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-47/91,

Annick Auzat, an official of the Commission of the European Communities, residing at Geneva, represented by G. Vandersanden, 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 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 refusing the applicant's request for payment of her salary in full in the currency of and with the weighting for her country of employment,

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 giving rise to the dispute, and procedure

1 The applicant is an official in Grade B 1 and has been employed at the Commission's Permanent Delegation in Geneva since 1 October 1989.

2 On 7 February 1990 she (and many of her colleagues) requested payment of her remuneration in full in the currency of and with the weighting for her place of employment.

3 By memorandum of 3 July 1990 the Director General for Personnel and Administration refused her request.

4 On 28 August 1990 the applicant (and her colleagues) submitted a complaint under Article 90(2) of the Staff Regulations of Officials of the European Communities (hereinafter 'the Staff Regulations') against the refusal of her request.

5 On 4 March 1991 the applicant was notified that her complaint had been rejected.

6 In those circumstances the applicant made this application, which was lodged at the Registry of the Court of First Instance on 17 June 1991.

7 By a separate document dated 28 August 1991 the Commission raised an objection of inadmissibility on the basis of Article 113 of the Rules of Procedure of the Court of First Instance.

8 By a document lodged at the Court Registry on 14 October 1991 the applicant submitted her observations on the objection of inadmissibility.

9 By order of 26 November 1991 the Court reserved a decision on the objection of inadmissibility for the final judgment in accordance with Article 114(4) of its Rules of Procedure.

10 Upon hearing the Report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure without any preparatory inquiry.

Forms of order sought by the parties

11 The applicant claims that the Court should:

— declare the action admissible and well founded;

— consequently, annul the implied decision (subsequently confirmed by an express decision of the Director General for Personnel and Administration dated 3 July 1990) refusing the applicant payment of her salary in full in the currency of her place of employment, that is to say in Swiss francs, with the relevant weighting;

— consequently, award the applicant, with retroactive effect, payment of the supplement required to bring her salary up to 100% in local currency with the relevant weighting, together with default interest thereon at 8%;

— order the defendant to pay all the costs.

The Commission contends that the Court should:

dismiss the action as inadmissible;

dismiss the application as unfounded;

make an order for costs according to law;

in the alternative

— if, contrary to all probability, the Court were to declare that Articles 11 and 12 of Annex X to the Staff Regulations or the internal directives of the Commission, or both, were unlawful, declare that: except as concerns officials serving in a non-member country who have already claimed their rights by bringing proceedings or by submitting a request or a complaint, the judgment of the Court cannot be relied upon in support of claims relating to periods of remuneration prior to the date of its delivery;

— with specific regard to the applicant, it will be necessary, when calculating the amounts which should have been paid in Swiss francs with the weighting for Switzerland, to take into account for the past only the amounts actually paid to her account in Belgian francs subsequent to February 1990 and to set the default interest at 6% per annum.

Admissibility

12 In support of her application, the applicant has put forward two submissions. During the written procedure the Commission raised an objection of inadmissibility in respect of both of those submissions on the ground that they are inconsistent with the criticisms set out in the complaint.

13 The Court notes that the Commission withdrew its objection of inadmissibility at the hearing and, regard being had to the papers before the Court, considers that the application must be declared admissible.

Substance

14 The applicant's first submission is to the effect that Articles 11 and 12 of Annex X to the Staff Regulations (hereinafter 'Annex X') are unlawful inasmuch as they infringe the principle of equivalence of purchasing power laid down in, *inter alia*, Article 64 of the Staff Regulations, the principle of non-discrimination and Article 62 of the Staff Regulations. The second submission alleges an incorrect interpretation by the Commission of Article 12 of Annex X in adopting Article 1 of its internal directives determining the arrangements for payment referred to in Article 12 of Annex X to the Staff Regulations (hereinafter 'internal directives').

15 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', and in Article 12 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'. Article 1 of the internal directives provides that '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 country 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: illegality of Articles 11 and 12 of Annex X

Arguments of the parties

16 The applicant claims in substance that Articles 11 and 12 of Annex X infringe the higher legal principal of equality of treatment between officials. That principle was laid down in relation to the remuneration of officials by Article 64 of the Staff Regulations, the purpose of which is to ensure a substantially equivalent purchasing power to officials irrespective of their place of employment (judgments of the Court of Justice in Case 7/87 *Commission* v *Council* [1988] ECR 3401 and Case C-301/90 *Commission* v *Council* [1992] ECR I-221).

