On those grounds,

THE COURT

hereby:

1. **Dismisses the action as unfounded;**

2. **Orders the applicant to pay the costs.**

Lecourt Mertens de Wilmars Mackenzie Stuart Donner Monaco

Pescatore Kutscher Sørensen O'Keeffe

Delivered in open court in Luxembourg on 26 June 1975.

A. Van Houtte — Registrar

R. Lecourt — President

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 28 MAY 1975 [1]

Mr President,
Members of the Court,

In my opinion in a case brought by various trade unions of the European public service against the Council (Judgment of 18 March 1975 in Case 72/74 *Union Syndicale-Service Public Européen v Council)* I had the opportunity not so long ago of explaining the basis of a dispute between the Council on the one hand and the organizations of the personnel of the European Communites and the Commission on the other on the annual adjustment of salaries and pensions which are paid by the Communities. I can therefore be relatively brief in the introductory remarks on the case today between the Commission and the Council.

The relevant authority for the matter in dispute is Article 65 of the Staff Regulations. According to this the Council has each year to review the remunerations of the officials and other servants of the Communities and in this

1 — Translated from the German.

— if I may for the moment limit myself to this part of the provision — particular account is taken of any increases in salaries in the public service of Member States.

In applying this provision it has been the custom for many years — the Commission says since 1966 — to take account of the average increase in the purchasing power of salaries in the public service of the Member States. For this there was at first used only a so-called joint specific index, which was prepared on the basis of the variation in remuneration of selected groups in the national public services and the variation in the cost of living.

The method used and the results obtained with its help, however, led continually to tension between the staff organizations and the Council. The former complained that this did not ensure that the Community salaries, in so far as the increase in the purchasing power was concerned, kept pace with the remuneration in the national public services. Attempts therefore began in December 1970, beginning with a request by the Council to the Commission, to improve the working methods to be used for the application of Article 65 of the Staff Regulations. They led to the Council resolving on 20 and 21 March 1972, on a proposal of the Commission, for a trial period of three years to use another system for determining the variation in the purchasing power of the national salaries. It is based — as I have already explained in my opinion in Case 72/74 — on two indices, namely an improved specific index and an index which shows the total emoluments per head in the national administrations.

This method was applied for the first time to the period from July 1971 to June 1972, with the result that there was a specific index of 3·6 % and a total emoluments per head index of 3·9 %. Since the Council did not then accept the Commission's proposal of a net salary adjustment of 3·75 %, but resolved under the heading of increase in purchasing power, on a salary increase of 2·5 % for the period from 1 July 1972 (cf. the regulation of 12.12.72), there resulted the first case brought by the Commission against the Council (Case 81/72). It concluded with the judgment of 5 June 1973 ([1973] ECR 575) in which it was stated that the Council had bound itself by its Decision of 20 and 21 March 1972 to observe certain criteria and that its discretion was confined between the joint specific index and the total emoluments index. Accordingly the Council fixed by a decision of 9 August 1973 a salary adjustment of 3·65 % with effect from 1 July 1972.

It was not long after this that the problems became apparent which have led to the present action.

In connexion with the establishment of the figures relating to the period from July 1972 to June 1973 the Commission at first took the view that the figure which had been given as the Italian specific index was not suitable to reflect the variation in the purchasing power in the Italian public service because it did not take account of all the amounts actually paid. It therefore used in its report of 7 November 1973 for Italy the total emoluments index instead of the specific index. This gave a joint specific index of 1·6 % for the six original Member States and 1·2 % for all the nine Member States. Having regard to the total emoluments index (3·6 % for the six original Member States; 3·2 % for all nine Member States) the Commission thought it ought to propose a salary increase of 2·8 % as from 1 July 1973.

Shortly afterwards however it received from the Italian source information according to which the Italian specific index — taking account of all payments — amounted to 30·4 % for the period in question. This led to a new joint specific index of 7·3 % for the nine Member

States and 9·8 % for the six original Member States, and to an amended proposal of 3·5 % salary adjustment.

