In Case 737/79

DINO BATTAGLIA, an official of the Commission of the European Communities at the Joint Research Centre, Ispra, Varese (Italy), represented and assisted by Marcel Slusny of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Victor Biel, Advocate, 18a Rue des Glacis,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser Joseph Griesmar, acting as Agent, assisted by Daniel Jacob of the Brussels Bar, with an address for service in Luxembourg at the office of Oreste Montalto, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION in the terms set out in the applicant's conclusions,

THE COURT (First Chamber)

composed of: A. O'Keeffe, President of Chamber, G. Bosco and T. Koopmans, Judges,

Advocate General: F. Capotorti
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The facts of the case and the conclusions and arguments of the parties put forward during the written procedure may be summarized as follows:

I — Facts and written procedure

1. In fixing the weighting referred to in Article 64 of the Staff Regulations, the

Council and the Commission have, since 1967, used the following procedure for comparing the level of prices between Brussels and the various other places of employment. The Statistical Office of the European Communities, in conjunction with the competent national offices, carries out regular price surveys in respect of goods and services considered as representing typical items of household expenditure for officials in the various places of employment. In respect of each item the relationship is calculated between the price in Brussels and the price prevailing in the town which is used as the point of reference for the place where the official performs his duties. By the use of this weighting it is possible to calculate the relative purchasing power of currencies in the countries where the officials of the Community perform their duties. For example, the index calculated using the "Fisher" method expresses in a single figure the relationship of prices in Brussels to those in Rome and *vice versa*. That figure is used for calculating the weightings within the Community because it expresses the relationship of prices from one town to another in a reversible manner and because it is therefore possible to make not only bilateral but also multilateral price comparisons. According to this method, the weighting is obtained by dividing the "Fisher" index calculated as described above, by the corresponding rate of exchange used to convert the remuneration of officials into the respective national currencies in accordance with Article 63 of the Staff Regulations. In October and November 1975 a comparative study of prices was carried out in all the capitals of the Community.

Article 1 of Regulation No 3087/78 of 21 December 1978 adjusting the weighting applicable to the remuneration and pensions of Officials and Other Servants of the European Communities employed or having a home in Italy (Official Journal No L 369 p. 10) provides that:

"With effect from 1 January 1978, the weighting applicable to the remuneration of officials employed in Italy shall be 146.4."

That regulation was adopted in the following circumstances:

The fall in the value of the Italian lira which depreciated rapidly at the end of 1975 and the beginning of 1976 and the monetary measures taken by the Italian Government as a result brought about strong inflationary pressure. It led the staff representatives in Ispra to submit a number of pay demands based on their claims that the weighting for Italy no longer reflected the widening gap between the cost of living in Brussels and Ispra and that the weighting calculated according to the "Fischer" method led in particular to a large gap between the par value of the lira in relation to the Belgian franc on the currency markets and the equivalent value in lire of the remuneration paid to officials at Ispra and considerably reduced the external purchasing power of the remuneration.

From July 1975 the weighting for Italy was 166.6 as against 148.7 for Brussels and Luxembourg. In the spring of 1976 the Commission proposed provisionally to increase the weighting for Italy to 5.5% from 1 January 1976, the final percentage to be fixed once precise stat-

istical data were available. The Council did not accept that proposal and on 29 June 1976 (Regulation No 1592/76) fixed the weighting at 176.6 for Italy as from 1 January 1976, as against 157.8 for Belgium.

The statistical inquiries to which the Commission referred were conducted by the Statistical Office in May 1976 in the Province of Varese. An inquiry into rent levels was then taken into account. The ensuing report found that there was a difference of 8.5% between the weighting for Italy, calculated for Varese by the Statistical Office to be 121.5 to the base 100 for Brussels and the weighting for Italy adopted by the Council (112.04 to the base 100 for Belgium). Of that 8.5%, 6.7% was attributed to the widening gap between the cost of living index in Italy and that in Belgium from December 1975 to June 1976. According to the Statistical Office approximately 2% might be attributed to the difference in price levels between the Varese and Rome regions.

On 21 December 1976 the Council adopted Regulation No 3177/76 (Official Journal L 359, p. 1) which from 1 July 1976 fixed the weighting at 189.3 for Italy as against 157.8 for Belgium and from 1 January 1977 at 120 for Italy as against 100 for Belgium.

The inquiry was the outcome of various representations made by staff representatives at Ispra to the Commission and in particular of a meeting with the President of the Commission on 23 May 1976. The staff representatives questioned the statistical method used to fix the weighting and sought to have it amended. They considered the large gap between the purchasing power parities and the monetary parities of remuneration paid in lire to be incompatible with the principle of the equal treatment of officials. That was the result in particular of the fact that prices of imported goods react much more quickly to the appreciation of a currency on the currency markets than the general price level. Equality of treatment in regard to pay can be attained only by reference to a common European "basket" of goods and services which are qualitatively and quantitatively identical. The Commission representatives rejected that basis of reference but they did agree that the purchasing power parities used to calculate the weighting might present some distortion. By a telex message of 12 December 1977 the staff representatives asked the Member of the Commission reponsible for administrative matters, Mr Tugendhat, to make representations to the Council in order to have the weighting for 1977 acknowledged to be provisional.

In May 1978, in addition to an adjustment of the weightings to the increased cost of living, the Commission proposed to the Council a supplementary increase of 5% in the weightings for Italy, the United Kingdom and Ireland.

On 12 June 1978 the President of the Commission met the staff representatives for a discussion on policy. A joint working party was set up in order to study the method of calculating and periodically reviewing the weighting. In

its report of 26 July 1978 that party recommended the Commission to submit to the Council a proposal based on these points:

The 1967 list of consumer goods to be brought into line with that used for the 1975 inquiry;

The price adopted in 1975 to be adopted and extrapolated to 1978 using common indices (namely for Rome and Brussels);

Justification of the use of those prices by the need to introduce a system enabling weightings to be regularly adjusted.

The Commission representatives stated that the method proposed should apply to the weighting as from 1 January 1978 while the staff representatives believed there was justification for applying it from an earlier date and reserved their freedom of action before the Council on this point. They also pointed out that some disparity still remained owing in particular to the differences in prices between Rome and Varese.

The working party's recommendations were incorporated in the Commission's proposal to the Council of 10 November 1978 to increase the weighting by 6.4% as from 1 January 1978 (Doc. COM(78) 591). During the discussions at Council level the staff representatives refused to accept 1 January 1978 as the date for the entry into force of the amended weighting.

