

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
30 September 1998 *

In Case T-121/97,

Richie Ryan, former member of the Court of Auditors of the European Communities, resident in Dublin, represented by Georges Vandersanden, of the Brussels Bar, with an address for service in Luxembourg at the offices of Fiduciaire Myson SARL, 30 Rue de Cessange,

applicant,

v

Court of Auditors of the European Communities, represented by Jean-Marie Stenier, Jan Inghelram and Paolo Giusta, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the seat of the Court of Auditors, 12 Rue Alcide de Gasperi, Kirchberg,

defendant,

supported by

Council of the European Union, represented by Jean-Paul Jacqué and Thérèse Blanchet, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Alessandro Morbilli, Director-General of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

intervener,

* Language of the case: French.

APPLICATION for the annulment of the decision of the Court of Auditors of 20 February 1997 setting the rate of the applicant's pension with effect from 1 March 1997,

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

composed of: J. Azizi, President, R. García-Valdecasas and M. Jaeger, Judges,

Registrar: B. Pastor, Principal Administrator,

having regard to the written procedure and further to the hearing on 12 May 1998,

gives the following

Judgment

Relevant provisions

- 1 Article 9(1) of Council Regulation (EEC, Euratom, ECSC) No 2290/77 of 18 October 1977 determining the emoluments of the members of the Court of Auditors (OJ 1977 L 268, p. 1) provides that 'after ceasing to hold office, members of the Court of Auditors shall be entitled to a pension for life payable from the date when they reached the age of 65 years'.

2 The first paragraph of Article 10 of that regulation states that the amount of the pension of members of the Court of Auditors is to be 4.5% of the basic salary last received for each full year in office and one-twelfth of that sum for each complete month, the maximum pension being 70% of the basic salary last received.

3 Under Article 2, the basic monthly salary of members of the Court of Auditors is to be equal to the amount resulting from the application of, in the case of the president, a percentage of 108%, and in the case of the other members, a percentage of 104%, to the basic salary of an official of the European Communities in the last step of Grade A 1.

4 Article 18 provides:

'Should the Council decide to increase the basic salary, it shall at the same time decide on an appropriate increase in the rates of existing pensions.'

5 Article 8(1) provides that for three years from the first day of the month following that in which he ceases to hold office, a former member of the Court of Auditors is to receive a monthly transitional allowance which varies, depending on the length of his service, from 35% to 60% of the basic salary which he was receiving when he ceased to hold office.

6 Article G(6) of the Treaty on European Union, which entered into force on 1 November 1993, conferred on the Court of Auditors the status of Community institution.

- 7 On 10 April 1995 the Council adopted Regulation (EC, Euratom, ECSC) No 840/95 amending Regulation No 2290/77 (OJ 1995 L 85, p. 10). The second recital in the preamble to that regulation states that, following the entry into force of the Treaty on European Union, the Court of Auditors became an institution of the European Communities and it therefore seemed desirable to amend the provisions of Regulation No 2290/77. Regulation No 840/95 entered into force on 20 April 1995 and, in accordance with the second paragraph of Article 3, was to apply from 1 May 1995.
- 8 Regulation No 840/95 amends Article 2 of Regulation No 2290/77 by increasing the basic monthly salary of the President of the Court of Auditors from 108% to 115%, and that of the other members from 104% to 108%, of the basic salary of an official of the European Communities in the last step of Grade A 1.
- 9 It also amends Article 8 of Regulation No 2290/77 by increasing the monthly transitional allowance of former members of the Court of Auditors to an amount which varies, depending on the length of service of the member concerned, from 40% to 65% of the basic salary which the member was receiving when he ceased to hold office.
- 10 Article 2 of Regulation No 840/95 provides:

‘Pensions acquired on the date of entry into force of this regulation shall not be altered by this regulation.’

Facts

- 11 The applicant was a member of the Court of Auditors from 18 May 1986 to 9 February 1994.

- 12 For a period of three years after ceasing to hold office, that is to say until February 1997, he received a monthly transitional allowance pursuant to Article 8 of Regulation No 2290/77.
- 13 Being entitled to draw his pension from 1 March 1997, he received for the first time, annexed to a letter of 20 February 1997 from the Secretary-General of the Court of Auditors, the slip on which the net amount of his pension was calculated.
- 14 He was then able to establish that his pension had been calculated by reference to a basic monthly salary which had been ascertained in accordance with the former version of Article 2 of Regulation No 2290/77 and was therefore equal to the amount resulting from the application of a percentage of 104% to the basic salary of an official of the European Communities in the last step of Grade A 1.

Procedure and forms of order sought

- 15 It was in those circumstances that, by application lodged at the Registry of the Court of First Instance on 16 April 1997, the applicant brought this action pursuant to the fourth paragraph of Article 173 of the EC Treaty.
- 16 By application lodged at the Registry of the Court of First Instance on 29 July 1997, the Council sought leave to intervene in support of the form of order sought by the Court of Auditors. By letter lodged at the Registry of the Court on 12 September 1997, the applicant requested that certain documents annexed to the Court of Auditors' defence be treated as confidential *vis-à-vis* the Council.

17 By order of the President of the Fifth Chamber of the Court of 20 November 1997, leave to intervene was granted and the request for confidential treatment was rejected.

18 Upon hearing the Report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure.

19 At the hearing on 12 May 1998 the parties presented argument and answered oral questions put to them by the Court.

20 The applicant claims that the Court should:

— annul the decision of the Court of Auditors of 20 February 1997 determining his pension with effect from 1 March 1997;

— order the Court of Auditors to pay all the costs.

21 The defendant contends that the Court should:

— dismiss the action as unfounded;

— make an appropriate order as to costs.

22 The intervener supports the form of order sought by the defendant.

Substance

- 23 In support of his action, the applicant essentially pleads, in the first place, that the Court of Auditors misinterpreted Article 2 of Regulation No 840/95 and, secondly, that Regulation No 840/95 is unlawful.

