OPINION OF ADVOCATE GENERAL MISCHO

delivered on 24 June 1999 *

1. This case concerns an appeal by 65 officials and former officials of the Commission, employed at the European Institute for Transuranic Elements in Karlsruhe, Germany, against a judgment of the Court of First Instance on 10 July 1997 [1] *(the 'contested judgment')*.

2. All those persons were also applicants in the case which gave rise to the judgment of the Court of First Instance in *Chavane de Dalmassy and Others* v *Commission* [2] (the '*Chavane de Dalmassy*' judgment). The method of implementing that judgment is at the root of this case.

3. Under Article 64 of the Staff Regulations of officials of the European Communities ('the Staff Regulations') and Article 20 of the Conditions of Employment of other servants of the European Communities, the remuneration of officials and temporary servants is adjusted by a weighting determined by reference to the cost of living in their place of employment, so that, whatever that cost of living, they enjoy equal purchasing power.

4. Until the adoption of Council Regulation (ECSC, EC, Euratom) No 3161/94 of 19 December 1994 adjusting, with effect from 1 July 1994, the remuneration and pensions of officials and other servants of the European Communities and the weightings applied thereto, [3] the weighting applied to the remuneration of the applicants employed at Karlsruhe was that applicable to officials employed at Bonn, which was the capital of the Federal Republic of Germany until October 1990.

5. After Berlin then became the capital of Germany, the Commission submitted draft regulation [SEC (91) 1612 final] to the Council on 4 September 1991, proposing that, with retrospective effect from 1 October 1990, a new weighting should be calculated for Germany on the basis of the cost of living in Berlin and specific weightings should be fixed for Bonn and Karlsruhe.

6. On 19 December 1991, the Council adopted Regulation (ECSC, EEC, Euratom) No 3834/91 adjusting, with effect from

* Original language: French.

1 Apostolidis and Others v *Commission* [1997] ECR-SC I-A-207 and II-607

2 Case T-64/92 *Chavane de Dalmassy and Others* v *Commission* [1994] ECR-SC I-A-227 and II-723.

3 OJ 1994 L 335, p. 1.

1 July 1991, the remuneration and pensions of officials and other servants of the European Communities and the weightings applied thereto.[4] Amongst other things, that regulation laid down a weighting for Germany calculated on the basis of the cost of living in the former capital, Bonn, and a specific weighting for Berlin.

7. In January 1992, each applicant received a supplementary pay slip, which applied the weighting for Germany calculated on the basis of the cost of living in Bonn.

8. In its judgment in *Chavane de Dalmassy* on 27 October 1994, following an action by the applicants challenging those pay slips for January 1992, the Court of First Instance annulled them because they applied a weighting calculated by reference to the cost of living in a city (in this case Bonn) other than the capital of Germany (since October 1990, Berlin).

9. Following the delivery of that judgment, on 9 December 1994, the Commission drew up a first proposal for Council regulation [SEC (94) 2024 final] with a view to the 'annual adaptation' of officials' remuneration and pensions, fixing the weightings to be applied as from 1 July 1994. It then sent the Council a second proposal for a regulation [SEC (94) 2085 final], fixing a general weighting for Germany and specific weightings for Bonn and Karlsruhe with retrospective effect from 1 October 1990.

10. Then, on the basis of the first amended proposal, the Council adopted Regulation No 3161/94, one of whose functions was to adapt weightings as from 1 July 1994, and which fixed a general weighting for Germany calculated on the basis of the cost of living in Berlin and a specific weighting for the remuneration of officials and other servants employed in Karlsruhe.

11. The Council took no action on the second amending proposal by the Commission concerning the retrospective fixing of the weightings as from October 1990.

12. On 5 May 1995, the applicants submitted a request to the Commission under Article 90(1) of the Staff Regulations, requesting, firstly, that their pay slips since January 1992 be drawn up on the basis of the statutorily applicable weighting, secondly, for a declaration that the Commission erred by not adopting within a reasonable time the measures required by the

4 OJ 1991 L 361, p. 13, corrigendum in OJ 1992 L 10, p. 56.

Chavane de Dalmassy judgment pursuant to Article 176 of the EC Treaty (now Article 233 EC) and, thirdly, for the payment of BFR 50 000 to each applicant by way of compensation for non-material damage.

