On those grounds,

THE COURT (First Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the parties to bear their own costs.**

Koopmans O'Keeffe Bosco

Delivered in open court in Luxembourg on 19 January 1984.

J. A. Pompe
Deputy Registrar

T. Koopmans
President of the First Chamber

OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 10 NOVEMBER 1983 [1]

Mr President,
Members of the Court,

The cases before the Court are brought by numerous officials against their institutions — the Commission,[2] the Council [3] and the Parliament [4] — seeking the challenge the lawfulness of Council Regulations No 160/80 of 21 January 1980 amending the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and No 161/80 of 21 January 1980 adjusting the re-

1 — Translated from the French.

2 — Case 211/80 *Michel Advernier and Others* and Joined Cases 219 to 228, 230 to 235, 237, 238 and 240 to 242/80 *Maurice André and Others.*

3 — Case 260/80 *Ivar Andersen and Others.*

4 — Case 262/80 *Kirsten Andersen and Others.*

muneration and pensions of Officials and Other Servants of the European Communities and the weightings applied thereto [1] or only the first of them.[2]

The facts which are at the origin of the actions and the substantive legal problems which they raise are identical to those of Case 64/80 *Giuffrida and Campogrande* v *Council* which led to the judgment of 26 February 1981.[3] That judgment held inadmissible an application made against their institutions by an official of the Council and an official of the Commission under the second paragraphe of Article 173 of the Treaty for a declaration that Regulation No 160/80 was void.

In the present cases the Court will no doubt find it necessary to decide as to the substance of the questions in terms of their different legal bases. The actions are or may be regarded as so-called staff cases brought under Article 179 of the Treaty and Article 91 of the Staff Regulations in which use is made of the incidental machinery for the review of the lawfulness of regulations provided by Article 184 of the Treaty. They are in fact directed [4] or may be understood as being partly directed [5] against certain of the applicants' salary statements and certain statements of payment of arrears of remuneration which are said to be void because they have been drawn up on the basis of Regulations Nos 160 and 161/80 which are alleged to be unlawful.[6]

Similar actions have also been brought by officials of the Court of Justice [7], the Court of Auditors [8] and the Economic and Social Comittee.[9] However, in those cases the time for filing the defence of the institution and other bodies concerned has been extended *sine die.* The proceedings against the Parliament have gone their full course at the request of the applicants becuase one head of their submissions directly concerns that institution and the parties were hoping for an answer on the substance. The Parliament has nevertheless declared itself in that respect ready to leave the matter to the Court and has basically confined its arguments to questions of admissibility.

I — Since the history of the events which have led to the actions and the causes thereof have been described in detail in the judgment in *Giuffrida and Campogrande* v *Council* [10] and in the Opinion of Mr Advocate General Reischl in that case [11] I shall summarize them only briefly.

1. Regulation No 160/80 was intended to remove the financial advantages enjoyed by certain officials (heads of family and those in receipt of expatriation allowance) following the incor-

1 — Joined Cases *André and Others.*

2 — Other cases.

3 — [1981] ECR 693.

4 — Cases other than the joined cases.

5 — Joined cases.

6 — In the cases other than the joined cases only the lawfulness of Regulation No 160/80 is challenged.

7 — Case 261/80 *Jan Lens* v *Court of Justice.*

8 — Case 259/80 *Caroline Buick-Lucas and Others* v *Court of Auditors.*

9 — Case 263/80 *John Baker and Others* v *Economic and Social Committee.*

10 — Facts and Issues — I. Facts and written procedure, [1981] ECR at pp. 695 and 696,

11 — Ibid. at pp. 704 to 708.

poration in 1976 [1] into the basic salaries of the weighting for Brussels and Luxembourg and the consequent adjustment of the other weightings. For that purpose Article 1 of the regulation reduced the scale of salaries for all officials and other servants.[2] However, in the case of those who would in consequence have suffered a net loss Article 2 maintained the previous basic salary.

Article 2 has been applied to only a very small number of officials, for Regulation No 161/80 which entered into force on the same day as part of the periodic review of remuneration led to an increase in basic salaries.[3] Moreover Regulation No 161/80 repealed Regulation No 160/80 except for Article 2 thereof.

I shall have occasion to mention many other facts when considering the substantive legal problems raised by the cases.

2. Nevertheless in view of the object of the actions may I add at this stage that the first individual measures applying Regulation No 160/80 taken by the Commission were the payment on 27 and 28 February of the arrears of remuneration for January and February 1980. In that institution the first monthly remuneration calculated according to the scales laid down by the regulation was paid in March 1980. In the Secretariat General of the Council the payment of the arrears of remuneration took place on 9 and 10 February 1980 and covered the period from 1 January 1979 to 31 January 1980. The first monthly remuneration calculated according to the new scales were paid at the end of February 1980 and the salary statements were sent to those concerned in March. In the Parliament the time-table was the same as that of the Council except that the salary statements for February 1980 were sent earlier to the officials concerned.

