JUDGMENT OF THE COURT (Third Chamber)

24 November 2010 *

In Case C-40/10,

ACTION for annulment under Article 263 TFEU, brought on 22 January 2010,

European Commission, represented by J. Currall, G. Berscheid and J.-P. Keppenne, acting as Agents, with an address for service in Luxembourg,

applicant,

supported by:

European Parliament, represented by S. Seyr and A. Neergaard, acting as Agents, with an address for service in Luxembourg,

intervener,

* Language of the case: French.

v

Council of the European Union, represented by M. Bauer, acting as Agent, assisted by D. Waelbroeck, avocat,

defendant,

supported by:

Kingdom of Denmark, represented by B. Weis Fogh, acting as Agent,

Federal Republic of Germany, represented by J. Möller and B. Klein, acting as Agents,

Hellenic Republic, represented by A. Samoni-Rantou and S. Chala, acting as Agents, with an address for service in Luxembourg,

Republic of Lithuania, represented by D. Kriaučiūnas and R. Krasuckaitė, acting as Agents,

Republic of Austria, represented by E. Riedl, acting as Agent,

Republic of Poland, represented by M. Szpunar, acting as Agent,

United Kingdom of Great Britain and Northern Ireland, represented by S. Behzadi-Spencer and L. Seeboruth, acting as Agents,

interveners,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of Chamber, R. Silva de Lapuerta, E. Juhász, J. Malenovský and T. von Danwitz (Rapporteur), Judges,

Advocate General: Y. Bot,
Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 21 October 2010,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its application, the European Commission asks the Court to annul, in part, Council Regulation (EU, Euratom) No 1296/2009 of 23 December 2009 adjusting with effect from 1 July 2009 the remuneration and pensions of officials and other servants of the European Union and the correction coefficients applied thereto (OJ 2009 L 348, p. 10, 'the contested regulation'), on the ground that that regulation constitutes an infringement of Article 65 of the Staff Regulations of Officials of the European Union, set out in Council Regulation (EEC, Euratom, ECSC) No 259/68 of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission (OJ 1968 L 56, p. 1), as amended by Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 (OJ 2004 L 124, p. 1, 'the Staff Regulations'), and Articles 1 and 3 to 7 of Annex XI to those Staff Regulations, in so far as, on the one hand, it makes an incorrect adjustment of the various amounts laid down by the Staff Regulations and, on the other, it provides for a new legal basis on which the contested regulation may be reviewed.

Legal context

The Staff Regulations

2 Article 65 of the Staff Regulations provides:

'1. The Council shall each year review the remunerations of the officials and other servants of the Communities. This review shall take place in September in the light of a joint report by the Commission based on a joint index prepared by the Statistical Office of the European Communities in agreement with the national statistical offices of the Member States; the index shall reflect the situation as at 1 July in each of the countries of the Communities.

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

2. 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.

3. For the purposes of this Article, the Council shall act by a qualified majority on a proposal from the Commission as provided for in the first indent of the second subparagraph of Articles 148(2) of the Treaty establishing the European Economic Community and 118(2) of the Treaty establishing the European Atomic Energy Community.'

3 Under Article 82(2) of the Staff Regulations, where the Council, in accordance with Article 65(1) of the Staff Regulations, decides to adapt remunerations, the same adaptation is to be applied to pensions.

4 Pursuant to Article 65a of the Staff Regulations, the rules for implementing Articles 64 and 65 of those Staff Regulations are set out in Annex XI to the Staff Regulations.

5 That Annex XI, headed 'Rules for implementing Articles 64 and 65 of the Staff Regulations', includes several chapters, the first of which, comprising Articles 1 to 3, covers the annual review of remuneration provided for in Article 65(1) of the Staff Regulations, whereas the second relates to intermediate adjustments of remuneration and pensions pursuant to Article 65(2) of the Staff Regulations. That Chapter 2 comprises Articles 4 to 7.

6 Chapter 1 of Annex XI to the Staff Regulations includes a Section 1, headed 'Factors determining annual adjustments'. Article 1 included in that section provides, in paragraph 1, that '[f]or the purposes of the review provided for in Article 65(1) of the Staff Regulations, Eurostat shall draw up every year before the end of October a report on changes in the cost of living in Brussels, the economic parities between Brussels and certain places in the Member States, and changes in the purchasing power of salaries in national civil services in central government'. Paragraphs 2 to 4 of that article

contain details of the process to be followed by Eurostat, in collaboration with the Member States, in order to calculate changes in the cost of living for Brussels (Brussels International Index), changes in the cost of living outside Brussels (economic parities and implicit indices) and changes in the purchasing power of salaries of national civil servants in central government (specific indicators).

7 As provided in Article 3 of Annex XI to the Staff Regulations, included in Section 2 concerning 'Arrangements for the annual adjustment of remuneration and pensions':

'1. Under Article 65(3) of the Staff Regulations, the Council, acting on a Commission proposal and on the basis of the criteria set out in Section 1 of this Annex, shall take a decision before the end of each year adjusting remuneration and pensions, with effect from 1 July.

2. The amount of the adjustment shall be obtained by multiplying the Brussels International Index by the specific indicator. The adjustment shall be in net terms as a uniform across-the-board percentage.

3. The amount of the adjustment thus fixed shall be incorporated, in accordance with the following method, in the basic salary tables appearing in Article 66 of the Staff Regulations and in Annex XIII to the Staff Regulations and in Articles 20, 63 and 93 of the Conditions of Employment of other servants:

...