13. That request having been rejected, the applicants brought an action against the rejection decision, which was in turn dismissed by the contested judgment.

The first plea in law

14. The applicants' first plea alleges infringement of the second paragraph of Article 215 of the EC Treaty (now Article 288 EC) and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance, and also manifest error in assessing the applicants' interest in bringing an action.

15. They consider that the Court of First Instance was wrong to hold, in paragraphs 77 to 81 of the contested judgment, that the applicants had not established the existence of damage capable of sustaining their claim for compensation.

16. It is important to view the disputed line of argument in the context of the reasoning of the Court of First Instance. The Court did not state that the applicants had suffered no damage through non-application to their remuneration of the weighting calculated by reference to Berlin. Having held that it was not possible in law to grant it to them, the Court examined, in accordance with the case-law,[5] whether the applicants had suffered damage justifying compensatory measures, given the impossibility of satisfying their principal claim.

17. The appeal seems to be referring both to material damage and non-material damage.

18. Concerning material damage, the applicants' line of argument is not entirely clear. They maintain that their interest in bringing an action should be assessed as at the time the initial proceedings were brought.

19. They point out that, at the time the action in *Chavane de Dalmassy* was brought, a proposal for a regulation fixing a higher weighting for Karlsruhe than for Bonn had been submitted by the Commission and was being studied by the Council, a fact which, in their submission, establishes their interest in bringing an action beyond doubt.

5 Case C-412/92 P *Parliament* v *Meskens* [1994] ECR I-3757, paragraph 28.

20. However, the facts described above show that, following the *Chavane de Dalmassy* judgment, various new proposals were made.

21. I therefore consider that the commencement of the *Chavane de Dalmassy* case is not the standpoint in time from which the applicants' interest in bringing these proceedings should be assessed.

22. Moreover, the case-law which the applicants cite in support of their argument concerned a different situation. [6] In this case, the action has been dismissed as inadmissible because the interest in bringing an action disappeared, the contested decision having already been replaced before the action was brought.

23. Thus, at the time the action was brought, there was no longer any interest in bringing it. However, that was the date which had to be taken as the standpoint in time from which to assess that interest.

24. It was therefore for the applicants to establish that their damage existed at the time they brought their action before the Court of First Instance despite the amendments which were made after the *Chavane de Dalmassy* judgment. However, the applicants have maintained a discreet silence as to their material damage assessed at that time.

25. In particular, they have not at any time challenged the figures put forward by the Commission which show that, over the whole of the period under consideration, the cost of living was slightly higher in Bonn than in Karlsruhe and that, consequently, the application claimed by the applicants of a weighting other than that calculated by reference to the cost of living in Bonn could not have brought them a material advantage, but on the contrary a loss.

26. It is true that, by implication at least, the applicants seem to see a material loss in the fact that they did not enjoy the weighting for Berlin, but rather the lower weighting calculated by reference to Bonn. Since, however, as we shall see, the Court of First Instance held that claim to be unjustified, on the ground that it conflicted with the whole purpose of weightings, its failure to materialise cannot constitute material loss justifying compensatory measures for the benefit of the applicants.

27. The Court of First Instance was therefore right to hold that the applicants did not establish the existence of such loss.

28. Contrary to what the applicants maintain, the Court of First Instance did not

6 Order of 13 December 1996, Case T-128/96 *Lebedef* v *Commission* [1996] ECR-SC I-A-629 and II-1679.

restrict its analysis to that aspect of loss, and did not hold that only financial loss could justify compensatory measures for the benefit of the applicants. Indeed, paragraphs 77 to 81 deal expressly with the additional loss alleged by the applicants, including non-material damage.

29. In that respect, the applicants argue that the Commission's inaction, in the absence of payslips to replace those annulled, kept them in an irregular situation. They maintain that a state of uncertainty and incomprehension for the applicants was the result.

30. They argue, moreover, that the Commission is responsible for a number of organisational failures in their regard, causing them non-material damage. Such damage has therefore been established sufficiently clearly by the applicants, who, by definition, could give nothing more than a fair estimate.