What the Commission was able to infer from notes from the Italian Ministry of Finance and Italian regulations and laws made it think that the salary adjustment in the past had not been done on a correct basis. The documents referred to showed that before December 1972 and January 1973 certain grants to Italian officials had been taken into account in the total emoluments index but not in the specific index. They were included in the specific index only after this date, for from then on the grants in question were either included in the basic salary or in a general adjustment supplement. The Commission informed the Council of this in a letter dated 10 December 1973. Since in the Commission's view the proposed salary increase of 3·5 % was not complete compensation for the shortcomings found, it made proposals to remedy the situation.

Although the Council thereafter fixed a salary adjustment of 3·3 % with effect from 1 July 1973 by a Decision dated 18 December 1973, it stated expressly its willingness to examine the proposals the Commission had intimated it would make.

The Commission made such a proposal in a report dated 14 February 1974. It anticipated a salary increase of 5·4 % with effect from 1 July 1972 as compensation for incorrect salary adjustment. The proposal for a regulation which the Commission put to the Council on 21 March 1974 was in similar terms. The Council did not however adopt this, even after hearing two neutral advisers, Mr Rey, a former President of the Commission and Mr Barre, a former Member of the Commission. At the meeting from 21 to 23 July 1974 it adopted the resolution not to alter the Decision of 18 December 1973, that is, not to provide for any retrospective salary adjustments.

This caused not only the trade unions of the European public service but also the Commission to bring the matter before the Court with the object of having the Decision of July 1974 annulled on the ground of infringement of Article 65 of the Staff Regulations and of the Decision of the Council of 21 March 1972.

My view of this dispute is as follows:

1. Let me briefly preface my remarks.

The subject-matter of the action is — as we have seen — the refusal of the Council, expressed in the Decision of July 1974, to undertake any salary adjustment for the previous years. In the Commission's view this refusal is illegal, because both in 1972 and in 1973 the salaries were wrongly fixed. This arises from the fact that the joint specific index for the appropriate period for both the said years was defective due to an incorrect fixing of the relevant Italian index. The Italian specific index did not completely reflect the variation in the purchasing power of the salaries of Italian officials during the appropriate period 1971/1972, because it did not take account of a large part of the grants paid to the officials. It is true these grants were taken into account in the reference period 1972/1973, but the fact could not be disregarded that the resulting specific index showed not only the increase in the purchasing power of the reference period 1972/1973 but also partly that of the previous years.

On the basis of this argument and the factors brought to light in the action, however, the conclusion must be reached at the outset that, even if the Commission is right in its criticism, at the most the salary decision for 1972 will be affected but not that for 1973.

In 1972 the decision on salaries — as we have seen — kept closely to the specific index (3·6 %), while the total emoluments index (3·9 %) was not taken into account. When it is shown, therefore, that for the

appropriate period a higher Italian specific index and therefore a higher joint specific index is to be taken as a basis (the influence of the Italian index is approximately 28 %), then the salary decision for this period will certainly be affected.

In 1973 the salary decision was taken on the basis of a specific index of 7·3 % and a total emoluments index of 3·2 %. It was 3·3 % and thus kept quite close to the total emoluments index. When, due to the reduction of the Italian specific index (which partly reflected the salary variation of earlier years), it was necessary to reduce the joint specific index for this period, this would obviously have no effect on the salary decision taken, which was based on the total emoluments index.

Accordingly, in view of the objections brought by the Commission, it can only be a question of inquiring whether the fixing of the salaries based on the 1971/1972 period must be revised.

2. The arguments so far have already made clear that the dispute is whether the salary variation of a Member State, namely Italy, has been sufficiently taken into account for the 1971/1972 period in the salary decision for 1972. The Commission takes the view that this is not the case and it opines that two objections may be made to the Council:

— the objection that Article 65 of the Staff Regulations is infringed and
— the objection that there has been an incorrect application of the Decision of the Council of March 1972, which is equivalent to alleging a violation of the principle that the legitimate expectation of the persons concerned must be protected.