6. The institutions shall make the corresponding positive or negative adjustment to the remuneration and pensions of the officials, former officials and other persons concerned with retroactive effect for the period between the effective date and the date of entry into force of the decision on the next adjustment.

If this retroactive adjustment necessitates the recovery of sums overpaid, such recovery may be spread over a period of not more than twelve months from the date of entry into force of the decision on the next annual adjustment.'

8 In accordance with Article 4 of Annex XI to the Staff Regulations, '[i]ntermediate adjustments of remuneration and pensions pursuant to Article 65(2) of the Staff Regulations, taking effect on 1 January, shall be made in the event of a substantial change in the cost of living between June and December … and with due allowance being made for the forecast of the change in purchasing power during the current annual reference period.'

9 Chapter 5 of Annex XI to the Staff Regulations is headed 'Exception clause'. It comprises Article 10 which provides:

'If there is a serious and sudden deterioration in the economic and social situation within the Community, assessed in the light of objective data supplied for this purpose by the Commission, the latter shall submit appropriate proposals on which the Council shall act in accordance with the procedure laid down in Article 283 of the EC Treaty.'

10 Chapter 7 of that annex, headed 'Final provision and review clause', includes Article 15 which states:

'1. The provisions of this Annex shall apply from 1 July 2004 to 31 December 2012.

2. They shall be reviewed at the end of the fourth year particularly in the light of their budgetary implications. To this end, the Commission shall submit a report to the European Parliament and the Council and, where appropriate, a proposal to amend this Annex on the basis of Article 283 of the EC Treaty.'

The contested regulation

11 In order to enable the Council, in accordance with Article 3(1) of Annex XI to the Staff Regulations, to take a decision before the end of 2009 adjusting the remuneration and pensions of officials and other servants of the European Communities, the Commission submitted, on 29 October 2009, proposal COM(2009) 603 final.

12 On 19 November 2009, an amended proposal for a regulation was submitted (COM(2009) 629 final) following the correction made by two Member States to their statistical data concerning the reference period to be taken into account in the calculation of changes in purchasing power, referred to in Article 1(4)(a) of Annex XI to the Staff Regulations.

13 According to point 3.1 of the explanatory memorandum to that proposal, the specific indicator is equal to 2.8 %, the Brussels International Index to 0.9 % and the proposed adjustment to remuneration and pensions in Belgium and Luxembourg to 3.7 %, which corresponds to the result of multiplying the two abovementioned elements together. The rate of adjustment of 3.7 % was applied to all the amounts specified in the proposal for a regulation.

14 The contested regulation reproduces the Commission's proposal only in part.

15 As stated in the first recital in the preamble to the contested regulation, which has the same wording as the sole recital in the preamble to the proposal, '[i]n order to guarantee that the purchasing power of Union officials and other servants develops in parallel with that of national civil servants in the Member States, the remuneration and pensions of officials and other servants of the European Union should be adjusted under the 2009 annual review'.

16 The second recital in the preamble to the contested regulation, added by the Council, states that '[t]he adjustment of remuneration and pensions proposed by the Commission should be amended in light of the financial and economic crisis and as part of economic and social policy of the Union. The situation should be reviewed when appropriate'.

17 Articles 2 and 4 to 17 of the contested regulation set out the new amounts of remuneration adopted by the Council applying a rate of adjustment of 1.85 %, amounts which replaced those proposed by the Commission applying the rate of adjustment of 3.7 %.

18 Under Article 18 of the contested regulation, which has no equivalent in the Commission proposal:

'This Regulation shall, if necessary, be reviewed and to this end, the Commission shall, where appropriate, submit a proposal to amend this Regulation on which the Council shall act with qualified majority.'

Forms of order sought by the parties and procedure before the Court

19 The Commission claims that the Court should:

— annul the contested regulation apart from Articles 1, 3 and 19 thereof, while maintaining its effects until the adoption by the Council of a new regulation correctly applying Articles 64 and 65 of the Staff Regulations and Annex XI thereto, and

— order the Council to pay the costs.

20 The Council contends that the Court should:

— dismiss the action as unfounded; and

— order the Commission to pay the costs.

21 By order of the President of the Court of 26 February 2010, the Parliament was granted leave to intervene in support of the form of order sought by the Commission.

22 By order of the President of the Court of 4 May 2010, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Republic of Lithuania, the Republic of Austria, the Republic of Poland and the United Kingdom of Great Britain and Northern Ireland were granted leave to intervene in support of the form of order sought by the Council.

23 By order of the President of the Court of 30 June 2010, the application to intervene submitted by the Union Syndicale Luxembourg was rejected on the ground that, under the second sentence of the second paragraph of Article 40 of the Statute of the Court of Justice of the European Union, the Union Syndicale Luxembourg, as a legal person under Luxembourg law, does not have a right to intervene in this case.

24 The Commission's application for the case to be determined by an expedited procedure was rejected by order of the President of the Court of 26 February 2010.

The action

25 In support of its action, the Commission raises two pleas in law, alleging disregard of the Staff Regulations and Annex XI thereto, first, by Articles 2 and 4 to 17 of the contested regulation and, second, by Article 18 of that regulation.

The first plea in law, alleging infringement of Article 65 of the Staff Regulations and Articles 1 and 3 of Annex XI to the Staff Regulations

Arguments of the parties

26 By the first plea in law, the Commission claims that the Council made an incorrect adjustment of the various amounts of remuneration and pensions laid down by the Staff Regulations and the Conditions of Employment of Other Servants by replacing the amounts proposed by the Commission applying a rate of adjustment of 3.7 % with amounts applying a rate of 1.85 %.