31. The Court of First Instance was therefore wrong to reach the opposite conclusion in paragraphs 79 to 81 of the contested decision.

32. In my opinion, the applicants are misconstruing the connection between their claim for compensation in respect of non-material damage and their principal claim.

33. The alleged non-material damage is directly connected with the applicants' failure to obtain the subject-matter of their claim. The state of uncertainty which they say they were in is the consequence. Similarly, the failings imputed to the Commission contribute to the alleged non-material damage not as such, but in so far as they prevented the satisfaction of the applicants' claim.

34. The applicants do not deny the finding of the Court of First Instance that the main purpose of their action is to obtain new pay slips adjusted by a weighting calculated by reference to the cost of living in Berlin.

35. The alleged non-material damage therefore arises from the fact that the applicants were not granted the benefit of the weighting calculated by reference to Berlin for the annulled payslips. On that point, however, the Court of First Instance had already held in its judgment in *Barraux and Others* v *Commission*[7] that, in such circumstances, the applicants would profit from an undue advantage.

36. Confirming that case-law, the Court of First Instance again held, in the contested judgment, that that claim was clearly unjustified. It therefore made no error in law by holding that failure of such a claim to materialise cannot constitute non-material damage.

7 Case T-177/95 *Barraux and Others* v *Commission* [1996] ECR-SC I-A-541 and II-1451.

37. Having thus rightly held that the applicants had not established the reality of their damage, the Court of First Instance drew the necessary consequences regarding the provisions of its Rules of Procedure.

38. It recalled that Article 44(1)(c) of those Rules of Procedure requires that an application should state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based, and very logically held that that requirement was not satisfied by an application for compensation in respect of damage caused by a Community institution that did not contain information allowing the damage alleged by the applicants to be identified.

39. Therefore, the Court of First Instance did not infringe that provision either.

40. It follows from the above that the first plea in law must be dismissed.

The second plea in law

41. The second plea alleges infringement of Article 176 of the Treaty and the case-law applying it, and also an error in the interpretation of the judgment of the Court of First Instance in *Chavane de Dalmassy*.

42. The applicants argue that the Court of First Instance erred in law by holding that that judgment placed two inseparable obligations on the Council, namely to adopt a regulation fixing a weighting for Germany calculated by reference to the cost of living in Berlin and to fix a specific weighting for Karlsruhe.

43. The Court of First Instance was therefore wrong to hold that the Commission was not obliged, where the Council had not adopted the necessary measures, to draw up new pay slips applying the weighting for the country of employment, calculated by reference to the cost of living in the capital in the absence of a specific weighting for the applicants' place of employment.

44. For the Court of First Instance to hold that non-execution of the *Chavane de Dalmassy* judgment by the Commission did not constitute a failure to act was therefore a breach of Article 176 of the Treaty.

45. The Commission considers, however, that the applicants' argument is clearly incorrect. Both the letter and the spirit of

the rules relied on and the *Chavane de Dalmassy* judgment meant that the Council was under two obligations which were inseparably linked and that the Commission was not entitled to disregard them in order to satisfy the applicants' claim. It maintains that it cannot therefore be accused of any failure to act in the matter whatsoever.

46. Let me say at once that I can only concur with the Commission's analysis, and that the applicants' attempts to make both the Staff Regulations and the case-law say what they clearly do not say do not appear to me convincing.

47. The applicants' lawyer emphasised at the hearing all the importance to be attached to this plea, insisting that in a Community governed by the rule of law it is crucial that a judgment should not be left unexecuted. I entirely share that point of view, but would observe that the implementation envisaged by the applicants concerns only part of the obligations set out by the judgment in question.

48. I find it undeniable that the *Chavane de Dalmassy* judgment imposes two connected obligations on the Council. First, by prohibiting the Council from adopting a weighting for the country in question calculated by reference to a city other that the capital, it requires it to refer to the cost of living in that capital to fix the weighting applicable to the country concerned.

49. Secondly, it requires it to fix specific weightings for places of employment of officials situated in that country where an appreciable distortion in the cost of living is found to exist in relation to the capital.

50. The link between those two obligations emerges clearly from the very wording of the *Chavane de Dalmassy* judgment, which shows that the Council was not entitled, in the light of the principle laid down in Annex XI to the Staff Regulations, to fix a provisional weighting for Germany on the basis of the cost of living in a city other than the capital.

