JUDGMENT OF THE COURT (FIRST CHAMBER)
27 OCTOBER 1981 [1]

Gerhard Venus and Wolfgang Obert v Commission and Council of the European Communities

(Temporary servants — Rate of exchange for the transferable part of their remuneration)

Joined Cases 783 and 786/79

1. *Officials — Applications to the Court — Prior complaint through official channels — Object — Act having an adverse effect adopted by the appointing authority*
(Staff Regulations of Officials, Arts 90 and 91)

2. *Officials — Applications to the Court — Act having an adverse effect — Concept — Pay slip applying new rules concerning remuneration*
(Staff Regulations of Officials, Arts 90 and 91)

1. Under Articles 90 and 91 of the Staff Regulations of Officials the complaint, and consequently the application, may be directed only against an act having an adverse effect adopted by the appointing authority.

2. The pay slip whereby the administration applies new regulations concerning remuneration constitutes an act liable to have an adverse effect within the meaning of the Staff Regulations.

In Joined Cases 783 and 786/79

GERHARD VENUS AND WOLFGANG OBERT, temporary servants of the Commission of the European Communities, employed by the Joint European Torus (JET) Joint Undertaking at Culham (UK), represented and assisted by Ernest Arendt, of the Luxembourg Bar, 34B Rue Philippe-II, Luxembourg,

applicants,

v

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

1 — Language of the Case: French.

and

COUNCIL OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, John Carbery, acting as Agent, with an address for service in Luxembourg at the office of Douglas Fontein, head of the Legal Department of the European Investment Bank, Kirchberg,

defendants,

APPLICATION in the terms set out in the pleadings,

THE COURT (First Chamber)

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

Advocate General: F. Capotorti
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

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

I — Facts and procedure

The background of these cases, as regards the provisions involved, may be analysed as follows:

The version of Article 63 of the Staff Regulations of Officials in force until 31 March 1979 provided that "Remuneration paid in a currency other than Belgian francs shall be calculated on the basis of the par values accepted by the International Monetary Fund which were in force on 1 January 1965". Reference was also made to the "IMF par values" with regard to the transfers provided for in Article 17 of Annex VII made at the request of officials who wished to have

part of their remuneration available in, for example, their country of origin.

This system had been adopted at a time when exchange rates were fixed and its application proved satisfactory as long as they remained fixed. Complications arose when currencies began fluctuating, that is to say from around 1971. The solution then adopted to deal with that situation consisted in fixing the weighting referred to in Article 64 of the Staff Regulations in such a way that it made allowance not only for changes in the cost of living but also for currency fluctuations. The result was of course that the weighting applied to countries with a strong currency was adjusted downwards and, conversely, the weighting for countries with a weak currency such as Italy, the United Kingdom and Ireland, was adjusted upwards. The lawfulness of that system was challenged by Mr Advocate General Mayras in his opinion in Case 26/74 *(Gillet* [1975] ECR 463, at p. 475), since in his view Article 64 had clearly been conceived and had clearly been formulated with the aim that the weighting should only compensate for variations in the cost of living. Nevertheless, the system was satisfactory in practice, as far as salaries were concerned, and did not in any way change the net salaries received by officials assigned elsewhere than to Belgium or to Luxembourg, regardless of whether the currency of the country concerned was weak or strong.

However, transfers made by officials assigned to countries whose currencies had become "weak" to countries with a "strong" currency gave rise to an "exchange gain". Moreover, the amount of the remuneration transferred was, by virtue of the wording of the Staff Regulations then in force, subject to the same weighting as that applicable to the remuneration as a whole (namely the weighting applicable to the place of employment which was intended to take into account the particular living conditions there). The combined effect of the high weighting applicable in the place of residence and of payment in the currency of the country where the institution had its seat (as authorized on the one hand by Article 82 of the Staff Regulations concerning the weighting and on the other hand by Article 45 of Annex VIII of the Staff Regulations concerning the choice which may be made between three currencies of payment) was to make a second exchange gain possible.

With a view to eliminating the distortions to which the retention of the reference to the "IMF par values" in the Staff Regulations were giving rise, the Commission submitted to the Council on 1 April 1977 a proposal for amendment of the Staff Regulations, involving abandonment of the "IMF par values" and updating of the rates of exchange (Official Journal C 99 of 22. 4. 1977, p. 5). For such updating, it was proposed, pursuant to Article 63 of the Staff Regulations, that "the calculation" of the remuneration "shall be made on the basis of the value of (the currency of payment) in terms of the European Unit of Account on 1 January 1977" (the latter date being liable to be changed at least once a year). It was simultaneously proposed, with regard to the transfers provided for in Article 17 of Annex VII, that they should be made "on the basis of the value of the European Unit of Account (EUA) specified in ... Article 63" and that moreover the amounts transferred should be "weighted by a coefficient representing the ratio between the weighting for the country in the

currency of which the transfer is made and the weighting for the country of the official's employment".