17 According to the applicant, Articles 11 and 12 of Annex X, as implemented by Article 1 of each of the internal directives, gives rise to an artificial and arbitrary reduction of her purchasing power by confining the application of the weighting for her place of employment to 80% of her remuneration and requiring a special statement of reasons before it can apply to the remaining 20%. That restriction has the consequence of reducing the applicant's salary by 7.8%. The applicant is therefore the victim of a two-fold discrimination compared with officials serving in a non-member country where the weighting is less than 100 and with officials serving within the Community.

18 With regard to the discrimination suffered compared with the first such category of officials, the applicant explains that they have the advantage of the system laid down in Article 11 of Annex X, which is extremely favourable to them since payment in Belgian francs with the weighting for Belgium, independently of the place of their actual expenditure and without having to submit justification, ensures that they have in their place of employment a higher purchasing power than that of other officials.

19 The applicant points out in her reply that the Commission's reliance on the system of rotation of officials serving in non-member countries as justification for the difference in treatment resulting from the application of Article 11 of Annex X to officials serving in countries where the weighting is less than 100 and of Article 12 to those serving in other countries constitutes an implied admission of the discriminatory nature of the system applied, since the 'fat' years are succeeded by the 'lean' years. She further states that that system does not give rise to the consequence submitted by the Commission, for two reasons: the first is that rotation is slow, since the Commission requires officials to serve a minimum period of four years, whilst the second is that such officials do not constitute a stable body of officials permanently serving in non-member countries, but rather officials who may sometimes be employed in the Community and sometimes in non-member countries.

20 With regard to the discrimination which she claims to have suffered in comparison with officials employed within the Community, the applicant explains that the latter have the benefit, under Article 64 of the Staff Regulations, of the application of the weighting for their country of employment to their entire remuneration without having to provide the slightest justification.

21 The applicant claims in her reply that the Commission cannot rely on the exceptional nature of the provisions of Annex X in relation to the other provisions of the Staff Regulations to justify their discriminatory nature, since it is in the light of a fundamental principle of law, superior to any measures adopted by the legislature, that she disputes the validity of Articles 11 and 12 of Annex X.

22 Furthermore, the applicant states that the Commission cannot justify those provisions of the Staff Regulations by claiming that it is reasonable to presume that a significant proportion — estimated at the flat rate of 20% — of the salary of officials serving in non-member countries is generally not used in the country of employment. It is not for the Commission to take account of the place where an official actually spends his remuneration or even to make suppositions in that respect. The actual structure of expenditure and the place where it is incurred come within an official's private life. No official employed within the Community has the local weighting linked to the actual structure of his personal expenditure or, *a fortiori*, to the production of evidence of that expenditure. Moreover, the application in full of the weighting for the place of employment is compulsory. It is only by way of exception that an official may have a limited part of his salary paid in his Member State of origin. There is nothing to justify this principle being ignored, and in fact reversed, for officials serving in non-member countries, with the consequence that there is an intolerable interference in the official's private life through the 'verification' of his personal expenditure.

23 The applicant further maintains that the fact that, according to the Commission, officials serving in non-member countries enjoy certain 'advantages' cannot justify the reduction in purchasing power resulting from the imposition of a ceiling of 80% of salary for the application of the weighting. When Annex X was adopted the Commission's representative stated to the Council that 'the proposed system seeks transparency and greater effectiveness by distinguishing the two elements of remuneration: the standard of living is offset by a specific allowance and the weighting is aimed solely at equivalence of purchasing power. Since responsibility for certain expenditure is accepted by the Institution in accordance with the proposal for a draft regulation, namely rent, medical fees and school fees, those items would not be taken into account in calculating the weighting'. The applicant concludes that the intention of the draftsmen was to offset those advantages by excluding them from the calculation of the weighting, not by limiting the application of the weighting. It is for that reason that the weighting must apply in full to ensure equivalence of purchasing power. The reduction in salary consequent upon the partial application of a weighting which has already been reduced constitutes a twofold reduction and means that the advantages in question have been taken into account twice.