In the case of *Advernier and Others* and in the cases against the Council and the Parliament the applicants made to the competent authority in due time a complaint against the salary statements received and the statements of reasons therein included the same legal arguments. Those made to the Commission by the applicants in the joined cases were also made in due time.

There was an express decision rejecting the complaints on 28 July 1980 by the Commission and on 7 October 1980 by the Council. Since the Parliament did not reply within the period provided its silence is deemed to be an implied decision of rejection. [4]

3. The applicants brought the present cases on 27 [5] and 28 October [6] and 25 November 1980.[7]

By order of 8 July 1981 the Court held the actions directed against the Council in the joined cases to be inadmissible. The Court declared that in so far as they were brought on the basis of Article 179 of the Treaty the actions by officials of the Commission were not directed

1 — By Council Regulation No 3177/76 of 21 December 1976, the first regulation applying the method of calculation to be used in the periodic review of remuneration decided upon by the Council on 29 June 1976.

2 — Article 1 of the regulation.

3 — On the basis of the revised scale of Article 1 of Regulation No 160/80.

4 — Article 90 (2) at the end.

5 — Case 211/80 against the Commission.

6 — Joined cases.

7 — Cases 260 and 262/80 respectively against the Council and the Parliament.

against the competent authority in so far as they were directed against the Council and added:

"As Regulations Nos 160/80 and 161/80 are neither decisions addressed to the applicants nor decisions which, although in the form of regulations, are of direct and individual concern to them, the applications are equally inadmissible in so far as they are based on Article 173 of the EEC Treaty."

The cases were adjourned at the request of the applicants in the hope of reaching an amicable settlement. The proceedings resumed their course after failure of the negotiations.

It is necessary first of all to consider the problems of admissibility and then the substantive submissions.

II — Admissibility

1. Admissibility of the actions directed against the Commission in the joined cases

Up to the end the argument between the applicants and the Commission on this question has ben dogged by a misunderstanding. Whereas the objection of inadmissibility raised by the Commission in its defence concerns the actions only in so far as they seek the annulment of Council Regulations Nos 160 and 161/80, the applicants in their reply repeated the arguments which they had put forward to refute the objection of inadmissibility raised by the Council, which the Court subsequently rejected in the aforesaid order. Since they considered it preferable that the Court should decide on admissibility before dealing with the substance they moreover confined the reply to questions of admissibility and asked to deliver a reply on the substance in a separate pleading. That request was refused and the Commission also restricted itself in the same way in its rejoinder, whilst emphasizing that it was not challenging the admissibility of the actions as a whole.

In my opinion in so far as the actions directly seek the annulment of Council Regulations Nos 160 and 161/80 they are manifestly inadmissible for the reasons already given in the Court's order of 8 July 1981. However, they are also directed against the "way in which the salary has been calculated on the basis" of those two regulations. Accordingly it is conceivable that they seek the annulment of the salary statements drawn up on the basis of the aforesaid regulations, the validity of which is thus, as in the other cases, indirectly challenged.

2. Objection of inadmissibility raised by the Council and the Parliament

(a) The *Council* contests the admissibility of the action inasmuch as it seeks the annulment of the express decision by its Secretary General of 7 October 1980 rejecting the applicants' complaints.

The objection by the Council seems to me limited. The Council is not denying the admissibility of the said actions in so far as they challenge the lawfulness of the salary statements and statements of arrears and indirectly the regulation on the basis of which they have been drawn

up. It considers only that the applicants have no interest in acting against the express decision of rejection of their complaint. It contends in essence that annulment of the decision would leave subsisting both the effects of the regulation against which the applicants have raised an objection of illegality and those of the statements of salary and arrears which constitute the measures directly challenged.

That view appears to me unfounded. It seems to me that officials have an interest in challenging decisions rejecting complaints made against measures such as statements of salary and arrears, for such decisions confirm expressly and with an appropriate statement of reasons the validity of the measures. Generally speaking it would moreover seem somewhat illogical to allow the admissibility of an action in so far as it is directed against a measure adversely affecting an applicant and to refuse it in so far as it is brought against the express rejection of the complaint made against that measure which is the necessary consequence in the system of remedies provided by the Staff Regulations.

(b) Whilst leaving the matter to the Court, the *Parliament* also voices doubts about the admissibility of the actions brought against it. Its reservations are of two kinds: they concern the action on the one hand in so far as it relates to the statements of salary and arrears and on the other in so far as it makes use of the possibilities provided by Article 184 of the Treaty.

On the first issue the Parliament's reasoning assumes that according to the wording of the Staff Regulations only a decision of the administration may be the subject of a complaint and then, if necessary, of an action before the Court. In the Parliament's view the statements of salary and arrears at issue cannot be regarded as decisions taken by the administration, for they constitute only the application of provisions of regulations which the applicants consider unlawful. In other words in drawing up those statements the administration of the Parliament has not taken any decision; it has confined itself to carrying out a Council regulation which is binding on it.

