their place of employment, in accordance with the principle of equality of treatment.

In that respect, under Article 65(2) of the Staff Regulations, it is for the Council to draw the appropriate conclusions by adjusting the weightings when it establishes that there has been a substantial increase in the cost of living.

The Council has no discretion as to whether to introduce a specific weighting for a given place of employment if it is established that the cost of living there is substantially higher than in the capital. The obligation to introduce such a weighting cannot, for instance, depend upon how many officials or servants of the Communities are employed in that place, and a practice of the institutions fixing a numerical threshold below which no specific weighting would be introduced would infringe the Staff Regulations. The application of a numerical threshold would result in an infringement of the principle of equality of treatment, and in discrimination between officials and servants who total less than the threshold and their colleagues employed in the capital. The principle of equality of treatment also requires that such a specific weighting apply retrospectively with effect from the date on which a substantial change in the cost of living in the place of employment in question has been recorded in relation to the data recorded in the capital.

REPORT FOR THE HEARING
in Case C-301/90 *

I — Facts

1. The first paragraph of Article 64 of the Staff Regulations of Officials provides:

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

Article 65(2) states that:

'In the event of a substantial change in the cost of living, the Council shall decide,

* Language of the case: French.

within two months, what adjustments should be made to the weightings and if appropriate to apply them retrospectively'.

2. According to 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 Statistical Office of the European Communities shall draw up, in agreement with the national statistical departments of the Member States, the joint indexes enabling trends of price increases borne by European officials in the various places of employment to be measured and thus enabling the geographical weightings in Article 64 of the Staff Regulations to be updated.

Every five years the Statistical Office of the European Communities shall verify, 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 shall be 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.'

3. Following the publication of Council Regulation (ECSC, EEC, Euratom) No 3295/88 of 24 October 1988 correcting the weightings applicable in Denmark, Germany, Greece, Spain, France, Ireland, Italy, the Netherlands, Portugal and the United Kingdom to the remuneration and pensions of officials and other servants of the European Communities (Official Journal 1988 L 293, p. 5), specific weightings were introduced for Berlin and Culham. Several officials of the Commission employed in Munich submitted administrative complaints seeking the annulment of their salary statements in so far as they did not contain any adjustment for Munich, for which no weighting exists. Those complaints were rejected by the Commission on the ground that Munich, where 16 officials and other servants were posted, did not have the 50 officials considered sufficient to justify fixing a specific weighting outside the capital. In the meantime, several of those officials brought actions before the Court of First Instance (see the judgment in Case T-134/89 *Hettrich* v *Commission* [1990] ECR II-565; and Case T-22/90 *Brambilla* v *Commission*, radiation of 1 April 1992, not published) complaining that a specific weighting for Munich had not been fixed.

4. In June 1989 the Commission proposed a Council regulation correcting the remuneration and pensions of officials and other servants of the European Communities with effect from 1 July 1988 and adjusting the weightings applied thereto with effect from 1 January 1989 and applying (retrospectively to 1 January 1988) a specific weighting for Munich. The

Council adopted Regulation (EEC, Euratom, ECSC) No 2187/89 of 18 July 1989 correcting the remuneration and pensions of officials and other servants of the European Communities with effect from 1 July 1988 and adjusting the weightings applied thereto with effect from 1 January 1989 (Official Journal 1989 L 209, p. 1) but decided to defer any decision on the question of a specific weighting for Munich. Moreover, the Council did not fix such a specific weighting in Regulation (EEC, Euratom, ECSC) No 3728/89 of 11 December 1989 adjusting the remuneration and pensions of officials and other servants of the European Communities and the weightings applied thereto (Official Journal 1989 L 364, p. 1).

5. By letter of 21 December 1989 the Commission drew to the Council's attention the main reasons which, in its view, justified fixing a specific weighting for Munich. In that letter, it pointed out, first, the considerable difference between the cost of living in Munich and that in the capital, as shown by the results of price surveys carried out by the Statistical Office of the European Communities in conjunction with the Statistisches Bundesamt (8%) and, secondly, the sufficiently large number of officials and other servants employed there (16), to which it was legitimate to add the approximately 100 teachers at the European School in Munich (in accordance with their payment scheme, teachers of the European schools have the same weighting as is applicable in their locality to officials of the Communities).

6. On 22 June 1990 the Commission laid before the Council a new proposal for correcting salary scales by 0.6%, adjusting weightings and fixing a specific weighting for Munich. On the basis of that proposal, the Council adopted 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).