(a) The following may be said on the first objection:

Article 65 states — in so far as is relevant here:

'The Council shall each year review the remunerations of the officials and other servants of the Communities ... During this review the Council shall consider whether, as part of economic and social policy of the Communities, remuneration should be adjusted. Particular account shall be taken of any increases in salaries in the public service and the needs of recruitment.'

In my opinion the wording, and especially the last sentence, which the Commission considers especially relevant, makes it clear that Article 65 does not alone resolve the questions in the present case, that is, it affords no support for the Commission's case.

Obviously the said provision is not sufficiently precise to answer the question whether grants and allowances which national officials receive are to be taken into account in salary adjustment. It is further material that Article 65 stipulates only that *particular account* shall be taken ('prise en considération') of any increases in national salaries. It cannot be said with regard to the Italian allowances which are in question here that the Council has violated this not very extensive obligation. The allowances — as we have seen — were included in the total emoluments index and were thus known to the Council in fixing the salary for 1972. Moreover, after it had become apparent in the autumn of 1973 how the Italian specific index was computed, the Council was aware of this fact when in December 1973 it made the necessary salary adjustment. Finally, it is important that Article 65 allows the Council a discretion. The Council has to consider whether, as part of economic and social policy of the Communities, remuneration should be adjusted, and in this, as appears from the word 'particular', the increase in national salaries is only one of several factors to be taken into account.

I take the view that the Commission's action can hardly be declared

well-founded on the basis of Article 65 of the Staff Regulations alone.

(b) Of more significance, on the other hand, is the second objection made by the Commission. This requires examination of whether the Council has respected the Decision taken in March 1972 in application of Article 65 of the Staff Regulations in so far as it relates to the establishment of the joint specific index and thereby also to the establishment of the relevant national indices.

(aa) In this connexion, before I go into the details of a difficult examination, I would like to make two things clear.

You will remember that the Council emphasized in its pleadings and then again at the hearing the unavoidable defectiveness of statistical indices and declared that criticism relating to the extent to which the indices considered by it were representative was irrelevant. It also made play of the difficulties which have apparently arisen in the application of the Decision of March 1972 in the new Member States. Further, the Council in the written procedure has noted the declarations of the Italian authorities to the effect that the scope of the Italian specific index, as notified in the autumn of 1973 (30·4 %), was partly due to the reorganization of the Italian administration and in consequence did not represent only an increase in purchasing power.

In my opinion it is right to make clear at the outset that these references are not relevant to the decision of the present case.

To start with, no-one would doubt that statistical indices, which comprise various values, may be representative in varying degrees and always give only approximate values. It is not therefore the degree to which the indices used were representative which is the subject of our examination, but only the question whether in the past *the* degree of representativity has been achieved, for which binding rules exist. In other words, the recognition of the general unreliability of such factors does not justify toleration of a disregard of the rules which apply in the establishment of a value necessary for a joint index. In this connexion, so far as concerns the reference to the difficulties which have occurred in the new Member States, which apparently have necessitated the use there of merely approximate values, it suffices to recognize that the difficulties — if I see it correctly — relate not to the year 1971/1972, which concerns us here, but to the year 1972/1973. Apart from this, such facts obviously do not justify departure in the other Member States from methods laid down in a binding manner, as is the case with the values necessary to establish the salary adjustment.

As far as the Italian statements on the scope of the Italian specific index for the reference period 1972/1973 are concerned, the following is to be observed: in my opinion it can be left open whether, having regard to the fact that the specific index relates only to certain categories of officials, events such as the alleged reorganization of the Italian administration can be reflected not in the specific index but at most in the total emoluments index, as the Commission considers right. For us it must be decisive that the relevant value (30·4 %) was notified by the Italian authorities with reference to the joint specific index and was thus fully effective. If the Council in fixing the salaries for 1973, in which this value was relevant, did not consider it necessary to undertake an analysis of the said value according to the increase in purchasing power of the salaries on the one hand and the reorganization of the administration on the other, it is certainly not possible to limit the evidential weight of this value in so far as it relates to the present proceedings.