That *prima facie* logical argument must nevertheless be rejected in the light of the case-law of the Court. It has several times recognized that statements of remuneration may constitute measures adversely affecting the recipients and starting the periods to run for taking steps through official channels and for bringing actions before the Court. [1] It seems difficult to follow the Parliament's analysis of those judgments to the effect that they are confined to stating that the receipt of a salary statement constitutes the starting point of the period for making a complaint. The following passage from the judgment in the

1 — Judgment of the Second Chamber of 21 February 1974 in Joined Cases 15 to 33, 52, 53, 57 to 109, 116, 117, 123, 132 and 135 to 137/73 *Schots née Kortner and Others* v *Council and Commission* [1974] ECR 177 and in particular paragraphs 14 to 19 at p. 189; judgment of the Second Chamber of 21 May 1981 in Case 29/80 *Reinarz* v *Commission* [1981] ECR 1311, paragraph 10 at p. 1321.

Reinarz case makes that restrictive interpretation impossible:

"In the present case, the document complained of consists of the first salary statement of May 1974, which enabled the applicant to establish the method of calculation". [1]

Even apart from that quotation I think that as soon as it is accepted that a pay slip causes time for bringing an action to start to run the case-law of the Court, by implication, confers on that class of document the quality of a measure adversely affecting a party. It seems to me that it cannot be otherwise by reason of the terms of Article 90 (2) of the Staff Regulations which provides that complainst must be made against a measure adversely affecting an official and may take the form, as in the present cases, of a measure of an individual nature and that the period for lodging complaints starts to run on the date of notification of the decision to the person concerned.

The Parliament also contests the objection, which is part of the claim for annulment of the salary statements, that Regulation No 160/80 is illegal. It maintains that Article 184 of the Treaty, which allows any party to proceedings in which a regulation of the Council is in issue to plead the grounds specified in the first paragraph of Article 173 notwithstanding the expiry of the period for bringing an action gives relief only from the period within which a direct action must be brought if it is not to lapse. It contends that the challenge to the lawfulness of Regulation No 160/80 as an ancillary issue in the present cases has become impossible since the judgment of 26 February 1980 declaring inadmissible an application for annulment pursuant to the second paragraph of Article 173 of the Treaty. In the Parliament's view the admissibility of the direct action because the contested measure is a regulation makes inadmissible for the same reasons an application in which the illegality is pleaded as an ancillary issue.

As with the previous argument this one is also contrary to the case-law. As long ago as the judgment of 14 December 1962 in the *Wöhrmann* case [2] the Court held that

"the sole object of Article 184 is ... to protect an interested party against the application of an illegal regulation". [3]

That view was clarified in the judgment of 6 March 1979 in the *Simmenthal* case [4] in which the Court stated that:

"Article 184 of the EEC Treaty gives expression to a general principle conferring upon any party to proceedings the right to challenge, for the purpose of obtaining the annulment of a decision of direct and individual concern to that party, the validity of previous acts of the institutions which form the legal basis of the decision which is being attacked, *if that party was not entitled under Article 173 of the Treaty to bring a direct action challenging those acts* by which it was thus affected without having been in a

1 — [1981] ECR at p. 1321.

2 — Joined Cases 31 and 33/62 *Wöhrmann KG and Lütticke GmbH* v *Commission of the European Economic Community* [1962] ECR 501.

3 — At p. 507.

4 — Case 92/78 *Simmenthal SpA* v *Commission* [1979] ECR 777.

position to ask that they be declared void". [1]

I may add that, as the applicants have already observed, in a previous action brought under the Staff Regulations the application was made against an individual decision refusing to pay the applicant a sum of money (expatriation allowance) due under a regulation [2] without the least doubt being raised as to its admissibility. [3]

III — Substance

Accepting thus the admissibility of the applications, may I turn to actual consideration of the substantive submissions. First of all, however, it seems to me appropriate to mention that:

Certain of them seem already to have been made in the *Giuffrida and Campogrande* case but are discussed at greater length here;

Certain submissions put forward in the joined cases are substantially similar in content to those made in the other cases, where, however, they are dealt with at considerably greater length;

Within each group of cases (joined cases and other cases) a connection which is at times very close may be found between different submissions.

It also happens that the same argument is put forward to support several submissions; in such a case I shall consider it only once.

A — All the applicants maintain that the statement of the reasons on which Regulation No 160/80 is based is inaccurate inasmuch as the second recital in the preamble thereto states that the manner in which the weighting was incorporated in the basic salary scales in 1976 resulted in "unintended increases in remuneration".

1. There is much evidence, in their view, that the Council voluntarily selected a method of incorporating weighting which would mean net increases in salary for certain officials including heads of family and those in receipt of the expatriation allowance.

Three months before the adoption of the decision of 29 June 1976 staff representatives had warned the Council of the distortions which would be involved if the system contempleted were implemented. In any event the Council could not have been unaware of that consequence in view of the experience of its experts and the results of previous incorporations.