7. Pursuant to that regulation, the remuneration scales for officials were corrected with effect from 1 July 1989, and weightings for certain countries were adjusted. Contrary to the Commission's proposal, no weighting was fixed for the remuneration of officials and other servants of the European Communities employed in Munich.

II — Written procedure

8. The Commission's application was lodged at the Court Registry on 3 October 1990.

9. The written procedure followed the normal course. Upon hearing the Report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

III — Forms of order sought

10. The *Commission of the European Communities*, the applicant, claims that the Court should:

(i) annul Council Regulation No 2258/90 of 27 July 1990 in so far as it does not establish a specific weighting for Munich;

(ii) declare, in so far as is necessary, that the provisions concerned continue to have effect until the adoption of a new regulation pursuant to the judgment.

11. The *Council of the European Communities*, the defendant, contends that the Court should:

declare unfounded the Commission's application for annulment of the Council's decision not to establish a specific weighting applicable to the remuneration of Community officials employed in Munich.

IV — Pleas in law and arguments of the parties

Admissibility

12. The *Council* leaves it to the judgment of the Court to decide on the admissibility of the application. Only the decision to reject the Commission's proposal to establish a weighting for Munich ought to be examined by the Court. In June 1990 two proposals had indeed been laid before the Council, one for the correction of remuneration and pensions of officials and the adjustment of certain weightings, and the other for the creation of a specific weighting for Munich which had first been proposed in 1989. Initially, the text submitted to the Council on 22 June 1990 had consisted of a single proposal for a regulation covering the correction of remuneration, the adjustment of certain weightings and the creation of a specific weighting for Munich. Since it was unlikely that the Council would reach agreement on the last proposal, and in view of the existing majorities within the Council in favour of the first two propositions, the Commission subsequently agreed to split its single proposal of 22 June 1990, which was of great significance with regard to the applicability of Articles 148 and 149 of the Treaty. The Council thus adopted the proposal to correct remuneration and adjust certain weightings and rejected the proposal to create a specific weighting for Munich. Only that latter decision to reject, and not Council Regulation No 2258/90, ought to be reviewed by the Court.

13. The *Commission* states that when its proposal of 22 June 1990 was examined by Coreper there was no unanimity to amend the proposal by deleting the proposal that a specific weighting be created for Munich. Accordingly, the Commission agreed to split its third proposal from the first two proposals, it being understood that the whole of its initial proposal would be examined at the same time, which took

place during the 1423rd session of the Council (Budget) on 27 July 1990.

The Council's observations concerning the identity of the contested measure fail to take account of the fact that the substance of the dispute is just as concerned with the Council's refusal to adopt a specific weighting for Munich. The Commission considers that it must challenge the legality of Regulation No 2258/90 in so far as it does not establish such a specific weighting for Munich, contrary to the Commission's proposal of 22 June 1990. The problems experienced within the Council during the examination of the proposal of 22 June 1990 are irrelevant.

The substance

14. As a preliminary comment, the *Commission* states that the fact that Berlin has become the capital of the Federal Republic of Germany with effect from October 1990 does not alter the terms of the dispute, which concerns the rules for determining separate weightings for certain places of employment in cases where the cost of living in those places is subject to greater variation than that in the capital of the Member State concerned.

15. In support of its application, the Commission puts forward four pleas based on the infringement of Article 64 of the Staff Regulations, of the duty to state reasons, of the rules adopted by the Council itself and of the general prohibition of discrimination.

16. In the course of the first plea, the Commission refers to certain judgments of the Court (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; Case 737/79 *Battaglia* v *Commission* [1982] ECR 4497; Case 7/87 *Commission* v *Council* [1988] ECR 3401 and Case 817/79 *Buyl* v *Commission* [1982] ECR 245) and concludes from them that two separate conditions must be satisfied in order to establish a specific weighting for a place of employment in the Community other than a capital. It is necessary (a) that a sufficiently large number of officials or other employees of the Community are employed there and (b) that objective factors suggest that there is a danger of considerable distortion in relation to data recorded in the capital of the country concerned.

17. In the Commission's view, meeting the second condition ought not to present any difficulties since a difference of 8% has been recorded. Moreover, a similar situation recently justified the creation of specific weightings for Culham where officials and servants working on the JET project and teachers at the European School are employed and where a difference of 3.9% in the cost of living in relation to the capital had been recorded. The same happened in the case of Berlin, seat of Cedefop and of an office of the Commission, where a difference of 9.7% had been recorded. Moreover, the judgments cited show that, in the case of Ispra, a difference of over 2.76% has been considered sufficient to justify establishing a specific weighting for the province of Varese.

