different situations should be treated differently in so far as is commensurate with the difference found to exist.

The situation of officials serving in a non-member country differs from that of officials serving in the Community, in particular as regards the expenditure that is likely to be incurred in the country of employment. In order to ensure that officials enjoy equivalent purchasing power, irrespective of their place of employment, the rules for payment of remuneration must take account of that difference between their respective situations. The presumption that officials serving in a non-member country are likely to spend only 80% of their remuneration in the country of employment, whereas officials serving in the Community are assumed to spend their entire remuneration in the country in which they perform their duties, constitutes a difference in treatment which is proportionate to the difference in the respective situations of those two categories of officials. Pursuant to Annex X to the Staff Regulations, officials serving in a non-member country are not required to bear either accommodation costs or the cost of health care in their place of employment.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
15 December 1992 *

In Case T-75/91,

Piera Scaramuzza, an official of the Commission of the European Communities, residing in New York, represented by F. Jongen, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of A. Schmitt, 62, Avenue Guillaume,

applicant,

v

Commission of the European Communities, represented by J. Griesmar, of its Legal Service, acting as Agent, assisted by D. Waelbroeck, of the Brussels Bar, with an address for service in Luxembourg at the office of R. Hayder, of the Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: French.

APPLICATION for the annulment of the decision rejecting the applicant's request for the whole of her salary to be paid in the currency of the country of employment with application of the corresponding weighting,

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

composed of: D. P. M. Barrington, President, K. Lenaerts and A. Kalogeropoulos, Judges,

Registrar: B. Pastor, Administrator,

having regard to the written procedure and further to the hearing on 28 October 1992,

gives the following

Judgment

Facts

1 The applicant is an official in Grade B 3. She was posted to the Permanent Delegation of the Commission in Oslo on 4 January 1988 before being transferred to the Commission's New York office on 17 June 1991.

2 On 1 October 1990 she sought payment of the whole of her salary in the currency of and with the weighting for her place of employment with effect from the date when she took up her duties.

3 That request remained unanswered by the Commission until the expiry of the period of four months provided for in the Staff Regulations of Officials of the European Communities (hereinafter 'the Staff Regulations'), namely 1 February 1991. On 12 February 1991, however, the applicant received a letter from the Director-General for Personnel and Administration expressly rejecting her request.

4 On 23 April 1991 the applicant submitted a complaint under Article 90(2) against the rejection of her request.

5 On 30 July 1991 the applicant received a letter from the Director-General for Personnel and Administration dated 26 July 1991 expressly rejecting her complaint.

6 The applicant accordingly brought the present application, which was lodged at the Registry of the Court of First Instance on 24 October 1991.

7 The written procedure followed the normal course. Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure without any preparatory inquiry.

Forms of order sought by the parties

8 The applicant claims that the Court should:

'1. Declare the present application admissible and well founded;

2. Consequently, annul the Commission's decision rejecting her request to be paid in full in the currency of her place of employment, that is to say in Norwegian kroner, with the corresponding weighting;

3. Consequently, order the defendant to pay to the applicant with retroactive effect the supplement corresponding to her full salary in local currency with application of the corresponding weighting, together with interest for late payment at the rate of 8%;

4. Order the defendant to pay the whole of the costs'.

The Commission claims that the Court should:

'Principally,

1. Dismiss the application as unfounded;

2. Make an order as to costs as required by law.

In the alternative,

3. If, as is highly unlikely, the Court should hold Article 1 of the Commission's internal directives to be unlawful, declare that:

(a) the judgment of the Court cannot be relied upon in support of claims relating to salary periods prior to the date of judgment, except in the case of officials serving in a non-member country who have already exercised their rights by bringing proceedings or by submitting a request or a complaint;

(b) specifically in the case of the applicant, it will be necessary, when calculating the amounts which should have been paid to her in Norwegian kroner with application of the weighting for Norway, to take into account as regards the past only the amounts actually paid into her account in Belgian francs after October 1990, or at the very least, as regards the preceding period, not to take account of the amounts directly transferred to the BHW bank in connection with a mortgage loan or other sums directly deducted from the applicant's remuneration.'