The plea alleging that the Court of Auditors misinterpreted Article 2 of Regulation No 840/95

Arguments of the parties

- 24 The applicant raises the question of the meaning of the term '*pensions acquises*' in Article 18 of Regulation No 2290/77 ('existing pensions') and Article 2 of Regulation No 840/95 ('pensions acquired') which, he asserts, is ambiguous and open to differing interpretations. In his view, it refers to pensions which have actually been determined, thus including those which are already being paid. He deduces from that interpretation that Regulation No 840/95 does not apply in his case because the pension awarded to him did not actually begin to be paid until March 1997, thus after that regulation had entered into force. He adds that if it were necessary to define '*pensions acquises*' differently, several possibilities could be envisaged. The pension could be acquired either from the first day of the month following the departure from office or from the end of the three-year period during which former presidents and members of the Court of Auditors receive a monthly transitional allowance. The applicant also refers to the difference between the English versions of Article 18 of Regulation No 2290/77 and Article 2 of Regulation No 840/95. The former refers to existing pensions, which suggests that pensions which are actually being paid are at issue. The latter refers to acquired pensions, corresponding to the French wording which is identical in both regulations, and is just as ambiguous.

- 25 The applicant concludes that, since the term '*pensions acquises*' is imprecise, it should be given the definition most favourable to him, that is to say the definition under which pensions are acquired only once they are paid. As the applicant's pension was not determined, in the sense that it was not paid, before the date on which Regulation No 840/95 was first applied, namely 1 May 1995, Article 2 of that regulation does not govern his case.
- 26 The applicant considers it to be logical and consistent with the system of payment established by Regulation No 2290/77 in respect of the period after a president or member of the Court of Auditors has ceased to hold office to regard a pension as acquired only if two conditions are met. First, the person concerned must have ceased to hold office at the Court of Auditors. Secondly, he must actually be drawing his pension, whether he has requested that it be paid early from the age of 60, or he has reached normal retirement age, that is to say the age of 65, or else payment of the monthly transitional allowance, which he receives for three years, causes him to pass the age of 65. The applicant is in the last of those situations.
- 27 The applicant concludes that Article 2 of Regulation No 840/95 does not apply to his situation.
- 28 The defendant considers that the effect of the wording of Article 9 of Regulation No 2290/77 is that entitlement to a pension arises, and the pension is acquired, when the member ceases to hold office. The view that the pension is not acquired until it is paid for the first time is contrary to the wording of Article 9 of Regulation No 2290/77, on the one hand, and leads to logical inconsistencies, on the other. When a member ceases to hold office, entitlement to a pension is established and the amount of the pension is ascertainable; only the date when it is first paid remains to be chosen by him.

29 The intervener has made no observations on the first plea.

Findings of the Court

30 The applicant essentially claims that the term 'pensions acquired' used in Article 2 of Regulation No 840/95 must be given the meaning most favourable to him. His pension has been paid from 1 March 1997. It is thus in his interest for his pension not to have been acquired, within the meaning of Article 2 of Regulation No 840/95, until after the date on which that regulation was first applied, that is to say until after 1 May 1995. He therefore suggests that 'pensions acquired' should be understood as referring to pensions which are actually being paid.

31 The Court finds that the interpretation put forward by the applicant cannot be reconciled with the wording of Regulation No 2290/77, whose effect is that entitlement to a pension arises, and the pension is therefore acquired, on the day when the member ceases to hold office.

32 First, Article 9(1) of that regulation provides that, after ceasing to hold office, members of the Court of Auditors are to be entitled to a pension for life payable from the date on which they reach the age of 65. Under Article 9(2) members may, however, ask to start drawing that pension from the age of 60. It follows that the regulation distinguishes between the moment at which entitlement to a pension arises, namely the day on which the member ceases to hold office, and the later or concomitant moment from which the former member begins to enjoy that entitlement, namely the day on which he reaches the age of 60 or 65.

- 33 Secondly, under Article 10 of Regulation No 2290/77 the amount of the pension is calculated on the basis of the basic salary last received. As is evident from Article 1 of that regulation, a member's entitlement to a basic salary comes to an end when he ceases to hold office. Payment of the basic salary last received, the criterion for determining pension entitlement, thus constitutes a single event fixed in time, concomitant with the departure from office.
- 34 In addition, the interpretation suggested by the applicant leads, as the defendant has rightly maintained, to logical inconsistencies. The pension due is calculated, pursuant to Article 10 of Regulation No 2290/77, on the basis of the last salary received. If '*pensions acquises*' within the meaning of Article 18 of Regulation No 2290/77 and Article 2 of Regulation No 840/95 were ascertained only when they were paid and on the basis of the basic salary applying on that date, the salary serving as a basis for the calculation of the amount of the pension would no longer be the basic salary last received, as Article 10 of Regulation No 2290/77 nevertheless provides.
- 35 It follows that the interpretation put forward by the applicant cannot be upheld.
- 36 As to the applicant's argument concerning the linguistic divergence between the English versions of, on the one hand, Article 18 of Regulation No 2290/77 ('existing pensions') and, on the other, Article 2 of Regulation No 840/95 ('pensions acquired'), it is sufficient to point out, first, that, according to settled case-law, Community provisions must be interpreted and applied uniformly in the light of the versions existing in the other Community languages (Case C-219/95 P *Ferriere Nord v Commission* [1997] ECR I-4411, paragraph 15). The need for a uniform interpretation of the language versions requires, in the case of divergence between them, that the provision in question be interpreted by reference to the purpose and general scheme of the rules of which it forms part (Case C-72/95 *Kraaijeveld and Others v Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403, paragraph 28). Furthermore, the two terms may be synonymous since a pension entitlement which has been acquired necessarily exists and a pension may exist without being paid. On the other hand, if the term 'existing pensions' in the English version of

Article 18 of Regulation No 2290/77 were to be translated as '*pensions liquidées*' ('pensions being paid') instead of '*pensions acquises*', it would diverge substantially from the other language versions of the same article, which are also authentic. It follows that that linguistic divergence does not allow Article 18 of Regulation No 2290/77 to be interpreted as referring to pensions which are being paid rather than pensions which have been acquired.

