OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 1 OCTOBER 1981 [1]

Mr President,
Members of the Court,

1. This case concerns the interpretation of the term "basic salary" appearing in Article 3 (3) of the General Provisions for giving effect to Article 11 (2) of Annex VIII to the Staff Regulations of Officials. The problem relates to the calculation, for the purposes of the Community retirement pension, of the years of pensionable service to be credited to an official in respect of his previous employment. In essence it is a matter of determining whether, in ascertaining the basic salary, account must be taken of the weighting applicable to the amounts set out in the table contained in Article 66 of the Staff Regulations.

It is appropriate to begin by setting out the provisions of Article 11 (2) of Annex VIII to the Staff Regulations. It states as follows:

"An official who enters the service of the Communities [2] after leaving the service of a government administration or of a national or international organization or of an undertaking shall have the right, on becoming established with that Community [2] to pay to it [2] either:

— The actuarial equivalent of retirement pension rights acquired by him in the government administration, national or international organization or undertaking; or

— the sums repaid to him from the pension fund of the government administration, organization or undertaking at the date of his leaving its service."

The same article provides that, where an official makes use of that right, "the institution in which the official serves shall, taking into account his grade on establishment, determine the number of years of pensionable service with which he shall be credited under its own pension scheme in respect of the former period of service, on the basis of the amount of the actuarial equivalent or sums repaid as aforesaid". That article does not, however, lay down any rules for calculating the number of years of pensionable service to be credited to the official. That matter is dealt with by Article 3 (3) of the General Provisions for giving effect to Article 11 (2) (published in Staff Courier No 77 of 29 July 1969), which provides that the amount transferred (the actuarial equivalent or sums repaid) is to be taken as the basis and converted "into a notional pension varying with the actuarial value determined by the budgetary authorities . . .". That pension is then converted "into years of pensionable service *varying with the basic annual salary* attaching to the grade on establishment".

The facts of the case are as follows. On becoming an established official with the Commission as from 1 September 1975, Paolo Benassi exercised the right

1 — Translated from the Italian.

2 — Translator's note: The exact words of the English version of the provision are quoted in spite of the apparent mistake.

provided for in Article 11 (2) of Annex VIII, relying on a period of previous service in Italy, and arranged for the payments to the Community of the actuarial equivalent of his accrued pension rights or of the sum which the Italian pension fund owed him when he left his previous employment. The Commission took account of Mr Benassi's grade on establishment and fixed the period of pensionable service to be credited to him at two years, three months and seven days. However, by a letter dated 17 March 1980, Mr Benassi lodged a complaint against that decision objecting to the fact that the administration had applied the weighting to his basic annual salary before performing the calculation. He maintained that no account should have been taken of the adjustment of salaries due to variations in the cost of living and pointed out that if the method which he considers to be correct had been followed he would have been credited with a longer period of pensionable service.

The complaint was rejected by the Commission by a letter of 2 September 1980. On 30 September 1980 Mr Benassi brought an action for a declaration that for the purpose of calculating the number of years of pensionable service with which he should be credited under the Community pension scheme the basic salary should be that indicated in the table of basic salaries contained in Article 66 of the Staff Regulations without the application of the weighting. He submitted that the Commission was therefore bound to amend its calculation and credit him with a period of pensionable service of three years, four months and fifteen days.

2. The Staff Regulations deal with basic salary in Article 62, which is the first article in Section I (entitled "Remuneration") of Chapter 1 of Title V, but it is mentioned only as one of the three elements of remuneration (the other two are family allowances and other allowances). Article 66 contains a table of basic monthly salaries for each grade and step.

The weighting is mentioned in the first and second paragraphs of Article 64 and in Article 65 (2). The first paragraph of Article 64 provides that "an official's remuneration expressed in Belgian francs shall ... be weighted at a rate above, below or equal to 100%, *depending on living conditions in the various places of* employment"; the final sentence of the second paragraph states that "the weighting applicable to the remuneration of officials employed at the provisional seats of the Communities shall be equal to 100% as at 1 January 1962". Article 65 deals with the annual review by the Council of the level of remuneration and the possibility of its adjustment (to take account in particular of any increases in salaries in the public service and the needs of recruitment); paragraph (2) provides that "in the event of a substantial change in the cost of living, the Council shall decide, within two months, what adjustments should be made to the weightings and if appropriate to apply them retrospectively".