Moreover, the Commission's proposal of 18 July 1977 for amending Regulation No 3177/76 and a memorandum from its Directorate General for Personnel and Administration of 8 November 1977

1 — Ibid. at paragraph 39, p. 800 (my italics); see also to the same effect the opinion of Mr Advocate General Dutheillet de Lamothe in Joined Cases 9 and 11/71 *Compagnie d'Approvisionnement et Grands Moulins de Paris* [1972] ECR at p. 411.

2 — Article 21 (2) of Council Regulation No 912/78.

3 — Judgment of the Second Chamber of 16 October 1980 in Case 147/79 *Hochstrass* v *Court of Justice supported by Council and Commission* [1980] ECR 3005.

show that in fact when adopting the method of June 1976 and the first implementing regulation the Council was not unaware that the system adopted for incorporating the weighting would result in financial gain for certain officials. In the applicants' view the system thus reflects a deliberate choice of salary policy.

2. In their defence the institutions admit that the Council was aware that there was a risk of the distortions which did in fact occur. They add however that they were surprised both by the size of the increases which certain officials received and by the losses suffered by others. To excuse the error to some extent the Council refers to the complexity of its task in relation to the adjustment of salaries owing to the need to ensure that the trend of salaries of officials of the Communities keeps in line with that of civil servants of the Member States. Let me observe that in addition to that difficulty, which is not contested, there was in 1976 the Council's intention to take advantage of the change in the method for the annual adjustment of remuneration to reduce to 100% the weighting for Belgium and Luxembourg and thus to give back to those weightings their true role, which is to compensate for the differences in the cost of living in the various countries of employment. [1] The institutions emphasize that that was the Council's major objective and that it was accepted by all the interested parties including the staff representatives. In those circumstances the difficulties encountered, which the Council had agreed to take upon itself, were in its view only a secondary, albeit unfortunate, effect of achieving its main objective. It moreover observes in that respect that it took the precaution to provide for their correction if necessary in the review clause (point V) which it inserted in its decision of June 1976. In any event the Council formally denies that the method adopted in 1976 for incorporating the weighting was the expression of a salary policy intended to favour certain categories of officials by this devious means.

3. In my opinion on adopting the method for adjusting remuneration in 1976 the Council was well aware that the system selected to neutralize the incorporation of the weighting for Brussels and Luxembourg in the basic salaries on the basis of net remuneration would involve more or less considerable increases in favour of all officials and other servants other than single persons not enjoying the various allowances. It is not even necessary to mention here the review clause, the scope of which has been challenged in relation to the examination of another submission, and which for that reason I shall consider in relation to that submission, since the documents produced by the applicants sufficiently disclose it.

It appears however from those very documents, especially those which show the efforts of the institutions to remove the distortions which appeared, that, as they have said, they were surprised by the occurrence of losses in certain cases

1 — Articles 64 and 65 (2) of the Staff Regulations.

and by the size of the gains found in very many other cases.

Yet other evidence seems to me to support that conclusion. As soon as it discovered the size of the increases caused by the system adopted the Council undertook to remove them. By Regulation No 2859/77 of 19 December 1977 adjusting the remuneration and pensions of officials and other servants of the European Communities and the weightings applied thereto it temporarily abandoned for one year the system which had led to the distortions observed during the previous year. It adopted definitively the neutral technique for indexing the tax grades on the weightings by amending on 26 June 1978 the method adopted two years earlier and by adopting on the same day Regulation No 1461/78 adjusting the weightings; "Article 2 thereof applies weightings for Belgium and Luxembourg to the tax grades without any limitation of time." [1] Finally the original cause of the distortions, which continued until then, was removed by Article 1 of Regulation No 160/80.

In view of those circumstances it seems to me exaggerated to claim that the increases which occurred had been intended by the Council and even more that they indicated a deliberate salary policy on its part. The words *"unintended increases* in remuneration" contained in the second recital in the statement of the reasons on which Regulation No 160/80 was based does not therefore seem to me to be inaccurate.

B — The second submission in the *Advernier* and *Andersen* cases relates to infringement of rules of law, namely the Council Decision of 29 June 1976 on the method for adjusting remuneration and Article 65 of the Staff Regulations. I shall consider along with that submission the sixth submission in the joined cases alleging breach of the principle contained in the maxim *patere legem quam ipse fecisti.*

1. The submission alleging disregard of the method of 1976 and beyond that Article 65 of the Staff Regulations may be set out as follows:

Article 1 of Regulation No 160/80 replaces the basic salary scales laid down by Regulation No 3084/78 and applicable until 30 June 1979 by lower salary scales from 1 July 1979. The scales of Regulation No 3084/78 were themselves adopted on the basis of those contained in Regulation No 3177/76 which constitutes the first application of the method defined by the Council Decision of 29 June 1976. Accordingly by replacing them the contested regulation disregards the 1976 method and since that was adopted in application of Article 65 of the Staff Regulations that is also infringed. More precisely, the infringement alleged relates to the fact that Regulation No 160/80, in laying down scales in which the basic salaries are lower than in the previous year, does not take account of the trend of remuneration in the national civil services during the reference period (1 July 1978

1 — Opinion of Mr Advocate General Reischl in the *Giuffrida and Campogrande* case [1981] ECR at p. 706.

to 30 June 1979) which constitutes Point II (2) of the decision on the method in relation to the specific indicator.