51. At paragraph 56 of that judgment, the Court of First Instance stated that:

'In those circumstances, the Council should on the one hand have fixed a weighting for Germany, provisional if necessary, on the basis of the cost of living in Berlin and then, on the other, fixed specific weightings, also provisional if necessary, for the various places of employment in that country where a noticeable variation in purchasing

power had been determined by comparison with the cost of living in the capital, Berlin.'

52. The use of the terms 'on the one hand ... on the other' undeniably reveals a link between the two parts of the sentence in question; they need to be understood together in order to determine the full content of the Council's obligation.

53. That evidence is confirmed by the very objective of weightings. They are not designed automatically to bring about an increase in the applicants' remuneration where the cost of living in the capital of the Member State where they are employed increases.

54. Article 64 of the Staff Regulations and Annex XI thereto, containing rules for implementing Articles 64 and 65, show that weightings are intended, as the term implies, to correct the effects of differences in the cost of living in the various places of employment, so as to safeguard equality of treatment between officials.

55. It necessarily follows that the Council is obliged to fix weightings where differences in the cost of living between the various places of employment reach a sufficient level to undermine equality of treatment.

56. If the Council's obligation were limited to fixing a weighting calculated by reference to the cost of living in the capital and did not include the fixing of specific weightings for places of employment where appreciable distortions are found, there would be no certainty that that the aim of equal treatment of officials, implying the neutralisation of those distortions, would be attained.

57. Article 9 of Annex XI to the Staff Regulations leaves no doubt in that regard, since it provides that, where such distortions are found, 'the Council ... *shall* decide' to fix specific weightings. The use of the word 'shall' clearly shows the imperative nature of the Council's obligation. [8]

58. That is also apparent from the settled case-law of the Court of Justice, which has held that:

'the purpose of Articles 64 and 65 of the Staff Regulations ... is to ensure that all officials have equivalent purchasing power, wherever their place of employment, in accordance with the principle of equality of treatment'.

8 The other language versions of that provision use similar terms.

59. The Court therefore concluded that:

'Accordingly the Council has no discretion as to whether to introduce a specific weighting for a place of employment if it is established that the cost of living there is substantially higher than in the capital.' [9]

60. That conclusion being, in the Court's judgment, the direct consequence of the principle of equal treatment, it is also valid where, as in this case, the cost of living in the place of employment in question is substantially lower than in the capital.

61. The applicants also rely on the case of *Brazzelli and Others* v *Commission* [10] in support of the argument that the Council's discretion in fixing weightings is such that there can be no certainty in the matter before the Council has exercised its powers.

62. That consideration is irrelevant in this case. It is not a question here of demonstrating that the Commission could have no certainty as to the weightings which the Council would fix.

63. What matters in this case is that the Commission not only had the right but was even under an obligation to consider that it was for the Council and it alone to fix the weightings and, in particular, a specific weighting for the places of employment where the cost of living diverged significantly in relation to the capital.

64. The fact that the raison d'être of the weightings is the implementation of the equal treatment principle also implies that the Commission cannot apply them in such a way as to undermine that principle. It therefore follows that, if the Council has not fixed the required weightings, the Commission cannot grant the benefit of a weighting calculated by reference to the capital and thus not taking account of differences in the cost of living found between the place of employment in question and the capital.

65. As the contested judgment rightly pointed out, it was already clear from the case-law that the difference in the cost of living between Karlsruhe and the capital Berlin was significant. [11]

66. Nor do the applicants anywhere deny the existence, referred to by the Commission in its proposals for a regulation for the

9 Case C-301/90 *Commission* v *Council* [1992] ECR I-221, paragraphs 22 and 25.

10 Joined Cases T-17/89, T-21/89 and T-25/89 *Brazzelli and Others* v *Commission* [1992] ECR II-293.

11 See *Barraux and Others* v *Commission*, cited in paragraph 53 above, and at paragraph 66 of the contested judgment.

purpose of fixing a specific weighting for Karlsruhe, of a significant difference in the cost of living between that city and Berlin.