- 37 The plea alleging that the Court of Auditors misinterpreted Article 2 of Regulation No 840/95 must therefore be rejected.

The plea alleging that Regulation No 840/95 is unlawful

- 38 The plea alleging that Regulation No 840/95 is unlawful has three limbs, namely that Article 18 of Regulation No 2290/77 was infringed, that the principle of non-discrimination was infringed and that the principle of the protection of legitimate expectations was infringed.

The first limb, alleging infringement of Article 18 of Regulation No 2290/77

— Arguments of the parties

- 39 The applicant takes the view that Article 2 of Regulation No 840/95 is incompatible with Article 18 of Regulation No 2290/77. It follows from the wording of Article 18 that when the Council increases the basic salary it must at the same time adopt a decision making the appropriate increase in the rates of acquired pensions. The Council has a discretion as to the amount of the increase. However, it cannot,

without infringing that article, fail to take a decision increasing the rates of acquired pensions if it increases the basic salary. Regulation No 840/95 offends against the spirit and wording of Article 18 of Regulation No 2290/77 and fails to have regard to the fact that pensions are generally regarded as an extension of salary.

40 The applicant notes that, on the one hand, Article 1 of Regulation No 840/95 increases the basic salary and monthly transitional allowance of presidents and members of the Court of Auditors. The only reason given for that increase is the entry into force of the Treaty on European Union, conferring on the Court of Auditors the status of Community institution. On the other hand, Article 2 of that regulation expressly provides that acquired pensions will not be increased.

41 The applicant submits, first, that no specific reason is set out for the failure of Regulation No 840/95 to increase acquired pensions. Secondly, the stated reason for the increase in the basic salary and the transitional allowance is purely formal and cannot in itself explain the failure to increase acquired pensions. The increase in the basic salary and transitional allowance without an increase in acquired pensions at the same time breaks with the Council's previous consistent practice and infringes Article 18 of Regulation No 2290/77; there is therefore no valid statement of reasons for it.

42 Furthermore, the date on which Regulation No 840/95 entered into force does not correspond to the date on which the Court of Auditors became an institution within the meaning of Article 4 of the EC Treaty, as amended by Article G(6) of the Treaty on European Union. The Treaty on European Union entered into force on 1 November 1993, thus at a time when the applicant was still in office. Therefore, the reasoning used to justify the increase in the salaries and transitional allowances of presidents and members of the Court of Auditors should also apply to the applicant and, *a fortiori*, result in an increase in his pension entitlement. There is accordingly a glaring contradiction between the statement of reasons for Regulation No 840/95 and its effects on the applicant's position.

43 The applicant concludes that Article 2 of Regulation No 840/95 is unlawful since it conflicts with Article 18 of Regulation No 2290/77.

44 The defendant concedes that, in accordance with Article 18 of Regulation No 2290/77, when the Council amended that regulation by adopting Regulation No 840/95 it was required to take a decision on an increase in the rates of acquired pensions. It considers that the Council fulfilled that obligation by providing in Article 2 of Regulation No 840/95 that the appropriate increase in the rates of acquired pensions was nil. Article 2 of Regulation No 840/95 satisfies the requirements of Article 18 of Regulation No 2290/77. First, Article 2 of Regulation No 840/95 was adopted at the same time as the decision to increase salaries laid down in Article 1 of that regulation. Secondly, Article 18 of Regulation No 2290/77 requires a decision on an appropriate increase, hence a decision as to whether an appropriate increase should be made. It therefore does not necessarily require an increase to be decided upon. Thirdly, Article 18 of Regulation No 2290/77 obliges the Council to decide on an 'appropriate increase', that is to say an increase which corresponds to the circumstances of the case justifying its decision to increase salaries. In this case, the Council decided that the increase in the rates of acquired pensions which appeared to it to correspond to the circumstances of the case and to the reasons for an increase in salaries was nil.

45 The defendant considers that the reasoning given for Article 2 of Regulation No 840/95 is correct and sufficient. That reasoning derives, first and foremost, from the fact that Article 2 directly applies a parent provision, namely Article 18 of Regulation No 2290/77. It derives, secondly and indirectly, from the reason for the increase in salaries, decided upon in Article 1 of Regulation No 840/95, which resulted from the Court of Auditors' attaining the status of institution. The defendant refers in that regard to the settled case-law according to which the statement of reasons for a regulation may simply set out the general situation which led to its adoption, having regard to the regulation's context (Case 5/67 *Beus v Hauptzollamt München* [1968] ECR 83, at p. 95, and Case 80/72 *Koninklijke Lassiefabrieken v Hoofdprodukschap voor Akkerbouwprodukten* [1973] ECR 635).