Substance

9 The applicant relies essentially on two submissions in support of her claim for annulment. The first is based on the infringement of Article 12, first paragraph, of Annex X to the Staff Regulations (hereinafter 'Annex X') by the Commission when it adopted Article 1 of its internal directives determining the arrangements for payment referred to in Article 12 of Annex X (hereinafter 'the internal directives'). The second submission is based on infringement of the principle that officials should enjoy equivalent purchasing power and of Articles 62 to 65 of the Staff Regulations.

10 Annex X, which was added to the Staff Regulations by Council Regulation (Euratom, ECSC, EEC) No 3019/87 of 5 October 1987 laying down special and exceptional provisions applicable to officials of the European Communities serving in a third country (OJ 1987 L 286, p. 3), provides in Article 11 that 'remuneration, as also the allowances referred to in Article 10, shall be paid in Belgian francs in Belgium. They shall be subject to the weighting applicable to the remuneration of officials employed in Belgium'; Article 12 provides that 'at the request of the official, the appointing authority may decide to pay all or part of his remuneration in the currency of the country of employment. In that event, it shall be subject to the weighting for the place of employment and shall be converted on the basis of the corresponding exchange rate. In duly substantiated exceptional cases, the appointing authority may make all or part of this payment in a currency other than that of the country of employment in such a way as to maintain purchasing power'. Article 1 of the internal directives provides as follows: 'In pursuance of Article 12 of Annex X to the Staff Regulations and at the request of the official, the appointing authority shall pay in the currency of the place of employment a part of his remuneration up to 80% of his net remuneration. In duly reasoned cases the appointing authority may agree to pay in the currency of the country of employment a part of the remuneration exceeding 80%'.

First submission: infringement of Article 12 of Annex X by Article 1 of the internal directives

Arguments of the parties

11 The applicant maintains that Article 1 of the internal directives, inasmuch as it limits to 80% of the net remuneration of officials serving in non-member countries the

amount of such remuneration paid in the currency of and with the weighting for the country of employment except where special reasons are stated, is contrary to Article 12 of Annex X, in application whereof those directives were adopted. Article 12 makes no provision for any such restriction and confers no discretionary power on the appointing authority in that respect. The word 'may' therefore shows that that provision derogates from the principle laid down in Article 11, where the official so requests. The words 'all or part' allow officials to adjust their requests in accordance with their best interests.

12 She further claims that Article 1 of the internal directives is contrary to Article 12 of Annex X in that it combines the first and second paragraphs of that provision, extending the exceptional arrangements provided for in the second paragraph to the principle that remuneration is to be paid in the currency of and with the weighting for the country of employment. According to the applicant, the principle laid down in the first paragraph of Article 12 — that all or part of an official's remuneration is to be paid in the currency of the place of employment at the official's request — should be compared with the second paragraph, which derogates from that principle: '*in duly substantiated exceptional cases, the appointing authority may make all or part of this payment in a currency other than that of the place of employment*'. The principle is thus laid down in the first paragraph and the exception to it in the second paragraph. If the argument that the first paragraph confers a discretion were accepted, the second paragraph would lose all meaning since there would be no reason, if the basic rule were purely an enabling one, to require that officials serving in a non-member country should duly substantiate exceptions.

13 The applicant states that, on the assumption that Article 12 confers on the administration a discretion to determine the part of the remuneration that may be paid in the currency of the country of employment with application of the weighting for that country, Article 1 of the internal directives places an excessive restriction on that power by prohibiting remuneration from being paid 'in full' in that currency.

14 The Commission replies that Annex X derogates from the Staff Regulations, as is clear from its title ('Special and exceptional provisions applicable to officials serving in a third country') and from Article 1 thereof. Annex X lays down a series of special provisions for officials serving in non-member countries, in respect of

whom Articles 11 and 12 determine the financial arrangements. Pursuant to Article 1 of Annex X, the method of payment of the remuneration of such officials was determined by the Commission in May 1988 by means of the internal directives adopted in application of Article 12 of Annex X.