2. It seems to me that that submission must be dismissed on the ground that it disregards the legal basis and the actual objective of Regulation No 160/80 and its place in the hierarchy of relevant rules.

The reasoning would be valid if it related to Regulation No 161/80 which adjusted the remuneration of officials and other servants for the period from 1 July 1979 to 30 June 1980. Since it was adopted on the basis in particular of Article 65 of the Staff Regulations it had to have regard to that article as also to the decision of 29 June 1976 on its method of application. It does however have regard to them as its statement of reasons testifies and that is not denied by the applicants.

The contested regulation is of another kind. It is founded directly on Article 24 of the so-called Treaty merging the executives [1] and seeks to reform the Staff Regulations themselves and the Conditions of Employment of Other Servants. Thus it has a higher place than Regulation No 161/80 in the hierarchy of rules of law governing the Community Civil Service. It thus did not have to have regard either to Article 65 of the Staff Regulations which has the same rank as it and a different purpose or, *a fortiori*, to the decision of 29 June 1976.

Against that analysis it may nevertheless be countered that Article 1 thereof amends the basic salary scales adopted by Regulation No 3084/78 which adjusted remuneration for the period from 1 July 1979 to 30 June 1980; it is intended to remove the root of the distortions created in 1976. In doing so does it infringe the decision of 1976?

The answer is that it does not. On the one hand, as regards the future, as we have seen, the system of incorporating the weightings adopted in the decision had already been reformed, first provisionally by Regulation No 2857/77 and then definitively by the decision of 29 June 1978 amending Point II (2) (c) of the decision of 29 June 1976 and Regulation No 1471/78 of the same date. Further, neither the decision of 1976 nor Article 65 of the Staff Regulations, nor any general principle of law prohibited the abolition of past distortions provided that is was not done retroactively. On the contrary when adopting the decision of 1976 the Council stated that it did not intend to restrict its freedom of decision beyond what was incident to the application of Article 65 of the Staff Regulations. The review clause in the decision moreover allows it to correct any distortions.

The judgments cited by the applicants, [2] which refer to the obligation of the Council to respect the method of ad-

1 — Treaty Establishing a Single Council and a Single Commission of the European Communities signed in Brussels on 8 April 1965.

2 — 5 June 1973 in Case 81/72 *Commission* v *Council* [1973] ECR 575 and 26 June 1975 in Case 70/74 *Commission* v *Council* [1975] ECR 795 to which must be added 6 October 1982 in Case 59/81 *Commission* v *Council* [1982] ECR 3329.

justing remuneration which it undertook to follow are therefore irrelevant.

3. For the same reasons no breach of the principle contained in the maxim *patere legem quam ipse fecisti* has been established.

In the joined cases the applicants allege that in adopting the system for neutralizing the incorporation of the weightings for which it opted in 1976 the Council was binding itself to observe it. In adopting however Regulations Nos 160 and 161/80 it departed from it, they claim, and thus disregarded the aforesaid principle.

As however I have already said Regulation No 161/80 did not apply the 1976 method. As to Regulation No 160/80 it did not have to comply with a system alien to its objective.

C — 1. In all the cases the applicants refer to breach of the principle of due care arising from the general duty of good management and sound administration required of the Community institutions, which they must respect in exercising their power to make regulations.

In spite *inter alia* of warnings from the staff representatives the Council adopted in 1976 a method for adjusting remuneration and a regulation based on it, which it knew would result in financial advantages for certain officials.

It cannot therefore rely on the pretext of an alleged error to impose corrective measures several years later and in addition with retroactive effect.

2. For many reasons that submission must be dismissed. Although negligence in the exercise of a power to make regulations may certainly be relied upon in support of an action for damages, I doubt whether it can justify an objection of illegality capable of being put forward in support of an action for annulment. In any event, were it otherwise, the submission could be effectively put forward only against the regulation negligently adopted, namely Regulation No 3177/76, and certainly not against the regulation intended to make good the negligence. Since the statements of salary and arrears the annulment of which is sought were drawn up on the basis of Council Regulations Nos 160 and 161/80, the applicants may rely in support of their objection of illegality directed against those regulations only on defects which appertain to them. They cannot allege negligence committed on the occasion of the adoption of a previous regulation which is not the legal basis of the individual decisions which they seek to have annulled.

Moreover, if the applicants were right, any authority would risk having its decisions annulled on the ground that they depart from opinions, or even advice, expressed during the procedure leading up to them, whereas as a general

rule opinions are, as in this case, without any binding force.

That complaint must be dismissed.