- 46 The intervener draws attention to the particular and exceptional nature of the circumstances which led to the decision to increase the salaries of members of the Court of Auditors. For both the Court of Auditors itself and the Council, the point was to take account of the fact that the Court of Auditors had attained the status of Community institution. It is therefore not an increase of the kind which ordinarily occur by reason, for example, of an increase in an index or a similar circumstance. Indeed, that type of increase is granted to the members of the Court of Auditors simply by reason of an increase in the base for calculating their remuneration, namely the salary of an official in the last step of Grade A 1.
- 47 From that perspective, it is perfectly logical for the increase to take effect in the future only and not to apply to acquired pensions. Such pensions are an extension of salary in so far as they are based on the last salary received. For members who ceased to hold office before Regulation No 840/95 was applied to them, that last salary is equal to 104%, and not 108%, of the salary of an official in the last step of Grade A 1.
- 48 The intervener considers that it complied in full with the obligation imposed on it by Article 18 of Regulation No 2290/77 to take a decision on acquired pensions. That decision was taken in the form of Article 2 of Regulation No 840/95. Article 18 of Regulation No 2290/77 was therefore not infringed.
- 49 The intervener challenges the applicant's argument that the reasoning concerning the Court of Auditors' becoming a Community institution is purely formal and cannot in itself justify a contravention of Article 18 of Regulation No 2290/77 since that is not an objective criterion and there is no link between the Court of Auditors' attainment of the status of institution and the increase in salaries. It is clear from the background to the adoption of Regulation No 840/95 that the attainment by the Court of Auditors of the status of Community institution was a substantive reason which justified fully, and by itself, the decision by the Council

to increase the salaries and transitional allowances of the members of that new institution. The objective was to ensure a degree of balance between the levels of pay of members of the various institutions.

50 Furthermore, since the Court of Auditors' attaining the status of institution was the only ground for Regulation No 840/95, it was neither necessary nor justified to state reasons for that regulation other than by the second recital in its preamble. It follows from that change of status that acquired pensions are not affected by the increase. There is therefore no need for a specific reference to it in the preamble.

51 The intervener concludes that the duty to state reasons laid down by Article 190 of the Treaty was fully complied with in this case and that the first limb of the second plea, that Regulation No 2290/77 was infringed by Article 2 of Regulation No 840/95, must be rejected as unfounded.

— Findings of the Court

52 In order for Article 18 of Regulation No 2290/77 to apply, the Council must have decided to increase the basic salary. It is not in dispute that, by Article 1 of Regulation No 840/95, the Council increased the basic salary of the President and members of the Court of Auditors.

53 Furthermore, Regulation No 840/95 did not repeal Article 18 of Regulation No 2290/77. Accordingly, when the Council adopted Regulation No 840/95 it was obliged to comply with Article 18 of Regulation No 2290/77.

- 54 Article 18 requires the Council, first, to take a decision on pensions at the same time as the decision increasing the basic salary. It is common ground that the Council complied with that obligation by adopting Article 2 of Regulation No 840/95.
- 55 Article 18 requires the Council, secondly, to give that decision a specified subject-matter, since it has to relate to 'an appropriate increase in the rates of existing pensions'.
- 56 That wording calls for a twofold conclusion. First, by providing that the Council is to 'decide on an ... increase' [*prend ... une décision sur une augmentation*] instead of providing that it is to make an increase, Article 18 obliges the Council merely to examine whether such an increase is desirable. By contrast, it does not impose a general obligation on it to decide, following that examination, to increase acquired pensions.
- 57 Secondly, when the Council considers whether it is desirable to increase pensions it must proceed in a particular direction. Article 18 of Regulation No 2290/77 requires the Council to decide on an 'appropriate' increase in the rates of pensions. That wording means, on the one hand, that the pension increase provided for, the subject-matter of the decision, does not necessarily have to be the same as the increase in the basic salary. It thus gives the Council a degree of latitude. On the other hand, it also expresses the idea that the Council must seek to ascertain what, in the circumstances, constitutes the 'appropriate' increase in acquired pensions.
- 58 Normally the appropriate increase in the rates of acquired pensions will be the same as the increase in the basic salary. In exceptional cases, and depending on the circumstances, a smaller, or even much smaller, increase in the rates of pensions than in the basic salary may, nevertheless, be appropriate and justified. Very excep-

tionally, and in the light of highly specific circumstances, an appropriate increase in the rates of acquired pensions may even be nil.

59 When assessing whether an increase in the rates of acquired pensions is appropriate, the Council has a discretion, which is, however, subject to review by the Court of First Instance. When the Court carries out that review in the light of, *inter alia*, general principles of Community law, it necessarily applies itself to analysing the reasons given in the regulation as to why an increase in the rates of acquired pensions is appropriate. While the Council is not required to specify why an increase in the rates of acquired pensions is appropriate when that increase is the same as the increase in the basic salary, that is not so in the exceptional cases where the increase in the rates of acquired pensions is much smaller than the increase in the basic salary and, even less so, in the entirely exceptional case where the Council considers that it is appropriate not to increase the rates of acquired pensions at all. It is therefore necessary to ascertain whether, in this case, Article 2 of Regulation No 840/95 satisfies the above requirements in so far as it provides that 'pensions acquired on the date of entry into force of this regulation shall not be altered by this regulation.'

60 The ground given for Regulation No 840/95 was that 'following the entry into force of the Treaty on European Union, the Court of Auditors [became] an institution of the European Communities and it therefore [seemed] desirable to amend the provisions of Regulation ... No 2290/77 with regard to the salaries and transitional termination-of-service allowances' (second recital in the preamble to Regulation No 840/95).

61 By contrast, Regulation No 840/95 does not contain any recital in its preamble expressly and specifically referring to the failure to increase the rates of acquired pensions.

62 According to the defendant and the intervener, the second recital in the preamble to Regulation No 840/95 nevertheless constitutes implied reasoning. The reason

given for increasing the basic monthly salary and the transitional allowance explains, by implication but adequately, the failure to increase the rates of acquired pensions. The reason for both those measures was that the Court of Auditors had become a Community institution. That circumstance upgrades in a certain way the function of members of the Court of Auditors. Conversely, duties performed before then cannot be upgraded in that way. They conclude that, as the pensions constitute remuneration for duties performed under the former system, they cannot be increased.

⁶³ Although that reasoning is implied, it is reasonably sufficient to explain the failure to increase pensions acquired up until the date on which the Court of Auditors became a Community institution, namely 1 November 1993. Members of the Court of Auditors who ceased to hold office before the Treaty on European Union entered into force cannot be considered to have performed their duties for the Court of Auditors as a Community institution.