After the adoption on 21 December 1978 of Regulation No 3087/78, in January 1979 the administration of the Commission calculated and paid the arrears due in respect of the period from 1 January 1978 to 30 June 1978. At the same time there were paid the arrears due in respect of the period from 1 July 1978 to 31 December 1978 under Council Regulation No 3084/78 of 21 December 1978 adjusting the remuneration and pensions of Officials and Other Servants of the European Communities and the weightings applied thereto (Official Journal L 369, p. 1), which fixed the weighting for Italy at 146.8 with effect from 1 July 1978.

2. By two complaints dated 26 March and 6 April 1979, formulated in the same terms as some 40 other complaints lodged at the same time, the applicant, without challenging the calculation made on the basis of Regulation No 3084/78, contested the calculation made in pursuance of Regulation No 3087/78 on the ground that it was not retroactive to 1 January 1976.

On 12 July 1979 the Commission rejected the complaints.

This application was brought on 17 October 1979 at the same time as the other similar applications (Cases 736 and 738 to 780/79).

On 10 January 1980 the Commission raised an objection of inadmissibility pursuant to Article 91 of the Rules of Procedure.

It was subsequently decided that this case should become a test case.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court (First Chamber) decided to open the oral

procedure on that objection without any preparatory inquiry.

At the sitting on 19 February 1981, the parties presented oral argument on the admissibility of the application.

The Advocate General delivered his opinion on the admissibility of the application at the sitting on 14 May 1981.

By order of 30 June 1981, the Court (First Chamber) decided to reserve its decision on the objection for the final judgment.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court (First Chamber) decided to open the oral procedure on the substance of the case without any preparatory inquiry.

II — Conclusions of the parties

The applicant claims that the Court should:

1. Declare null and void the defendant's decision settling the arrears owing to the applicant by limiting them to 1 January 1978 without taking into account the cost of living peculiar to the Province of Varese;

2. Declare inapplicable Regulation No 3087/78 of the Council of Ministers and in particular Article 1 (1) thereof inasmuch as the latter restricts retroactivity to 1 January 1978 under Article 184 of the EEC Treaty, Article 156 of the EAEC Treaty and the third paragraph of Article 36 of the ECSC Treaty;

3. Making use of its unlimited jurisdiction, declare and adjudge that there is due to the applicant for the period from 1 January 1976 to 1 January 1978 an additional amount of salary regard being had to the cost of living peculiar to the Province of Varese; and that the Commission should be required to calculate that amount of salary and to pay it, subject to the right to apply to the Court if the parties should fail to reach agreement;

4. Declare and adjudge that the normal legal rate of interest in Italy should be added to the sums to be paid;

5. In the alternative, declare that the defendant has committed the wrongful acts or omissions indicated in the application;

   Order it therefore to pay by way of damages the amounts set out under 3., together with the interest set out under 4;

6. In the further alternative declare that the conditions set out in Article 65 (2) of the Staff Regulations of Officials have been met since 1 January 1976 and that it is therefore for the Council of Ministers to adopt measures appropriate to ensure that the salary of officials and other servants is calculated in conformity with the principles laid down in Articles 64 and 65 of the Staff Regulations of Officials and that there is no discrimination between them, whatever may be the place of performance of their duties;

7. Order the defendant to pay the costs.

The *Commission* contends that the Court should:

Dismiss the application as inadmissible and in any event as unfounded;

Order the applicant to pay the costs.

In his reply the *applicant* claims that the Court should:

Appoint an expert or a college of experts with the task of determining the cost of living in Italy and in the Province of Varese as from 1 January 1976 until the date referred to in Regulation No 3087/78;

Determine the weightings applicable to Varese as from 1 January 1976 until the date fixed in Regulation No 3087/78.

III — Submissions and arguments of the parties

In his application the *applicant* first raises the question whether the Commission's reply of 12 July 1979, which was intended as an express rejection, is not open to serious criticisms on formal and substantive grounds and whether its validity must not therefore be called in question. That reply is collective in nature and it is impossible to determine precisely who are the addressees, whether they are adversely affected by that reply and, if so, as at what date. The reply is all-embracing and relates not only to the complaint in question but also to complaints made on the basis of Council Regulations Nos 3085 and 3086/78. Article 25 of the Staff Regulations provides that any decision adversely affecting an official must be accompanied by a statement of the reasons on which it is based. However, the Commission's reply contains no reasons explaining why the retroactivity of the application of the weighting of 6.4% is restricted to 1 January 1978. Only the confirmatory memorandum of 27 August 1979 is therefore capable of being regarded as an express rejection in due form.

The applicant claims in his first submission that, by limiting to 1 January 1978 the retroactivity of the raising of the weighting, the Council has failed to fulfil its obligations under Article 65 (2) of the Staff Regulations. That provision lays down a mandatory rule to be applied within a given period, namely two months at the most. The concept of a substantial change in the cost of living is objective in nature and the Court is able to appraise it as it does in a similar way when applying Articles 85 and 86 of the Treaty. The applicant requests the Court to declare null and void the application made by the Commission of Article 1 (1) of Regulation No 3087/78 and at the same time to declare the contested provision inapplicable under Article 156 of the EAEC Treaty.

The Court is requested in the second submission to make use of its power of unlimited jurisdiction under Article 91 (1) of the Staff Regulations to uphold the personal right of the applicant to his salary, provided for by Article 62 of the Staff Regulations, by ordering the defendant to pay to him the additional amount of salary which he would have received with effect from 1 January 1976 if the weighting had been made retroactive to that date and if account had been taken of the specific level of the cost of living in Varese.

The applicant's third submission is to the effect that the manner in which the Commission applied Regulation No 3087/78 not only conflicts with the wording of Articles 64 and 65 of the Staff Regulations but is a breach of the general principle of non-discrimination between officials and other servants, wherever they perform their duties. The Commission's liability for disregarding

the principle of non-discrimination which it was required to observe as regards its own officials is all the more striking since the defendant itself has reaffirmed, as if reaffirmation were needed, its attachment to the principle of non-discrimination between officials performing their duties at different places of employment. The member of the Commission responsible for questions of personnel also made a clear statement to that effect at the sitting of the Parliament on 7 July 1977. The failure on the part of the Commission to observe that principle is a wrongful omission which may be appropriately remedied by ordering the Commission to pay by way of damages an amount calculated as if the weighting now acknowledged to be correct had been applied with effect from 1 January 1976.

The fourth submission is to the effect that the repudiation of the applicant's right to his salary (a personal right conferred by Article 62 of the Staff Regulations) likewise constitutes a failure by the Commission to fulfil its general duty of assistance embodied with regard to special cases in Article 24 of the Staff Regulations. The Commission has also failed to fulfil that obligation specifically by proposing to the Council to make the measure adopted retroactive only to 1 January 1978. The Commission has therefore committed a wrongful act or omission in addition to the previously mentioned one, which may therefore be appropriately remedied under the same conditions.