24 The applicant goes on to claim that the Commission is wrong to believe that it can base its presumption that 20% of the remuneration of officials serving in non-member countries is not spent in the place of employment on the greater mobility

of those officials or on the grant of advantages associated with their status. She maintains that the mobility of such officials is no greater than that of officials serving outside the institution's seat but inside the Community and that all the alleged 'advantages' either correspond to actual extra expense or have already been taken into account in the calculation of the weighting itself.

25 The applicant claims that the discrimination of which she is therefore a victim also constitutes, owing to the reduction of her remuneration, an infringement of Article 62 of the Staff Regulations, which provides that every official is to be entitled to his remuneration, that is, to all his remuneration, and cannot waive his entitlement.

26 The applicant concludes that the provisions at issue are contrary to the higher principles of law to which she has referred and that, consequently, they must be declared inapplicable in pursuance of Article 184 of the EEC Treaty.

27 The Commission explains that the level of 80% was chosen because it is reasonable to presume that a significant proportion — set at a flat rate of 20% — of the salaries of officials serving in non-member countries is normally not used in the country of employment. Unlike officials serving in a Member State, those officials tend to have much greater mobility and, consequently, relatively less attachment to their successive countries of employment. Furthermore, the Commission also takes responsibility for a significant proportion of their local expenses by paying their rent in full in the country of employment, by reimbursing their medical fees in full and by contributing to special accident insurance for the members of their families. Since those officials do not have to bear certain essential expenses in their country of employment, they normally spend the amounts thus made available either in the country of the seat of the institution or in the country where they have their centre of interests.

28 The Commission further states that even if the '80% rule' were to be 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 actually exist are quite inaccurate. The fact that housing 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 housing costs into account in the calculation of the weighting is the logical consequence of the fact that those officials are not responsible for such costs. It none the less remains the position 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 each case adjusted by a weighting, and it is only the rules for calculating that weighting that have been the subject of a slight adaptation in the case of such officials. It is therefore apparent that no amount is deducted from the remuneration of those officials to take account of the fact that they are provided with free accommodation. As regards the supplementary sickness insurance, those officials pay only a 50% share at the maximum (with a ceiling of 0.6% of their basic salary), the remainder being the responsibility of the institution, which again constitutes a significant advantage and a reason for considering that those officials spend correspondingly less on medical fees.

29 The Commission concludes that, since it has shown that it had good reason to fix at 80% the amount of remuneration which may be paid in the currency of the country of employment with the weighting for that country, there cannot be any question of an infringement of Article 62 of the Staff Regulations.

Findings of the Court

30 The Court notes that both parties base their respective claims on the higher principle of law, the principle of equality of treatment, which, as the Court of Justice has consistently held, underlies Articles 64 and 65 of the Staff Regulations (see, most recently, Case C-301/90 *Commission* v *Council*, cited above, paragraphs 15 and 29). The applicant maintains in essence that the only way of ensuring equality of treatment between all officials, viewed in terms of equivalence of purchasing power in the various places of employment, is that 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. The Commission, on the other hand, explains that equality of treatment, conceived in the same terms, requires that the weighting system be applied differently to officials serving in the Community and those serving in non-member countries in order to take account of the specific situation of the latter, and that that is the object of Annex X, as interpreted by Article 1 of each of the internal directives.

31 The Court observes that the principle of equality of treatment requires that identical situations be treated in the same way and that different situations be treated differently according to the precise extent of the difference found.

32 In order to examine whether Annex X to the Staff Regulations, as interpreted by Article 1 of the internal directives, may, 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 resolved. First, is the situation of officials serving in non-member countries, to whom Annex X applies, different from the situation of officials employed in the Community, to whom Articles 64 and 65 of the Staff Regulations apply? Secondly, are the former officials treated differently compared with officials serving in the Community? Thirdly, if there is a difference in treatment, is it justified by possible differences between the situation of officials serving in non-member countries and that of officials serving in the Community?