15 The Commission contends that Article 12 of Annex X expressly confers a discretion on the appointing authority to decide to pay 'all or part of' the remuneration in the currency of the country of employment. It is therefore for that authority — subject to proper review by the Community judicature — to fix the percentage of remuneration that it considers reasonable to pay in the currency of the country of employment to an official seeking to take advantage of Article 12. By fixing at a flat rate of 80% the 'part' of the remuneration which may normally be paid in the currency of the country of employment at the request of an official serving in a non-member country (except where the official can show that a higher proportion should be paid in the local currency), the internal directives complied fully with the principle embodied in the first paragraph of Article 12 of Annex X. The Commission contends that if it had decided, as the applicant claims it should, systematically to pay the whole of the remuneration in the currency of the country of employment at an official's request, Article 12 of Annex X would have been infringed. Such a request would unlawfully remove the institution's discretion in the matter.

16 The Commission further states that the applicant's reference to the second paragraph of Article 12 of Annex X is irrelevant, in so far as that provision does not refer to her situation but solely to payments in a currency which is neither that of the country in which the institution concerned has its seat (Article 11 of Annex X) nor that of the country of employment (Article 12, first paragraph).

Findings of the Court

17 The Court finds that the use in the first paragraph of Article 12 of Annex X of the words 'may decide' or their equivalent in all the Community languages, in conjunction with the use of the words 'at the request of the official', would be pleonastic if, contrary to the applicant's assertion, it did not have the effect of conferring a discretion on the appointing authority. For the applicant's argument to be upheld, the provision at issue would have to be worded as follows: 'At the request of the official, all or part of his remuneration shall be paid in the currency of the

country of employment. In that event ...'. That version would have been more natural, since it would have incorporated the same structure as that of Article 11. Furthermore, the use of the word 'decide' means that a decision must be taken by the appointing authority, which implies that the official's request alone is not sufficient. Here again the practical effect of that word is inconsistent with the applicant's argument.

18 It follows that the first paragraph of Article 12 of Annex X confers a discretion on the Commission to determine the extent to which it must grant a request made by an official on the basis of that provision.

19 Furthermore, the Court considers that the applicant's argument based on a reading of both paragraphs of Article 12 of Annex X in conjunction with one another is irrelevant. The second paragraph of that article does not constitute a derogation from the first paragraph but, like the first paragraph, a derogation from Article 11 of Annex X. Article 11 lays down the principle that the remuneration of officials serving in non-member countries is to be paid in Belgian francs in Belgium with the weighting for that country. Two derogations from that principle are provided for in Article 12: payment of all or part of the remuneration in the currency of and with the weighting for the country of employment (first paragraph) or payment of all or part of the remuneration in a currency other than that of the country of employment in such a way as to maintain purchasing power (second paragraph).

20 The Court observes that in principle there is nothing to prevent the appointing authority from laying down, in an internal decision of a general nature, rules governing the exercise of the discretion which it has under the Staff Regulations (see, for example, with regard to the exercise of the appointing authority's discretion under Article 32, second paragraph, of the Staff Regulations, the judgments in Case

266/83 *Samara* v *Commission* [1985] ECR 189, paragraph 15, and in Case 146/84 *De Santis* v *Court of Auditors* [1985] ECR 1723, paragraph 11).

21 It is necessary to examine whether in the present case the Commission exceeded the limits of its discretion in adopting Article 1 of the internal directives, which restricts to 80% the part of the remuneration that is automatically paid in the currency of and with the weighting for the country of employment.

22 In that respect, the Court notes that the applicant relies on two arguments in claiming that the Commission abused its discretion. First, she maintains that by setting the limit at 80%, the Commission precluded payment of 'all' of her remuneration in the currency of and with the weighting for the country of employment. Secondly, she claims that the 80% limit is discriminatory in comparison with officials serving in the Community.

23 With regard to the applicant's first argument, it is important to note that Article 1 of the internal directives does not prevent 'all' the remuneration from being paid in the currency of and with the weighting for the country of employment, but requires that the official should duly substantiate his request where it concerns more than 80% of his remuneration. Consequently, Article 1 of the internal directives does not exceed the power conferred on the appointing authority by Article 12, first paragraph, of Annex X.