D — All the applicants put forward breach of the principle of the protection of legitimate expectation.

That principle which is a general principle of law and accordingly ranks higher than secondary rules of Community law such as Council regulations, expresses the idea that those affected by the regulations, and their representatives, are entitled to expect that the Community authority will honour its undertakings.

The applicants consider that their legitimate expectations have been disappointed in several ways which it is appropriate to consider in turn.

1. Although they recognize that the review clause in the decision of 1976 on the method allows the decision to be amended, they deny that the Council is empowered to amend it unilaterally. They consider that the decision on the method was reached in the context of an agreement and therefore any amendments must be made in a similar way.

Although the staff representatives gave their assent in 1977 (on the adoption of Regulation No 2859/77) and in 1978 (on the change in the method itself and the adoption of Regulation No 1461/78) to the amendment for the future of the system of incorporating weightings in the salary scales, it is common ground that they refused it in relation to the amendment made by Regulation No 160/80.

I stress that Regulation No 160/80 makes no amendment to the system of incorporating weightings into the salary scales adopted by the decision of 29 June 1976; that amendment was the subject of the corrective decision of 26 June 1978. Its purpose was to remove the causes of distortion from the 1976 system which had subsisted since its implementation in Regulation No 3177/76 and which the 1978 decision, applying as it did only to the future, did not remove.

In any event under the system adopted for the drafting of legislation the authority with the power to issue regulations is entitled unilaterally to amend its previous measures. The Council thus had the power to adopt Regulation No 160/80 which definitively removes the questionable effects of Regulation No 3177/76 in spite of the reservations of the staff representatives.

2. The applicants also consider that the review clause contained in the Council decision of 20 June 1976 does not justify the frustration of their legitimate expectation that the system for incorporating the weightings selected at the time of the adoption of the decision would continue to apply. That clause was intended, they claim, only to create an appropriate framework for reviewing the method itself, which was to continue indefinitely. In using it to go back on the system of incorporating the weightings adopted in 1976 the Council gave it a scope alien to it. At no time during the lengthy discussions with the staff repesentatives did the Council inform them of its intention to use the review clause in such a way. Thus even the most experienced of all the officials were

entitled to believe that the clause certainly did not cover the effects of the system of incorporation of the weightings.

That complaint is also wrongly addressed. If it were well founded it would involve, for the reasons I have already expounded, the illegality not of Regulation No 160/80 but of the amending decision of 1978. Moreover even apart from what I have already said it is to be observed that the applicants' interpretation is incompatible with the wording of the review clause which includes review by the Council of the "results of applying the method ... with a view ... to ... rectifying any distortions".

3. Finally the applicants maintain in the alternative that they could legitimately expect the Council to maintain the bases of calculation contained in Regulation No 3177/76, if not from 1976 at least from the adoption of the decision of 26 June 1978, which establishes a new method of incorporating the wieghtings, and Regulation No 1461/78 of the same date which applies it for the first time. In the statement of the reasons on which its proposal for a regulation was to become the aforesaid regulation was based the Commission had stated that it was "not right to re-open the basis of the calculation previously adopted by the Council". For their part during the negotiations prior to the adoption of the new formula for incorporating the weightings the staff representatives made a point of emphasizing that "as regards the past, decisions taken must be upheld as they are. It would be inconceivable for the Council to go back on its own decisions which were taken with full knowledge of the matter and in spite of warnings ... of the drawbacks which might result therefrom" [1] and the Council made no reservation with regard thereto.

In my opinion that argument does not bear scrutiny. What do the matters to which the applicants refer reveal? In relation to the Commission there is only one conclusion: in 1979 it did not have the same opinion as it had in 1978 since it proposed to the Council the draft of what was to become Regulation No 160/80. That observation is however not decisive. The Council, it is true, may not adopt a regulation except after a proposal from the Commission but it is not bound to follow it. It could therefore have adopted the regulation in question even if the Commission had not changed its opinion.

As to the Council, there is nothing to show that its failure to react to the aforesaid declaration by the staff representatives must be regarded as acquiescence. Since the distortions caused in the salary scales by the former method of incorporating the weightings were not eliminated by the measures adopted in 1978, there is on the contrary nothing surprising in the fact that it was not decided to maintain definitively such inequality of treatment. In any event the precise assurances given by the administration to those concerned and required by the case-law of the Court before a breach of the principle of the

1 — The application by the Council that there should be no discussion of the document from which the quotation is extracted on the ground that it is confidential is obviously inadmissible since the same document was produced in the *Giuffrida and Campogrande* case against the Council without any reaction on the latter's part.

protection of legitimate expectation may successfully be relied upon, are absent here. [1]

In those circumstances the submission must be dismissed in its entirety.

E — In all the cases also the applicants claim that Regulation No 160/80 infringed their vested rights.