27 The rate of adjustment of 1.85 %, which is exactly half the rate calculated by the Commission, cannot result from application of the factors laid down in Articles 1 and 3 of Annex XI to the Staff Regulations. It was fixed in an arbitrary manner, based on general considerations relating to the economic situation existing at the time of the adoption of the contested regulation.

28 The procedure laid down in Article 65 of the Staff Regulations and in Articles 1 and 3 of Annex XI to the Staff Regulations establishes an automatic method of adjustment which does not allow the Council any discretion, unless it disputes the figures submitted. The annual adjustment of remuneration is not a legislative act, but merely an implementing measure of an administrative rather than a legislative nature.

29 It is already apparent from the very wording of Article 3 of Annex XI to the Staff Regulations that the Council has only circumscribed powers in this area. Contrary to what the Council maintains, Article 65 of the Staff Regulations cannot prevail over Article 3 of Annex XI, since both provisions have the same rank in the hierarchy of norms. In addition, Article 10 of Annex XI to the Staff Regulations would be nugatory if Article 3 of that annex already conferred on the Council a discretion making it possible to take into consideration, beyond the criteria laid down in that Article 3, criteria unrelated to the reference period, such as the economic or financial situation existing at the time of the adoption of the regulation adjusting the remuneration.

30 The fact that the Council exercises circumscribed powers when it adopts the regulation adjusting the remuneration and pensions is also confirmed by the judgments in Case 81/72 *Commission* v *Council* [1973] ECR 575, paragraphs 9 and 10, and Case 59/81 *Commission* v *Council* [1982] ECR 3329, paragraphs 23 to 25, given in connection with the earlier versions of the method of adjusting remuneration, which laid

down a less strict and less detailed legal framework than that resulting from the current Annex XI to the Staff Regulations.

31 The Commission points out that the automatic nature of the method of adjustment laid down by Annex XI to the Staff Regulations reflects the intention of the Council itself, which had accepted, in Regulation No 723/2004, the method which the Commission had proposed to it, in order to create a degree of medium-term stability and on the basis of the inclusion of a number of elements representing counter-concessions for the Council. In that connection, the Commission mentions the introduction of the 'special levy' applicable to remuneration paid by the Union, and the increase in contributions to the pension scheme, measures which had the effect of reducing salary progression. The Commission further points out that the method of annual adjustment laid down in Annex XI to the Staff Regulations may lead to negative as well as positive results. In the light of those aspects, the Council, by accepting that method, agreed to be bound, in principle, for the period of validity of Annex XI to the Staff Regulations, namely eight years, to observe the conditions which that annex lays down.

32 According to the Commission, Article 10 of Annex XI to the Staff Regulations is the only provision enabling account to be taken of a sudden deterioration in the economic and social situation. However, that article was not applied in this case.

33 The Council was not entitled to transform the Commission proposal made under Article 3 of Annex XI to the Staff Regulations into a proposal having as its legal basis Article 10, an article which gives a wide discretion to the Commission as to whether a proposal under that provision is necessary. In addition, the Council did not send a formal request to the Commission to call for the submission of a proposal on the basis of Article 10 of Annex XI to the Staff Regulations. Moreover, even the submission of such a proposal by the Commission could have concerned only future amendments of the Staff Regulations and was not capable of relieving the Council, which

had circumscribed powers, of its obligation to exercise the power provided for in Article 3(1) of that annex before the end of 2009 in order to adjust salaries and pensions with effect from 1 July 2009.

34 In addition, in the light of the reference, in Article 10 of Annex XI to the Staff Regulations, to Article 283 EC, now Article 336 TFEU, an amendment of the method of adjustment of remuneration could, after the entry into force of the Treaty of Lisbon, be made only by the Parliament and the Council acting in accordance with the ordinary legislative procedure. No claim of urgency can permit the Council to disregard those requirements. By not providing, in Regulation No 723/2004, for the possibility of taking at least provisional measures, the Council knowingly accepted the 'slowness' of applying the exception clause.

35 Finally, the Commission points out that the time-lag before any financial changes, whether negative or positive, are taken into consideration is inherent in the method laid down in Article 3 of Annex XI to the Staff Regulations. Thus, the economic crisis is taken into account in the 2010 financial year, since the reference Member States will have incorporated the consequences of that crisis into the level of remuneration of their respective national civil services between July 2009 and June 2010. The application of Article 10 of that annex should therefore be reserved for genuinely exceptional and unforeseen situations.

36 However, the Commission asks the Court, in order to avoid any lack of continuity in the system of remuneration and pensions, to make use of the second paragraph of Article 264 TFEU so that the annulled provisions continue to produce their effects

until the Council adopts, in implementation of the forthcoming judgment, a new regulation complying with the Commission proposal, taking effect on 1 July 2009.

37 The Parliament supports all the pleas in law and submissions of the Commission. It points out in particular that, by adopting Article 3 of Annex XI to the Staff Regulations, the Council laid down in advance the detailed rules for the exercise of its powers under Article 65 of the Staff Regulations, so that the decision on the annual adjustments of remuneration and pensions is simply a matter of the straightforward implementation of the rules and criteria laid down in the Annex XI. Article 65(3) of the Staff Regulations must therefore be interpreted as a provision conferring on the Council only implementing powers in regard to that annual adjustment. The use of Article 10 of Annex XI to the Staff Regulations presupposes a Commission initiative and the application of the ordinary legislative procedure in accordance with Article 336 TFEU. However, that procedure was not followed in this case.