In the alternative the *applicant* claims that in any event, in accordance with the principle which it laid down in its judgment in Case 28/74 *Gillet* [1975] ECR 463, the Court might point out to the Council that "it is for the Council to adapt the regulations to economic realities and thus to seek the means of alleviating any loss suffered by officials residing in a country whose currency has been substantially devalued". The Court might perhaps not restrict itself to noting the obligations stemming as regards the Council from Articles 64 and 65 of the Staff Regulations. It might appraise to what extent and as from what date there was a substantial change in the cost of living, thus exercising powers analogous to those which it has under Articles 85 and 86 of the Treaty.

A — Admissibility

1. In its objection of inadmissibility the *Commission* observes that the application is inadmissible first in its conclusions seeking annulment. The measure adversely affecting the applicant is said to be the Commission's decision to pay to the applicant arrears of salary with retroactive effect limited to 1 January 1978, without taking account of the cost of living peculiar to the Province of Varese. In January 1979 arrears of salary were paid to the applicant in implementation, on the one hand, of Regulation No 3087/78 and, on the other, of Regulation No 3084/78 altering with effect from 1 July 1978 the scale of basic salaries and fixing, with effect from the same date, the weighting for Italy at 146.8. The applicant is not contesting the calculation of arrears of salary for the period subsequent to 1 July 1978. His claim relates solely to the determination of his salary arrears by the application of Regulation No 3087/78 and the objection raised to the effect that one regulation is inapplicable relates only to Regulation No 3087/78. The calculation of salary arrears for the period subsequent to 1 July 1978 is therefore not at issue, since it must be regarded as having become definitive.

The Commission takes the view that the claim for arrears of salary for a period prior to 1 January 1978 is inadmissible since it is tantamount to a challenge, made outside the time-limits, to the

various successive measures of the administrative authority which at the material time calculated the applicant's monthly remuneration. To challenge the decision relating to the salary arrears amounts to challenging successive calculations of remuneration from January 1976 to December 1977.

Since it grants no additional amount on the basis of each monthly instalment of salary calculated and paid from January 1976 to December 1977, the contested decision is confirmatory in nature as regards each of the monthly calculations made during that period. As such it can found no right of action, regard being had to well-settled authority to the effect that a confirmatory measure is not a measure capable of adversely affecting an official. On the other hand, none of the administrative decisions calculating the monthly instalments of salary paid to the applicant from January 1976 to December 1977 was ever the subject of a complaint, still less was any legal action brought in respect of them. The Court is therefore faced with a situation similar to that which came before it in the 81 Joined Cases 15/73 etc. *Kortner and Others* v *Commission, Council and Parliament* [1974] ECR 177.

The application is also inadmissible in its conclusions seeking compensation since the Court cannot exercise unlimited jurisdiction where no action for annulment lies (cf. Case 32/68, *Grasselli* v *Commission* [1969] ECR 505).

The Commission considers that the head of claim seeking damages for alleged wrongful acts or omissions by the defendant is, like the foregoing heads of claim, manifestly inadmissible. In fact the Court has already had the opportunity of declaring that the inadmissibility of a claim for annulment entails the inadmissibility of a claim for damages which is closely connected to the claim for annulment (cf. Case 4/67 *Collignon-Muller* [1967] ECR 470). In the present case the claim for damages could not be more closely connected with the first head of claim concerning legality. To claim damages up to an amount calculated as if the weighting now applied had been applied with effect from January 1976 is merely the other side of the coin whose face is the first head of claim seeking the annulment of the defendant's decision calculating arrears of salary with effect only from 1 January 1978 and not from 1 January 1976. The Commission therefore requests the Court to affirm its previously-mentioned case-law in *Kortner* since the present case is strikingly similar to that case.

The application is also inadmissible to the extent to which it is brought as an application for a declaration since the Court has jurisdiction in contentious staff matters pursuant to Article 179 of the Treaty "within the limits and under the conditions laid down in the Staff Regulations". Therefore in the absence of inadmissibility it is always in relation to the legality of a measure "adversely affecting an official" that it has jurisdiction. The Commission does not see how the Court going beyond a claim seeking the annulment of a measure can be requested to make findings relating to certain matters of fact or law by a judgment which would be neither a judgment annulling a measure nor a judgment rejecting a claim seeking annulment. In Case 32/68, *Grasselli*, already referred to, the Court already had the opportunity of declining jurisdiction. As far as its judgment in Case 28/74, *Gillet*, also previously cited, is concerned, which the applicant relies

upon to support his claims for a declaration, that judgment by no means judicially extended the Court's jurisdiction. It is one thing to say that it is for the Council to adapt the Staff Regulations to economic realities — because it is empowered to do so — it is quite another thing to say that it must do so, so much so that a failure to do so would be judged unlawful and might be condemned within the context of an application for failure to act within the meaning of the third paragraph of Article 175 of the Treaty.

had to give rise to a request, then to a complaint and finally to an application to the Court, the Commission would have received nearly 30 000 requests followed by 30 000 complaints and 30 000 applications. The routine updatings carried out by the Council each time provide for a retroactivity of six months. Therefore the applicant, if he failed to make a complaint immediately in respect of the first month and the two following months was time-barred for the first three months and even for the following three months.

2. In his observations on the Commission's objection of inadmissibility, the *applicant* claims, as regards the alleged inadmissibility of the application in so far as it is brought as an application for annulment, that in relation to the weighting mentioned in Article 65 (2) of the Staff Regulations it is not a question of a personal right relating to a given amount or an amount easily determinable. That provision confers no direct and immediate right of the official but creates a duty for the Council and not for the institution by which the official is employed, a duty which is political in nature and which the official cannot enforce by means of the procedure open to him, contained in Articles 90 and 91 of the Staff Regulations. The applicant was therefore not entitled to submit a claim or a complaint to the Council, still less could he have brought an application before the Court. He had to await the outcome of the "political" negotiations between the local Staff Committee and the staff representative bodies — negotiations which led to the regulation which is specifically challenged by the applicant on the ground that the retroactivity provided for therein does not correspond to the objective nature of the problem. If each payment of salary since 1 January 1976

The Court has already acknowledged in a number of other types of cases (though the general principles laid down by it are of general application) that a sufficiently material new fact causes the periods for bringing an action to start to run again. The applicant does not doubt that in the present case the publication of Regulation No 3087/78 amounts to a material new fact in relation to the previous situation and forms part of the "political" negotiations begun in the beginning of 1976. Apparently for financial reasons the Council on this occasion fixed the retroactivity at one year.

