JUDGMENT OF THE COURT
23 January 1992 *

In Case C-301/90,

Commission of the European Communities, represented by Joseph Griesmar, Legal Adviser, and Sean van Raepenbusch, a member of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Council of the European Communities, represented by Yves Crétien, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Xavier Herlin, Manager of the Legal Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

APPLICATION for the annulment of Council Regulation (Euratom, ECSC, EEC) No 2258/90 of 27 July 1990 correcting the remuneration and pensions of officials

* Language of the case: French.

and other servants of the European Communities and adjusting the weightings applied thereto (Official Journal 1990 L 204, p. 1) in so far as it does not establish a specific weighting for Munich,

THE COURT,

composed of: O. Due, President, F. A. Schockweiler, F. Grévisse and P. J. G. Kapteyn, (Presidents of Chambers), G. F. Mancini, C. N. Kakouris, J. C. Moitinho de Almeida, M. Díez de Velasco and M. Zuleeg, Judges,

Advocate General: F. G. Jacobs,
Registrar: J. A. Pompe, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 1 October 1991,

after hearing the Opinion of the Advocate General at the sitting on 7 November 1991,

gives the following

Judgment

1 By application lodged at the Court Registry on 3 October 1990, the Commission of the European Communities brought an action under Article 173 of the EEC Treaty for the annulment of Council Regulation (Euratom, ECSC, EEC) No 2258/90 of 27 July 1990 correcting the remuneration and pensions of officials and other servants of the European Communities and adjusting the weightings applied thereto (Official Journal 1990 L 204, p. 1) in so far as that regulation did not establish a specific weighting for Munich.

2 The first paragraph of Article 63 of the Staff Regulations of Officials of the European Communities (hereinafter referred to as the 'Staff Regulations') provides: 'An official's remuneration shall be expressed in Belgian francs. It shall be paid in the currency of the country in which the official performs his duties'.

3 In order that all officials may enjoy equivalent purchasing power in respect of the remuneration they receive, regardless of their place of employment, the first paragraph of Article 64 of the Staff Regulations provides that 'an official's remuneration expressed in Belgian francs shall ... be weighted at a rate above, below or equal to 100%, depending on living conditions in the various places of employment'. The second paragraph of Article 64 provides that those weightings are to be adopted by the Council on a proposal from the Commission.

4 Article 65 of the Staff Regulations concerns the level of remuneration, and the first paragraph thereof lays down the procedure and rules for the annual review, on 1 July in each year, of that remuneration and, if applicable, its adjustment. Article 65(2) provides that 'in the event of a substantial change in the cost of living, the Council shall decide, within two months, what adjustments should be made to the weightings and if appropriate to apply them retrospectively'.

5 In accordance with paragraph 1.1. of Section II of the Annex to Council Decision 81/1061/Euratom, ECSC, EEC of 15 December 1981 amending the method of adjusting the remuneration of officials and other servants of the Communities (Official Journal 1981 L 386, p. 6), the geographical weightings referred to in Article 64 of the Staff Regulations may be updated on the basis of joint indexes drawn up by the Statistical Office of the European Communities, in agreement with the national statistical departments of the Member States, enabling trends of price increases borne by European officials in the various places of employment to be measured. Every five years the Statistical Office of the European Communities verifies, in agreement with the statistical departments of the Member States, whether the ratios between weightings accurately reflect purchasing power equivalences between salaries paid to staff serving in the capitals of the Member States. Such a check is made for other places of employment when objective factors suggest that there is a danger of considerable distortion in relation to data recorded in the capital of the country concerned.

6 During the five-yearly review, the inquiry into prices carried out pursuant to Decision 81/1061, cited above, revealed at the end of 1987 that the cost of living in Munich was approximately 8% higher than that recorded in the capital.

7 In 1989 the Council rejected an initial proposal by the Commission for the introduction with effect from 1 January 1988 of a specific weighting for the remuneration of Community officials employed in Munich. On 22 June 1990 the Commission laid before the Council a new proposal for a regulation correcting the scales applicable to remuneration, adjusting existing weightings and introducing with effect from 1 January 1988 a specific weighting for Munich.