⁶⁴ On the other hand, the decision in Article 2 of Regulation No 840/95 not to increase the rates of acquired pensions takes effect not from the date on which the Treaty on European Union entered into force, namely 1 November 1993, but on the date when that regulation was first applied, namely 1 May 1995. Since, as stated in paragraph 31 above, entitlement to a pension is acquired on the day when the person concerned ceases to hold office, it follows that members of the Court of Auditors who, like the applicant, held office after 1 November 1993, but ceased to do so, and therefore acquired their entitlement to a pension, before 1 May 1995, are refused an increase in their pension. The reason for the failure to increase pensions, contained in the second recital in the preamble to Regulation No 840/95, namely that the Court of Auditors had become a Community institution, is not applicable to them because they held office after it had acquired that status. That reason is particularly inapplicable to them because the grant of pension entitlement is determined by reference to their departure from office. Changes of circumstance, such as the change relied on in the preamble to Regulation No 840/95, must therefore be assessed as at that date.

- 65 The regulation thus contains no reasons explaining the failure to increase the rate of pensions acquired between the date on which the Court of Auditors became a Community institution, namely 1 November 1993, and the date on which the regulation was first applied, namely 1 May 1995. It therefore fails, in breach of Article 18 of Regulation No 2290/77, to provide reasons as to why it would be appropriate for members of the Court of Auditors who ceased to hold office between those two dates not to benefit from an increase in the rate of their pension from the date when Regulation No 840/95 entered into force and the basic salary of members holding office increased.
- 66 At the hearing, the intervener asserted that the refusal to grant a member such as the applicant an increase in the rate of his pension was justified by the fact that the functions of the Court of Auditors had increased on its becoming a Community institution; in particular, it had the function, laid down by the new second subparagraph of Article 188c(1) of the EC Treaty, of providing the European Parliament and the Council with a statement of assurance as to the reliability of the accounts and the legality and regularity of the underlying transactions. New tasks and responsibilities were thus assigned to its members. Those new functions were not performed in full until a complete financial year had elapsed and the corresponding first statement of assurance had been drawn up. A member who, like the applicant, left office in February 1994 would not therefore have actually been involved in the performance of the new functions. The refusal to give him the benefit of the increase in basic salary granted to members because the Court of Auditors had become an institution was therefore objectively justified.
- 67 The Court considers, however, that that line of argument — which, moreover, was put forward for the first time at the hearing in reply to a question from the Court and is disputed by the applicant — is invalid in two respects. First, by requiring the Council to adopt, at the same time as a decision increasing the basic salary, a decision making an appropriate increase in the rates of acquired pensions, Article 18 of Regulation No 2290/77 necessarily requires the Council to consider whether the increase in the rates of acquired pensions is appropriate and, therefore, the reason why an increase in that amount is appropriate, before that decision. In this case, the reason put forward by the Council at the hearing derives neither from the preamble to Regulation No 840/95 nor from any other document submitted to the Court, so that it has not been established that it actually guided the

Council in its decision not to increase pensions acquired between 1 November 1993 and 1 May 1995. Secondly, the reason put forward does not explain why the decision to increase the rates of acquired pensions takes effect on 1 May 1995 and not, as that reasoning would dictate, either at the end of the Court of Auditors' first financial year after becoming a Community institution, that is to say on 31 December 1994, or on the date of the first statement of assurance, relating to the 1994 financial year, which, according to the explanation given by the defendant's representative at the hearing, was provided in November 1995. Furthermore, the amount of the pension is calculated on the basis not only of completed full years in office but also, in accordance with the first paragraph of Article 10 of Regulation No 2290/77, of each additional month completed after the last full year in office.

68 The first limb of the second plea, alleging that Article 18 of Regulation No 2290/77 was infringed by Article 2 of Regulation No 840/95, is therefore well founded.

69 Notwithstanding that conclusion, it is desirable also to examine the second limb of the second plea, alleging that the principle of non-discrimination was infringed.

The second limb, alleging infringement of the principle of non-discrimination

— Arguments of the parties

70 The applicant states that the date on which Regulation No 840/95 took effect, namely 1 May 1995, is pivotal, in that pensions acquired after that date, unlike pensions acquired before that date, benefit from an increase. That difference in treatment is not based on any objective criterion. The ground put forward by the Council to justify that distinction, namely the fact that the Court of Auditors had

become an institution of the European Communities, is not an objective criterion related to an increase in basic salaries and monthly transitional allowances. Furthermore, Article 18 of Regulation No 2290/77 applies irrespective of the reason for the increase in question.

- 71 The applicant raises the question why that increase covers, apart from basic salaries, monthly transitional allowances being paid at the date on which Regulation No 840/95 was first applied, namely 1 May 1995, but does not cover pensions. That distinction is striking in his case. Having left the Court of Auditors in February 1994, that is to say two months after it had become an institution of the European Communities, he was nevertheless entitled, once Regulation No 840/95 was applied, to the increase in the monthly transitional allowance which he had been paid from March 1994. By contrast, his pension could not be increased since it was set on the basis of the last basic salary which he had received before Regulation No 840/95 was applied. The applicant concludes that there is no link between the Court of Auditors' attainment of the status of Community institution and the determination of salaries, transitional allowances and pensions.
- 72 The applicant takes the view that the same must hold for pensions as holds for transitional allowances, which were increased following the entry into force of Regulation No 840/95. By treating the determination of transitional allowances and that of pensions differently without a valid objective reason, Regulation No 840/95 is arbitrarily discriminatory, with the result that Article 2 is unlawful and unenforceable against him.
- 73 The applicant claims that the system set up by Article 2 of Regulation No 840/95 also creates an unjustifiable and unfair difference of treatment, first, with regard to the President and members of the Court of Auditors who are not yet entitled to a pension and, secondly, between those entitled to a pension themselves depending on the date which is taken into account to determine when their pension is acquired.