These proceedings are in reality to do with the frustration by the Commission of the legitimate expectations of officials. That constitutes a wrongful act or omission by the Commission, which was wrong not to ensure that the problem of updating the weighting was settled with the shortest possible delay and could not in any event be heard now to plead the lateness of the complaints. This principle is to be found in the Anglo-Saxon doctrine of estoppel. Under that principle

the Commission, which itself is responsible for the delay, cannot prevent officials from lodging complaints now which it could not have claimed were out of time if the Commission itself had not brought about a situation from which the alleged lateness arises.

The applicant does not dispute that the Court's power of unlimited jurisdiction, which would enable it to order the Commission to pay arrears of salary, can apply only if the Court had jurisdiction to annul, which would not be the case if for example the application were out of time.

The applicant is amazed that the Commission states that this case is "strikingly similar" to the *Kortner* case. That case was quite different; it concerned female officials who considered that they were entitled to an allowance like some of their colleagues who, having obtained it by bringing an application at the appropriate time, considered that a fresh decision by the Court definitively constituted a new fact. In these proceedings the new material fact is not a fresh decision but a Council regulation. Here, neither the claim nor the allegation on which this case is founded is indissolubly connected with the claim for annulment or for the payment of supplementary remuneration. Nor is it sufficient that the damages are calculated on the basis of that supplementary remuneration for it to be claimed that there is such a link (and how could it be otherwise?) To assert that such a link exists would be to deny that the Court may order an institution to pay damages to an official for a wrongful act or omission independently of any annulment of a measure. In Case 61/76 *Geist* [1977] ECR 1419 the Court ordered the Commission to pay damages to an official because his periodic reports had not been drawn up and that order was made even though he failed on a principal head of claim for the annulment of a decision taken to re-assign him.

To the extent to which the application is brought as an application for a declaration the applicant observes that the Court might express its views on the substance even though it upholds submissions of inadmissibility or lack of jurisdiction.

3. In its defence, the *Commission* replies that it would have been sufficient for the applicant to bring a single complaint against the salary statement relating to January 1976 to enable the Court, by means of an application brought following the rejection of that complaint, to be validly seised of the whole problem of the absence of retroactivity between January 1976 and December 1977.

It puts forward a further submission of inadmissibility affecting the application to the extent to which it relates to the failure to take into consideration in the contested decision the cost of living peculiar to the Province of Varese. In fact that question was not made the subject of a complaint. It is clear from the case-law of the Court that legal proceedings must be preceded by a complaint and that, in any event, heads of claim put forward at the stage of the application may alter neither the basis nor the subject-matter of the complaint.

It draws justification for its argument from the Opinion of Mr Advocate General Capotorti of 14 May 1981 in

this case, in the parallel Case 158/79 *(Roumengous)* and in Case 543/79 *(Birke)*.

4. In the reply the *applicant* claims that, in a situation characterized by problems of great technical complexity, he relied upon the staff representatives and was not concerned to worry himself personally about his individual situation which could be gleaned from a perusal — though difficult and uncertain — of the salary statements. The administration did not reply clearly to each official or other servant. It drafted a reply dated 11 July 1979 which was rather a kind of circular confusing the various complaints directed against the different regulations and which certainly did not constitute an express rejection of the complaints made by each of the parties concerned including the applicant himself. It follows that the complaints made cannot be treated as normal steps preceding an application to the Court, such as those which are taken where an official is faced with a problem peculiar to him.

The Court has consistently held that an applicant may introduce additional heads of claim provided that they are contained by implication in the heads of claim originally formulated. The applicant concludes from private procedural law (the objection *obscuri libelli)* that the head of claim seeking a decision by the Court on the supplementary salary due as a result of the difference in the level of the cost of living in the Province of Varese in comparison with that in Rome does not amount to a new factor from the defendant's point of view. In any event if the defendant wished to raise that objection it ought to have done so at the outset of the proceedings. Finally, the applicant maintains in the alternative his point of view that, by making use of the very general powers which it possesses in the determination of the general policy of the Communities, the Court might make its view known as regards the regulations under challenge.

5. In its rejoinder the *Commission* stresses that, if the applicant's argument to the effect that the absence of any personal right in his eyes excuses him from not having made any complaint concerning the amount of his salary calculated during 1976 and 1977 were well founded, the question might arise how he suddenly obtained a personal right as from 1 January 1978 whereas that was not the case in 1976 and 1977. In any event it is certainly not in Regulation No 3087/78 that such a right might find its basis for the period 1976 and 1977 since that regulation raised the rate of the weighting in question only with effect from 1 January 1978.

The applicant deliberately chose not to make any complaint in 1976 and 1977, no doubt hoping to obtain satisfaction as the indirect result of a regulation which would come into force with retroactive effect to 1 January 1976.

The reply to the applicant's complaints, dated 11 July 1979, even if it appeared in the form of a circular, was addressed personally to the applicant. Moreover, in the absence of an express rejection of a complaint, an implied decision of rejection is deemed to occur four months after the making of the complaint, by virtue of Article 90 (1) of the Staff Regulations. In any event, this action was brought before the Court within the proper period following the notification of the express rejection of the

complaints. On the other hand, no direct action was brought before the Court in either 1976 or 1977 concerning the level of the Italian weightings applicable during that period.

It is impossible to have recourse to the concept of *obscuri libelli* in an attempt to escape the sanction of inadmissibility since the wording of the complaints is entirely clear and contains no reference to the problem of the cost of living in Varese. It is also vain to argue that the objection of inadmissibility ought to have been raised at the outset of the proceedings. There is no provision in the Rules of Procedure of the Court to support that argument. On the contrary a party may successively raise several objections as long as the substance of the case has not come under consideration.

As regards the application in so far as it involves the unlimited jurisdiction of the Court, no evidence has been adduced of the existence of any damage distinct from pecuniary damage. To the extent to which it seeks to make the administration liable the application is inadmissible because, supposing (which is not the case) that the Commission's proposal to the Council is a measure capable of being challenged, the applicant ought to have made a complaint within a period of three months following the date on which he acquired knowledge of it and that to claim that the Commission is liable likewise presupposes the existence of damage and a connection between that damage and the alleged wrongful act or omission. There is nothing to show that the Commission would have been followed by the Council if it had proposed to it that retroactive effect to 1 January 1976 should be given to the increase in the weighting.

The Court, on hearing an application "might make its views known" by way of the judgment which it gives and in which it decides on admissibility and possibly whether the application is well founded. In that connection it is quite unnecessary to make a separate claim which would be a superfluous addition to the conclusions seeking annulment and compensation.

B — The substance

1. The Commission, in its defence, seeks to examine "entirely in the alternative" the substance of the submissions put forward in support of the application.