In considering that submission I shall deal at the same time with two submissions special to the joined cases. As it is worded the submission of disregard of the principle of fairness largely covers that of infringement of vested rights since it maintains that "it is repugnant to fairness to permit an administration to take away established positions ... which have been in force for many months and indeed years". I shall also give my opinion on the alleged infringement of Article 85 of the Staff Regulations.

1. In the applicants' view Regulation No 3177/76 gave those who were affected by it the right that the basic salaries applicable to them should be calculated pursuant to the system of incorporation of the weightings selected in 1976 at least so long as the 1976 method was in force.

Regulation No 160/80 which was adopted while the method was in force infringes those rights both by making retroactive to 1 July 1979 and fixing from that date the amount of remuneration at a lower level than that applicable on 30 June of the same year.

2. That submission is also unfounded, for it amounts to misunderstanding the legal nature of the ties between the Community institutions and their officials. Those ties are not of a contractual nature; they depend solely on the Staff Regulations. Accordingly the Council, which is the authority with the power to make regulations, is entitled at any time to make such amendments to the rules of the Staff Regulations as it considers consistent with the interests of the service.[2] As the Commission has very rightly observed the amount of remuneration of officials is laid down in the Staff Regulations.[3] The amount may therefore be altered at any time for the future and those concerned are not entitled to claim that it should be kept at the level previously fixed.

Nevertheless according to the case-law of the Court the new rules cannot have retroactive effect upon arrears of salary which have already fallen due under previous rules. The officials have a vested right to them and that right has its origin in specific Staff Regulations which were in force prior to the amendment decided upon by the competent authority.[4]

In the present case Regulation No 160/80 does not adversely affect the vested rights of officials in relation to arrears of salary or pension which have already fallen due. On the one hand it provides that no part of the amounts paid during the period between 1 July 1979 and the date of entry into force of

1 — Cf. the Opinion of Mr Advocate General Capotorti in Case 268/80 *Guglielmi* v *Parliament* [1981] ECR 2307.

2 — Cf. the Opinion of Mr Advocate General Mayras in Case 28/74 *F. Gillet* v *Commission* [1975] ECR at pp. 477 and 478.

3 — Article 66 in respect of basic salaries.

4 — *Gillet* v *Commission*, paragraph 5 at p. 473; cf. the Opinion of Mr Advocate General Mayras therein at p. 478 to the same effect.

the regulation is to be required to be repaid,[1] and on the other it establishes a transitional system for the benefit of officials who have been in receipt of increased remuneration ensuring that they should receive in future at least their previous minimum remuneration.[2]

Finally let me observe that those transitional provisions which expressly exclude repayment show that the applicants in the joined cases are obviously wrong in claiming that there is a breach of Article 85 of the Staff Regulations in relation to recovery of undue payment.

F — The last two submissions in relation to the internal lawfulness of the regulation adopted and put forward only by the applicants in the joined cases may also be speedily dismissed.

1. They claim that a breach of the principle of equality among officials in the calculation of their salaries, guaranteed by the Staff Regulations, was committed by the fact that, it seems, Article 1 of Regulation No 160/80 reduces the basic salaries only of officials recruited before 1 January 1977.

It suffices to observe in that respect that the regulation is applicable in principle from 1 July 1979 to all officials and other employees whatever the date of their recruitment. If there is a distinction it is in relation to the transitional measures in favour only of officials whose pecuniary rights are reduced for the future as a result of the application of the new basic salary scales.[3] Those officials therefore have no interest in citing the principle of equality which moreover has in no way been disregarded, for the Council could lawfully take the view that they were not in the same position as the other officials and that they thus represented a distinct class objectively determinable.

2. Finally it is obviously not possible to complain that the contested measures made the weightings an instrument of salary policy, since they are intended to ensure equality of treatment among all officials independently of their place of employment[4] and to ensure a speedy adjustment of salaries in the event of a substantial change in the cost of living in a place of employment,[5] which is alleged to amount to a misuse of power.

No such submission can be properly made either against the regulations adopted in 1980 or moreover with regard to the decision of 29 June 1976 and Regulation No 3177/76. As has been seen the latter were intended to give back to the weightings their function under the Staff Regulations, as described by the applicants, and Regulation No 160/80 merely removed distortions arising from the system selected for that purpose. The complaint ought to have been directed against the remuneration policy which the decision of 1976 specifically abandoned; the previous policy adopted by the Council in 1972 raised remuneration not by adjusting the basic salaries in Article 66 but by means of the weightings.

1 — Article 2 (1) (a).
2 — Article 2 (1) (b).
3 — Article 2.
4 — Article 64.
5 — Article 65 (2).

G — It remains for me to consider the submissions as to external lawfulness which the applicants put forward based on infringement of essential procedural requirements [1] and the fact that the Council was not empowered to adopt Regulation No 160/80.[2]

1. This last submission may be dismissed without delay.

In the applicants' view Regulation No 160/80 ought to have been adopted by the Council pursuant to Article 65 of the Staff Regulations and not Article 24 of the Merger Treaty since Article 1 replaces by new tables the salary tables laid down by regulation adopted by the Council on the basis of Article 65.