Having received that proposal and after obtaining the opinion of the European Parliament and of the Court of Justice with regard thereto, the Council adopted Regulation No 3085/78 on 21 December 1978, amending, with particular reference to the monetary parities to be used, Regulation No 259/68 laying down the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of the Communities, Regulation No 2530/72 and Regulation No 1543/73 concerning certain special measures (Official Journal 1978, L 369, p. 6). Regulation No 3085/78, which was to apply from 1 April 1979, updates the parities referred to in Article 63 of the Staff Regulations, in this way: the Belgian franc remains the currency in which the remuneration is to be expressed, but is to be converted for the purposes of payment into another currency "on the basis of the exchange rates used for the implementation of the General Budget of the European Communities on 1 July 1978". As regards the weighting to be applied to the amounts transferred, Regulation No 3085/78 adopted the formula contained in the proposal of 1 April 1977.

At the same time as the exchange rates were updated, it was appropriate to adjust the weightings applicable to the various places of employment so that every official (or temporary servant) assigned elsewhere than to Belgium or to Luxembourg would be assured that his remuneration for April 1979 would remain at the same level as his remuneration for the previous month, this being achieved by Council Regulation No 3086/78 of 21 December 1978 adjusting the weightings applicable to the remuneration and pensions of Officials and Other Servants of the European Communities following the amendment of the provisions of the Staff Regulations concerning the monetary parities to be used in implementing the Staff Regulations (Official Journal 1978, L 369, p. 8). Since the point of departure (amount of the remuneration expressed in Belgian francs, the currency in which the remuneration was to be expressed) in fact theoretically remained unchanged, as far as calculation of the payment was concerned and since the point of arrival (amount in national currency of payment) was also normally to stay the same, it was appropriate that, as soon as one of the parameters (rate of exchange) involved in calculation of the payment underwent a change, the second parameter (weighting coefficient) should be adjusted to ensure the neutrality of the transaction.

The applicants, who are temporary servants, of German nationality, at the Joint European Torus (JET) Joint Undertaking, complain of the loss they have suffered as a result of the new arrangements adopted in Regulations Nos 3085/78 and 3086/78 which entail, at their expense, an increase in the cost of the transfer in accordance with Article 17 of Annex VII to the Staff Regulations, made at their request through the institution.

In the offers of employment signed respectively on 8 November and 13 December 1978 (Dr Venus) and on 27 October 1978 (Dr Obert) by the Head of Personnel at the JET Joint Undertaking, it was stated that the proposed remuneration was made up of a part payable in sterling at the place of employment at the rate of UKL 1 = BFR 140 and of another part, known as the transferable part, payable in German marks in the country of origin at the rate of DM 1 = BFR 13.66.

As a result of the new rules, the rate of exchange of the German mark against the Belgian franc went up from BFR 12.50 to BFR 15.76; transfers from the United Kingdom, the country of employment, to the Federal Republic of Germany, the country of origin, were thenceforth made at the rate of UKL 1 = DM 6.096 whereas previously UKL 1 was worth upon transfer (140 : 13.66 =) DM 10.24. Thus, for a transfer of DM 1 000, the exchange value which, according to the previous rates of exchange, was UKL 97.57 in March 1979 (corresponding to BFR 13 660), in April went up to UKL 164.05, by virtue of the new rates provided for in Article 63 of the Staff Regulations UKL 1 = DM 3.86) and of the adjustment arising from the weighting represented by the ratio between the new "Germany" weighting (98.7) and the new "United Kingdom" weighting (62.5).

In the case of Dr Venus, the amount of whose transfers in April 1979 was DM 4 318.96, the increased cost amounted to

UKL 709.38 (exchange value in April of the amount transferred)
— UKL 421.40 (exchange value in March of the amount transferred)
UKL 287.98.

In the case of Dr Obert, whose transfers were of DM 4 363.03, the increased cost amounted to:

UKL 716.61 (exchange value of the amount in April)
— UKL 425.70 (exchange value of the amount in March)
UKL 290.91.

By a circular of 4 April 1979, the Head of Personnel at the JET Joint Undertaking informed the European Atomic Energy Community and JET personnel that as from 1 April 1979 new rules were to enter into force for calculating the transferable part of their remuneration, that is to say Regulations Nos 3085/78 and 3086/78.

Even before that circular was distributed, the applicants submitted a complaint to the Commission dated 26 March 1979. In that complaint the applicants claimed that the above regulations should not be applied or at least that "appropriate transitional measures" should be adopted.