As regards the first submission, the Commission recalls that the weighting in question was established on the basis of the weighting schemes fixed as a result of the survey "officials' family budgets" conducted in Brussels and Ispra in 1967 (the staff representatives were against the carrying out of a new survey in 1978, regard being had to the delay which such a survey would have entailed in fixing the new weighting); those schemes were however adapted for use in 1976. The price surveys themselves were carried out in October and November 1975; however, by the use of the index of prices in Rome and Brussels established in December 1977 those prices were extrapolated in such a way that the weighting finally adopted is based on the cost of living in Brussels and Rome in December 1977. There can therefore be no question of back-dating to 1 January 1976 a weighting based on surveys of prices updated to December 1977.

Moreover, Article 65 (2) of the Staff Regulations provides that the adjustments made to the weightings shall be applied retroactively "if appropriate", thus showing that the legislative authority does enjoy a certain margin of

discretion. Also, the staff representatives several times stated that they acknowledged that the retroactivity of the new weighting should go back only as far as 1 July 1977, or even 1 January 1978, thus acknowledging that on an objective view retroactivity was not necessary at all.

As far as the second submission is concerned, and in the absence of any further details, the defendant assumes that the applicant is basing his claim, which was moreover not expressed by way of a complaint, on the fact that, in its report of 17 August 1976, the Statistical Office stated that the cost of living in the Province of Varese was 1.8% higher than that in Rome. Pursuant to a Council decision adopted in 1968, the weighting relating to a given country is to be determined in accordance with the cost of living in the capital of that country; it is therefore not possible to take into account the cost of living in each place of employment; any other solution would come up against insurmountable practical problems when it is realized that the Commission's officials are spread over some 150 places of employment. Nor can the applicant maintain that the failure to take into account the cost of living in the Province of Varese is contrary to fairness; from the setting-up of the centre in Ispra until a very recent period the cost of living in Rome was significantly higher than in the Province of Varese; the applicant thus enjoyed, for a number of years, a weighting calculated in accordance with a cost of living higher than that which he was in fact required to meet. Finally, it should be stressed that the difference of 1.8% mentioned above is merely of importance as an indicator. That result was obtained on the basis of a test survey of prices carried out in the Province of Varese in May 1976 affecting 230 items and services, whilst the price surveys carried out in Brussels and Rome concerned 700 items and services. Furthermore, that result was obtained by the use of a weighting scheme drawn up following a survey dating back to 1967, which, admittedly, had been brought up to date, and recourse was not had to a fresh survey in view of the opposition, mentioned above, from the unions and staff associations.

As regards the third submission, it is clear beyond doubt from its wording that it is based not on the discriminatory nature of Regulation No 3087/78 which ought to lead the applicant to plead its inapplicability, but on the discriminatory application made of it by the Commission. Therefore the submission is clearly unfounded. In fact Article 1 (1) of that regulation expressly provides that the new weighting is to apply with effect from 1 January 1978. Therefore it is evident that the Commission in applying the regulation could not have had regard to any other date, still less could it have committed any wrongful act or omission capable of rendering it liable.

As regards the fourth submission, the Commission considers that economic factors did not warrant extending retroactivity beyond 1 January 1978, and that the wide interpretation given to the duty of assistance cannot be accepted, regard being had to the terms of Article 24 of the Staff Regulations. The Opinion of Mr Advocate General Dutheillet de

Lamothe in Joined Cases 63 to 75/70 *Bode* [1971] ECR 558 may appropriately be cited in that connection; Regulation No 3087/78 was adopted by the Council in order to deal with a situation brought about by the devaluation of the Italian lira and the increase in the cost of living in Italy. Supposing even that in its proposal for a regulation submitted to the Council the Commission ought to have stated 1 January as its date of entry into force, it is already beyond question that that date would not have been accepted by the Council, as stated previously; therefore, even if it had to be conceded that by not proposing a date to the Council, the Commission committed a wrongful omission, it is clearly established that such omission has no causal connection with the damage pleaded by the applicant.

As far as the claim for a "declaration" is concerned the Commission refers to its objection of inadmissibility in which it showed that the judgment in the *Gillet* case in no way constitutes an example of a decision of a declaratory nature, and in general that an action for a declaration has no place in legal proceedings in staff matters, as was expressly decided by the Court in the *Grasselli* case.

2. In his reply, the *applicant* derives support for his argument from the document of the Statistical Office of the Communities annexed to the proposal for a regulation submitted by the Commission to the Council on 10 November 1978. It appears that, if reference is made to the extrapolations relating to the date of 1 January 1978, the figure goes from 134.5 to 143.2 which actually represents an increase of 6.4%. But it is also clear from that document that since July 1975 the weighting for Italy ought to have been 119, as against 100 for Brussels, which would have justified an increase from 112 to 119 with effect from 1 January 1976, that is to say also an increase of 6.4%.

The applicant considers that the words "if appropriate" appearing in Article 65 of the Staff Regulations should not be understood as enabling the Council, in its discretion, to determine retroactivity but that retroactivity must be given to the measures which it adopts if the circumstances warrant it and the opportunity presents itself. Moreover, the wording of Article 65 (2) itself gives to the Council a maximum period of two months within which to take the necessary measures. It is therefore self-evident that retroactivity may not in principle go beyond that period but must take effect as from the date on which the substantial change in the cost of living occured. It is for that reason that successive regulations are adopted having variable and provisional retroactivity in circumstances such as those of the present case for example, in which the members of staff did not consider they had to react immediately on receipt of their salary statements for January 1976, when negotiations were to be started which were to deal in particular with the question of retroactivity. In the present case, there is no dispute as to the determination of the weighting, there being no problem over the increase of 6.4%. It is over the period of retroactivity that the parties are divided and, in that respect, it appears that the Council took a decision inspired by the wish to make savings, which is foreign to the scheme of Article 65 (2) of the Staff Regulations. Finally, the agreement of the staff representatives is not binding on the applicant especially since the representatives agreed to negotiate on the basis

of a compromise and that compromise was never definitive. Also, in the statement of the reasons on which the proposal for a regulation submitted by the Commission on 10 November 1978 was based, the Commission itself emphasized that: "The Commission must also inform the Council that the staff representatives have asked that the new weighting be applied from a date earlier than 1 January 1978."

