JUDGMENT OF THE COURT (FIRST CHAMBER)
19 JANUARY 1984 [1]

Kirsten Andersen and Others v European Parliament

(Official — Revision of salary scales)

Case 262/80

1. *Officials — Application — Measure adversely affecting — Concept — Salary statement applying the rules in force in relation to remuneration*
(Staff Regulations, Arts 90 and 91)

2. *Objection of inadmissibility — Article 184 of the EEC Treaty — Objective*

1. The salary statement prepared by an institution and issued to an official may constitute a measure adversely affecting him and be the subject of a complaint and ultimately an action. The fact that the institution concerned is only applying the regulations in force is irrelevant in that respect.

2. Article 184 of the EEC Treaty gives expression to a general principle conferring upon any party to proceedings the right to challenge incidentally, with a view to obtaining the annulment of a decision addressed to him, the validity of the provisions of regulations which form the legal basis thereof.

In Case 262/80,

KIRSTEN ANDERSEN AND OTHERS, officials of the Secretariat General of the European Parliament, represented by Georges Vandersanden, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Janine Biver, 2 Rue Goethe,

applicants,

v

EUROPEAN PARLIAMENT, represented by Martin Schmidt, Director of Personnel and Social Affairs, assisted by Alex Bonn, of the Luxembourg Bar,

1 — Language of the Case: French.

with an address for service in Luxembourg at the Chambers of Alex Bonn, 22 Côte d'Eich,

defendant,

APPLICATION for the annulment of the implied decision by the European Parliament rejecting the complaints submitted by the applicants against the decision of the European Parliament to pay their remuneration on the basis of Council Regulation 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 (Official Journal L 20, p. 1),

THE COURT (First Chamber)

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

Advocate General: S. Rozès
Registrar: A. W. H. Meij, Legal Secretary

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Facts and written procedure

1. Article 65 (1) of the Staff Regulations provides that the Council is each year to review the remuneration of the officials and other servants of the Communities and to determine any adjustment thereof.

Article 64 of the Staff Regulations provides that the remuneration should be weighted in accordance with the living conditions in the various places of employment. Article 65 (2) provides that

in the event of a substantial change in the cost of living, the Council is to decide, within two months, what adjustment should be made to the weightings.

At its meeting on 29 June 1976 the Council adopted a new method for adjusting the remuneration of officials and other servants of the Communities.

It appears from the file that the adoption of that new method of adjustment was intended, *inter alia,* to incorporate the weighting, which amounted at the time to 148.7 as regards Belgium and Luxembourg, into the basic salary scales. Without concomitant measures such incorporation would have involved a reduction in net remuneration since the basic salaries as increased are also the basis for the Community tax and other mandatory deductions.

To remedy that situation the staff representatives in the course of meetings with the Council preceding the adoption of the new method had proposed to weight the portions of remuneration liable to tax and other deductions not only with the new weighting to be decided but also with the weighting incorporated. Moreover, they had drawn attention to the risk of distortion arising from the incorporation of weightings if the least advantageous situation, for example that of an unmarried official not receiving any of the various allowances, were taken as a basis. Nevertheless the Council took a different course to avoid a reduction in net remuneration without providing for adjustment of the portions liable to Community tax along with the increase in basic salaries.

The new method of adjustment adopted on 29 June 1976 provided that the Council was to decide on remuneration adjustments in net terms and that the net rate thus fixed was to be incorporated, in accordance with the following method, in the salary scales given in Article 66 of the Staff Regulations and in Article 63 of the Conditions of Employment of Other Servants:

"The rate of adjustment decided shall be applied to the amount of the net salary for each step of each grade of official and for each class in every group of other servants.

The new scale in gross terms shall be drawn up by calculating for each step or class the gross amount which, after deduction of tax and compulsory contributions, gives the new net amount referred to above.

This conversion of net amounts into gross amounts shall be based on the situation of an unmarried official who does not receive the various allowances.