38 By contrast, the Council submits that, in the light of the wording and general scheme of Article 65 of the Staff Regulations and of Annex XI thereto, it always has a discretion with regard to the annual adjustments of remuneration and pensions, even though it does not dispute that the calculation of the annual adjustment submitted by the Commission was correctly carried out in accordance with Article 1 of Annex XI. Basing its view on the word 'particular' in Article 65(1) of the Staff Regulations, the Council asserts that Annex XI to the Staff Regulations lays down the detailed rules for the application of certain criteria of which it must take account when examining the level of remuneration and pensions, but that that annex does not preclude its taking into account other criteria.

39 Even though, by adopting Annex XI to the Staff Regulations, the Council had agreed to be bound, in principle, for the period of validity of that annex, to observe the conditions which it lays down, it did not relinquish all discretion in the determination of

the annual adjustment of remuneration and pensions. It neither repealed Article 65 of the Staff Regulations and replaced it with the provisions of Article 3 of Annex XI to the Staff Regulations nor entirely delegated its decision-making powers in this area to the Commission. The reading of Article 3 of Annex XI to the Staff Regulations defended by the Commission, according to which that article lays down an automatic procedure, renders Article 65 of the Staff Regulations completely redundant. In that regard, it is irrelevant whether the Council's decision on the annual adjustment of remuneration and pensions is a legislative or executive act.

40 In addition, the Court, in its judgment in Case 59/81 *Commission* v *Council*, paragraph 32, and the Court of First Instance of the European Communities, in its judgments in Joined Cases T-544/93 and T-566/93 *Abello and Others* v *Commission* [1995] ECR-SC I-A-271 and II-815, paragraph 53; Case T-158/98 *Bareyt and Others* v *Commission* [2000] ECR-SC I-A-235 and II-1085, paragraph 57; and Joined Cases T-201/00 et T-384/00 *Ajour and Others* v *Commission* [2002] ECR-SC I-A-167 and II-885, paragraph 47, have held that the Council has a discretion in relation to the annual adjustment of remuneration and pensions.

41 In any event, the Council has such a discretion if there is a particularly serious economic crisis of a nature such as that which occurred from the end of 2008, the occurrence and scale of which no-one could have foreseen at the time of the adoption of Regulation No 723/2004. It is inconceivable that a responsible legislature would relinquish altogether the flexibility which is essential in the event of a serious economic and social crisis.

42 That discretion based on Article 65 of the Staff Regulations exists regardless of Article 10 of Annex XI to the Staff Regulations. Admittedly, application of the latter article would make it possible to achieve a similar result. However, resorting to the

application of Article 10 would require the implementation of a more cumbersome procedure than that laid down in Article 3 of Annex XI to the Staff Regulations for the annual adjustment of remuneration and pensions, which underlines the fact that Article 10 has neither the purpose nor the effect of offering a substitute for the Council's discretion resulting from Article 65 of the Staff Regulations. Against that background, the Council contends that, even in the context of the ordinary legislative procedure under Article 336 TFEU, it may, in accordance with Article 294(9) TFEU, acting unanimously, amend the Commission's proposal, even if the Commission delivers a negative opinion in that regard.

43 In addition, the purpose of the measures which may be taken under Article 65 of the Staff Regulations and Articles 1 and 3 of Annex XI to the Staff Regulations and that of the acts which may be adopted under Article 10 of Annex XI are only partially the same. Article 10 has a far wider scope than that of the other provisions, in so far as it not only makes it possible to adjust the adaptation of remuneration and pensions resulting from the 'mechanical' application of the method, but also to suspend the application of the method, to amend it or to repeal it by a legislative act. It is common in law for legal bases to overlap partially.

44 The increase in remuneration and pensions of 1.85 % provided for by the contested regulation is designed to maintain the purchasing power of civil servants of the European Union by cancelling out the effects of the inflation recorded in Brussels (0.9 %), of the increase in civil servants' contributions to the pension scheme (0.4 %) and of the increase in the special contribution (0.43 %). To grant officials and other servants of the Union an even greater increase in their remuneration and pensions than that awarded could only provoke incomprehension of the Union by its citizens. That increase has, in addition, represented an extra burden for the budgets of the Member States which comes on top of those resulting from the interventions necessitated by the economic crisis. In the light of the measures taken by the Member States in regard

to their national civil servants following the economic crisis, it was not sufficient to wait for those measures to be reflected in the level of the next annual adjustment of the remuneration of officials of the Union at the end of 2010.

45 As regards Article 10 of Annex XI to the Staff Regulations, the Council disputes first of all the argument that that article concerns only the possible replacement of the 'normal' method of annual adjustment of remuneration and pensions with another method, which would apply only for the future, so that the application of Article 10 is precluded in the implementation of that 'normal' method. In particular, the fact that Article 10 is headed 'Exception clause' demonstrates that it enables the annual adaptation to be adjusted in the event of a serious and sudden deterioration in the economic and social situation, yet without amending the 'normal' method for the future.

46 In this case, the factual preconditions for the application of Article 10 of Annex XI to the Staff Regulations were fulfilled. During the reference period, the Union had to face a particularly serious economic crisis caused by the financial crisis. The effects of that crisis manifested themselves from the second half of 2008 and were particularly marked at the beginning of 2009. However, those effects were not taken into account in the Commission's proposal.