In reply to the Commission's assertion that the claim relating to the cost of living peculiar to Varese is not founded on any submission, the applicant states that an application is a single entity and that the submissions must supplement one another; as regards this head of claim the third submission is perfectly explicit; it relates both to Articles 64 and 65 of the Staff Regulations and to the principle of non-discrimination. As regards moreover the factual justification of that submission, the Commission knows that problem better than anyone else since it was asked to make proposals to the Council and makes reference to the report of the Statistical Office. Reliance may not be placed upon the fact that, by a decision taken in 1968, the Council decided that the weighting relating to a given country should be determined in accordance with the cost of living in the capital of that country. The first paragraph of Article 64 of the Staff Regulations is clear; it refers to places of employment. In fact it would not be more difficult to calculate weightings for 150 places than for a series of countries which do not include merely the Member States but also Switzerland, the United States, Israel and so forth. Finally, there are places and places. Even if it were necessary to fix a standard figure for places employing only a few officials and other servants it could not be the same for the centre at Ispra, which employs more than 1 700 people.

It would be wrong to say that until recently the cost of living in Rome was higher. By referring to the factors appearing in the Consumer Price Index of the Central Institute of Statistics in Rome, the applicant believes he can show that since 1981 prices in Varese have always been higher than in Rome. In any event, the applicant considers that the parties will have to reply to the questions which the Court may think fit to ask them or that the Court will have to ask one or more experts to enlighten it.

As regards the third submission, the applicant states that he did plead the inapplicability of the regulation which is the second head of claim appearing in his conclusions. Furthermore he was not merely criticizing the Commission for applying Regulation No 3087/78 but for proposing to the Council the actual text which the Council finally adopted. That was a wrongful act independent of any other, since the Commission cannot rely on the fact that it could not have done anything other than apply the regulation without ignoring its own responsibility for drawing up regulations and the opportunity which it has of bringing the matter before the Court, as it has already done in Case 81/72, *Commission* v *Council* [1973] ECR 575, Case 70/74 *Commission* v *Council* [1975] ECR 795 and Case 59/81 *Commission* v *Council* [1982] ECR 3329.

As far as the fourth submission is concerned, the *Bode* case is quite different from this one: there the applicants asked that the institution in question protect them from the

consequences of a monetary measure adopted by their State of origin.

3. In its rejoinder the *Commission* recalls that the weighting, which entered into force on 1 January 1978, was fixed by reference to factors updated in relation to those used when the weightings for the preceding periods were drawn up. That reform therefore represents some progress, which does not however mean to say that the weightings fixed at various rates between 1 January 1976 and 31 December 1977 must be regarded as conflicting with Article 65 (2). On the contrary, it should be remembered that in May 1976, the Statistical Office carried out, at the Commission's request, an inquiry into prices in the Province of Varese. It is clear from the Office's report that, of the difference of 8.5% existing between the weighting for Italy as calculated for Varese (121.5 as against 100 for Brussels) and the weighting for Italy adopted by the Council (112.04 as against 100 for Belgium), 6.7% was attributable to the widening gap between the cost of living indices in Italy and Belgium from December 1975 to June 1976. On 30 December 1976 the Council adopted Regulation No 3077/76 (Official Journal L 359, p. 1) by which the weighting for Italy was increased, with effect from 1 July 1976, to 189.3 for Italy as against 157.8 for Belgium. With effect from 1 January 1977 the weighting was fixed at 120.1 for Brussels. The weighting fixed by the Council with effect from 1 July 1976 at 189.3 or 119.16 as against the basic weighting of 100 for Brussels therefore differed only by 1.3% from the weighting calculated by the office for Varese. Therefore, if the applicant considers that the rates at which the Italian weightings were fixed in 1976 and 1977 are vitiated by illegality it would be appropriate to seek not the retroactive application to 1 January 1976 of the rate which came into force on 1 January 1978 but he should request that four new rates be fixed, to be calculated on the basis of four price surveys respectively carried out on the basis of information as at 1 January and 1 July 1976 and 1977. It would also be necessary, whilst adhering to principles, to lay down four weighting schemes, based on the results of four surveys of officials' family budgets conducted on the basis of the information available at the aforementioned dates. The weighting adopted by the Council in Regulations Nos 3084 and 3087/78 is the result of a compromise including both the rate of increase applied and the date of entry into force.

As to the second submission, by giving for the first time in his reply a legal footing to the claim to have the cost of living peculiar to Varese taken into account, the applicant is disregarding the terms of Article 42 (2) of the Rules of Procedure which forbids the raising of fresh issues in the course of proceedings. In the alternative, therefore, the Commission replies that the figures produced by the applicant are hardly explicit. As regards the price indices for Rome and Varese, those figures relate to 1966, 1970 and 1976 without any indication as to whether what is referred to is the index relating to the year stated

or the average index of the period preceding that year. For its part, the Commission refers to the tables drawn up by the Statistical Office on 1 June of each year of the respective costs of living for the period 1970 to 1981 in each of Brussels, Rome and Varese. It may be seen from those tables that, having been slightly greater in Varese in 1971, the increase in the cost of living was greater in Rome in 1972 and 1973, then lower than that in Varese between 1974 and 1979. Since 1979, the increase in the cost of living has again been greater in Rome. If the whole of the period in question is considered, the cumulative increase in the cost of living was greater by 3.71% in Varese than in Rome, that is to say on average 0.33% per annum. The difference is so slight that it is sufficient if the trend observed over the last two years, namely a rate of increase greater by 1.8 % per annum in the cost of living in Rome, continues until June 1983 for arithmetical equality to be achieved in living costs as between Rome and Ispra in the period from June 1970 to June 1983. Generally, the Commission considers that the discretionary power conferred on the Council, when it is faced with a complex economic situation, allows it to take the view that a change in the cost of living of the order of that found in the present case does not constitute a "substantial" change within the meaning of Article 65 (2) of the Staff Regulations.

As far as the third submission is concerned, there are two possible situations. Either the first submission may be upheld and Regulation No 3087/78 is declared inapplicable and in that case, the third submission would lose its object since it would be for the Commission, on adopting a new regulation in compliance with the judgment to pay to the applicant the arrears of salary corresponding to the application of the new weighting between 1 January 1976 and 31 December 1977. Or else the first submission may be declared unfounded and the lawfulness of Regulation No 3087/78 would be affirmed, in which case it is self-evident that to apply a regulation recognized as valid or to have proposed the adoption of such a regulation to the Council cannot constitute a wrongful act on the part of the Commission. In reality, no causal connection between the alleged wrongful act and the damage alleged has been established since the staff representatives accepted that the new Italian weighting would come into force only with effect from 1 June 1977 and the President of the Permanent Representatives Committee let it be known that in his view an amended proposal fixing the date of entry into effect as 1 July 1977 had no chance of success. Finally, it is clearly not for the Commission to bring an application against the Council on the ground of the illegality of Regulation No 3087/78. Moreover, it would be inconceivable for the Commission to bring an application challenging the legality of a regulation which is in conformity with the original proposal which preceded it.