24 As for the applicant's second argument, it overlaps in substance with her second submission, and will be examined together with it.

25 It follows from the foregoing that, in so far as it does not overlap with the second submission, the first submission must be rejected.

Second submission: infringement of the principle that officials are to enjoy equivalent purchasing power and of Articles 62 to 64 of the Staff Regulations

First part: infringement of the principle that officials are to enjoy equivalent purchasing power

Arguments of the parties

26 The applicant claims that Articles 64 and 65 of the Staff Regulations, which lay down the principle that officials are to enjoy equivalent purchasing power, have been infringed in so far as the adjustment of her remuneration, by means of the relevant weighting, to the standard of living in Oslo applies to only 80% of her remuneration, while the balance is paid in Belgian francs without being adjusted to the cost of living in Oslo.

27 She further claims that the actual concept of weighting set out in Article 64 of the Staff Regulations is intended to ensure equality of purchasing power irrespective of the place of employment, particularly with a view to avoiding any discrimination between officials according to the place where they are employed. It follows from the case-law of the Court of Justice that the principle of equality of treatment forms the basis of Article 64 of the Staff Regulations (judgment in Case 7/87 *Commission* v *Council* [1988] ECR 3401). For officials employed in the Community, the principle referred to in Article 64 is directly applicable, since an official's remuneration is calculated with the weighting determined for his place of employment without its being necessary for him either to apply for it expressly or to provide any proof of the nature or structure of his outgoings. To require such proof from an official would in fact constitute unacceptable interference in his private life, contrary to Article 12 of the Universal Declaration of Human Rights. For officials serving outside the Community, the principle laid down in Article 64 is applied through Articles 11 and 13 of Annex X; Article 13 states, *inter alia*, that the fixing of weightings is intended to 'ensure as far as possible that officials enjoy equivalent purchasing power irrespective of their place of employment'. Weighting fulfils its purpose only if it is applied to the whole of an official's remuneration.

28 The applicant also claims that it is arbitrary to fix the limit at 80% of remuneration. In her reply she states that the Commission cannot justify that limit on the ground that it is 'reasonable to assume that a significant proportion — evaluated at a flat rate of 20% — of the salaries of officials serving in non-member countries is generally not used in the country of employment'. Such an assumption is not

sufficient for legal purposes and cannot be based on the grounds relied upon by the Commission. Since payment of accommodation costs in full already has the effect of reducing the weighting by excluding it from the calculation of the cost of living, it cannot again be relied on to justify a payment involving only partial application of that weighting. As for supplementary sickness cover, it is chosen and imposed by the administration and is justified by the fact that full cover is indispensable to ensure that an official has adequate protection in the various countries to which he may be posted. The same applies to accident insurance.

29 The Commission explains that the figure of 80% was chosen because it is reasonable to assume that a significant proportion — set at flat rate of 20% — of the salaries of officials serving in non-member countries is generally not used in the country of employment. Unlike officials serving in a Member State, those officials have much greater mobility and, consequently, are much less attached to their successive countries of employment. That is why it is appropriate to consider that a significant part of the remuneration of those officials will not be used in their country of employment. Furthermore, the Commission also bears a significant proportion of their local expenditure by paying the whole of their rent in the country of employment, by reimbursing their medical expenses in full and by contributing to special accident insurance for the members of their families. Since those officials do not have to bear certain basic expenditure in their country of employment, they normally spend the amounts thus made available either in the country in which the institution concerned has its seat or in the country where their centre of interests is established.

30 The Commission further states that even if the 80% rule were regarded as intended to 'offset' various 'advantages' granted to officials serving in non-member countries, which is not in fact the case, the arguments whereby the applicant seeks to show that those 'advantages' do not in fact exist are quite inaccurate. The fact that accommodation costs are not taken into account in the calculation of the weighting does not mean that free accommodation is not a real advantage for those officials. The failure to take accommodation costs into account in the calculation of the weighting is the logical consequence of the fact that those officials do not bear such costs. The fact remains, however, that the other expenses related to the cost of living in the host country are all taken into consideration in the calculation of the

weighting. The remuneration of officials serving in non-member countries is therefore in all cases adjusted by a weighting, and it is only the rules for calculating the weighting that have been slightly modified in the case of such officials. It is therefore apparent that no amount is deducted from the remuneration of those officials in order to take account of the fact that their accommodation is supplied free. As regards supplementary health insurance, those officials pay only a share of 50% at most (with a ceiling of 0, 6% of their basic salary), the remainder being borne by the institution, which again constitutes a significant advantage and supports the view that in the case of an official serving in a non-member country local outgoings for medical fees will be reduced accordingly.