8 On the basis of that new proposal, the Council adopted Regulation No 2258/90, whose annulment is requested, and in which the Council approved only those proposals concerning the correction of remuneration and the adjustment of existing weightings whilst rejecting the proposal concerning the introduction of a specific weighting for Munich.

9 In support of its application for annulment, the Commission relies on four pleas in law based on the failure to observe Article 64 of the Staff Regulations, the duty to give reasons for decisions, the rules which the Council itself is alleged to have adopted and the general principle prohibiting discrimination.

10 Whilst contending, with regard to the substance of the case, that the application should be rejected, the Council leaves the question of its admissibility to the judgment of the Court.

11 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Admissibility

12 The Council contends that the subject of the application for annulment ought to be its decision rejecting the proposal for the introduction of a specific weighting for Munich and not Regulation No 2258/90. The probable lack of agreement within the Council concerning the introduction of such a weighting induced the Commission to split its initial proposal of 22 June 1990 by separating the proposal for a specific weighting for Munich from the proposals concerning the correction of scales of remuneration and the adjustment of existing weightings. The Council was therefore faced with two proposals, of which it adopted one and rejected the other.

13 The Commission states that the substance of the dispute between it and the Council is the Council's refusal to establish a specific weighting for Munich in Regulation No 2258/90. Accordingly, it is the legality of that regulation which is in dispute and that does not depend upon the internal difficulties of the Council during its examination of the Commission's proposal of 22 June 1990.

14 In this respect, it is sufficient to state that the Commission's proposal of 22 June 1990 concerned, in particular, the introduction of a specific weighting for Munich and that Council Regulation No 2258/90, adopted on the basis of that proposal, does not contain provisions to that effect. As a result, the Commission is entitled to commence an action for annulment of that regulation on the ground that it considers that by that omission the Council has failed to perform its obligations under the Treaty.

Substance

15 Of the four pleas relied on by the Commission, those based on the infringement of Article 64 of the Staff Regulations and of the principle of equality of treatment must be examined together. As the Court has consistently held, that principle underlies Articles 64 and 65 of the Staff Regulations (see to this effect, in particular, the judgments in Case 194/80 *Benassi* v *Commission* [1981] ECR 2815, at paragraph 5, and Case 7/87 *Commission* v *Council* [1988] ECR 3401, at paragraphs 3 and 25).

16 In the context of those two pleas, the Commission refers, first, to the case-law of the Court (see, in particular, the judgments in Case 158/79 *Roumengous Carpentier* v *Commission* [1982] ECR 4379; Case 543/79 *Birke* v *Commission* [1982] ECR 4425; Joined Cases 532/79, 534/79, 567/79, 600/79, 618/79 and 660/79 *Amesz and Others* v *Commission* [1982] ECR 4465; and Case 737/79 *Battaglia* v *Commission* [1982] ECR 4497) according to which it is for the Community institutions to determine specific weightings for the exact places where the duties of a sufficiently large number of officials and servants of the Communities are performed when the cost of living in those places of employment undergoes fluctuations greater than those occurring in the capitals of the States concerned.

17 The Commission then states, and the Council does not dispute, that the joint indexes drawn up by the Statistical Office of the European Communities in agreement with the statistical departments of the Member States suggested that in the case of Munich there was a danger of considerable distortion in relation to data recorded in the capital of the Federal Republic of Germany at that time.

18 Moreover, the Commission considers that the number of persons concerned is sufficiently large to make it necessary to determine a specific weighting for that city. To the 16 officials or servants of the Communities employed in Munich there should be added approximately 100 teachers at the European School in Munich whose remuneration is calculated by reference to the specific weighting applied for those officials and servants. It is also necessary to take into account the staff of the European Patent Office whose consumer habits resemble those of officials and other servants of the Communities.

19 In any case, the criterion of the number of officials or servants of the Communities ought to be taken into account only in conjunction with that of the difference between the cost of living recorded in the capital and that in the exact place of employment. A particularly high difference requires a specific weighting to be determined even where the number of Community officials and servants is less than the 50 which has been considered necessary by the Community institutions under a ten-year old practice.