The Commission replied on 12 July 1979 informing the persons concerned that on the one hand it could not, without exceeding its powers, refrain from applying Council regulations which had duly entered into force and on the other hand that it approved in substance the amendments which had been made to the Staff Regulations.

The applications in these proceedings were recorded at the Court Registry on 22 October 1979 (in the case of the Venus application 783/79) and on 26 October 1979 (in the case of the Obert application 786/79).

By an order of 13 December 1979, the Court (First Chamber) decided to join the cases for the purposes of the procedure and the judgment.

On 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.

II — Conclusions of the parties

The *applicants* claim that the Court should:

1. Rule that the decision of the applicants' employer, whereby the conversion rate for the transferable part of their remuneration is fixed at UKL 1 = DM 6.09 is void or else not applicable to the applicants;

2. Rule, on the contrary, that the conversion rate for that transferable part is the rate fixed by contract between the parties, namely UKL 1 = (140 : 13.66) = DM 10.24;

3. Order the Commission to repay to the applicants the loss of salary suffered owing to and since the application of the rules in issue;

4. Order the defendants to pay the costs of the action.

The *Commission* contends that the Court should:

1. Dismiss the applications as inadmissible;

2. In the alternative, dismiss them as unfounded.

The *Council*, in a written submission on a procedural issue lodged pursuant to Article 91 of the Rules of Procedure, contends that the Court should declare the applications inadmissible as far as the Council is concerned.

III — Submissions and arguments of the parties

The *applicants* maintain that their rights and obligations in their capacity as temporary servants are derived in the first place from their contract of employment and not from the Staff Regulations of Officials (Case 25/68 *Schertzer* v *Parliament* [1977] ECR 1729).

The offers of employment accepted by the applicants stated that the conversion rate of the part of their remuneration transferable to the Federal Republic of Germany had been fixed at DM 1 = BFR 13.66.

Regulations Nos 3085/78 and 3086/78 had the effect of unilaterally changing the agreed conversion rate and therefore the employer infringed the contractual rights validly acquired by the applicants.

The applicants maintain that they left their employment and families in the Federal Republic of Germany to take up the posts offered by the Commission on the faith of the specific proposals, containing detailed figures, which had been made to them during the negotiations which preceded their engagement. The possibility of transferring a substantial part of their remuneration at the rate of DM 1 = BFR 13.66 to their country of origin, where they would still have major financial commitments, was a deciding factor in their entering into the contracts and should therefore be regarded as an essential aspect thereof.

The applicants claim that it would be contrary to the general principle of legal certainty that they should be exposed to a radical change in their circumstances brought about by interference with fundamental conditions which were such as to induce them to accept their posts.

The applicants are of the opinion, in the second place, that by unilaterally changing their terms of remuneration the employer has breached the rule laid down by the Court in its judgment of 5 June 1973 (Case 81/72 *Commission* v *Council* [1973] ECR 575) protecting the confidence that the staff could have that the authorities would respect their undertakings.

In its defence submissions, the *Commission* contends that the admissibility of these applications seems doubtful, on more than one ground.

The Commission points out that the applicants seek annulment of the "employer's decision whereby the

conversion rate for the transferable part of their remuneration is fixed at UKL 1 = DM 6.09" without specifying the date and the nature of the contested decision. The Commission therefore takes the view that three possibilities should be envisaged:

— First: the applications seek a declaration that Regulations Nos 3085/78 and 3086/78 of the Council are void and inapplicable.

The Commission states that in those circumstances these applications are inadmissible having regard to the order of the Court of 4 October 1979 in Case 48/79 *(Ooms and Others* v *Commission* [1979] ECR 3121) in which the Court stated:

"According to Article 91 (2) of the Staff Regulations actions by officials instituted under Article 179 of the EEC Treaty must be directed against the appointing authority and relate to acts or omissions *of that authority* which adversely affect the applicants. The action does not satisfy that condition since it relates to the annulment of a Council Regulation ... Furthermore since Regulations Nos 3085/78 and 3086/78 constitute neither a decision addressed to the applicants nor a decision which although in the form of a regulation is of direct and individual concern to them, the application is likewise inadmissible in so far as it is based upon Article 173 of the EEC Treaty."

— Second: the applications seek annulment of the circular of 4 April 1979 issued by the JET administration.

The Commission maintains that that memorandum does not constitute a measure in respect of which an application may be made. It is a document the scope of which is merely to explain the content and consequences of new provisions of the Staff Regulations and is intended to provide "clarifications" as to the consequences of Regulations Nos 3085/78 and 3086/78. According to the Commission therefore the memorandum does not constitute a measure having an adverse effect in respect of which an action can be brought. The Commission takes the view that the concept of a measure having an adverse effect is very closely linked with the concept of an interest in taking legal proceedings but, in its view, the applicants have no interest which can be furthered by annulment of the circular in question, since neither its legality nor even its existence affects the lawfulness of subsequent decisions as to calculation of remuneration, those decisions having been taken to implement not the circular but the new provisions of the Staff Regulations.