47 Despite its obligation to act on its own initiative if there is evidence of a serious and sudden deterioration in the economic and social situation and, where appropriate, to submit an appropriate proposal in good time under Article 10 of Annex XI to the Staff Regulations, the Commission did not use that article. During the discussions within the Council's preparatory bodies prior to the adoption of the contested regulation, the possibility of recourse to Article 10 was raised. However, at two meetings which

took place at the end of November 2009 and in early December of that year, the Commission indicated that it would not be submitting a proposal on that legal basis.

48 The Council contends that, in the absence of a Commission proposal under Article 10 of Annex XI to the Staff Regulations, it was unable to use that article. Consequently, it had no alternative but to make use of the discretion which it has under Article 65 of the Staff Regulations in order to adopt the contested regulation within the prescribed periods. The Court has acknowledged, on several occasions, that 'exceptional and unforeseen situations' may give rise to ad hoc solutions in order to enable the Union to act and to discharge its responsibilities, which is undeniably the case here. In any event, even if the Commission had submitted, in December 2009, a proposal under Article 10 of Annex XI to the Staff Regulations, it would have been impossible to adopt such a proposal before the end of the year, due to the unwieldy nature of the procedure laid down in that article.

49 Although the Danish, German, Lithuanian, Polish and United Kingdom Governments support the pleas in law and submissions put forward by the Council, they add various points of clarification.

50 Thus, it follows from the wording of Article 65 of the Staff Regulations and of Article 10 of Annex XI to the Staff Regulations and from the case-law of the Court of Justice and the General Court that the Council has a discretion in relation to the annual adjustments of remuneration and pensions, and in particular in relation to the factors to be taken into consideration in that adjustment. In particular, Article 65 of the Staff Regulations and Annex XI thereto do not specify exhaustively the factors which may legitimately be taken into account by the Council, on the one hand, and the factors which must be applied by the Council, on the other.

51 According to the institutional balance of the Union, the Council is not a mere 'executive body' of the Commission. In principle, the Council is not bound to adopt unamended a proposal for a legislative act coming from the Commission, but may make amendments to it by unanimous decision, with or without the participation of the Parliament, depending on the procedure. It is required only not to depart from the subject-matter and objective of the proposal, an obligation complied with in this case. In addition, even if implementing powers were transferred to the Commission, the Council would, in many circumstances, be able to obstruct a legislative act proposed by the Commission. It is not clear from the wording of Article 3 of Annex XI to the Staff Regulations that that article confers on the Council a power to simply rubberstamp the Commission's proposal.

52 According to the Commission's interpretation of Article 10 of Annex XI to the Staff Regulations, the Commission can completely block the applicability of that exception clause and thus render that provision completely redundant.

Findings of the Court

53 The first plea in law, alleging infringement of Article 65 of the Staff Regulations and of Articles 1 and 3 of Annex XI to the Staff Regulations by Articles 2 and 4 to 17 of the contested regulation, raises the question whether and, if so, to what extent the Council has a discretion allowing it to depart from a Commission proposal concerning the annual adjustment of the remuneration and pensions of officials and other servants of the Union by invoking a serious economic crisis, but does not dispute the compliance

with the requirements of Articles 1 and 3 of Annex XI to the Staff Regulations of the figures submitted by the Commission in its proposed adjustment.

54 Article 65 of the Staff Regulations lays down the basic rule relating to the annual review and possible adjustment of the remuneration of officials and other servants of the Union, an adjustment which also applies, pursuant to Article 82(2) of the Staff Regulations, to pensions. Paragraph 1 of Article 65 provides that the Council is to review each year the remunerations of the officials and other servants of the Union. During that review the Council is to consider whether, as part of the economic and social policy of the Union, remuneration should be adjusted. Particular account is to be taken of any increases in salaries in the public service and the needs of recruitment.

55 It follows from the wording of Article 65(1) of the Staff Regulations that that provision confers discretion on the Council in the annual review of the level of remuneration (see, to that effect, Case 81/72 *Commission* v *Council*, paragraphs 7 and 11, and Case 59/81 *Commission* v *Council*, paragraphs 20 to 22 and 32).

56 However, under Article 65a of the Staff Regulations, the rules for implementing Articles 64 and 65 are set out in Annex XI to the Staff Regulations.

57 Article 3 of that annex, which covers the 'Arrangements for the annual adjustment of remuneration and pensions', provides, in paragraph 1, that the Council, acting on a Commission proposal and on the basis of the criteria set out in Section 1 of Annex XI to the Staff Regulations, is to take a decision before the end of each year adjusting

remuneration and pensions, with effect from 1 July. Under paragraph 2 of Article 3, the amount of the adjustment is to be obtained by multiplying the Brussels International Index by the specific indicator and the adjustment is to be in net terms as a uniform across-the-board percentage. Finally, Article 3(3) of Annex XI to the Staff Regulations provides that the amount of the adjustment thus fixed is to be incorporated, in accordance with the method set out thereafter, in the basic salary tables appearing in certain provisions of the Staff Regulations and of the Conditions of Employment of Other Servants

58 It follows that, according to the wording and scheme of the provisions set out in the previous paragraph, Article 3 of Annex XI to the Staff Regulations lays down exhaustively the criteria governing the annual adjustment of the level of remuneration.

59 In order to determine whether, under Article 65 of the Staff Regulations, the Council may, within that framework, nevertheless take account of other factors, and in particular of the occurrence of a serious economic crisis, the relationship between those two provisions must be examined.