That argument overlooks the fact that apart from Article 1 the regulation in question includes an Article 2 laying down transitional provisions for which Article 65 is an insufficiently legal basis and that those provisions cannot be separated from those of Article 1 the adverse consequences of which they are intended to mitigate in respect of officials who until then had benefited from the distortions created in 1976.

2. In the view of the applicants in the other cases Regulation No 160/80 was adopted in disregard of essential procedural requirements in three respects; failure to take into account the opinion of the Parliament; disregard of the joint declaration on inter-institutional conciliation of 4 March 1975; and disregard of the decision on discussions with the staff.

(a) Two facts are said to show that in adopting Regulation No 160/80 on 21 January 1980 the Council did not really consider the opinion of the Parliament given on 18 January. On the one hand the Council had formally informed the staff representatives on 17 January of its decision to adopt the draft which was to become Regulation No 160/80. 17 January is therefore the date to be taken into account in determining whether the Council in fact observed the procedure of consulting the Parliament. Furthermore, 18 January 1980 was a Friday and 21 January a Monday. The closeness of those two dates separated by a Saturday and a Sunday and the complete rejection of the criticisms contained in the adverse opinion show that the Council was not able and did not intend seriously to take it into account.

It follows from the judgments of the Court of 20 October 1980 in the so-called isoglucose cases [3] that observance, on pain of a declaration of nullity, of the essential procedural requirement involved in due consultation of the Parliament implies that the Parliament expresses its opinion and the mere request for the opinion is insufficient in that respect unless all procedural ooportunities for obtaining it have been exhausted. Moreover I agree with the applicants in thinking that a measure must be regarded as void for disregard of an essential procedural requirement if it is

1 — Cases 211, 260 and 262/80.

2 — Joined cases.

3 — Case 138/79 *SA Roquette Frères* v *Council* [1980] ECR 3333, paragraphs 32 to 37 at pp. 3360 and 3361 and Case 139/79 *Maizena GmbH* v *Council* [1980] ECR 3393, paragraphs 33 to 38 at pp. 3424 and 3425.

shown that its author has failed to consider an opinion the provision of which is a prior requisite for the lawfulness of the measure.

(b) The present case however differs in two respects from the isoglucose cases. It is first of all common ground that Regulation No 160/80 was adopted after the Parliament had given its opinion. It must also be observed that the Council had not only requested the opinion of the Parliament on 29 June 1979 but had further subsequently asked for the emergency procedure to be applied. [1]

The documents supplied by the Council after the hearing show that at its meeting on 15 and 16 January 1980 (620th meeting of the Council) its members were not able to reach agreement on the adoption of the future Regulation No 160/80. Since the next meeting of the Council was that of 21 January (621st meeting) one of its representatives could not have issued on 17 January the formal declaration on which the applicants rely. Finally the same documents show that on 18 January the Committee of Permanent Representatives resumed consideration of the file in relation to the remuneration of officials in the light of the Parliament's opinion and was able the same day to recommend to the Council the adoption of the regulations at issue.

It thus appears that the Parliament's opinion was properly taken into account by the Council.

3. The last two parts of the submission will require less time.

(a) As the Court is aware, the conciliation procedure between the Assembly and the Council established by the Joint Declaration of 4 March 1975 "may be followed for Community acts of general application which have appreciable financial implications, and of which the adoption is not required by virtue of acts already in existence" (paragraph 2). [2]

The applicants consider that that procedure was disregarded because the Parliament in its resolution of 18 January took the view that the conditions for its application were satisfied in the present case and expressly requested its application by the Council in the event of the latter's deciding not to follow its opinion.

It is not necessary to decide whether the declaration in question constitutes only an undertaking of a political nature or whether it has legal effects; it suffices to observe that Regulation No 160/80 cannot be regarded as a measure having appreciable financial implication since Article 1 thereof was repealed on the day on which it entered into force by Regulation No 161/80 and Article 2 was applied to only some 5% of those benefiting from the distortions. Since that condition is of an objective nature, as soon as it was obvious that it was not satisfied it was not for one of the

1 — On 23 August, 29 October and 27 November 1979.

2 — Opinion of Mr Advocate General Reischl in the *Giuffrida and Campogrande* case [1981] ECR at p. 714.

institutions concerned to impose on the others recourse to a procedure subject thereto.

(b) Since the applicants' argument, in relation to the last part of the submission, on the procedure of discussion with the staff representatives is identical with that put forward by Mr Giuffrida and Mr Campogrande in Case 64/80 I shall adopt the view expressed on those questions by Mr Advocate General Reischl in his Opinion in that case. [1] Like Mr Reischl and for the reasons which he gives I also consider that part of the submission to be unfounded.

For all those reasons my Opinion is that the Court should:

Dismiss the applications as unfounded;

Order the defendant institutions to bear their own costs pursuant to Article 70 of the Rules of Procedure.

1 — [1981] ECR at pp. 713 and 714.