The applicants' complaint is therefore to be ascribed not to the underlying measures, Regulations Nos 3085/78 and 3086/78, or to the explanatory circular of 4 April 1979, but to the decisions involved in calculating their remuneration for April which gave rise to the alleged loss.

— Third: the applications seek annulment of the individual decisions regarding calculation of the applicants' remuneration in respect of April 1979 in regard to which Regulations Nos 3085/78 and 3086/78 were applied for the first time.

The Commission considers that the applications appear to be inadmissible in this third case because the calculation of the applicants' remuneration for the month of April was not the subject of any complaint on their part. By their

complaint of 26 March 1979 directed against Regulations Nos 3085/78 and 3086/78, the applicants asked that the rules should not be applied to them. That complaint having been rejected, the applicants were entitled to lodge a complaint against the actual decision relating to the calculation of remuneration. However, no such complaint was ever lodged.

For the above reasons the Commission is of the opinion that the first head of claim of the application is inadmissible.

As regards the second head of claim seeking repayment of the alleged loss of remuneration, the Commission takes the view that it too is inadmissible by reason of the inadmissibility of the first head of claim in the application.

The Commission relies on the judgment of the Court of 12 December 1967 (Case 4/67, *Muller (née Collignon)* v *Commission* [1967] ECR 365) in which the Court stated that the inadmissibility of a request for annulment involves the inadmissibility of a claim for damages closely linked with the request for annulment.

In their reply the *applicants* state that they lodged not only a complaint on 26 March 1979 but also a collective complaint on 15 March 1979 signed by all the EAEC servants at JET. Moreover, they point out that in its examination of the admissibility of the application the Commission fails to mention the express decision rejecting the complaint through official channels, signed by Mr Tugendhat on 12 July 1979.

As regards the admissibility of the application, the applicants are of the view that it is incorrect to assert, as does the Commission, that the memorandum of 4 April 1979 is a document of a merely explanatory nature and not therefore one which can be contested before the Court. By means of that explanatory note, the employer in fact informed the staff of the JET Joint Undertaking that as from 1 April 1979 the new rules relating to the methods of calculating remuneration and transfer rates established by Regulations Nos 3085/78 and 3086/78 would likewise be applied to the remuneration paid by JET. Consequently, the note of 4 April 1979 gave notice to the applicants, for the first time, of the new rates which were to be applied to transfers by staff under contract to JET. That note was therefore not one of a merely explanatory nature.

The applicants maintain that it was impossible to bring their action in respect of the pay slips since, as from April, they would have had to lodge a complaint through official channels each month against the calculation of their monthly salary until the Court had finally given a decision on their application.

The applicants consider that the matter in issue was properly submitted to the Commission by the two complaints through official channels of 15 and 26 March 1979. In their view, the aim of Article 91 (2), which is intended to allow and encourage amicable settlement of any difference which arises between the officials or servants and the administration, was thus attained. Therefore, it would have been superfluous to lodge fresh complaints against the employer's subsequent decisions and in particular against the memorandum of 4 April 1979 and against the monthly pay slips.

The applicants take the view that Council regulations may be contested indirectly by officials by means of an objection of illegality (Article 184 of the Treaty).

On all the foregoing grounds, the applicants are of the opinion that the application is admissible. Accordingly, their request for compensation for the loss arising from the entry into force of Regulations Nos 3085/78 and 3086/78 is likewise admissible. The applicants take the view that the request for compensation flows by implication, but not of necessity, from the request for annulment.

In its rejoinder, the *Commission* observes that regulations cannot be contested by means of the objection of illegality provided for in Article 184 of the Treaty, since the applications are not admissible under either Article 179 or Article 173 of the Treaty. Applications by officials lodged under Article 179 must be directed against the appointing authority and must specify the acts or omissions on the part of that authority, and that condition is not fulfilled where the application is directed against a Council regulation.

Moreover, since Regulations Nos 3085/78 and 3086/78 do not constitute a decision addressed to the applicants, the application is also inadmissible because it is based on Article 173 of the Treaty.