18. With regard to the first condition referred to above, the Commission states that the concept of 'a sufficiently large number of officials and servants' does not lay down any particular quantity and leaves open a margin of discretion.

The Commission raises the question whether the Council has not exceeded the bounds of its discretion by departing, without giving reasons, from the Commission's proposal of 22 June 1990. Having regard to the need to reconcile the right of the official to receive remuneration with equal purchasing power, wherever his place of employment, with the requirements of good administration (availability of statistical data, cost of surveys), the scope of that margin of discretion is narrow.

In the case of the Ispra site, the Court considered several hundred officials and servants to be a sufficiently large number where there was a difference of 2.76%. Similarly, with regard to the Culham site, where 185 officials and other servants are employed, a weighting has been created to take account of a difference of 3.9%. A difference of 9.7% was judged sufficient by the Council to introduce a specific weighting for 66 officials employed in Berlin. The Commission considers that, in the case of capital cities, the number of officials and other servants employed there has not been decisive (Copenhagen (37), Madrid (28), Lisbon (17), Athens (15)), since their weightings have been determined on the basis of the consumer habits of a group with incomes comparable to those of officials of the European Communities. In those capitals of Member States and third countries where the number of officials employed is very low, it has always been necessary to take into account the consumer habits of a group with incomes comparable to those of officials.

In the Commission's view, the inclusion of teachers at the European School in Munich and officials of the European Patent Office was only an additional component in making the assessment, which cannot call into question the value of the statistical sample used. If this were not so, the analyses of the sites where a small number of persons are employed would be called into question. In any event, the criteria of a significant difference in the cost of living and a sufficiently large number of officials are to be considered in conjunction with each other. Thus a large difference in purchasing power justifies the adoption of a specific weighting for a group of less than 50 officials and servants if that weighting is intended to be applied to a group of at least 50 persons (such as teachers at the European School whose own salary scheme applies that weighting) and if figures calculating that difference in purchasing power are available. A larger group of officials and servants, on the other hand, may justify the adoption of a specific weighting (as has been the case for Ispra and Culham) even where the difference in purchasing power is more limited.

19. The Commission's proposal for the creation of a specific weighting for Munich was drawn up after having taken into

consideration the 16 officials of the Communities working in Munich, the statistics already available (a difference of 8% between the cost of living in Munich and that in Bonn) and approximately 100 teachers at the European School to whom the weighting would apply, together with officials of the European Patent Office, whose consumer habits are comparable to those of Community officials and who are compensated for the cost of living in Munich.

The Commission admits that its initial assessment in respect of Munich was wrong in that it considered that the benchmark of 50 persons could apply only to officials and other Community servants. The Commission is of the opinion that, in the case of Munich, the more important principle that officials should enjoy the same purchasing power wherever their place of employment ought to prevail when administrative and statistical difficulties no longer exist. Given the existence of a clear (8%) distortion in the purchasing power of officials employed in Munich in relation to that of officials and servants employed in the capital, it is necessary to establish a specific weighting for Munich in order to comply with Article 64 of the Staff Regulations. The Council's decision is therefore vitiated by the defect of failing to give the requirements of Article 64 precedence over the administrative and statistical requirements which proved to be insignificant. The Commission considers that it has correctly interpreted Article 64 of the Staff Regulations by proposing that the Council should fix a specific weighting for Munich and that, by refusing to do so, the Council has infringed Article 64 of the Staff Regulations.

20. In support of its second plea, based on the infringement of the duty to give a reasoned decision, the Commission claims that the discussion within the Council did not produce any argument justifying the failure to follow the Commission's reasoning and that the Council has adopted its decision without stating why it has rejected the Commission's reasoning. The Council ought to have given reasons for its decision to reject the Commission's proposal.

21. In the context of its third plea, based on the infringement of the Council's own rules, the Commission considers that the Council has established a practice for the identification of the objective factors which suggest that there is a danger of considerable distortion in relation to data recorded in the capital of the country concerned, and may not depart from that practice unless it states the reasons for doing so. It has not done so in the case in point.

22. With regard to the fourth plea, based on the principle of the prohibition of discrimination, the Commission considers that in accordance with the case-law of the Court (judgments in Case 59/81 *Commission* v *Council* [1982] ECR 3329; and Case 7/87 *Commission* v *Council*, cited above), Article 64 of the Staff Regulations is based on the principle of equality of treatment in order to ensure that all officials have an equivalent purchasing power wherever their place of employment. It follows that, by refusing to establish a specific weighting for Munich, when it is apparent from surveys made jointly by the Statistical Office of the Communities and the German authorities that a considerable difference in living conditions can be recorded in that place of employment and in the capital, the contested regulation infringes the principle of equality of

treatment. That same principle ought to lead the Council to fix the effective date of the new weighting as 1 January 1988, since the statistical proof relates to the end of 1987.