— The relationship between Article 65 of the Staff Regulations and Article 3 of Annex XI to the Staff Regulations

60 In this regard, it must be noted, firstly, that, according to Article 65a of the Staff Regulations, the function of Annex XI to the Staff Regulations is to set out the rules for implementing Articles 64 and 65 of the Staff Regulations.

61 Secondly, it must be borne in mind that that annex, and in particular Article 3, has the same legal force as the articles of the Staff Regulations and, consequently, as Article 65 of those regulations. Since Article 65 of the Staff Regulations and Annex XI thereto are both included in the same regulatory act, they have the same rank in the hierarchy of norms.

62 Both the adoption of the Staff Regulations and all the amendments made to them, and in particular the insertion of Annex XI, have been effected by a regulation, an act which, as stated in the second paragraph of Article 288 TFEU, is binding in its entirety. The Court has already held, as regards a provision of Annex VIII to the Staff Regulations, that the Staff Regulations laid down by Regulation No 259/68 possess all the characteristics set out in the second paragraph of Article 189 of the EEC Treaty (to which the second paragraph of Article 288 TFEU now corresponds) and are binding in their entirety (see Case 137/80 *Commission* v *Belgium* [1981] ECR 2393, paragraph 7).

63 Thirdly, with regard to the history of Annex XI to the Staff Regulations, the version of that annex currently in force is the culmination of a continuous development which began in 1972. That development is characterised by the setting of an ever more precise and restrictive framework for the method of annual adjustment of remuneration in terms of both the form of the legal measure used and its content.

64 As is apparent from Case 81/72 *Commission* v *Council*, paragraphs 3 and 4; Case 70/74 *Commission* v *Council* [1975] ECR 795, paragraph 7; and Case 59/81 *Commission* v *Council*, paragraph 8, the Council decided, first of all, in 1972, to apply, as an experiment and for a period of three years, a system of adjustment of remuneration involving recourse to two specific indices, while rejecting the automatic application of an arithmetical mean between the two indices which were adopted. In the light of that approach, the Court held that, by its decision, the Council, acting within the

framework of the powers relating to the remunerations of the staff conferred on it by Article 65 of the Staff Regulations, assumed obligations which it has bound itself to observe for the period it has defined (see Case 81/72 *Commission* v *Council*, paragraphs 8 and 9; Case 70/74 *Commission* v *Council*, paragraphs 20 to 22; and Case 59/81 *Commission* v *Council*, paragraph 8).

65 In 1976, the Council adopted a new method for adjusting remuneration, as is apparent from Case 59/81 *Commission* v *Council*, paragraphs 9 to 13. Subsequently, another method of adjusting remuneration was laid down for a period of 10 years by Council Decision 81/1061/Euratom, ECSC, EEC of 15 December 1981 amending the method of adjusting the remuneration of officials and other servants of the Communities (OJ 1981 L 386, p. 6).

66 Finally, the Council incorporated the method of adjusting remuneration in the Staff Regulations themselves by inserting Annex XI, for the period from 1 July 1991 to 30 June 2001, by Council Regulation (ECSC, EEC, Euratom) No 3830/91 of 19 December 1991 amending the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of those Communities in respect of detailed rules for adjusting the remuneration (OJ 1991 L 361, p. 1). The period of validity of Annex XI to the Staff Regulations, in the version resulting from Regulation No 3830/91, was extended on two occasions, in December 2000 and in December 2003, before the current version of that annex was adopted, by Regulation No 723/2004, for a period of eight years.

67 In the light of the foregoing considerations, it must be held that, even though the Council has not amended the wording of Article 65 of the Staff Regulations, it has, by the adoption of Annex XI to the Staff Regulations, adopted provisions for the

implementation of that article. The general guidelines contained in that article are clarified in detail in Article 3 of Annex XI to the Staff Regulations, by which the Council establishes, for a certain number of years, the specific rules relating to the procedure laid down in Article 65 of the Staff Regulations, in particular the criteria governing exhaustively the annual adjustment of remuneration.

68 That framework, which restricts the Council's discretion resulting from Article 65 of the Staff Regulations, is justified inter alia in the light of the objectives of ensuring a degree of medium-term stability and avoiding discussions and recurrent difficulties, in particular between the organisations representing the staff and the institutions concerned, as to whether and to what extent an adjustment is justified or necessary (see, to that effect, Case 81/72 *Commission* v *Council*, paragraph 2). In that regard, the first recital in the preamble to Decision 81/1061 and the second and third recitals in the preamble to Regulation No 3830/91 had already indicated that that framework restricting the Council's discretion was intended to maintain harmonious relations between the European institutions and their officials and other staff.

69 In order that those objectives can be achieved, it is necessary for the Council to comply with the criteria established in Article 3 of Annex XI to the Staff Regulations.

70 In addition, the adjustment mechanism laid down in Article 3 is based essentially on the idea of an alignment, admittedly with a certain time-lag, of changes in salaries at Union level with those which occurred between July of the previous year and July of the current year in the reference Member States, changes which themselves reflect the decisions on the remuneration of civil servants taken by the authorities of those Member States in the light of the economic situation prevailing during that period.

Indeed, the criteria established in Article 3 may lead to negative as well as positive results, as is evident, inter alia, from paragraph 6 of that article.