The Commission states that the memorandum of 4 April 1979 does not constitute a measure having an adverse effect, in respect of which an application may be lodged. That memorandum could not be in the nature of a general decision whose object was to render Regulations Nos 3085/78 and 3086/78 applicable to some of the Commission staff. The Commission is of the opinion that those regulations, which are mandatory and enforceable in their own right, were in fact implemented as soon as they were applied to the staff as a whole. The applicants should know that their situation is governed by the "Conditions of Employment of Other Servants" and by Article 17 of Annex VII, which in conjunction with Article 63 of the Staff Regulations defines the terms on which an official may transfer part of his remuneration. They should have known that those provisions were amended by Regulations Nos 3085/78 and 3086/78. The Commission therefore rejects the applicants' argument that the memorandum of 4 April 1979 "... is equivalent with respect to (them) to the decision of which (they) seek annulment and of which (they) do not know the precise date and nature".

The Commission also rejects the applicants' argument as to the need that would have arisen for them to lodge a complaint through official channels each month as from April against the monthly calculation of their remuneration. According to the Commission, a complaint followed by an application, both directed against the salary slip for the month of April 1979, would have been valid as a complaint and application against the subsequent salary slips.

As regards the applicants' observation that the application is also directed against the Commission's decision of 12 July 1979 whereby their complaint was expressly rejected, the Commission asserts that decisions of the Court have consistently indicated that an application of that kind is to be regarded as inadmissible (judgments of 8 February 1973 in Case 33/72 *Gunnella* v *Commission* [1973] ECR 475 and of 15 June 1976 in Case 1/76 *Mack* v *Commission* [1976] ECR 1017). The measures having an adverse affect consisted of measures capable of directly affecting a specific legal situation (judgment of 10 December 1969 in Case 32/68 *Grasselli* v *Commission* [1969] ECR 505).

A confirmatory measure, like the Commission's decision of 12 July 1979, is one whereby the appointing authority,

having received at an earlier stage a complaint within the meaning of Article 90 (2) of the Staff Regulations, confirms in its reply the decision against which the complaint is directed. The application should be directed against the decision having an adverse effect and not against the confirmatory measure.

The *Council*, in its objection of inadmissibility, contends that the act having an adverse effect is an administrative measure taken by the Commission, namely the application as from 1 April 1979 to the applicants of the conversion rates determined in accordance with Regulations Nos 3085/78 and 3086/78 to the transferable portion of their remuneration. The application of those rates, in the Council's view, was the responsibility of the Commission as the appointing authority as regards the servants of the JET Joint Undertaking recruited by it. The Council is of the view that in those circumstances the applications are not to be regarded as direct actions against the Council

Article 91 (1) of the Staff Regulations of Officials provides that the Court has jurisdiction "... in any dispute between the Communities and any person to whom the Staff Regulations apply regarding the legality of an act adversely affecting such person within the meaning of Article 90 (2)". The latter provision defines the concept of an act having an adverse affect, stating that the appointing authority must have taken a decision or failed to adopt a measure prescribed by the Staff Regulations. The Council maintains therefore that, since it is not the appointing authority as far as the applicants are concerned, a measure adopted by it cannot constitute an act having an adverse effect within the meaning of Article 90 (2) of the Staff Regulations.

As regards the applicants' request that the Commission should be ordered to reimburse them for the loss of salary suffered by them in consequence of and since the time of application of Regulations Nos 3085/78 and 3086/78, the Council relies on the case-law of the Court (judgments of 20 October 1975 in Case 9/75 *Meyer-Burchhardt* v *Commission* [1975] ECR 1171 and of 17 February 1977 in Case 48/76 *Reinarz* v *Commission and Council* [1977] ECR 291) to support its view that the actions brought by the applicants in respect of non-contractual liability are inadmissible for the same reasons as those already indicated with regard to the application for annulment based on Article 91 of the Staff Regulations.

In their reply to the objection of inadmissibility raised by the Council, the *applicants* state that it is not their intention to bring a direct action against the Council but believe that it is appropriate for the Council, which drew up the regulations called in question by the application, to have an opportunity to express its view on the grounds of their alleged illegality.

The applicants are of the opinion that the conditions for admissibility prescribed in Article 184 of the Treaty have been fulfilled.

The application is directed, in the first instance, against a decision having an adverse affect taken by the appointing authority, the matter at issue having previously been submitted to it in accordance with Article 90 (2) of the Staff Regulations. That decision having an adverse effect was taken on the basis of two Council regulations. In consequence, in the applicants' view, the conditions for admissibility prescribed in Article 91 of the Staff Regulation and in Article 184 of the Treaty have been fulfilled.

As regards an application to establish non-contractual liability pursuant to Article 215 (2) of the Treaty, the applicants state that it is not their

intention to lodge such an application against either the Council or the Commission. In the applicants' view, the Commission's obligation to compensate them for their loss of remuneration arises from breach of the contract of employment. That contract is between the Commission and the applicants and accordingly is of no concern to the Council.

IV — Oral procedure

The parties presented oral argument at the sittings on 19 and 20 February 1981.