(bb) Let us now turn to the central issue of the dispute, namely the question whether the disregard of certain allowances and grants under Italian civil service law, which indeed can be said to have occurred in respect of 1971/1972, means that the Italian specific index was prepared incorrectly in this respect, that is in disregard of clear rules of law, which would involve the inaccuracy of the joint index. I will not now read the relevant measure, the Decision of the Council of March 1972. It will be necessary to go into the details hereafter, in discussing the arguments put by both parties.

In the Council's view the most important factor is that it is stressed in this decision, on the subject of reparation of the specific index, that the index of the variation in the salaries in the public service in the Member States is to be prepared according to the methods previously used. On this point reference is made to a note dating from 1966 relating to the method to be used in the application of Article 65 of the Staff Regulations. From this it appears however that the term salaries means general and permanent payments and that consideration of all other possible allowances and grants is not required.

It must certainly be admitted that this argument is impressive, since it is stated in the said note from 1966 under the heading 'Notion des traitements': 'Il y a lieu de tenir compte de tous les émoluments ayant le caractère de rémunération et qui sont payés de façon générale et permanente sur une base réglementaire.'

The first impression of the correctness of the Council's argument is however quickly destroyed if the Commission's argument is considered.

In this I am not thinking so much of the Commission's view that the wording 'payés de façon générale' does not point so conclusively to effective remuneration of all officials as would an expression referring to the totality of officials and payments to them. The Commission infers from this, as we know, that a reasonable interpretation of this phrase would be that 'general' means 'a broad spectrum', and accordingly it would be appropriate where necessary to give a fictitious average value which would apply to all officials.

I am referring rather to the fact that the Commission, referring in particular to the whole system in the note dating from 1966, reproaches the Council for having wrongly limited its observation to *one* of the factors mentioned in the note. Certainly the Commission can with justice refer to the fact that the system of assessing the variation of salaries in the public service, on page 4 at letter (b) in the 1966 note, is divided into several parts and there is no reason for giving special precedence to any one of these paragraphs, that is, for supposing that any one has special weight. It must accordingly be inferred that a rule having the same significance as the concept of 'salaries' previously mentioned lies behind the fourth subparagraph, which, significantly, is headed 'Prise en compte d'autres éléments', that is, uses phrases corresponding to those which are to be met under the heading 'Notion des traitements'. This rule states: 'La fixation en commun d'une méthode de travail en vue de l'examen de l'évolution des traitements publics dans les États membres n'empêche pas les Commissions de faire valoir, le cas échéant, d'autres éléments que ceux visés par ladite méthode.' From this it may reasonably be inferred that already under the system laid down in 1966 other additional factors in the system of remuneration besides the salaries had to be taken into account. Apparently this was a common practice, the is an attempt was made to reflect the actual salary situation in the Member States as accurately as possible. In support of this there are the detailed statements of the Commission at the hearing. They related to various allowances in France which

were in no way granted to all officials; they gave a similar impression of Belgium, the Federal Republic of Germany, Denmark, Ireland and even Italy and they made it clear that the said practice was to be met with even after the Decision of March 1972 was reached.

In my opinion it is quite reasonable to infer as the Commission does that already under the system laid down in 1966 it was inconceivable to leave some 30 % of the increase in purchasing power of national salaries out of account, as has happened in fixing the Italian specific index for the reference period 1971/1972.

If these considerations show that there are considerable doubts in the way of the restrictive interpretation of the Council, then such impression must be strengthened if the examination is extended to other parts of the Decision of March 1972, if its background and obvious purpose are considered and if we look at the spirit, which is apparent from other acts of the Council.