33 With regard to the first question, the Court finds that the applicant accepted, both in her pleadings (reply, pages 3 and 4) and at the hearing, that the situation of officials serving in non-member countries differs from that of officials serving in the Community. She stated that the various advantages conferred on the former category of officials by Annex X are all intended to offset the disadvantages peculiar to them. By recognizing that officials serving in non-member countries have to suffer disadvantages which officials serving in the Community do not, the applicant accepted that their situation differs from that of officials serving in the Community. The difference in the situations is borne out by the statement of reasons accompanying the proposal for a regulation 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 are different in significant aspects from those prevailing within the Community: staff serving outside the Community work in external delegations and are subject to rotation, which means that they seldom remain in the same place for very long; living conditions and financial conditions in a number of non-member countries are very different from those found in the Community ... For staff serving outside the Community, mobility constitutes an essential aspect of the conditions of service. Staff of delegations must in principle be transferred at regular intervals, generally not exceeding four years ... For two decades it has been the practice of the EAC to make free accommodation available for its staff ... It is the practice of certain Member States in this sphere to provide free

accommodation for their diplomatic staff abroad ... That practice appears to be justified in itself, regard being had to the frequent problems of mobility and the need to maintain a permanent base in Europe ... The policy in relation to school fees for staff serving outside the Community must comply with the principle already recognized that, basically, education must be free for the children of Community officials, primarily through access to European and other schools by means of the payment of increased allowances. The fact that an official performs his duties outside the Community should not entail discrimination on that point. In a number of places of work, the forms of education available which are suitable for the children of officials are limited and very expensive. Consequently, it is proposed to take into account the reasonable fees actually borne by officials serving outside the Community for the education of their children ... Owing to the very high health charges in certain countries and the additional risks to which those officials and their families are exposed, provision is made for supplementary insurance covering 100% of medical fees ... The official will be responsible for half these insurance costs ...'.

34 The drafting history of Annex X to the Staff Regulations shows 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. It is in fact stated that those officials are in the service of the Community 'in the delegations which represent the Community institutions in the world'. Thereafter numerous references are made to the status of the diplomatic staff of the Member States. It is then stated: 'for the staff of the external delegations, the obligation of mobility means that their centre of interests seldom coincides with the place of work ...'.

35 It follows from the foregoing that the situation of officials serving in non-member countries is actually different from that of officials serving within the Community.

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

37 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, for 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 the weighting for that place, whereas, for officials serving in non-member countries, only 80% of their remuneration is paid in the currency of their place of employment with the weighting for that place, and only at their request.

38 It is necessary to consider the underlying objective of 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. Purchasing power is the measure of the quantity of goods and services which may be procured by a unit of currency at a given moment. Purchasing power therefore has no meaning except in relation to expenses liable to be incurred. The strict application of the rule of equivalence of purchasing power should therefore in theory require that the weighting for the place of employment should be applied only to the amounts in respect of which it is proved that they are liable to be spent in the place of employment.

39 In view of the practical impossibility of administering a system in which, on the one hand, each official had to establish what expenses he was likely to incur in his place of employment and those he would be likely to have elsewhere and in which, on the other hand, the administration had to verify those statements, the Community legislature established a system of presumptions, which are 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.

40 For the first category, it is presumed that 100% of their expenses are liable 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.

41 For officials serving in non-member countries, the Commission has concluded that different treatment was required owing to differences in situation which it had described in the explanatory memorandum with regard to the proposed Annex X which it submitted to the Council (see paragraphs 33 and 34, above). The Commission gave its conclusion in the following words: 'Consequently, the Commission considers that the principle governing the payment of their remuneration must be that the remuneration and allowances shall be calculated and paid in Belgian francs according to the appropriate weighting for Brussels ... The institutions will be ready to transfer to any official serving outside the Community the funds which he may need in his place of work, adjusting those transfers by means of a weighting which will take account of the different costs of living at the appropriate exchange rate'. That draft was adopted by the Council and 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, as mentioned in Article 13 of Annex X, it is necessary to ensure as far as possible the equivalence of officials' purchasing power irrespective of their place of employment, 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' 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'.

42 Article 1 of the internal directives, adopted in application of that provision, presumes that as regards 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 liable to be spent in the place of employment. It is therefore presumed that 20% of the remuneration of such an official is not liable to be spent in the place of employment. However, that presumption, like the presumption applicable to officials serving in the Community, is rebuttable, in so far as the final sentence of Article 1 provides that the official, if he duly justifies his

request, may obtain payment in the currency of the country of employment, with the relevant weighting, of a part of his remuneration exceeding 80%. An official serving in a non-member country may therefore reverse 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.