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

Decision

1 By applications lodged at the Court Registry on 22 October 1979 and 26 October 1979 the applicants, Dr G. Venus and Dr W. Obert, temporary servants of the Commission working at the Joint European Torus (JET) Joint Undertaking in the United Kingdom brought actions pursuant to Article 91 of the Staff Regulations of Officials (hereinafter referred to as "the Staff Regulations") for annulment of the Commission's decision whereby the conversion rate for the transferable portion of their remuneration was fixed at UK = DM 6.09.

2 By Council Decision of 30 May 1978 (Official Journal 1978 L 151, p. 10) a joint undertaking called "Joint European Torus (JET), Joint Undertaking" (hereinafter referred to as "JET") was set up, its aim being to construct, operate and exploit a large torus facility of the Tokamak type and its auxiliary facilities. Article 2 of the decision provides that the Statutes of JET, annexed to the decision, are to be adopted. Article 8.5 of the Statutes provides *inter alia* that, unless decided otherwise in certain special cases, staff is to be recruited by the Commission for temporary posts in accordance with the "Conditions of Employment of Other Servants of the European Communities" (hereinafter referred to as the "Conditions of Employment") and assigned by the Commission to the Joint Undertaking.

3 The applicant Dr Venus is of German nationality. He is a certificated physicist and a doctor in natural sciences of the Technical University of Munich. He was recruited as a temporary servant, assigned to JET and classified in Grade A 4, Step 1, on the basis of offers of employment dated

8 November 1978 and 13 December 1978. In the offer of 13 December 1978 it was stated that of his total salary, expressed in Belgian francs and amounting to BFR 155 842 per month, he could transfer to his country of origin 35%, that is to say BFR 54 545, at a rate at which the actual cost of the transfer would be only UKL 389.60, which would leave the applicant with a balance of salary of UKL 723.56. The applicant accepted the offer and entered into a written contract with the Commission on 13 December 1978.

4 The applicant Dr Obert is of German nationality. He is a certificated physicist of the University of Karlsruhe. He was recruited as a temporary servant, classified in Grade A 5, Step 3, on the basis of an offer of employment dated 27 October 1978 accompanied by a calculation of his net remuneration, in which it was stated that of his total salary, expressed in Belgian francs amounting to BFR 157 247 per month, he could transfer to his country of origin 35 %, that is to say, BFR 55 036, at a rate at which the actual cost of the transfer would be only UKL 458.63, leaving him a balance of salary of UKL 664.56. The applicant accepted the offer and entered into a written contract with the Commission on 21 November 1978.

5 The contracts entered into with the applicants provided that the latter would be bound by the provisions applicable to temporary servants in accordance with Article 2 (a) of the Conditions of Employment.

6 The provisions concerning remuneration and reimbursement of expenses for such staff appear in Chapter 5 of the Conditions of Employment. Article 27, which is part of that chapter, provided that Articles 16 and 17 of Annex VII to the Staff Regulations are to apply to them by analogy.

7 The applicants then regularly transferred throught the Commission part of their emoluments in the currency of their country of origin pursuant to Article 17 of Annex VII to the Staff Regulations.

8 On 21 December 1978, the Council adopted Regulation (Euratom, ECSC, EEC) No 3085/78 (Official Journal L 369, p. 6) Article 1 of which provides that Article 63 of the Staff Regulations is to be replaced by the following:

"Officials' remuneration shall be expressed in Belgian francs. It shall be paid in the currency of the country in which the official performs his duties.

Remuneration paid in a currency other than Belgian francs shall be calculated on the basis of the exchange rates used for the implementation of the general budget of the European Communities on 1 July 1978.

This date shall be changed, at the time of the annual review of remuneration provided for in Article 65, by the Council acting by a qualified majority upon a proposal from the Commission as provided in the first indent of the second sub-paragraph of Articles 148 (2) of the EEC Treaty and of 118 (2) of the Euratom Treaty.

Without prejudice to the application of Articles 64 and 65, the weightings fixed pursuant to these Articles shall, whenever the above date is changed, be adjusted by the Council, which, acting in accordance with the procedure mentioned in the third paragraph, shall correct the effect of the variation in the Belgian franc with respect to the rates referred to in the second paragraph."

9 Article 2 of the Regulation provides:

"Article 17 of Annex VII shall be replaced by the following:

Article 17

1. Payment shall be made to each official at the place and in the currency of the country where he carries out his duties.