23. In conclusion, the Commission asks the Court, if the application is admissible, to declare that in order to avoid salary arrangements being interrupted, the effects of the annulled regulation are to continue until the Council has adopted the measures which it is obliged to take in order to implement the judgment.

24. The *Council* states that the application raises the issue of the conditions under which weightings are to be fixed for places other than the capitals of the Member States.

25. With regard to the plea regarding the infringement of Article 64 of the Staff Regulations, the Council states, as does the Commission, that in accordance with the case-law of the Court (see Cases 158/79, 543/79, 532/79, 534/79, 567/79, 600/79, 618/79 and 660/79, 737/79, cited above), the necessary conditions for establishing a weighting in a place of employment in the Community other than a capital are:

— that a sufficiently large number of officials or other servants of the Community is employed there;

— that objective factors suggest that there is a danger of considerable distortion in relation to data recorded in the capital of the country concerned.

26. Those criteria have been fully met with regard to the fixing of specific weightings for Culham, Berlin and Varese. In order to check whether the conditions were satisfied, the Council, exercising the margin of discretion which it has with regard to the condition that there be a 'sufficiently large number' of officials, adopted the Commission's suggestion that there was a sufficient number when at least 50 officials or servants were employed in the place concerned. That administrative practice of the Council, if it exists, is based in reality on the approach proposed by the Commission, namely that of requiring a minimum number of officials and servants of the Communities to be taken into consideration to enable the necessary and relevant statistical assessment to be carried out by the Statistical Office of the Communities and a specific weighting to be determined if appropriate.

In the case of Munich, it was the Commission which departed without good and convincing reasons from the practice followed hitherto. This is a recent change in the Commission's standpoint. Initially the Commission rejected requests and complaints by officials employed in Munich on the ground that a sound statistical survey could not be carried out unless a sufficient number of officials were employed there, and that in that respect, 50 constituted a minimum. After the matter was brought before the Court of First Instance by a number of those officials, the Commission

changed its position when it submitted to the Council in June 1988 a proposal that a specific weighting be fixed for Munich. The Council considers that the arguments put forward by the Commission in support of its proposal for a specific weighting for Munich are not sufficient to establish in law that the Council's only option was to accept the Commission's proposal.

27. The Council doubts whether officials of the European Patent Office can be taken into consideration, in particular because the arguments submitted by the Commission to the Council no longer rely on that group. In any event, those officials and the teachers at the European School in Munich cannot be included in the criteria for establishing the minimum number, because they are not Community officials. Articles 64 and 65 of the Staff Regulations and Decision 81/1061, cited above, refer only to officials and other servants of the Communities. A total of 16 Community officials would not have been considered as sufficient to enable a sound statistical analysis to be made if the Commission had not proposed — contrary to practice and the wording of the texts — to extend the group taken into account so as to include persons who were not officials or other servants of the Communities. Accordingly, the Council cannot admit that the reasons submitted by the Commission in support of its view are correct.

28. With regard to the plea based on the infringement of the duty to state reasons for its decision, the Council is tempted to reverse the argument. It is for the Commission first to justify the reasons which have led it to depart from the practice which it admits exists. The Council considers that it does not have to give reasons for its disagreement with the Commission.

29. With regard to the plea based on the prohibition of discrimination, the Council shares the Commission's view that Article 64 of the Staff Regulations is based on the principle of equality of treatment between Community officials in order to ensure that they have equal purchasing power wherever their place of employment. In the Council's view, a specific weighting does not need to be fixed if either of the two conditions (the existence of considerable distortion and a sufficient number of officials) is not satisfied. In the case of Munich, the condition that there be a sufficiently large number of officials is not satisfied and, consequently, the Council has not disregarded, in this case, the prohibition of discrimination.

30. Finally, the Council considers that, in view of its observations concerning the admissibility of the application, the Court ought not to allow the Commission's request for the effects of the annulled regulation to continue until the Council has adopted measures to implement the Court's judgment. If there were to be an annulment, that would only apply to the Council's decision not to agree to fix a weighting for Munich. Annulment would therefore not affect Regulation No 2258/90 itself.

G. F. Mancini
Judge-Rapporteur