- 74 He considers that the judgment in Case 28/74 *Gillet v Commission* [1975] ECR 463, relied on by the defendant, is not relevant here. That case was concerned with the alteration of a situation in the future and the ensuing financial consequences. Regulation No 840/95, on the other hand, introduces different levels of pension for identical services already performed by the President or members of the Court of Auditors in the past. In point of fact, its effect is to lay down different rates of pension for the period from October 1977, when the Court of Auditors was set up, to May 1995. Thus, a member of the Court of Auditors who held office from October 1977 until he acquired a pension in April 1995 receives a lower pension than a colleague who was appointed at the same time, in October 1977, but acquired his pension a week later, in the course of May 1995. The applicant reiterates that he was appointed to the Court of Auditors on 18 May 1986 and that he ceased to hold office on 9 February 1994, when the Court of Auditors had just gained the status of Community institution.
- 75 The applicant further points out that when the Council adopted Regulation No 840/95, it departed from its customary practice designed to give the increase in the rates of pensions the same retrospective effect as that given to pay. If the rationale for that legislation were, as the Council claims, that the Court of Auditors had become an institution, the adjustment of salaries should have been backdated to December 1993, when he was still in office. Accordingly, the date of 1 May 1995 is not based on any valid objective criterion for determining which persons are entitled to an increase in the rate of their pension.
- 76 Furthermore, according to the applicant, the Council may not, contrary to the assertion of the Court of Auditors, consider the increase in salaries 'on a case by case basis'. On the contrary, Article 18 of Regulation No 2290/77 requires a simultaneous decision on the appropriate increase in the rates of pensions in relation to the increase in salaries. 'Appropriate decision' is not to be understood as meaning a decision taken 'on a case by case basis' but as a decision justified in relation to the increase in salaries.

77 The defendant refers to the judgment in *Gillet*, cited in paragraph 74 above, where it was held, in relation to a regulation repealing from a given moment a measure benefiting officials, that there was no unequal treatment of officials to whom that measure could still apply *vis-à-vis* those to whom it could no longer apply. It cites in that regard the Opinion of Advocate General Mayras in *Gillet*, where he stated, at p. 476, that no rule of law higher than the Staff Regulations required the Community legislature to obtain the same advantages for officials appointed or promoted after the date on which the regulation repealing previous legislation had taken effect, and concluded that if those servants were thus treated differently there was no unlawful discrimination.

78 The defendant deduces therefrom that the date on which new legislation enters into force constitutes an objective distinguishing criterion for ascertaining the persons to whom it applies. That criterion is considered in the case-law of the Court of Justice to comply with the principle of equal treatment and non-discrimination. The judgment recalls the principle under which difference of treatment arising from the entry into force of a new provision on a particular date cannot amount to unlawful discrimination. Its entry into force is an objective factor, applicable to everybody alike. That conclusion must therefore also apply in the instant case to Regulation No 840/95 which, from 1 May 1995, freezes the pensions of former members of the Court of Auditors at a given level, calculated on the basis of an amount corresponding to 104% of the salary of an official in the last step of Grade A 1, while the remuneration of current or future members corresponds to 108% of the salary of such an official.

79 In the defendant's view, the opposite solution would render completely meaningless the principle under which the Community authority, in this case the Council, is entitled at any time to make such amendments to the Staff Regulations as it considers to be consistent with the interests of the service.

80 The defendant states that the difference of treatment relied on by the applicant, between the solution adopted for the transitional allowance and that applied to

pensions, is justified in the light of the principle that a derogation must be interpreted strictly. Applying that principle, only pensions should be covered by the specific derogation laid down by Article 2 of Regulation No 840/95, while the transitional allowance, in the absence of a specific derogation, would be covered by the general system embodied in Article 1. In addition, if the Court were to take the view that the transitional allowance was increased unlawfully, that could not in any event constitute grounds for an increase in pensions as well.

81 The defendant considers that the applicant's argument that Article 2 of Regulation No 840/95 discriminates between former members entitled to a pension should also be rejected. They could all be guaranteed the same pension only if Article 18 of Regulation No 2290/77 automatically imposed the same increase for everybody. However, Article 18 provides that the increase is to be examined case by case and in any event is not automatic. The defendant deduces that all the applicant can do is to plead that Article 18 is unlawful, although he does not do so in his application.

82 The defendant concedes that it is, in accordance with the example cited by the applicant in his reply, theoretically correct that two former members may receive different pensions because one acquired his pension shortly before, and the other shortly after, the new provision entered into force. However, that argument is not relevant. First, the adoption of a general and abstract rule is not discriminatory simply because, in certain borderline cases, some persons to whom it applies may be subject to the drawbacks arising from it (Case 147/79 *Hochstrass v Court of Justice* [1980] ECR 3005, paragraph 14). In the instant case, therefore, the example cited by the applicant, which, moreover, does not correspond to his own situation, cannot call into question the validity of the general and abstract measure. Secondly, a difference of treatment does not necessarily entail unequal treatment or discrimination. In this case, therefore, there is an objective, neutral and abstract distinction, based on the date when the new regulation entered into force.

83 The defendant also explains what it means by increasing the rates of pensions on a case by case basis. Article 18 of Regulation No 2290/77 requires the Council to take a specific decision on an appropriate increase in the rates of pensions whenever it decides on an increase in the basic salary, that is to say whenever that case arises. That assessment is therefore carried out 'on a case by case basis' because the increase in the rates of pensions can be 'appropriate' only if it specifically relates to the increase made to salaries. Furthermore, it is clear that Article 18 requires an increase in the rates of pensions to be specifically considered if salaries are increased. The increase in the rates of pensions cannot be automatic, as otherwise Article 18 would serve no purpose.