The incorporation of the net rate into the salary scale shall result in the weighting for Belgium and Luxembourg being fixed at 100 % and the weightings for other countries of employment being adjusted on the basis of the ratio between the cost-of-living indices in these countries and the cost-of-living

index in Brussels, expressed in each case by joint indices."

In consequence the new method provides that:

Allowance is to be made within the framework of the subsequent annual review for any interim adjustment of remuneration decided pursuant to Article 65 (2) of the Staff Regulations and made by adjusting the relevant weightings;

The current weighting for Belgium and Luxembourg is to be incorporated into the salary scales in accordance with the aforesaid conditions; the weighting for Belgium and Luxembourg thus becomes 100% and the weightings for the other countries of employment are to be adjusted accordingly.

There is also a review clause "with a view in particular to determining possible further improvements and rectifying any distortions".

The weightings were incorporated into the salary scales for the first time by Council Regulation No 3177/76 of 21 December 1976 adjusting the remuneration and pensions of officials and other servants of the European Communities and the weightings applied thereto (Official Journal L 359, p. 1). That regulation reduced the weighting for Belgium and Luxembourg, fixed at 157.8 from 1 July 1976, to 100 with effect from 1 January 1977 at the same time as new scales were introduced with effect from the same date.

2. Those measures caused distortion in the remuneration of officials to the advantage of those receiving allowances on their taxable income, or an expatriation allowance or both. In view of such distortions and in order to avoid their repetition in future the Council introduced 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 (Official Journal L 330, p. 1) an amendment to Regulation No 260/68 of the Council of 29 February 1968 laying down the conditions and procedure or applying the tax for the benefit of the European Communities (Official Journal, English Special Edition 1968 (I) p. 37). The amendment subjected the amounts liable to Comunity tax, for the period from 1 July 1977 to 30 June 1978, to a weighting of 106.084.

Subsequently, by a decision dated 26 June 1978 the Council amended the method of adjustment adopted on 29 June 1976 and introduced a formula for correcting the amounts liable for tax as provided for in the aforesaid Regulation No 260/68 of the Council.

Although the Council thus avoided a repetition of the distortion which appeared in applying Regulation No 3177/76 in the period from 1 January to 30 June 1977, nevertheless since subsequent adjustments of remuneration were based on the scale adopted in that

regulation, the distortion to which that led was repeated from year to year.

Since it was found that unintended increases in remuneration resulted from the manner in which the 157.8 weighting was incorporated in the basic salary scales, as decided in December 1976, with effect from 1 January 1977, the Council determined to put an end to that situation and on 21 January 1980 adopted Regulation No 160/80 amending the Staff Regulations (Official Journal L 20, p. 1). That regulation lays down a new table of gross monthly salaries and abolishes the distortions in question. It entered into force on 27 January 1980 with effect from 1 July 1979. It provides however that no part of the salaries paid betwen 1 July 1979 and the date on which the regulation entered into force should be required to be repaid. On the other hand it lays down a transitional scheme for the benefit of officials who might suffer a loss of income on application of the new scale. So long as the new scale would involve them in a loss of income the regulation provides that they are to continue to enjoy the benefit of the former scheme.

Except for certain special cases the reductions in basic salaries resulting from the adjustment of the scale were reabsorbed following the adjustment made on the same day by Council Regulation No 161/80 effecting the annual adjustment of remuneration on the basis of the revised scales (Official Journal L 20, p. 5) which also applied as from 1 July 1979.

3. On 26 April 1980 the applicant lodged complaints based on a common model under Article 90 (2) of the Staff Regulations directed both against the salary statements for February 1980 and the statements of payment of arrears of remuneration for the period from 1 January 1979 to 31 January 1980 and claiming that their remuneration and the arrears in question should be calculated without regard to Regulation No 160/80.

The European Parliament rejected the complaints by implication by not replying thereto within the period of four months provided for in Article 90 (2) of the Staff Regulations. Subsequently the applicants brought the present joint action on 25 November 1980.

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 without any preparatory enquiry.