71 It follows that, by adopting Annex XI to the Staff Regulations, the Council, by a unilateral decision, bound itself, for the period of validity of that annex, in the exercise of its discretion under Article 65 of the Staff Regulations, to comply with the criteria laid down exhaustively in Article 3 of that annex. The reasoning followed by the Court in Case 81/72 *Commission* v *Council*, paragraph 9, and Case 70/74 *Commission* v *Council*, paragraphs 20 to 22, applies *mutatis mutandis* to the regulation introducing Annex XI to the Staff Regulations, which the Council adopted under Article 65a of the Staff Regulations. In those circumstances, the Council is not entitled to rely, in the context of Article 3, on a discretion going beyond the criteria laid down in that article.

72 Consequently, the Council cannot rely, in the annual review of the level of remuneration, on the discretion conferred by Article 65 of the Staff Regulations, in order to depart from the method laid down in Article 3 of Annex XI to the Staff Regulations and to take into consideration criteria other than those laid down in that article.

— The possibility of taking account of a serious economic crisis

73 As regards the possibility, invoked by the Council and the intervening Member States, of taking account of a serious economic crisis in the annual review of the level of remuneration, it must be remembered that, as provided in Article 10 of Annex XI to the Staff Regulations, '[i]f there is a serious and sudden deterioration in the economic and

social situation within the Community, assessed in the light of objective data supplied for this purpose by the Commission, the latter shall submit appropriate proposals on which the Council shall act in accordance with the procedure laid down in Article 283 of the EC Treaty'.

74 That article makes it possible, in an extraordinary situation, to disregard on an ad hoc basis the method laid down in Article 3 of Annex XI to the Staff Regulations, without amending it or repealing it for the following years. Article 10 of Annex XI to the Staff Regulations is included in Chapter 5 of that annex, headed 'Exception clause'. However, amendment of the provisions of Annex XI to the Staff Regulations is dealt with in Chapter 7 of that annex, headed 'Final provision and review clause', a chapter which includes only a single article, namely, Article 15. Article 15 fixes, firstly, the period of validity of the provisions laid down in Annex XI to the Staff Regulations and lays down, secondly, rules relating to a review of those provisions at the end of the fourth year, particularly in the light of their budgetary implications. It also mentions the possibility of amending that annex on the basis of Article 283 of the EC Treaty.

75 In addition, according to its wording, Article 10 of Annex XI to the Staff Regulations is intended to enable the institutions to react in the face of sudden events which require an ad hoc reaction rather than a comprehensive amendment of the 'normal' method of adjusting remuneration. Finally, as the Commission considered in its report of 27 June 1994 on the applicability of the exception clause (SEC(94) 1027 final, point II.3, pp. 5 and 6), that clause enables account to be taken of the consequences of a deterioration in the economic and social situation which is both serious and sudden where, under the 'normal method', the remuneration of officials would not be adjusted quickly enough.

76 Annex XI to the Staff Regulations therefore lays down a specific procedure for adjusting remuneration in the event of a serious economic crisis.

77 In order not to nullify the binding effect of Annex XI to the Staff Regulations, and in particular Articles 3 and 10 of that annex (see, by analogy, Case 81/72 *Commission* v *Council*, paragraph 13), and in the absence of other provisions of that annex relating to the possible effect of an economic crisis on the adjustment of remuneration, it must be held that, for the period of application of that annex, the procedure laid down in Article 10 thereof constitutes the only means of taking account of an economic crisis in the adjustment of remuneration and therefore of disapplying the criteria laid down in Article 3(2) of that annex.

78 That finding cannot be invalidated by the fact that the application of Article 10 of Annex XI to the Staff Regulations is dependent on a proposal from the Commission. It is clear inter alia from Article 17(2) TEU that that situation is consistent with the institutional balance envisaged by the Treaties which, in principle, grant the Commission, in respect of legislative procedures, the sole power to initiate proposals.

79 Under Article 10 of Annex XI to the Staff Regulations, the Commission 'shall submit' appropriate proposals if there is a serious and sudden deterioration in the economic and social situation. In the light of the clear wording of that article, it cannot be considered that the exercise of the powers conferred on the Commission by Article 10 constitutes a mere option for that institution.

80 In addition, the Commission must observe the duty of cooperation in good faith between the institutions, recognised by the case-law (see, inter alia, Case 204/86 *Greece* v *Conseil* [1988] ECR 5323, paragraph 16, and Case C-29/99 *Commission* v *Council* [2002] ECR I-11221, paragraph 69) and, since the entry into force of the Treaty of Lisbon, expressly enshrined in the second sentence of Article 13(2) TEU. Finally, as set out in Article 241 TFEU, the Council may request the Commission to undertake any studies the Council considers desirable for the attainment of the common objectives, and to submit to it any appropriate proposals. However, prior to the adoption of the contested regulation, the Council did not, in contrast to 1994 (see Commission report SEC(94) 1027 final of 27 June 1994, point I, p. 3), send any formal request to the Commission calling on it to discharge its duties resulting from Article 10 of Annex XI to the Staff Regulations.

81 The fact that the procedure laid down in Article 10 of Annex XI to the Staff Regulations is more cumbersome than the procedure laid down in Article 3 of that annex, in particular on account of the participation of the Parliament since the entry into force of the Treaty of Lisbon, cannot exempt the Council from the obligation to observe the rules set out in that annex. In that regard, it must be pointed out that the Council itself acknowledges that even complex procedures involving several institutions can be completed within shorter periods if there is a political will to achieve a result quickly. That possibility arises inter alia from the means of accelerating the treatment of a procedure by the European Parliament, provided for in the second paragraph of Article 229 TFEU and in the second subparagraph of Rule 134(4), Rule 142 and Rule 144 of the Rules of Procedure of the European Parliament.