There is a clear difference between the function given to the weighting in Article

64 and that which the same mechanism may have under Article 65. In substance Article 64 seeks to ensure that all officials, irrespective of their place of employment, enjoy remuneration which has the same purchasing power. Therefore the remuneration expressed in Belgian francs is not merely converted into the local currency of the various places of employment other than Belgium and Luxembourg, but a weighting is applied which takes account of the cost of living in the various places of employment. That weighting therefore has a purely equalizing function which has nothing to do with changes in remuneration, because the remuneration of officials working at the provisional seats (which serve as a reference) may stay unchanged whilst fluctuations in the cost of living in other countries lead to adjustments in the "geographical" weightings. However, any recourse to the weightings for the purposes of Article 65 has an effect above all on the index fixed for the provisional seats of the institutions. In fact the weighting here represents one of the two technical instruments which the Council may use in order to adjust the remuneration of all officials and employees of the Communities (the other instrument is the adjustment of the figures given in the table contained in Article 66 and this the Council has done each year since 1 January 1977). The distinction between the "geographical" weighting and the weighting used for the general adjustment of remuneration was, moreover, recognized by the Court in the judgment of 13 July 1978 in Case 114/77 *Jacquemart* v *Commission* [1978] ECR 1697.

Undoubtedly the weighting referred to in this case is that envisaged in Article 65. That much is clear from the fact that it is a question of the weighting applicable to an official posted to one of the provisional seats of the Community.

3. We come now to the essential issue of the case: is the term "basic salary" to be defined as including or excluding the weighting referred to in Article 65? In view of the function of that weighting, which I have just described, it does not seem reasonable to me to attribute separate significance to the figures contained in the table in Article 66, irrespective of the effect of the weighting on them. Without the weighting those figures reflect only the situation existing at the time when the table was drawn up, whereas over the years, with considerable changes having occurred in the purchasing power of the Belgian franc and in the other factors mentioned in Article 65 (1), the basic salary has been progressively adjusted by means of the weighting (a method applied in particular from 1972 to 1976). Therefore, in my view, when Article 3 (3) of the General Provisions for giving effect to Article 11 (2) of Annex VIII speaks of basic salary, it is necessary to refer, depending on the time when the official was established, to the figures contained in Article 66 of the Staff Regulations, until they were changed by means of the weighting for the provisional seats of the institutions, or to the amounts resulting from the application of the weighting to those figures (as in

this case which arose in 1975), or, finally, to the figures in the table brought up to date through the inclusion of the weighting (as regards officials who were established after 1 January 1977).

That view accords with the principle of non-discrimination. In fact the definition of the term "basic salary" which I am proposing has the result that officials are treated equally for the purposes of Article 11 (2) of Annex VIII to the Staff Regulations irrespective of whether at the time of their establishment salary adjustments due to variations in the cost of living, or in the other factors mentioned in Article 65 (1), were effected by means of the weighting mechanism or by means of a revision of the table contained in Article 66. I think that it should be stressed here that the difference between those two methods is purely one of form; nothing prevented the Council from achieving the objectives of Article 65 by directly altering the figures contained in the table each time the conditions for the adjustment of basic salaries were satisfied. The fact that for some years it was decided to leave the table unchanged and apply the weightings to it does not go to the root of the matter; basic salaries were also adjusted in that way. But the applicant's argument has the anomalous result that two officials who paid the same contributions during their previous employment would be credited with a different period of pensionable service under the Community pension rules depending on whether or not the changes in the cost of living after the adoption of the Staff Regulations were transferred to the figures contained in the table in Article 66.