However, at the request of the applicants the President of the First Chamber adjourned the opening of the oral procedure until after the judgment of the Court in Case 59/81 *Commission* v *Council*, which was given on 6 October 1982.

II — Conclusions of the parties

The *applicants* claim that the Court should:

"Declare that the application is admissible and well founded;

Order the defendant to pay the costs."

The *European Parliament* contends that the Court should:

"Dismiss the application as inadmissible;

Alternatively, as regards the substance of the application, take note that the Parliament leaves the matter to the Court."

III — Submissions and arguments of the parties

Admissibility

The *applicants* state that the application is directed against the statements of arrears and salary statements for February and March 1980, the annulment of which is sought in so far as they reflect the application of the revised scales introduced by Regulation No 160/80. The claim is therefore for annulment of individual measures and is accompanied by an objection of illegality as regards Council Regulation No 160/80.

The *European Parliament*, the *defendant*, observes that according to Article 90 (2) of the Staff Regulations the measure adversely affecting an official which he may bring before the Court must be a "decision" taken by the authority or the failure to adopt a measure required by the Staff Regulations. In its opinion the statements of salary, the annulment of which is sought, are not the specific expression of decisions taken by the administration but represent mere compliance by the administration with provisions of the regulations covering the remuneration of officials.

The objection of illegality is not admissible either because Article 184 of the Treaty does not apply in this case. Since a direct action by the applicants under Article 173 of the Treaty against Regulation No 160/80 would be inadmissible (cf. judgment of 26 February 1981 in Case 64/80, *Giuffrida and Campogrande* v *Commission* [1981] ECR 693), they cannot, in the Parliament's view, achieve the same end by means of an objection of illegality. Article 184 of the Treaty covers only cases in which the applicant has a right of direct action under Article 173 but in which he has allowed the period for bringing an action to expire.

In reply the *applicants* refer first of all to the case-law of the Court from which it appears that a statement of salary may constitute a measure adversely affecting an official within the meaning of the Staff Regulations, causing, when it clearly shows the decision taken, the period for bringing an action to start to run.

Then they claim that the *raison d'être* for the objection of illegality provided for in Article 184 of the Treaty is on the one hand to allow unprivileged applicants to challenge the validity of a provision applied to them and on the other to prevent the application of unlawful general measures which may no longer be challenged because the period for bringing an action to have them declared void has expired.

In its rejoinder the *Parliament* states that case-law has hitherto dealt only with the question whether a salary statement causes periods to start to run, which does not imply that it constitutes a decision within the meaning of the Staff Regulations.

In the present case the applicants' complaint, given specific form by the salary statements, arises entirely from the regulation on which they are based which the applicants cannot challenge by way of an objection of illegality.

Substance

The *applicants* put forward six submissions in support of their objection that Regulation No 160/80 is unlawful.

In the first place Regulation No 160/80 is based on an erroneous statement of reasons. Contrary to what is stated in the second recital in the preamble thereto it cannot be claimed that the regulation was adopted to correct "unintended increases" in remuneration resulting from the incorporation of the weighting into the salary scales.

It was in spite of an opinion to the contrary by the Commission, the staff representatives and the Working Party on the Staff Regulations and after staff representatives expressly drew attention to the problem of distortions that the Council adopted Regulation No 3177/76 which was to be at the origin of the increases in salary corrected by Regulation No 160/80. Moreover the Council has already in the past tried on two occasions the same method, which produced the same effects. In the applicants' view the Council was fully alerted to the risks of distortion inherent in the course of action contemplated.

By the same line of argument the applicants in their third submission allege that the Council, in adopting Regulation No 3177/76 in spite of the warnings given to it, failed to exercise due care in administration. After thus knowingly running the risk of accepting all the consequences arising from Regulation No 3177/76 it cannot subsequently justify its attitude by an alleged error.