67. They say, indeed, that 'the Council's refusal to adopt the proposal submitted by the Commission conveys its wish to apply the "Germany" weighting, calculated by reference to the cost of living in Berlin, to officials employed in Karlsruhe'. [12]

68. However, the regulation adopted by the Council, following the Commission's proposals, had the effect of applying to the applicants the weighting calculated by reference to Bonn, a fact which should have been known to the applicants since it lay at the root of the action brought by them in the case which led to the *Chavane de Dalmassy* judgment, compliance with which they say they are seeking.

69. If, as the applicants argue, the Council had wished to give them the benefit of the Berlin weighting, I do not believe it would have adopted a regulation whose effect was to apply to them the very different weighting calculated by reference to the cost of living in Bonn.

70. It follows from the above that the Court of First Instance was right to hold that the Commission was not entitled to draw up pay slips for the applicants by reference to the cost of living in Berlin, since the distortion found in relation to Berlin made it obligatory for the Council to fix a specific weighting for Karlsruhe.

71. The Court of First Instance was therefore right to hold that there was no failure to act on the part of the Commission.

72. The applicants further argue that three possibilities were open to the Commission in order to comply with the *Chavane de Dalmassy* judgment.

73. They maintain that, apart from drawing up pay slips applying a weighting calculated by reference to Berlin, a possibility rejected by the Court of First Instance, the Commission could have brought an action against the Council for failure to act or started a dialogue with them.

74. They do not, however, challenge the reasoning of the Court of First Instance in

12 Paragraph 64 of the appeal.

paragraphs 99 to 103 of the contested judgment, which shows that an individual cannot compel the Commission to bring an action for failure to act, since it would thus endanger the margin for manœuvre inherent in the Commission's discretion in the matter of complying with a judgment.

75. It therefore only remains for me to examine whether the Court of First Instance should have held that the Commission was required, in the circumstances of the case, to open a dialogue with the applicants concerning compliance with the *Chavane de Dalmassy* judgment.

76. The Court of First Instance begins by noting that, in accordance with that judgment, the Commission was unable, where a legislative measure had not been adopted by the Council, to apply a different weighting to the applicants' remuneration from that required by the legislation in force and thus, in particular, a weighting calculated by reference to the cost of living in Berlin.

77. It has already been seen that the Court of First Instance was right to reach that conclusion.

78. As the Court of First Instance states, that inability undeniably constituted a 'particular difficulty' in complying with that judgment.

79. Where such a difficulty arises, the case-law holds [13] that it is for the institution concerned to take such decision as will provide due compensation for a disadvantage which has resulted for the applicants from the annulled decision.

80. The applicants deduce therefrom that, if the Commission considered that it faced a particular difficulty in complying with the *Chavane de Dalmassy* judgment, it should have opened a dialogue with them in order to resolve the situation, rather than refraining from taking any position.

81. However, such a dialogue only had any reason to come into being if the situation arising for the applicants from non-compliance with the *Chavane de Dalmassy* judgment caused them loss.

82. The case-law cited by the applicants themselves requires the institution concerned, in the event of particular difficulty

13 See the judgment in *Parliament* v *Meskens*, cited above.

in complying with a judgment, to take measures capable of providing due compensation for the disadvantages arising from that situation.

83. It necessarily follows that there is no obligation to take such measures where the disadvantage has not been established.

84. It has been noted above that the Court of First Instance rightly held that, in this case, such loss has not been demonstrated.

85. It was therefore right to conclude that the Commission was not obliged to take compensatory measures for the benefit of applicants, and could not therefore be accused of any failure to act in that regard.

86. The Council states, in its reply, that it shares the conclusions which the Court of First Instance reached. It does, however, challenge the reasoning of the Court in paragraphs 60 and 61 of the contested judgment, worded as follows:

'Where the Community judicature annuls a measure taken by an institution, that institution is obliged under Article 176 of the Treaty to take the appropriate measures to comply with the judgment.... Furthermore, where rules are declared unlawful, the subsequent adoption by that institution of new rules, applicable to future situations, does not remove, as far as the injured party is concerned, the effects of the illegality committed against him in the past ...