31 The Commission therefore considers that, compared with officials serving at the seat of the institution or in another Member State, those serving in non-member countries use a significant part (estimated at 20%) of their remuneration within the Community. It points out, however, that the figure of 80% was chosen only as a flat rate, since pursuant to the second paragraph of Article 1 of the internal directives 'in duly reasoned cases, the appointing authority may agree to pay in the currency of the country of employment a part of the remuneration exceeding 80%'. The Commission further states in its rejoinder that the figure of 20% is all the more justified when compared with the system previously applied to officials serving in non-member countries, under which a contribution of 15 to 20% was levied on officials' remuneration in respect of accommodation.

Findings of the Court

32 The Court finds that both parties base their respective claims on a higher principle of law, namely the principle of equal treatment, which, as the Court of Justice has consistently held, underlies Articles 64 and 65 of the Staff Regulations (see, most recently, the judgment in Case C-301/90 *Commission* v *Council* [1992] ECR I-221, paragraphs 15 and 29). The applicant maintains essentially that the only means of ensuring equal treatment of all officials, viewed in terms of equivalence of purchasing power in the various places of employment, are laid down in Articles 64 and 65 of the Staff Regulations, which provide that remuneration is automatically to be paid in the currency of and with the weighting for the place of employment. According to the Commission, on the other hand, equality of treatment, viewed in the same terms, requires the weighting system to be applied differently to officials serving in the Community and to those serving in non-member countries in order to take account of the specific situation of the latter, that being the purpose of Annex X, as interpreted by Article 1 of the internal directives.

33 The Court observes that the principle of equal treatment requires that identical situations should be treated identically and that different situations should be treated differently in so far as is commensurate with the difference found to exist.

34 In order to examine whether Annex X to the Staff Regulations, as interpreted by Article 1 of the internal directives, can, like Articles 64 and 65 of the Staff Regulations, ensure equality of treatment, viewed in terms of equivalence of purchasing power in the various places of employment, the Court considers that three questions must be answered. First, is the situation of officials serving in non-member countries, to whom Annex X applies, different from the situation of officials serving in the Community, to whom Articles 64 and 65 of the Staff Regulations apply? Second, are officials serving in non-member countries treated differently compared with officials serving in the Community? Third, if there is a difference in treatment, is it justified by possible differences between the situation of officials serving in non-member countries and the situation of officials serving in the Community?

35 With regard to the first question, the Court finds that the applicant accepted, both in her submissions (reply, pages 3, paragraph 7, and page 4, paragraph 8) and at the hearing, that the situation of officials serving in non-member countries is different from that of officials serving in the Community. She claimed that the various advantages conferred on the former category of officials by Annex X are all intended to offset the disadvantages to which they are subject. By recognizing that officials serving in non-member countries are subject to disadvantages that do not affect officials serving in the Community, the applicant accepted that their situation is different from that of officials serving in the Community. That difference is borne out by the statement of reasons in the proposal submitted by the Commission to the Council which led to the adoption of Annex X. It states, in particular, that 'the working conditions of such staff differ from those within the Community in the following important respects: staff serving outside the Community work in external delegations and are subject to rotation; this means that they rarely spend very long in any one place; living and financial conditions in many non-member countries differ significantly from those within the Community. Mobility is an essential feature of the conditions of service for staff serving overseas. Staff in delegations should as a rule move at regular intervals, normally not exceeding four years ... It has been EAC practice for two decades to provide its staff with free

accommodation ... some Member States provide free housing for diplomatic staff abroad ... This practice seems justified by the problems of frequent mobility and the need to maintain a permanent base in Europe ... Policy on education costs for staff serving overseas must respect the recognized basic principle that free education should be available for children of Community officials, primarily through access to the European Schools and failing this through the payment of increased allowances. The fact that an official is serving overseas should not lead to discrimination on this point. In many places of employment, the forms of education available which are suitable for the children of officials are both limited and very expensive. It is accordingly proposed that within reason the costs actually incurred by officials serving outside the Community for the education of their children be reimbursed ... Because of the very high cost of health care in some of these countries and the extra risks faced by such officials and their families, provision will be made for supplementary insurance to cover 100% of medical expenses ... Half the cost of the insurance will be paid by the official ...'.