The applicants' second submission is that the adoption of Regulation No 160/80 is incompatible with Article 65 of the Staff Regulations and with the new method of adjustment established in 1976. According to the judgment of 5 June 1973 (Case 81/72, *Commission* v *Council* [1973] ECR 575) on the annual adjustment of salaries for 1979 the Council was bound to observe the criteria which it established itself in adopting the new method of adjustment. That method does not allow the Council to reopen the issue of the salaries during the reference period, in the present case the period from 1 July 1978 to 30 June 1979. The Council was not therefore empowered to make the adjustment for 1979 on the basis of amended scales. The only ground capable of justifying in the present case a derogation from the method of adjustment would be an error previously made in drawing up the scales. In adopting Regulation No 160/80 the Council was however in no way correcting an error; on the contrary it had gone back on its assessment of salary policy as determined in 1976.

In those circumstances the applicants in their fourth and fifth submissions also rely on the principle of the protection of legitimate expectation and vested rights.

The review clause provided by the new method of adjustment would have allowed the Council, first on the adoption of Regulation No 2859/77 and then in 1978, to alter for the future the method of incorporating the weightings into the scale by inserting a forumla for adjusting the taxable portions of remuneration in accordance with the view expressed by the staff representatives in 1976. The Council however frustrated the applicants' legitimate expectation of the observance of the established method by using the review clause to reopen the

issue of the incorporation of the weightings into the scale.

Further, Regulation No 3177/76 gave the applicants vested rights in the maintenance of the salary scales arising from the application of the method of incorporating the weightings in force at the time for the purpose of the subsequent annual adjustments of their remuneration.

The applicants' sixth submission is that Regulation No 160/80 was adopted in breach of essential procedural requirements. The Council formed an intention to adopt the regulation before the opinion of the European Parliament, which was unfavourable, was known. Furthermore the Council observed neither the conciliation procedure demanded by the Parliament pursuant to the Joint Declaration of 4 March 1975 (Official Journal C 89, p. 1) nor the procedure for consultation with the staff which the Council terminated before the opinion of the Parliament was given.

The *European Parliament* states that it leaves to the Court the matter of the substance of the application.

IV — Oral procedure

At the sitting on 15 September 1983 the parties presented oral argument.

The Advocate General delivered her opinion at the sitting on 10 November 1983.

Decision

1 By application lodged at the Court Registry on 25 November 1980 Kirsten Andersen and 28 other officials of the European Parliament brought an action under Article 179 of the EEC Treaty for the annulment of their salary statements for February and March 1980 in so far as those statements were based on the provisions of Council Regulation 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 (Official Journal L 20, p. 1).

2 The applicants have stated that they are challenging by their action the individual decisions addressed to them and, by way of an objection of illegality, the validity of Regulation No 160/80 on which the contested decisions are based.

3 The European Parliament raises two objections of inadmissibility with regard to the action. In the first place it contends that the salary statements the

annulment of which is sought are merely the implementation by the administration of the provisions of regulations providing for the remuneration of officials; accordingly they cannot be regarded as decisions since no administrative authority has to decide any problem whatsoever.

4 That objection must be dismissed. It follows from the case-law of the Court and in particular the judgment of 27 October 1981 (Joined Cases 783 and 786/79 *Venus and Obert* v *Commission and Council* [1981] ECR 2445) that the salary statement prepared by an institution and issued to an official may constitute a measure adversely affecting him and be the subject of a complaint and ultimately an action. The fact that the institution concerned is only applying the regulations in force is irrelevant in that respect.

5 In the second place the European Parliament contends that the objection of illegality put forward by the applicants is not admissible. Where the applicants cannot bring a direct action against a regulation the Parliament claims that they cannot, as is apparent from the case-law of the Court, achieve the same end by the indirect means of an objection of illegality. Article 184 of the Treaty does not apply in the present case since it refers to the special case of an applicant who would have been able to bring a direct action under Article 173 but has allowed the time for doing so to expire.