To begin with it is a fact that the application of the method of assessing the increase in salaries laid down in the 1966 note led to increasing tensions between the Council and the staff, which found expression in the side effects known to all of us. Obviously this was due in no small measure to the fact that the Council was paying less and less regard to the supplementary factors in the right to remuneration, such as the allowances now in question. The complaints of the staff were thus directed to the manner in which the joint index was *made up* and not so much to the way it was *applied*. The Decision of March 1972 was obviously intended to remedy this awkward development. It was the result of an understanding with the staff and was intended to secure the necessary peace in the Communities' service. In this respect, however, it can be said at the outset that the only reasonable interpretation of this decision is one which allows appropriate account to be taken of certain service emoluments outside the actual payment of salaries.

Further, if the Decision of March 1972 is looked at as a whole, then this too provides weighty indications in support of the wide interpretation now suggested.

In particular it is material that the decision does not simply take account of the method formerly used to establish the index of public salaries in the Member States, but is quite clearly intended to introduce certain improvements. Contrary to the opinion of the Council, this is not mainly the creation of a second index, namely the total emoluments index, and the check which it provides. In the light of the development described, such an index does not amount to a substantial improvement, for the Council is, as we have seen, completely free in the exercise of its discretion to disregard this index. Moreover the wording of the decision makes it quite clear that the improvements relate to the *specific index* and moreover to its computation — the Commission has shown this in a careful analysis.

In the Decision of March 1972, under the heading 'Indicateur spécifique', and after the catchword 'améliorations' there is reference *inter alia* to;

- improved harmonization of the methods of computation applied by the various national administrations;
- informing the Commission about the factors of the system of remuneration in the public service and any change in these factors;
- informing the commission on the details of the computation of the annual index of public salaries;
- contacts with the national delegations in cases in which the Commission could have doubts on any factor taken into account in the computation of the index of public salaries so that the delegations concerned can give the necessary explanations.

Finally it is stated: 'Il est entendu qu'une information complète des représentants du personnel au sujet des éléments statistiques relatifs à cet indicateur sera assurée par la Commission.'

In my opinion it cannot be denied that there is something to be said for concluding from these factors that there was a duty in fixing the specific index to take account — to describe it thus — of factors in the right to remuneration other than the actual payment of salary. The Commission rightly refers to the fact that these rules obviously intend an annual examination of the factors which are to be taken account in the specific index, for otherwise the Council would have expressly laid down that only payments of salary are to be taken into account. It was rightly stated that there would be no necessity for the complex review provided if it were only a question of taking account of payments to all officials and finding whether the information from Member States was correct in this respect. With regard to the necessity to keep the staff completely informed about the actual variation in the salary situation in the Member States on the one hand, and with regard to the object of the Decision of March 1972 in bringing peace on the other hand, it was also rightly stressed that it was not to be assumed that after this decision it would not be necessary to take account of additional factors in the right to remuneration.

The analysis as a whole of the method of fixing the specific index thus compels the recognition that there is a clear stressing — as I have previously stated — of *other factors in the right to remuneration* in the Decision of March 1972 and in particular in the paragraph concerned with the specific index. Looked at in this light it is moreover also understandable that the total heading was changed by the inclusion of the word 'Purchasing power' and thus expression was given to the fact that as true as possible a picture of the variation of the salary situation in the Member States was sought.

Finally — as already stated — there must not be left out of account the spirit of the decision, to which the neutral advisers brought in by the Council have referred in their opinion which was ultimately in favour of the staff. It has certainly considerable weight in the interpretation of decisions which are the result of an understanding with the staff and which have the object of securing peace. It will become clear how this spirit is to be understood if the Decision of the Council of 18 and 19 December 1972 is considered, in which it is stated:

'Le Conseil estime que le règlement du 12 décembre 1972 ne préjuge pas de l'interprétation de sa décision du 21 mars 1972 sur le système d'ajustement pour les rémunérations et confirme que celui-ci s'inscrit dans le cadre d'une politique tendant à garantir, à moyen terme, une évolution des rémunérations des fonctionnaires européens *parallèle* à celle, relevée en moyenne, pour les traitements des fonctions publiques nationales.'