2. Under the terms laid down in rules drawn up by common agreement by the institutions of the Communities, after consultation of the Staff Regulations Committee, an official may:

(a) through the institution which he serves, regularly have part of his emoluments transferred up to a maximum amount equal to his expatriation or foreign residence allowance;

— either in the currency of the Member State of which he is a national,

— or in the currency of the Member State in which either his own domicile or the place of residence of a dependant relatives is located,

— or in the currency of his previous country of employment or of the country in which his institution has its seat, provided that the official in question has been assigned to a post outside the territory of the European Communities;

(b) have regular transfers made in excess of the maximum stated at the beginning of paragraph (a) provided that they are intended to cover expenditure arising in particular out of commitments proved to have been regularly undertaken by the official outside the country where the institution has its seat or outside the country where he carries out his duties;

(c) be authorized, in very exceptional circumstances and for good reasons supported by evidence, to have transferred, apart from the aforementioned regular transfers, sums which he may wish to have available in the currencies referred to in paragraph (a).

3. The transfers provided for in paragraph (2) shall be made at the exchange rate specified in the second paragraph of Article 63 of the Staff Regulations; the amounts transferred shall be multiplied by a coefficient representing the difference between the weighting for the country in which the official is employed."

10 Article 4 of Regulation No 3085/78 provides that it is to enter into force on 1 January 1979 and is to apply as from 1 April 1979.

11 On 21 December 1978, the Council also adopted Regulation (Euratom, ECSC, EEC) No 3086/78 adjusting the weightings applicable to the remuneration and pensions of Officials and Other Servants of the European Communities following the amendment of the provisions of the Staff Regulations concerning the monetary parities to be used in implementing the Staff Regulations. Article 1 (1) of the regulation fixes, *inter alia*, the weighting applicable to the remuneration as 98.7 for the Federal Republic of Germany and 62.5 for the United Kingdom.

12 As a result of the new rules, the rate of exchange for the German mark against the pound sterling changed from UKL 1 = DM 10.24 to UKL 1 = DM 6.096 and consequently the application of those rules entailed, according to the applicants, a substantial decrease in their effective salary, the amount transferred in German marks remaining the same but the balance paid in pounds sterling being decreased.

13 Pursuant to Article 46 of the Conditions of Employment, the provisions of Title VII (namely Articles 90 and 91) of the Staff Regulations concerning appeals are applicable by analogy to the applicants.

14 By a letter of 15 March 1979, the applicants and other scientists employed as servants with JET sent a collective request to the JET Council asking it to set up an interim system which would avoid any reduction in their effective salary.

15 In letters sent by them separately on 26 March 1979 the applicants asked that the rules in issue should not be applied to them or that the Commission should apply compensatory interim measures in their case.

16 By letter of 12 July 1979, the Commission replied on the one hand that it could not, without exceeding its powers, refrain from applying Council regulations which had duly entered into force and on the other hand that it approved in substance the amendments which had been made to the Staff Regulations.

17 The applicants then brought their actions against both the Council and the Commission. They ask that the Court declare that their employer's decision whereby the conversion rate for the transferable portion of their remuneration is fixed at UKL 1 = DM 6.09 is void, or else that it is not applicable to them; to declare that, on the contrary, the rate of exchange for that transferable portion is the one fixed by contract between the parties namely UKL 1 = DM 10.24 and to order the Commission to reimburse them for the loss of salary suffered by them as a result of the rules in issue.

18 The applicants rely on two grounds. The first is the infringement of acquired rights. According to the applicants, the conditions applicable to temporary servants are based on their contract of employment. The rights and obligations of the applicants are therefore derived in the first place from their contract of employment and not from the Conditions of Employment. The terms of remuneration were in the circumstances the subject of a special agreement between the parties. The various components of that remuneration were set out in the offers of employment of 26 October 1978 (Obert) and 8 November and 13 December 1978 (Venus). Those rights and obligations could not be unilaterally changed by the rules in issue and the employer therefore infringed the rights which the applicants had validly acquired by contract.

19 The second ground is breach of the principle of the legitimate expectation which every official may have with regard to the conduct of the authority employing him. Both applicants left their employment, and Dr Venus also left his family, to take up the posts offered by the Commission on the faith of the specific proposals, containing detailed figures, which had been made to them during the negotiations which preceded their engagement; the possibility of transferring a substantial portion of their remuneration at the rates specified in the offers of employment to their country of origin where they would still have major financial commitments was a deciding factor in their entering into the contracts and should therefore be regarded as an essential aspect of their appointment. It would be contrary to the general principle of legal certainty that the applicants should be exposed to a radical change in their circumstances brought about by interference with fundamental conditions of such a nature as to induce them to accept their posts.