6 On that issue it suffices to recall, as the Court has stated *inter alia* in the judgment of 6 March 1979 (Case 92/78, *Simmenthal* v *Commission* [1979] ECR 777) that Article 184 of the EEC Treaty gives expression to a general principle conferring upon any party to proceedings the right to challenge incidentally, with a view to obtaining the annulment of a decision addressed to him, the validity of the provisions of regulations which form the legal basis thereof.

7 It follows that the submissions of the Parliament in relation to admissibility must be dismissed and that it is necessary to consider the substance of the application.

8 All six submissions put forward by the applicants challenge the validity of Regulation No 160/80. The European Parliament has left this matter to the Court.

9 The first submission alleges an inaccurate statement of reasons in the regulation. The recitals in the preamble thereto refer to the need to correct "unintended" increases in remuneration resulting from the incorporation of the weighting into the salary scales of officials, whereas in fact, it is claimed, the Council had been alerted to the risks inherent in the manner in which the incorporation was effected and the distortions which would result therefrom; in nevertheless proceeding therewith the Council thus acted with full knowledge of the situation.

10 The incorporation of the weighting into the basic salary scales laid down by the Staff Regulations was decided upon by the Council on 29 June 1976 as part of a new method of adjusting the remuneration of officials. The incorporation was effected by Council Regulation No 3177/76 of 21 December 1976 adjusting the remuneration and pensions of officials and other servants of the European Communities and the weightings applied thereto (Official Journal L 359, p. 1). The regulation introduced new scales with effect from 1 January 1977 and reduced the weighting for Belgium and Luxembourg, which had been 157.8 from 1 July 1976, to 100.

11 It must be observed that the recitals in the preamble to Regulation No 160/80 expressly mention "that unintended increases in remuneration resulted from the manner in which the 157.8% weighting was incorporated in the basic salary scales" and for that reason "this situation should be rectified by adjusting the basic salary scales". Thus the regulation itself states in the recitals thereto that it is intended to correct a situation which appeared following the reform of 1976 and in which increases in remuneration were revealed which did not relate to that reform.

12 Those considerations constitute a sufficient statement of reasons on which to base the operation of revising the salary scales. In particular it by no means appears from the decisions and regulations prior to Regulation No 160/80 that the Council, as part of the method for adjusting the remuneration

adopted in 1976, intended to favour certain officials as against others rather than to arrange for the incorporation of the weighting into the scale in a manner which would necessitate subsequent correction of certain distortions the importance of which, moreover, it under-estimated at the time.

13 The second submission alleges infringement of rules of law inasmuch as the Council did not observe the criteria which it had itself laid down in adopting the decision of 1976 in relation to the method of adjusting remuneration. Whereas Regulation No 3177/76 constituted a correct application of the method of adjustment defined by that decision Regulation No 160/80 was intended to call that application in question, it is claimed, by readjusting the basic salaries and thus breaking undertakings entered into in relation to the adjustment of remuneration.

14 That submission must be dismissed. On the one hand it overlooks the fact that the Council in the decision of 1976 had inserted a review clause relating in particular to distortions which might arise from the incorporation of the weighting into the scale. On the other hand the method adopted by the said decision was intended to implement Article 65 of the Staff Regulations; although it might thus result in circumscribing the exercise by the Council of the discretion conferred upon it by Article 65 in adusting remuneration, it does not affect Regulation No 160/80, which is a regulation amending the Staff Regulations pursuant to Article 24 of the Treaty Establishing a Single Council and a Single Commission of the European Communities and adopted according to the procedures and with the guarantees involved in such an amendment.

15 In their third submission the applicants maintain that the Council has infringed the principle of due care inasmuch as the distortions which it sought to remove by Regulation No 160/80 were the actual results of the implementation of Regulation No 3177/76. The Council could have avoided the occurrence of distortions if it had postponed the incorporation of the weighting into the salary scale as the staff representatives proposed in order to carry out the necessary calculations for a correct assessment of the possible distortions.