36 The *travaux préparatoires* for Annex X to the Staff Regulations show above all that the intention of the Community legislature in adopting that measure was to assimilate the status of officials serving in non-member countries to that of national diplomats working in similar conditions. Those officials are stated to be in the service of the Community as part of the delegations which represent the Community institutions throughout the world. Thereafter numerous references are made to the status of diplomatic staff of the Member States. Furthermore, 'for the staff of external delegations, the requirement of mobility means that the centre of interests seldom coincides with the place of work ...'.

37 It follows from the foregoing that the situation of officials serving in non-member countries in fact differs from that of officials serving within the Community.

38 It is therefore necessary to examine the second question, namely whether officials serving in non-member countries are treated differently from officials serving within the Community.

39 In that respect, the Court notes that the applicant claims that the difference in treatment between officials serving in non-member countries and officials serving within the Community lies in the fact that, in the case of the latter, Article 64 of the Staff Regulations allows those serving outside the seat of the institution to be paid automatically and in full in the currency of their place of employment with application of the weighting for that place, whereas in the case of officials serving in non-member countries only 80% of their remuneration is paid in the currency of and with the weighting for their place of employment, and only at their request.

40 It is necessary to consider the rationale underlying Article 64 of the Staff Regulations and Article 12 of Annex X, as interpreted by Article 1 of the internal directives. The purpose of the weighting mechanism is to ensure that equivalent purchasing power is maintained for all officials irrespective of their place of employment. However, purchasing power is the measure of the quantity of goods and services that may be acquired for a monetary unit at any given moment. Purchasing power therefore has no meaning except in relation to expenditure that is liable to be incurred. For that reason, the strict application of the rule that officials are to enjoy equivalent purchasing power should in theory require the weighting for the place of employment to be applied only to the amounts which are shown to be likely to be spent in the place of employment.

41 Given the practical impossibility of operating a system in which, on the one hand, each official has to establish the expenditure he is likely to incur in his place of employment and the expenditure he will incur elsewhere and, on the other, the administration has to verify those statements, the Community legislature has established a system based on certain presumptions, which is set out in Article 64 of the Staff Regulations for officials serving in the Community and in Article 12 of Annex X, as interpreted by Article 1 of the internal directives, for officials serving in non-member countries.

42 For the first category, there is a presumption that 100% of their expenditure is likely to be incurred in their place of employment. That presumption is none the less rebuttable, in so far as Article 17 of Annex VII to the Staff Regulations provides that an official may, through the institution which he serves, regularly have part of his emoluments transferred up to a maximum amount equal to his expatriation allowance (16%) or foreign residence allowance, provided that those

transfers 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.

43 For officials serving in non-member countries, the Commission concluded that different treatment was required owing to the fact that they were in a different situation, as described in the explanatory memorandum of the proposal for Annex X which it submitted to the Council (see paragraphs 35 and 36, above). The Commission submitted its conclusion in the following words: 'Under the circumstances, the Commission believes that their pay and allowances should be calculated and paid in Belgian francs at the weighting for Brussels ... The institutions will transfer to officials serving outside the Community any funds required on the spot and will adjust such transfers by a weighting to take account of the differences in cost of living at the appropriate exchange rate'. As that proposal was adopted by the Council, Article 11 of Annex X to the Staff Regulations provides that officials serving in non-member countries are, in principle, to be paid in Belgian francs in Belgium and that their remuneration is to be subject to the weighting for Belgium. However, since it is necessary to ensure as far as possible that officials enjoy equivalent purchasing power irrespective of their place of employment (Article 13), Article 12 of Annex X provides that: 'At the request of the official, the appointing authority may decide to pay all or part of his remuneration in the currency of the country of employment' and that 'in that event it shall be subject to the weighting for the place of employment and shall be converted on the basis of the corresponding exchange rate'.