84 The defendant concludes that the alleged discrimination between former members entitled to a pension stems from Article 18 of Regulation No 2290/77, and not from Article 2 of Regulation No 840/95 which merely implements that provision. It deduces that the applicant may therefore plead only that Article 18 of Regulation No 2290/77 is unlawful, although he does not do so. This branch of the plea should therefore be rejected.

85 The intervener adopts the view expressed by the Court of Auditors that, as the latter had become a Community institution, it was appropriate to increase the salaries of its members, and states that it merely exercised its discretion. It was not required to adopt the measure. Neither the Treaty nor any other provision obliged it to decide on those increases. Since it was under no obligation, it did not unlawfully fail to act, the only ground which could possibly have justified, in order to make good that failure to act, the increase in salaries taking effect retrospectively from the date on which the Treaty on European Union entered into force. In any event, any retrospective effect should normally remain the exception. The date on which Regulation No 840/95 began to be applied is objective, neutral and abstract. It does not give rise to discrimination.

86 The intervener concludes that the limb of the plea alleging that the principle of non-discrimination was infringed must be rejected as unfounded.

— Findings of the Court

- 87 According to settled case-law (see, for example, Case T-109/92 *Lacruz Bassols v Court of Justice* [1994] ECR-SC II-105, paragraph 87, and Case T-142/95 *Delvaux v Commission* [1997] ECR-SC II-1247, paragraph 95), the principle of equality and non-discrimination requires that comparable situations should not be treated differently, unless different treatment is objectively justified.
- 88 In this case, Regulation No 840/95 introduces a difference in the pension arrangements for former members of the Court of Auditors depending on whether they ceased to hold office, and therefore acquired their pension entitlement, before or after that regulation was first applied on 1 May 1995. The difference lies in the fact that the pension of members who ceased to hold office before 1 May 1995 is calculated by reference to a basic salary of 104% of the salary of an official in the last step of Grade A 1, whereas the pension of members who ceased to hold office after 1 May 1995 is calculated by reference to a basic salary of 108% of the salary of such an official.
- 89 Regulation No 840/95 gives no express justification for that difference of treatment. That regulation was adopted in order to take account of the fact that the Court of Auditors became a Community institution when the Treaty on European Union entered into force on 1 November 1993. That statement of reasons is thus capable of justifying a difference of treatment between members who ceased to hold office before and after that date. On the other hand, it cannot justify a difference of treatment between members all of whom ceased to hold office after that date and therefore performed their duties after the Court of Auditors had become a Community institution. Those members are, in the light of that statement, in a comparable position, but are treated differently. The statement of reasons therefore does not explain why it was appropriate to accord different treatment to members all of whom ceased to hold office after the Treaty on European Union had entered into force on 1 November 1993, depending on whether they did so before or after

1 May 1995, the date on which Regulation No 840/95 was first applied. Neither the defendant nor the intervener adduced evidence in the course of the written procedure which is capable of showing that that difference in the treatment of persons who were nevertheless in a comparable position was objectively justified.

90 The argument put forward by the intervener at the hearing relating to the fact that the new functions conferred on the Court of Auditors by the Treaty on European Union could not have been performed in full until a complete financial year had ended, when the first statement of assurance was presented (paragraph 66 above), is also intended to demonstrate that the applicant is in a different position, justifying a difference of treatment, from members who ceased to hold office after Regulation No 840/95 had entered into force. The Court draws attention to its findings in paragraph 67 above and adds that the date from which the different arrangements at issue were introduced, namely 1 May 1995, is both subsequent to the end of the first financial year following the Court of Auditors' becoming an institution, namely 31 December 1994, and prior to the drawing up of the first statement of assurance, relating to the 1994 financial year, which, according to the explanation given by the defendant's representative at the hearing, was provided in November 1995. In the light of those contradictions, the date of 1 May 1995 does not appear to have been a deliberate choice prompted by the considerations put forward or to reflect those considerations.

91 Nor can the considerations put forward by the intervener at the hearing objectively justify a difference of treatment. Their starting point is a comparison of the position of members of the Court of Auditors in the light of its becoming an institution. That comparison does not merely link the two objective terms, namely the date on which the Court of Auditors became an institution and the date on which a member ceased to hold office. It additionally takes account of a third factor, namely how long the member held office after the Court of Auditors became an institution. That factor thus brings an assessment of length of service into the comparison.

- 92 Following that particular line of approach, account ought also to have been taken of the fact that the pension constitutes consideration for all the duties performed by the member for the body, and then the institution, which he served. The first paragraph of Article 10 of Regulation No 2290/77 provides, in that regard, that the amount of the pension is to be determined by reference to the entire period during which the member held office, including not only full years in office but also each additional month completed after the last full year. Furthermore, in accordance with the first subparagraph of Article 206(4) of the EC Treaty, which, pursuant to Article G(59) of the Treaty on European Union, has now become the first subparagraph of Article 188b(3) of the EC Treaty, members of the Court of Auditors are appointed for a term of six years, which may be renewed. It follows, therefore, that, in the absence of special circumstances, a member who ceased to hold office shortly after the date on which Regulation No 840/95 was first applied, namely 1 May 1995, acted almost entirely before the Court of Auditors became an institution on 1 November 1993. By contrast, only a small fraction of his period in office was served after that event. His position is thus, in that regard, not significantly different from that of the applicant.
- 93 The circumstances relied on by the intervener at the hearing, therefore, do not constitute an objective justification for the difference of treatment, with regard to an increase in the rate of pension justified by the Court of Auditors' becoming an institution, between members all of whom continued to hold office after it had become an institution, depending on whether they ceased to hold office before, or after, 1 May 1995.
- 94 The defendant and the intervener also contend in essence that it is well established that different treatment resulting from the entry into force of a new provision on a specific date cannot amount to unlawful discrimination. The provision's entry into force is an objective factor, applicable to everybody alike. The opposite solution would render meaningless the principle under which the Community authority is entitled at any time to make such amendments as it considers to be consistent with the interests of the service.