As to the fourth submission the Commission refers to the arguments put forward against the previous submission. As far as the scope of the duty of assistance is concerned, the Court, in its judgment in Case 178/80 *Bellardi-Ricci* [1981] ECR 3187, stated with regard to Article 24 of the Staff Regulations that:

"It suffices to observe that that provision is concerned with the defence of officials by the institution against the acts of third parties and not against the acts of the institution itself, the review of which is governed by other provisions of the Staff Regulations." Furthermore, Articles 64 and 65 of the Staff Regulations enable the legality of the proposal mentioned above to be reviewed without its being necessary to invoke the concept of the duty of assistance.

IV — Oral procedure

The parties presented oral argument at the sitting on 15 July 1982.

The Advocate General delivered his opinion at the sitting on 30 September 1982.

Decision

1 By an application lodged at the Court Registry on 17 October 1979, Dino Battaglia, an official of the Commission employed at the Joint Research Centre in Ispra, Italy, brought an action under Article 91 of the Staff Regulations of Officials for a declaration that Council Regulation No 3087/78 of 21 December 1978 adjusting the weighting applicable to the remuneration and pensions of officials and other servants of the European Communities employed or having a home in Italy (Official Journal L 369, p. 10) is not applicable to him.

2 Until the end of 1978 the Staff Regulations provided that an official's remuneration was to be expressed in Belgian francs and weighted at a rate above, below or equal to 100%, depending on living conditions in the various places of employment.

3 From 1975 officials employed at the Joint Research Centre in Ispra complained to the Commission that the cost of living in Italy had considerably increased and accordingly requested that the weighting for Italy be revised. They complained in particular that in their opinion the cost of living in the Province of Varese was higher than in Rome and they urged the Commission to take account of that difference when fixing the weighting applicable to their remuneration.

4 In 1976, 1977 and 1978 consultations on technical matters took place between representatives of the staff and those of the Commission and Council but no agreement was reached on the alteration of the weighting or on the date to which the new weighting should have retroactive effect. In the meantime by a series of regulations the Council had increased the weighting for Italy as from 1 January 1976 to 176.6 as against 157.8 for Belgium, as from 1 July 1976 to 189.3 as against 157.8 for Belgium, as from 1 January 1977 to 120 as against 100 for Belgium, as from 1 January 1977 to 132.1 as against 104.5 for Belgium, and as from 1 July 1977 to 130.2 as against 100 for Belgium. In most cases those regulations had a retroactive effect of about six months.

5 On 26 June 1978 the Council adopted Regulation No 1461/78 (Official Journal L 176, p. 1) by which the weighting for Italy was fixed at 137.6 as against 102.3 for Belgium. The recitals in the preamble to that regulation state that "a decision on the Commission proposal for the correction of the weightings for three countries of employment will be taken only in the light of a study to be carried out by the Commission".

6 After a fresh inquiry by the Statistical Office of the Communities and discussions between the Commission and the Council, on 10 November 1978 the Commission proposed to the Council to fix the weighting for Italy at 146.4 as against 102.3 for Belgium with retroactive effect to 1 January 1978. That proposal was accepted by the Council by the adoption of Regulation No 3087/78 of 21 December 1978 (Official Journal L 369, p. 10). On the same date the Council adopted Regulation No 3084/78 (Official Journal L 369, p. 1) fixing the weighting for Italy at 146.8 as against 100 for Belgium as from 1 July 1978.

7 The staff concerned challenged Regulation No 3087/78 in so far as it fixed the weighting at a level which did not take account of the cost of living in Varese and gave that weighting retroactive effect only to 1 January 1978.

8 In January 1979 the Commission paid the arrears of remuneration due under Regulations Nos 3087/78 and 3084/78.

9 By two complaints made to the Commission on 26 March and 6 April 1979 pursuant to Article 90 (2) of the Staff Regulations, the applicant requested the Commission to take the measures necessary to compensate him for the loss in his purchasing power during the years 1976 and 1977.

10 By circular letter dated 12 July 1979 the Commission rejected those complaints.

11 The applicant then brought this application in which he seeks the annulment of the Commission's decision settling the applicant's arrears of remuneration by limiting them to 1 January 1978 without taking into account the cost of living peculiar to the Province of Varese; a declaration that Regulation No 3087/78 is not applicable to him in so far as it limits its retroactivity to 1 January 1978; and an order to the Commission to pay the applicant by way of compensation an amount calculated as if the weighting at present agreed had been applied as from 1 January 1976 together with interest.

Admissibility

12 The Commission claims that the application is inadmissible because the calculation of arrears carried out in January 1979 was in the nature of a confirmation of the monthly calculations of salary made during 1976 and 1977 and such payment of arrears does not therefore constitute a measure capable of founding an independent right of action, particularly since no complaint was made at that time against the calculations of salary for the years in question.

13 Regard being had to the circumstances of the case, the Commission's objection cannot be accepted. In fact, although it is important to safeguard the application of the rule contained in the Staff Regulations which provides for a prior complaint through official channels within a relatively short period consideration must be given to the fact that, as negotiations had been going on for many months between the Council, the Commission and staff representative bodies, the applicant was legitimately entitled to await the

outcome of those negotiations before concerning himself about their possibly negative effect on his salary. In fact the Council regulations adjusting the weightings come into effect after a period of delay and are therefore normally given retroactive application, the extent of which is however hardly foreseeable. In the recitals in the preamble to Regulation No 1461/78, moreover, the Council itself acknowledged that the adjustment of the weighting provided for by that regulation for three countries of employment was not definitive.

14 The Commission's argument, if it were accepted, would mean that an official who considered himself injured by the Council's delay in adjusting the weighting would have had not merely to submit a series of complaints possibly stretching over several years, but also to bring a series of actions before the Court, or risk being time-barred. That argument cannot be upheld. The facts of Case 15/73 *(Kortner* [1974] ECR 177) on which the Commission founds its argument are in no way similar to those of the present case.

15 As far as concerns the second objection raised by the Commission, regarding the application for damages, suffice it to state that the admissibility of the application for annulment entails the admissibility of the application for compensation where, as in this case, those applications are closely linked the one with the other.

16 The application must therefore be adjudged admissible.

The substance

17 As regards the weighting applied to officials employed in Ispra, the applicant is pursuing two objectives. First he seeks to obtain a revision of the amount of the weighting which, in his view, ought to be calculated on the basis of the cost of living at the official's exact place of employment, in this case in the Province of Varese, and not automatically in the capital of the country in question. In this case, the applicant maintains that the cost of living in the

Province of Varese was, during the years 1976 to 1978, substantially higher than in Rome. Secondly the applicant requests that the weighting for Italy, fixed at 146.4 by Regulation No 3087/78, be applied retroactively to 1 January 1976.