44 Article 1 of the internal directives, adopted in application of that provision, is based on the presumption that in the case of officials serving in non-member countries who request payment in the currency of and with the weighting for their country of employment, only 80% of their remuneration is likely to be spent in the place of employment. It is therefore assumed that 20% of the remuneration of such officials is not likely to be spent in the place of employment. However, that presumption, like the one applicable to officials serving in the Community, is rebuttable, in so far as the final sentence of Article 1 provides that an official may, if he duly justifies his request, obtain payment in the currency of the country of employment, with application of the relevant weighting, of a part of his remuneration exceeding 80%. An official serving in a non-member country may therefore rebut that presumption if he shows that, for reasons of his own, he is likely to spend more than 80% of his remuneration in his place of employment.

45 The Court must therefore answer the third question, namely whether the difference in treatment resulting from the fact that the presumption applies to 100% of remuneration in the case of officials serving in the Community but to only 80% in the case of those serving in non-member countries, is justified in the light of the difference in their respective situations.

46 The question whether it is reasonable in the case of officials serving in non-member countries to restrict to 80% the part of their remuneration which they are assumed to be likely to spend in their place of employment must be examined in the light of a comparison between the expenditure which officials serving in the Community and those serving in non-member countries are likely to incur in their place of employment. In that respect, it follows from Articles 5, 18 and 23 of Annex X that an official serving in a non-member country does not pay for the cost of accommodation in his place of employment in so far as accommodation appropriate to the composition of his family is provided by the institution and that, in the absence of accommodation, he is entitled either to reimbursement of hotel expenses for himself and his family, after prior authorization by the appointing authority, or to reimbursement of his rent, provided that the accommodation corresponds to the level of his duties and to the composition of his dependent family. On the other hand, an official serving in the Community bears the cost of his accommodation and that of his family in the place of employment. Furthermore, the fact that officials serving in non-member countries have the benefit of supplementary sickness insurance in respect of all their health care expenditure, albeit financed in part by themselves (Article 24 of Annex X), also means that they are not required to bear the cost of health care in their place of employment, whereas officials serving in the Community must in principle bear 20% of such costs in their place of employment (Article 72 of the Staff Regulations).

47 In view of the rationale underlying the system, according to which the weighting is to be applied only to amounts likely to be spent in the place of employment, it is reasonable not to apply the weighting automatically to such part of the remuneration of an official serving in a non-member country as corresponds to the part of the remuneration of an official serving in the Community which is spent on accommodation and health care, since, unlike the latter, an official serving in a non-member country will not be able to incur such costs in his place of employment.

48 The question which arises is whether it is reasonable to estimate at 20% the part of his remuneration that an official serving in the Community is likely to spend in his place of employment on accommodation and health care. In that respect, the Commission was correct in referring, as evidence of the reasonableness of that estimate, to the 15 to 20% of the remuneration of officials serving in non-member countries which, before Annex X entered into force, corresponded to the contribution that the officials had to pay to their institution in order for it to provide them with accommodation. Furthermore, the figure of 20% corresponds to the size of the 'accommodation' item in the weighting structure of consumption for officials and therefore to the importance accorded to that item in the calculation of the weightings for a given place of employment (see paragraph 19 of the Opinion of Advocate General Cruz Vilaça in Case 7/87, cited above, at p. 3414). That estimate is all the more reasonable because officials serving in non-member countries do not have to bear any expenditure on health care in their place of employment.

49 Furthermore, in the present case, the reasonableness of that assumption is borne out by the fact that the applicant did not claim at any stage of the proceedings that she had to spend more than 80% of her remuneration in her place of employment, and did not submit a duly reasoned request within the meaning of the second paragraph of Article 1 of the internal directives.