It follows that the mere adoption of Regulation No 3161/94 does not, *a priori*, constitute sufficient compliance with the *Chavane de Dalmassy* judgment, inasmuch as that regulation does not concern the officials' pay slips for the months of January 1992 to June 1994 inclusive.'

87. The Council considers that it might be deduced from those statements of the Court of First Instance that the Council, the author of the regulation of which application had been set aside in the *Chavane de Dalmassy* case through operation of the objection of illegality, was under an obligation to adopt a new regulation.

88. The Council submits that the case-law on Article 184 of the Treaty shows that not to be so. It maintains that a distinction should be made between the annulment of a legislative measure, entailing in principle an obligation to replace it, and the application of the objection of illegality, the only consequence of which is to make it neces-

sary, in a given case, to set aside the legislative provisions serving as a basis for the individual measure under challenge.

89. The Council concludes by requesting the Court 'in accordance with the second indent of Article 116(1) of the Rules of Procedure, to uphold the forms of order sought at first instance by the Commission and the Council'.

90. Since those forms of order were upheld by the Court of First Instance, the Council's intervention thus seeks confirmation of the contested judgment and the dismissal of the appeal, even if it criticises an aspect of the contested judgment.

91. The Council thus seeks confirmation of the contested judgment whilst at the same time pursuing a line of argument that does not constitute a reply to the pleas of the applicants, since the latter are alleging a failure to act on the part of the Commission, not the Council.

92. I do not therefore consider that the Court needs to give a ruling on the Council's argument.

93. It is therefore only as a subsidiary remark that I say I do not share the Council's anxieties. What the Court of First Instance says is that 'mere adoption of Regulation No 3161/94 does not, *a priori*,[14] constitute sufficient compliance with the *Chavane de Dalmassy* judgment'.

94. The Court of First Instance has not therefore expressed a final position on the subject.

95. Moreover, the paragraphs cited above do not constitute grounds inseparable from the operative part of the contested judgment. The only conclusion which the Court of First Instance draws is that it needs to examine the extent of the obligations for the Commission arising from the Chavane de Dalmassy judgment in the absence of adoption by the Council of a regulation applicable to the period concerned.

96. That conclusion is not challenged by the Council, and the question whether or not the latter was obliged to adopt such a regulation is not relevant to the reasoning of the Court of First Instance.

14 Emphasis added.

97. In the light of the above, the applicants' second plea in law must also be dismissed.

The third plea in law

98. This plea alleges infringement of Article 63 et seq. of the Staff Regulations concerning the remuneration of officials. Under the case-law, the applicants maintain, those provisions require that, in the absence of a fixing by the Council of a specific weighting for Karlsruhe, their remuneration should be subject to a weighting calculated by reference to the cost of living in the capital of the Member State of employment.

99. I entirely share the Commission's analysis that that plea clearly disregards the purpose of the provisions on weightings in the Staff Regulations.

100. As already stated, the case-law [15] shows that the purpose of weightings on the remuneration of officials, provided for by Articles 64 and 65 of the Staff Regulations, is to ensure that all officials have equivalent purchasing power, wherever their place of employment, in accordance with the principle of equality of treatment.

101. It is undeniable, and moreover not challenged by the applicants themselves, that during the period in question the cost of living in Karlsruhe was considerably lower than that in Berlin. Therefore, to apply to the remuneration of staff employed in Karlsruhe a weighting calculated by reference to the cost of living in Berlin would clearly be contrary to the principles following from the case-law cited above.

102. It follows from the above that the Court of First Instance did not infringe Article 63 et seq. of the Staff Regulations by deciding that the Commission was not in a position to apply to the applicants' remuneration a weighting calculated by reference to the cost of living in Berlin.

103. The applicants' third plea in law must therefore also be dismissed.

15 See *Commission* v *Council*, cited above.

Conclusions

104. For the reasons given above, I propose that the Court should dismiss the action as unfounded.

105. Concerning costs, it should be noted that, by virtue of the reference in Article 118 of the Rules of Procedure of the Court of Justice, Article 69 of those rules applies in this case, subject to the provisions of Article 122.

106. Article 69(2) provides that an unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. That is not the case here.

107. Under Article 69(4), institutions which intervene are to bear their own costs.

108. I therefore propose that each of the parties should bear its own costs.