43 It follows that the differences in treatment between officials serving in the Community and those serving in non-member countries are — as far as the payment of their remuneration in the currency of their place of employment with the relevant weighting is concerned — that, first, only those serving in non-member countries must submit a request in order to benefit from the presumption that they spend their remuneration in their place of employment and, secondly, that officials serving in the Community are presumed to spend 100% of their remuneration in their place of employment, whereas those serving in non-member countries are presumed to spend only 80% in their place of employment, even though the presumption is rebuttable in both cases.

44 The Court must therefore answer the third question, namely whether those differences in treatment are justified in the light of the different situations in which officials serving in the Community and those serving in non-member countries are placed.

45 With regard, first of all, to the fact that payment in the currency of and with the weighting for the place of employment is automatic in the first case and that a request must be submitted in the second case, the Court considers that the applicant cannot claim that there is any discrimination in that difference in treatment. That difference in treatment is justified, first, by the purpose of the exceptional system applicable to officials serving in non-member countries, namely the legislature's desire to make their status equivalent to that of national diplomats and, secondly, by the need to protect those officials from the automatic application of the weighting where they are established in a non-member country whose weighting is less than 100.

46 It follows that this first difference in treatment is the result of the advantages conferred on officials serving in non-member countries by Annex X to the Staff Regulations, which more than offset the disadvantage represented by the requirement that they submit a request by signing a printed form. That difference in treatment is therefore proportional to the difference in situation which exists between officials serving in non-member countries and other officials.

47 Moreover, the Court notes that at the hearing the applicant withdrew her submission in so far as it alleged discrimination, in terms of purchasing power, of which she is the victim compared with officials serving in non-member countries where the weighting is less than 100.

48 With regard, secondly, to the question whether it is reasonable to restrict to 80% of the remuneration of officials serving in non-member countries the part presumed liable to be spent in their place of employment, the Court takes the view that it must be considered in the light of a comparison between the expenditure with which officials serving in the Community and those serving in non-member countries are likely to be faced in their place of employment. On that point, it follows from Articles 5, 18 and 23 of Annex X that an official serving in a non-member country can pay no housing costs, in so far as accommodation which corresponds to the composition of his family is provided by the institution and that, failing that, he is entitled either to reimbursement of the hotel expenses of 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 expenses connected with his accommodation and that of his family. Furthermore, the fact that officials serving in non-member countries have the benefit of insurance for all their health expenses in the form of supplementary sickness insurance, albeit financed in part by themselves (Article 24 of Annex X), also means that they are not faced with health expenditure in their place of employment, whereas officials serving in the Community must in principle bear 20% of such expenditure incurred in their place of employment (Article 72 of the Staff Regulations).

49 Because of the underlying objective of the system, according to which the weighting is to be applied only to amounts which may be presumed liable to be spent in the place of employment, it is reasonable that the weighting should not automatically apply to the part of the remuneration of an official serving in a non-member country corresponding to the part of the remuneration of an official serving in the Community which is spent on his accommodation and health, since unlike such officials an official serving in a non-member country will be unable to incur such expenses in his place of employment.

50 It is appropriate to enquire whether it is reasonable to evaluate at 20% the part of his remuneration which an official serving in the Community is likely to spend in his place of employment on accommodation and health. In that respect, the Commission was correct to refer, as an indicator of the reasonableness of that evaluation, to the 15 to 20% of the remuneration of officials serving in non-member countries which, before Annex X became applicable, corresponded to the housing contribution which the officials had to pay to their institution so that it might provide them with accommodation. Furthermore, the figure of 20% corresponds to the importance of the 'accommodation' item in the weighting structure of consumption of officials and therefore to the weight accorded to the accommodation item in the calculation of 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 page 3414). That evaluation is all the more reasonable because officials serving in non-member countries do not have to bear any health expenses in their place of employment.

51 It should be added that in this case the reasonableness of that presumption 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 that she did not submit a duly reasoned request within the meaning of the second paragraph of Article 1 of the internal directives.