Finally, I should like to point out that my view accords with that expressed by the Court in the judgment of 13 July 1978 in the *Jacquemart* case which I have already cited. In that case it was a question of defining the term "basic salary" in order to calculate the severance grant payable under Article 12 of Annex VIII. The Court held that that term "comprises the amounts included in the table contained in that article (Article 66), subject, where appropriate, to the weighting adopted for the provisional seats by the Council following the annual review provided for in Article 65 (1)" (paragraph 22 of the decision).

4. According to the applicant the expression "basic salary" must be given a different meaning depending on the provision in which it appears: in particular, he submits that the basic salary mentioned in Article 12 (c) of Annex VIII is different from the basic salary referred to in Article 3 (3) of the General Provisions for giving effect to Article 11 (2) of that annex. That argument seems arbitrary to me, especially as both provisions cited are part of the pension scheme rules and the principle of coherent and systematic interpretation requires that an expression used in several provisions occurring in the same context should be construed in the same way. Moreover, in the *Jacquemart* judgment the Court stated that "it is ... not possible to interpret Article

12 (2) of Annex VIII to the Staff Regulations as expressing the Council's intention to calculate the severance grant on a basis different from that of the monthly basic salary as intended and established by the Council pursuant to the methods for the adjustment of the level of remuneration referred to in Article 65" (paragraph 23 of the decision). The Court went on to stress that "any other interpretation would lead to the conclusion that Article 12 (c) of Annex VIII to the Staff Regulations is unlawful as being incompatible with the principle of the equality of officials in that two different concepts of basic salary would be applied, in Article 66 of the Staff Regulations and Article 12 of Annex VIII respectively, without there being any objective consideration to justify such a difference" (paragraph 24 of the decision). In my opinion that reasoning also applies to the expression "basic salary" contained in the General Provisions for giving effect to Article 11 (2) of Annex VIII.

Counsel for the applicant submitted that there are objective reasons in this case which might justify placing a different construction on the term "basic salary" disregarding the effect of the weightings under Article 65. He observed that the Court held in the *Jacquemart* judgment that the severance grant must be calculated on the basis of the salary referred to in Article 66 adjusted by the weighting inasmuch as the severance grant is based on the remuneration which the official was receiving immediately before leaving the service and must therefore reflect the acutal amount of that remuneration. He claims that the situation is quite different in this case: here no reference is made to actual previous earnings, it is rather simply a matter of calculating a *notional* period of service by applying mathematical formulae which take account of the contributions paid in previous employment.

I do not find that argument convincing. The use of the mathematical formulae for the calculation in question is above all linked to two precise factors, namely the amount transferred (which reflects the sum of the contributions paid by the person concerned) and the basic salary corresponding to the grade in which the official was established. Therefore it is reasonable that in this case also, as in the case of the severance grant the actual basic salary adjusted by the weighting be taken into account. Furthermore I do not consider that support may be found for Mr Benassi's case in the Rules on Sickness Insurance for Officials adopted by the various institutions in 1974 (and in particular by the Commission on 26 September 1974).

Counsel for the applicant stressed that under Article 23 (2) of those rules the amount of the contributions is fixed at a percentage of the basic salary and that it is expressly provided that: "The contribution shall be weighted at the rate applicable to the remunerations of officials serving in Belgium." Counsel for the applicant argued that the fact that the use of the weighting for the determination of the basic salary is expressly mentioned in that provision confirms the view that, in the absence of any express indication to that effect, the basic salary

must be that given in the table in Article 66 of the Staff Regulations. However, that view has already been declared incorrect by the Court in the *Jacquemart* judgment, cited earlier, in which the Court, holding that in order to determine the basic salary account must be taken of the weighting, referred to two provisions, Article 66 of the Staff Regulations and Article 12 (c) of Annex VIII thereto, in which the weighting is not mentioned at all.

5. In view of the considerations set forth above I propose that the Court should reject Mr Paolo Benassi's action against the Commission begun by the application of 30 September 1980. As regards costs, I propose that the parties should bear their own in accordance with Article 70 of the Rules of Procedure.