This can only reasonably mean taking into account as far as possible *all* essential factors in the national system of remuneration, and in view of the Council's discretion according to the judgment of the Court of Justice, all the factors not only in the total emoluments index but also in the specific index.

For all these reasons there is to be inferred from the Decision of March 1972 an obligation in preparing the specific index to take account not only of payments of salary as such and allowances to all officials but also other factors in the salary system if they are common and significant. In this connexion the Commission has attempted a narrower definition, referring to the amounts paid to a representative group of officials for services appertaining to their normal duties. This definition is illuminating but probably

unnecessary in the present case. For the purpose of judging the matter the fact should be sufficient that in respect of the allowances which concern us here a declaration was made to the Italian Parliament on the amendment of the Italian system of remuneration that it was not a matter, on the whole, of allowances for particular services but amounts paid for purposes of adjustment. Moreover it is known — even the Council admits this — that the greater part of the allowances in question has been incorporated into the salary or into a special allowance, which certainly has to be taken into account in the specific index, that is a correction of the Italian system of remuneration has taken place permitting conclusions to be drawn as to the nature of the grants and allowances previously paid.

To summarize, it must therefore be found that the failure to take into account the said other factors in the Italian system of remuneration for the reference period 1971/1972 has led to an incorrect Italian specific index, that is one that is too low, and therefore the Community index, to which Italy contributes 28 %, was incorrect. Since the rules mentioned have to be respected in fixing the specific index, if the index is found to be incorrect there is an obligation to correct it subsequently. From this arises the obligation to correct the salary adjustment of that time, for it is beyond dispute that the salaries for 1972 were fixed very close to the specific index and the higher total emoluments index was left out of account. The refusal of the Council to undertake a retrospective salary adjustment is thus contrary to law and must be reversed.

How the Council subsequently undertakes the requisite salary adjustment need not be gone into in detail now. This is rather a matter for the Council in implementing any judgment of annulment by the Court of Justice.

3. This could actually conclude consideration of the case. I will not however conclude without mentioning a subsidiary matter which would apply if there is found not to have been any disregard of the Decision of March 1972 in preparing the specific index for the reference period 1971/1972.

This subsidiary point necessarily arises in my view after what has become clear in the action on the background and spirit of the Decision of March 1972. From this it appears quite out of the question that the matter which is at the centre of this dispute, namely the failure to take into account a large part of the grants and allowances paid to the Italian officials, has no effect at all on the salary adjustment.

I would think that in the event of discovery of such an error an influence would at least have to be admitted on the decision which the Council has to take in accordance with the Decision of March 1972 within the limits of the two said indices; more precisely: in such a case one cannot proceed on the basis that the decision is completely unfettered. If, then, it is shown that an index (in this case the specific index) is obviously not representative, the decision should be affected to the extent that the other index, that is the total emoluments index, which contains all the factors in question, should have greater effect. It would also be conceivable to make a proper adjustment by having more regard to the specific index in 1973, when the specific index no longer contained the defect which is known. Since however the salary decision for 1972 — as already mentioned — was based on the specific index, while that of 1973 was based on the total emoluments index, there would have been, if the matter is looked at in this way, a duty on the Council to undertake a subsequent salary adjustment and in consequence to declare unlawful its refusal to come forward with an unobjectionable decision.

I would however like once more to stress that this is only an alternative point and

that primarily I am of the opinion that the Decision of the Council of June 1974 should be annulled because the Council refused to correct the specific index for the reference period 1971/72.

4. On these premises, my conclusion is as follows:

The action brought by the Commission against the Council is wellfounded. The refusal contained in the Decision of the Council of 21-23 July 1974 to undertake a salary adjustment should be declared void. No ruling on costs need be made since none is asked for.