52 The Court also notes that the applicant maintains that the restriction of the presumption of expenses in the place of employment to 80% of remuneration on the ground that officials serving in non-member countries are provided with free accommodation has the consequence that the free accommodation is taken into account twice, to the detriment of those officials, since that factor was already excluded from the calculation of the weighting. The Court considers that there is complete justification for taking free accommodation into account twice, inasmuch as, since no housing expenses can be incurred by such officials in their place of employment, accommodation must in no way be taken into account in calculating the purchasing power which those officials derive from their remuneration (see above, paragraph 38). Housing costs do not in fact form part of the goods and

services that they are likely to obtain with their remuneration in their place of employment. They must not therefore come into the calculation of the cost of living for officials serving in non-member countries in their place of employment, expressed by the weighting. Moreover, the weighting must not be applied to amounts which it is established are not likely to be expended in the place of employment. There is therefore no reason for the weighting for the place of employment to be applied to the part of the remuneration of officials serving in non-member countries which corresponds for officials serving in the Community to housing expenses.

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

54 For the remainder, in so far as the applicant's arguments tend to compare the situation of officials serving in non-member countries under the system of housing contribution applicable before Annex X was adopted with their situation after it came into force, it should be pointed out that the applicant cannot rely on the principle of equality of treatment to challenge the decision of the legislature to amend, as from a certain point in time, the remuneration applicable to officials serving in non-member countries.

55 In this case, the Court finds that the legislature, in adopting Annex X, wished to amend the system previously in force, in particular the system of housing contribution. That amendment of the system could not prejudice the rights acquired by the applicant, since 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'.

56 Furthermore, the applicant cannot rely on a system which was amended before becoming applicable to her, since she acquired no rights under it. The applicant was posted to Geneva with effect from 1 October 1989, whereas the system of Annex X and the internal directives entered into force on 10 October 1987.

57 It follows from all the foregoing that the applicant cannot invoke an infringement of the principle of equality of treatment by Articles 11 and 12 of Annex X, as interpreted by Article 1 of the internal directives. It should be noted, however, that that would have been the case if officials serving in non-member countries had had to pay for their accommodation and health expenditure themselves without those items being taken into consideration when the weighting was calculated and without the weighting being applied to their remuneration in full. In that case, officials serving in non-member countries would, like officials serving in the Community, have to face such expenditure in their place of employment, which would then have to be taken into account twice, as for the latter.

58 It follows that the first submission must be rejected.

Second submission: incorrect interpretation of Article 12 of Annex X by Article 1 of the internal directives

Arguments of the parties

59 In the alternative, the applicant claims that, on the supposition that Article 12 of Annex X is not intrinsically unlawful, it is possible to put forward a different interpretation from that inherent in Article 1 of the internal directives. According to

that interpretation, any official who so requests has the right to demand payment in local currency, with the relevant weighting, whilst the appointing authority must agree, to the extent requested. The expression 'may decide' means that the power does not belong to the appointing authority as of right but may be used only on the initiative of the official concerned. The expression 'all or part' means that the official may himself specify the extent of the conversion into local currency with the relevant weighting which he desires. If the official wishes to have his remuneration paid in full in local currency with the relevant weighting, the appointing authority cannot oppose it by imposing any arbitrary lower percentage.

60 The applicant concludes that if the Court should follow that interpretation, it must find that Article 1 of the internal directives is unlawful and annul the contested measure.

61 The Commission replies that the interpretation of Article 12 of Annex X suggested by the applicant is plainly contrary to the wording of that provision, which clearly provides that it is the appointing authority which may decide to pay all or part of the remuneration in the currency of the country of employment. While the official may take the initiative and request the appointing authority to pay all or part of his remuneration in the currency of the country of employment, the power of decision belongs to the appointing authority.

62 For the remainder, the Commission refers to its refutation of the applicant's arguments contained in her first submission.

Findings of the Court

63 The Court considers that, since it established in its assessment of the first submission that Article 12 as interpreted by Article 1 of the internal directives was lawful, there is no need to decide as to any other interpretation of Article 12.

64 Consequently, the second submission must also be dismissed.

Costs

65 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied 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 pay their own costs.

Barrington Lenaerts Kalogeropoulos

Delivered in open court in Luxembourg on 15 December 1992.

H. Jung D. P. M. Barrington

Registrar President