- 95 However, in the first place, that argument fails to take into account that it is conceivable for the date on which new legislation becomes applicable to constitute unlawful discrimination (see, for example, in relation to the discriminatory nature of the date of entry into force of new internal directives, Case T-92/96 *Monaco v Parliament* [1997] ECR-SC II-573, paragraphs 50 to 58).
- 96 Secondly, the defendant cannot rely, in support of its contention, on the judgments in *Gillet* and *Hochstrass*, cited above.
- 97 The question raised in *Gillet* related to a regulation adopted in 1972 which established, in relation to measures terminating service, different systems of payment for officials in Grade A 1 or A 2 who were recruited under the former Staff Regulations of the European Coal and Steel Community of 1956 and terminated their service under the same conditions, according to whether or not they held one of those two grades when the new Staff Regulations of Officials of the European Coal and Steel Community entered into force on 1 January 1962. The applicant, an official who did not fall within that category until after 1 January 1962, claimed, in connection with a plea of illegality, that that regulation was discriminatory. The Court of Justice dismissed that plea.
- 98 It is admittedly implicit in that judgment that the Community legislature is entitled to adopt, for the future, staff regulations which are less favourable for officials. However, in that judgment the Court stated that the validity of transitional measures safeguarding the rights lawfully acquired by officials recruited under former, more favourable, staff regulations could not be called into question, and concluded that those transitional measures did not discriminate against an official recruited under the new, less favourable, staff regulations. The Court took care in its review of the disputed measures to check that the difference of treatment between, on the one hand, an official recruited under the former, more favourable, staff regulations who continues, after the new, less favourable, regulations are adopted, to benefit from transitional arrangements safeguarding his rights and, on the other hand, an official recruited under the new, less favourable, staff regulations, was objectively justified. The Court held in that regard, first, that the official

recruited under the new staff regulations could not rely on the former, more favourable, regulations and, secondly, that the transitional arrangements benefiting officials recruited under the former, more favourable, staff regulations could not be called into question.

- 99 The Court also checked that the reference date distinguishing between the two categories, namely 1 January 1962, was objectively justified.
- 100 It cannot therefore be inferred from that judgment that the date on which new legislation enters into force can never be discriminatory.
- 101 The second judgment relied on by the defendant, that in *Hochstrass*, cited at paragraph 82 above, admittedly states that ‘although in borderline cases fortuitous problems must arise from the introduction of any general ... system of rules, there are no grounds for taking exception to the fact that the legislature has resorted to categorisation’ alleged to be discriminatory (paragraph 14). However, the Court immediately goes on to add that that conclusion applies only if the categorisation ‘is not in essence discriminatory having regard to the objective which it pursues’.
- 102 Moreover, care is taken in the judgment to verify that the categorisation under the new legislation (in that case, the introduction of an expatriation allowance granted on the basis of the criterion of nationality) is objectively justified.
- 103 That judgment therefore cannot do away with the need to check, in reviewing compliance with the principle of non-discrimination, that the differences in arrangements introduced by new rules are objectively justified.

104 The Court observes, finally, that it is true that the Community legislature is free to make at any time such amendments to staff regulations, in this case Regulation No 2290/77, as it considers to be consistent with the interests of the service. The fact remains, however, that where that amendment is specifically justified by reference to a new situation, in this case the attainment by the Court of Auditors of the status of Community institution, and concerns a specified category of persons, in this case members who held office after the Court of Auditors had become an institution, it must treat in the same way those persons falling within the category which is specifically concerned by that new situation.

105 In the instant case the Community legislature was not necessarily obliged to increase the basic salary, and therefore the pensions, of members of the Court of Auditors. However, if it makes such an increase, on the ground that the Court of Auditors has become an institution, and if it proposes not to give the benefit of that increase to persons entitled to pensions acquired before the entry into force of the regulation adopted for that purpose, it is required to ensure that, from the entry into force of that regulation, all the members who are in the situation which brought about that increase, namely those who have held office after the Court of Auditors became an institution, are treated in the same way. It has been established above that those requirements were not complied with in this case.

106 Finally, the discrimination found to exist does not arise, as the defendant maintains, from the application of Article 18 of Regulation No 2290/77. That provision, which obliges the Council, in the event of an increase in the basic salary of the members of the Court of Auditors, to adopt at the same time a decision on an appropriate increase in the rates of acquired pensions, in no way prevents the Council from complying with the principle of equal treatment. On the contrary, that article, by using the adjective 'appropriate', obliges the Council also to consider whether that higher rule of law is complied with.

107 It follows that, in this instance, the Council has infringed the principle of equal treatment.

- 108 Since the second limb of the present plea, alleging infringement of the principle of equal treatment, is also well founded, there is no need to deal with the applicant's arguments relating to the fact that Regulation No 840/95 increased the transitional allowance without increasing pensions acquired on the date of its entry into force.
- 109 The action is therefore well founded without it being necessary to analyse the third limb of the present plea, alleging infringement of the principle of the protection of legitimate expectations.
- 110 The contested decision adopted by the defendant, which is founded on Article 2 of Regulation No 840/95, must therefore be annulled.

Costs

- 111 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Court of Auditors has been unsuccessful and costs were applied for, it must be ordered to pay the costs.
- 112 Under the first subparagraph of Article 87(4) of the Rules of Procedure, institutions which have intervened are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber),

hereby:

1. **Annuls the decision of the Court of Auditors of 20 February 1997 setting the rate of the applicant's pension;**
2. **Orders the Court of Auditors to pay the costs;**
3. **Orders the Council to bear its own costs.**

Azizi

García-Valdecasas

Jaeger

Delivered in open court in Luxembourg on 30 September 1998.

H. Jung

J. Azizi

Registrar

President