20 The Council considers that the number of officials or servants of the Communities employed in Munich — 16 — is not sufficiently large to make it necessary to determine a specific weighting. Moreover, it does not agree that the teachers at the European School in Munich or the staff of the European Patent Office ought to be taken into account, because they are not officials or servants of the Communities. Finally, the Council refers to the ten-year old practice of the institutions by which the presence of 50 officials or servants at one place of employment has been considered necessary both by the Commission, which has made it a condition for proposing the introduction of a specific weighting, and by the Council when it has had occasion to determine such a weighting.

21 It must first be stated that the provisions of the Staff Regulations and those of Decision 81/1061, cited above, apply only to officials and servants of the Communities. As a result, in applying the rules concerning the determination of a specific weighting, staff not covered by the Staff Regulations cannot be taken into consideration.

22 Next, it should be noted that the purpose of Articles 64 and 65 of the Staff Regulations, as the Council itself recognizes, is to ensure that all officials have equivalent purchasing power, wherever their place of employment, in accordance with the principle of equality of treatment.

23 Furthermore, it should be stated that at the end of 1987 the cost of living in Munich was 8.3% higher than in Bonn, the capital at that time. That percentage represents a considerable difference which, in the absence of a specific weighting, reduces the purchasing power of officials employed in Munich in relation to that of their colleagues working in Bonn.

24 In this respect, the Court has consistently held (judgment in Case 59/81 *Commission* v *Council* [1982] ECR 3329, at paragraph 32, and judgments in Case 158/79, at paragraph 28; Case 543/79, at paragraph 44; Joined Cases 532/79, 534/79, 567/79, 600/79, 618/79 and 660/79, at paragraph 44, all cited above) that the Council's power under Article 65(2) of the Staff Regulations is to decide

whether or not there has been a substantial increase in the cost of living and, if there has, to draw the appropriate conclusions.

5 Accordingly the Council has no discretion as to whether to introduce a specific weighting for a place of employment if it is established that the cost of living there is substantially higher than in the capital.

6 In particular, where there is a difference as large as that recorded in the case in point, the obligation to introduce a specific weighting cannot depend upon how many officials or servants of the Communities are concerned. As Mr Advocate General Jacobs pointed out in paragraph 24 of his Opinion, the application of a numerical threshold would result in discrimination between officials and servants of the Communities who total less than the threshold adopted and their colleagues employed in the capital.

7 Moreover, that interpretation cannot be called into question by the practice of the institutions relied on by the Council. Without it being necessary to determine the legal nature of such a practice, it is sufficient to state that even agreed conduct reflecting internal directives of Community institutions cannot in any case legally derogate from the provisions of the Staff Regulations (see, to this effect, in particular, the judgment in Case 190/82 *Blomefield* v *Commission* [1983] ECR 3981).

8 It follows from all the above considerations that the contested regulation must be annulled in so far as it does not determine a specific weighting for Munich with effect from 1 January 1988.

9 The principle of equality of treatment which underlies Article 64 of the Staff Regulations requires that such a specific weighting apply retrospectively with effect from the date on which the Statistical Office of the Communities, in agreement

with the national statistical departments of the Member States, recorded a substantial change in the cost of living in Munich in relation to the data recorded in the capital, Bonn.

Costs

30 Under Article 69(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. In this case, neither of the parties has applied for costs. Accordingly, the parties must be ordered to bear their own costs.

On those grounds,

THE COURT

hereby:

(1) Annuls Council Regulation (Euratom, ECSC, EEC) No 2258/90 of 27 July 1990 correcting the remuneration and pensions of officials and other servants of the European Communities and adjusting the weightings applied thereto (Official Journal 1990 L 204, p. 1) in so far as it does not establish a specific weighting for Munich;

(2) Orders the parties to bear their own costs.

Due Schockweiler Grévisse Kapteyn

Mancini Kakouris Moitinho de Almeida Díez de Velasco Zuleeg

Delivered in open court in Luxembourg on 23 January 1992.

J.-G. Giraud — Registrar

O. Due — President