Admissibility

20 By written submission lodged at the Court Registry on 14 January 1980 the Council raised an objection of inadmissibility pursuant to Article 91 of the Rules of Procedure of the Court. Neither the subject-matter of the applications nor the conclusions contained in them called in question any measure taken by the Council. The Council is not the appointing authority as far as the applicants are concerned. Moreover, the applicants never sent the Council a complaint within the meaning of Article 90 (2) of the Staff Regulations. As regards the request that the Commission be ordered to reimburse them for their loss of salary in consequence of and from the time of application of the rules in issue, apart from the fact that that request refers expressly to the Commission, the applicants' action in respect of non-con-

tractual liability is also inadmissible. The damage allegedly suffered by the applicants is to be regarded as a direct consequence of the application of the decision in respect of which a declaration of nullity is sought and, in those circumstances, the action to establish liability is merged with the action for annulment.

21 In reply to the Council the applicants state that it is not their intention to bring an action specifically against one of its measures but add that they thought that they should indirectly involve the Council in the proceedings since the rules in issue originated from it. They state that they do not seek and have never sought to bring an action to establish non-contractual liability under Article 215 of the Treaty, against either the Council or the Commission.

22 The objections must be upheld. Under Articles 90 and 91 of the Staff Regulations the complaint, and consequently the application, may be directed only against the appointing authority and the act having an adverse affect must have been adopted by that authority.

23 In its defence, the Commission also contends that the application is inadmissible. It envisages three possibilities regarding the request for annulment of the "employer's decision whereby the conversion rate for the transferable part of their remuneration is fixed at UKL 1 = 6.09 DM". If the applications seek annulment of Regulations Nos 3085/78 and 3086/78 they do not refer to a measure by the appointing authority and are thereby inadmissible. If the applications seek annulment of the circular of 4 April 1979, issued by the JET administration, the applications are likewise inadmissible, in the first place because that circular is merely a document which explains the content and consequences of the new provisions of the Staff Regulations and cannot therefore constitute a measure having an adverse affect within the meaning of Article 90 of the Staff Regulations: in addition, because the applicants did not lodge any complaint regarding the circular. Finally, if, as postulated as the third possibility, the applications seek annulment of the individual decisions regarding calculation of the remuneration in respect of April 1980, they are likewise inadmissible because the calculation of the applicant's remuneration for the month of April was not the subject of any complaint at all on their part. Inadmissibility of the claim for annulment involves inadmissibility of the claim for compensation linked with the first mentioned claim.

24 In reply the applicants state that the Commission may not, without contradicting itself, reproach the applicants for not lodging a prior complaint through official channels against a decision which, according to the Commission, may not be annulled or amended. The matter in issue was properly submitted to the Commission by the complaints through official channels of 15 and 26 March 1979 and consequently the applications, in so far as they are directed against the employer's decision to calculate their remuneration in accordance with the rules in issue, are admissible and accordingly their action seeking compensation for the damage suffered by them in consequence of that decision is also admissible.

25 The action is also inadmissible in so far as it is directed against the Commission. The applicants' complaints date from March 1979. Only on 15 April 1979, when preparing the pay slip for April 1979, did the Commission apply the new regulations and thus adopt the first measure liable adversely to affect the applicants in the manner provided for in the Staff Regulations. The complaints were therefore premature. After receipt of their pay slips for April 1979 the applicants did not at any time lodge complaints against that measure pursuant to Article 90 (2) of the Staff Regulations. If the complaints of 15 and 26 March are to be regarded as requests as provided for by Article 90 (1) of the Staff Regulations, inviting the Commission to adopt a decision with respect to them, the applicants did not lodge complaints as provided for by Article 90 (2) of the Staff Regulations against the Commission's refusal to take such a decision, regardless of whether that refusal was constituted by the circular letter of 4 April 1979 or by the letter of 12 July 1979. In the absence of a complaint duly lodged in accordance with Article 90 (2) of the Staff Regulations, following a measure having an adverse effect, the applications are inadmissible.

26 It is regrettable that the Commission should have given the applicants, in the offers of employment of 27 October and 13 December 1978, specific details as to the exchange rates applicable to the transfers, knowing as it did that those rates would be considerably affected by the regulations which, at the time the offers of employment were made, it was insistently asking the Council to adopt before the end of 1978. However, that fact has no effect on the admissibility of the applications.

27 Having regard to the foregoing considerations, the applications must be dismissed as inadmissible.

Costs

28 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs.

29 However, since the terms of the Commission's offers of employment were a factor in the applicants' decision to bring their applications the Commission is ordered to pay the costs of the proceedings.

On those grounds,

THE COURT (First Chamber)

1. **Dismisses the applications as inadmissible.**

2. **Orders the Commission to pay to costs of the proceedings.**

Bosco O'Keeffe Koopmans

Delivered in open court in Luxembourg on 27 October 1981.

A. Van Houtte
Registrar

G. Bosco
President of the First Chamber

OPINION OF MR ADVOCATE GENERAL CAPOTORTI

(see Case 167/80, [1981] ECR 1512)