16 It must be observed that that submission overlooks the fact that the objective of Regulation No 3177/76 differs from that of Regulation No 160/80. Whereas the former is intended to implement the Council decision of 29 June 1976 by incorporating the weighting into the scale subject to subsequent review, especially as regards possible distortion. It was in fact the Council's task to remove as soon as possible distortion consisting in a favourable treatment of certain officials as against others as regards their pecuniary entitlements. The submission must therefore be rejected.

17 The fourth and fifth submissions complain that in adopting Regulation No 160/80 the Council infringed the principle of the protection of legitimate expectation and the vested rights of the applicants.

18 Those submissions are first of all based on the argument that Regulation No 160/80 substantially departs from the method which the Council had selected in June 1976. It nevertheless appears from the previous considerations that the regulation is outside the field of application of the method adopted for implementing Article 65 of the Staff Regulations.

19 The two submissions are also based on a slightly different argument, namely that the rights acquired by officials under Regulation No 3177/76 cannot be called in question by the Council save in the event of the adoption of a new method for adjusting remuneration.

20 In that respect it must be remembered that Regulation No 160/80, which has retroactive effect from 1 July 1979, provides that no part of the amounts paid between that date and the date of its entry into force, namely 27 January 1980, is to be required to be repaid. Furthermore, it provides transitional measures intended progressively to reabsorb the distortions without bringing about a reduction in the amounts actually paid. Moreover, the effect of Council Regulation No 161/80 of 21 January 1980 effecting the annual review of remuneration under the revised scales (Official Journal L 20, p. 5) was to increase, also from 1 July 1979, (the remuneration resulting from the application of Regulation No 160/80 in such a way that, apart from certain

special cases, the reductions in basic salaries resulting from the revision of the scale were immediately re-absorbed.

21 In those circumstances there has been disregard neither of legitimate expectations nor of vested rights. The applicants' argument to the effect that to determine whether there has been such disregard it is necessary to ascertain, not whether or not there has been a reduction in the amounts actually paid but whether the rate of remuneration has been frozen for a certain period, must be rejected in circumstances such as the present, in which the regulation at issue is intended precisely to put an end to unjustified increases such as those resulting from the scale previously applicable.

22 The sixth submission alleges infringement of essential procedural requirements. In adopting Regulation No 160/80 of 21 January 1980, whereas the opinion of the European Parliament was not given until 18 January 1980, the Council, it is claimed, failed in its duty to take account of the opinion; in doing so it also disregarded the rules governing negotiations between the Council and staff, which assume that all the facts of the problem are known. Finally, the Council disregarded the Joint Declaration on inter-institutional conciliation since the Parliament had in vain requested that the conciliation procedure be initiated in the present case.

23 The complaint that the opinion of the European Parliament was not taken into account has no factual basis. It is apparent from the documents prepared by the secretariat of the Council and included in the file that after being informed that the opinion adopted by the Parliament at the sitting on 18 January 1980 did not depart from the draft opinion of which it had cognizance the Permanent Representatives Committee decided on 18 January 1980 to resume consideration of the problem of staff remuneration and to recommend to the Council the adoption of two regulations and certain declarations to be included in the minutes of the Council sitting. It thus appears that the opinion of the Parliament was properly taken into account by the Council.

24 As regards inter-institutional conciliation, the applicants have referred to the Joint Declaration of the European Parliament, the Council and the

Commission of 4 March 1975 (Official Journal C 89, p. 1). That declaration provides that the conciliation procedure which it lays down may be followed for Community measures of general application which have appreciable financial implications, and of which the adoption is not required by virtue of existing measures.

25 It follows that the procedure was not devised for cases in which the Community measures in question does not have appreciable financial implications. As regards Regulation No 160/80 the applicants have not established or even alleged that it has such implications. In those circumstances their complaint must be rejected since the sole fact that the Parliament had requested the initiation of the conciliation procedure is not capable of affecting the legality of the regulation.

26 It follows from all the foregoing that the action must be dismissed in its entirety.

Costs

27 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. However, under Article 70 of the Rules of Procedure in proceedings brought by servants of the Communities the institutions are to bear their own costs.

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

(see Case 211/80, p. 147)