Accordingly, the applicants claim for damages must be rejected.

It follows from all the foregoing considerations that the action must be dismissed in its entirety.

**Costs**

- 44 Under the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. However, in proceedings brought by the servants of the Communities the institutions are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

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

Saggio

Yeraris

Briët

Barrington

Vesterdorf

Delivered in open court in Luxembourg on 26 February 1992.

H. Jung

Registrar

A. Saggio

President