18 The applicant challenges the arrears of salary, calculated on the basis of Regulation No 3087/78, which, in his view, are in breach of Articles 64 and 65 of the Staff Regulations relating to the weighting, Article 24 of the Staff Regulations relating to the Commission's duty of assistance towards its officials and the principle of non-discrimination and the rules which require respect for essential procedural requirements.

19 The applicant thus first puts forward the argument that Regulation No 3087/78 infringes Article 64 of the Staff Regulations inasmuch as the surveys of the Statistical Office of the Communities for determining the weighting were carried out with reference to living conditions in the capital and not at the place of employment situated in the Province of Varese.

20 It should be noted that in the past the Council has interpreted Article 64 of the Staff Regulations as pointing not necessarily to the capital of the country of employment as the place of employment but, according to the circumstances of the case, the precise place of employment. Thus Regulation No 1/67/ECSC, 988/67/EEC and 9/67/EAEC of the Council of 12 December 1967 provided two weightings both for France (130.5% for Paris and for certain departments and 122.5% for the rest of the country) and for Italy (114% for Ispra and 114.5% for the rest of the country). It was only later that the Council decided to use a single weighting for each Member State.

21 That new system in reality confers in most cases a benefit on officials not resident in the capital since the cost of living there is generally higher than in the provinces. However, it seems that that is not the case specifically in Italy where the survey by the Statistical Office and the information supplied by the Italian Institute of Statistics show that the cost of living in Varese is higher than that in Rome.

22 In fact it is clear from the figures communicated by the Commission on the basis of the results of the survey carried out by the Statistical Office in

Varese in May 1976 taking into consideration 230 items of expenditure (excluding rent, heating and electricity which were the subject of a later investigation) that the cost of living in that province was 7.66% higher than in Rome. After the result of the investigation carried out in Varese on the level of rents had been taken into account, the difference was reduced to 2.76% which still represented a substantial difference within the meaning of Article 65 (2) of the Staff Regulations. Moreover it is clear from the reasons accompanying the Commission's proposal which led to Regulation No 3087/78 that the Commission itself entertained doubts as to whether sole reference to the cost of living in Rome was well founded since it stated that: "The use of a single weighting for each country of employment, worked out for the capital, places staff working in Ispra at a slight disadvantage. The statistics available show that the cost of living in Rome has risen less rapidly than in the Varese area, from which it may reasonably be assumed that prices in Rome are now lower than in Varese. This existence of lower prices in the capital than elsewhere is the exception rather than the rule in the Nine. In view of the number of staff employed in Ispra a special local price survey would appear justified. However, the Commission feels that it would be wiser not to innovate in this direction and to abide by the Council Decision of 1968, which provides specifically for the use of the price indexes relating to the capitals."

23 Under those conditions, in order that the rule contained in Article 64 of the Staff Regulations to the effect that account must be taken of living conditions in the various "places of employment" may be observed, that expression must be understood as meaning not only the capitals of the Member States but the exact places where the duties of a sufficiently large number of officials and other employees of the Communities are performed.

24 Therefore it is for the Community institutions, in cases in which the cost of living in such a place of employment undergoes fluctuations greater than those occurring in the capital of the State in question, to determine separable weightings. Hence the applicant's submission relating to the calculation of the weighting affecting his salary on the basis of the cost of living in the Province of Varese must be considered well founded.

25 As regards the retroactivity of Regulation No 3087/78 the applicant claims that that regulation ought to have been applied as from 1 January 1976 since substantial increases in the cost of living had occurred as from that year.

26 In fact it is clear from the reports of the Statistical Office of 17 and 29 June 1976 and from its memorandum of 17 August 1976 that changes of more than 2% in the cost of living as against that in Brussels had occurred in 1976 both in Rome and, to a greater extent, in Varese.

27 The Commission states in that connection that Article 65 (2) on the Staff Regulations, which 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", must be understood as giving the Council discretionary power to decide whether measures adjusting weightings should be retroactive or not.

28 That argument cannot be upheld. In fact the wording of Article 65 (2) precludes any interpretation to the effect that the Council is not obliged to adjust the weightings within a period of two months following any substantial change in the cost of living. It should be remembered that the Court in its judgment of 6 October 1982 in Case 59/81 *Commission* v *Council* [1982] ECR 3329, held that the Council's power in this respect was to decide whether or not there had been a substantial increase in the cost of living and, if there had, to draw the appropriate conclusions. Any other interpretation would run counter to the objective of the provision in question which is to guarantee to all officials the same purchasing power whatever their place of employment.

29 That submission is therefore well founded.

30 Consequently it is not necessary to examine the other submissions put forward by the applicant which were put only in the alternative.

31 The applicant's salary statement for the month of January 1979 must therefore be annulled, in so far as it is restricted to giving effect to Council Regulation No 3087/78, both as to the amount of the adjustment of the weighting and as to the retroactive effect of that adjustment, together with the decisions rejecting the applicant's complaints. Regulation No 3087/78 is not applicable to the applicant in so far as it takes no account of the cost of living in Varese and limits the retroactive effect of the adjustment of the weighting to 1 January 1978.

32 Since it may be expected that the competent institutions will take the measures necessary to comply with this judgment, examination of the claim for compensation for the pecuniary damage suffered by the applicant is deferred to a date to be fixed later if necessary.

33 Before 15 July 1983 the Commission shall report to the Court on the measures taken to compensate the applicant; the applicant will be given an opportunity to reply.

On those grounds,

THE COURT (First Chamber)

hereby:

1. **Annuls the applicant's salary statement for January 1979, in so far as it is restricted to giving effect to Council Regulation No 3087/78, both as to the amount of the adjustment of the weighting and as to the retroactive effect of that adjustment, together with the decisions rejecting the applicant's complaints; declares Regulation No 3087/78 not applicable to the applicant in so far as it takes no account of the cost of living in Varese and limits the retroactive effect of the adjustment of the weighting to 1 January 1978;**

2. **Orders the Commission to report to the Court before 15 July 1983 on the measures taken to comply with this judgment;**

3. **Defers examination of the claim for compensation for the pecuniary damage suffered by the applicant to a date to be fixed later if necessary;**

4. **Reserves the costs.**

O'Keeffe Bosco Koopmans

Delivered in open court in Luxembourg on 15 December 1982.

J. A. Pompe
Deputy Registrar

A. O'Keeffe
President of the First Chamber

OPINION OF MR ADVOCATE GENERAL CAPOTORTI

(see Case 158/79, p. 4404)