50 In addition, the applicant maintains that the effect of restricting the amount which an official serving in a non-member country is assumed to spend in the place of employment to 80% of remuneration on the ground that the official is provided with accommodation free of charge is that such accommodation is taken into consideration twice, to the detriment of the official, since that factor was already excluded from the calculation of the weighting. The Court considers that taking free accommodation into account twice is entirely justified, inasmuch as, since no accommodation costs can be incurred by such officials in their place of employment, accommodation must not be taken into account in any way in calculating the purchasing power which those officials have by virtue of their remuneration (see above, paragraph 40). Accommodation does not form part of the goods and services which they are likely to obtain with their remuneration in their place of employment. Accordingly, accommodation costs must not be taken into account in the calculation of the cost of living for officials serving in non-member countries in their place of employment as expressed by the weighting. Moreover, the

weighting cannot be applied to amounts which are shown to be unlikely to be spent in the place of employment. There is therefore no justification for the weighting for the place of employment to be applied to such part of the remuneration of officials serving in non-member countries as corresponds to accommodation costs for officials serving in the Community.

51 There is no need to take into consideration, either in calculating the weighting or in applying it, items which are entirely and necessarily unconnected with the structure of expenditure in their place of employment of officials serving in non-member countries. It follows that the difference in treatment found is proportionate to the difference in the situation of such officials compared with that of officials serving in the Community.

52 For the rest, in so far as the applicant seeks to compare the situation of officials serving in non-member countries under the system of paying a contribution in respect of accommodation, in force before Annex X was adopted, with their situation after that annex entered into force, she cannot rely on the principle of equal treatment to challenge the decision of the legislature to amend, as from a particular date, the system of remuneration applicable to officials serving in non-member countries.

53 In the present case, the Court finds that by adopting Annex X, the legislature sought to amend the system previously in force, in particular the system of paying a contribution in respect of accommodation. That amendment could not prejudice the rights acquired by the applicant. Article 27 of Annex X expressly provides that 'an official or a member of the staff covered by Regulation No 3018/87 shall, for a period not exceeding the duration of the assignment being carried out when these provisions enter into force and for a maximum of five years, receive remuneration at least equal to that which he was receiving the day before entry into force of these provisions'.

54 Furthermore, the applicant cannot rely on a system which was amended before it became applicable to her, since she did not acquire any rights under it. The applicant was posted to Oslo with effect from 4 January 1988, while the system established by Annex X and the internal directives entered into force on 10 October 1987.

55 It follows from all the foregoing considerations that the applicant cannot rely on a breach, by Articles 11 and 12 of Annex X, as interpreted by Article 1 of the internal directives, of the principle of equal treatment. However, that would have been the case if officials serving in non-member countries had been required to pay for their accommodation and health care themselves, without those items being taken into consideration when the weighting was calculated and without the weighting being applied to the whole of their remuneration. In those circumstances, officials serving in non-member countries would have to bear such expenses in their place of employment, like officials serving in the Community, and those expenses would then have to be taken into account twice, as in the case of the latter.

56 It follows that the first part of this submission must be rejected.

Second part: infringement of an official's right to his remuneration

57 The applicant maintains that the Commission's decision is contrary to Articles 62 to 65 of the Staff Regulations, which define the content of remuneration and establish officials' entitlement to remuneration. She claims that she is being deprived of part of the remuneration to which she is entitled since she is denied payment of the whole of her remuneration in the currency of her country of employment with application of the weighting for that country.

58 The Commission does not specifically answer this part of the applicant's submission.

59 The Court considers that this part of her submission, like the first part, must be rejected. Since Article 1 of the internal directives is consistent with both Articles 11 and 12 of Annex X and the principle of equal treatment, the Commission calculated the applicant's remuneration correctly and she has not therefore been deprived of a part of her remuneration without justification.

60 It follows from all the foregoing considerations that the application must be dismissed.

Costs

61 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party must be ordered to pay the costs if they have been asked for in the successful party's pleadings. However, according to Article 88 of those rules, in proceedings between the Communities and their servants the institutions are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the application.

2. Orders the parties to bear their own costs.

Barrington Lenaerts Kalogeropoulos

Delivered in open court in Luxembourg on 15 December 1992.

H. Jung D. P. M. Barrington

Registrar President