82 As regards, in addition, the situation existing at the time of the adoption of the contested regulation, it must be noted that, according to the Council's line of argument, the consequences of the economic crisis were already noticeable during the reference period, which ended in July 2009. Thus, the Council could already have acted during

the summer of 2009 for the purpose of the submission of a proposal under Article 10 of Annex XI to the Staff Regulations.

83 It follows from all the foregoing considerations that the Council does not have a discretion allowing it, without having recourse to the procedure laid down in Article 10 of Annex XI to the Staff Regulations, to decide upon and fix, as it did in Articles 2 and 4 to 17 of the contested regulation, on account of an economic crisis, an adjustment of remuneration differing from that proposed by the Commission under Article 3 alone of that annex.

84 Consequently, Articles 2 and 4 to 17 of the contested regulation must be annulled.

The second plea in law, alleging infringement of Article 65 of the Staff Regulations and Articles 3 to 7 of Annex XI to the Staff Regulations

Arguments of the parties

85 By its second plea in law, the Commission argues that Article 18 of the contested regulation infringes Article 65 of the Staff Regulations and Articles 3 to 7 of Annex XI to the Staff Regulations inasmuch as it creates a new legal basis for reviewing the contested regulation and, therefore, a possibility of making an intermediate adjustment of remuneration.

86 Article 65 of the Staff Regulations lays down only one annual deadline for the adjustment of remuneration. The possibility of making an intermediate adjustment of remuneration, provided for in Articles 4 to 7 of Annex XI to the Staff Regulations, presupposes a substantial change in the cost of living between June and December and, in addition, the submission of a Commission proposal. However, the Council did not request the Commission to submit a proposal to that effect and, in any event, the Commission did not submit such a proposal. Nor can the Council, on its own, disregard the procedural requirements of Article 10 of Annex XI to the Staff Regulations, in particular the need for the submission of a Commission proposal and for the participation of the Parliament in the legislative procedure.

87 In any event, the annulment of Articles 2 and 4 to 17 of the contested regulation would make the review clause in Article 18 of that regulation redundant.

88 The Parliament adds that Article 290 TFEU does not allow the Council to reserve to itself powers in an implementing act and that Articles 64 and 65 of the Staff Regulations and Annex XI thereto do not provide any legal basis for such a review clause.

89 The Council contends that the second plea in law is linked to the first plea in law and to the Commission's argument that, by adopting Annex XI to the Staff Regulations, the Council relinquished all discretion. Article 18 of the contested regulation cannot be contrary to Articles 4 to 7 of Annex XI to the Staff Regulations, given that those articles do not cover the same situation. Article 18 of the contested regulation relates to the possibility of reviewing, on a proposal from the Commission, the rate of adjustment of remuneration and pensions as fixed in the contested regulation, taking account of the development of the economic and financial crisis and of the economic

and social policy of the Union, in accordance with the flexibility expressly postulated by the Staff Regulations.

Findings of the Court

90 The Commission's second plea in law alleges infringement of Article 65 of the Staff Regulations and of Articles 3 to 7 of Annex XI to the Staff Regulations by Article 18 of the contested regulation, which provides for the possibility of reviewing the contested regulation. Such a possibility was not provided for in the Commission proposal.

91 With regard to the level of remuneration, Article 65(1) of the Staff Regulations provides for only one annual review of it. On the other hand, as regards the weightings, paragraph 2 of that article allows intermediate adjustments to be made to those weightings in the event of a substantial change in the cost of living. Articles 1 to 3 of Annex XI to the Staff Regulations set out the arrangements for the annual review of remuneration and Articles 4 to 7 of that annex lay down more detailed rules for intermediate adjustments of the correction coefficients.

92 None of those provisions envisages the possibility of laying down, in the context of the annual review of the level of remuneration, new rules allowing a review of that level, or of adjusting the remuneration outside the framework of the annual adjustment under Articles 65(1) of the Staff Regulations and 1 to 3 of Annex XI to the Staff Regulations. Nor do those provisions allow departure from the intermediate adjustment of weightings and correction coefficients, provided for in Article 65(2) of the Staff Regulations and Articles 4 to 7 of Annex XI.

93 Consequently, Article 18 of the contested regulation was adopted in contravention of Article 65 of the Staff Regulations and Articles 3 to 7 of Annex XI thereto and must therefore also be annulled.

94 It follows from all the foregoing considerations that Articles 2 and 4 to 18 of the contested regulation must be annulled.

95 However, in order to avoid discontinuity in the system of remuneration, it is necessary to apply the second paragraph of Article 264 TFEU and to maintain the effects of the annulled provisions of the contested regulation relating to the adjustment of the remuneration of officials and other servants of the Union as from 1 July 2009, namely, Articles 2 and 4 to 17 of that regulation, until the entry into force of a new regulation adopted by the Council in order to ensure compliance with this judgment.

Costs

96 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Council has been unsuccessful, the Council must be ordered to pay the costs. Under the first subparagraph of Article 69(4) of the Rules of Procedure, the Member States and institutions which intervene in the proceedings are to bear their own costs.

On those grounds, the Court (Third Chamber) hereby

1. **Annuls Articles 2 and 4 to 18 of Council Regulation (EU, Euratom) No 1296/2009 adjusting with effect from 1 July 2009 the remuneration and pensions of officials and other servants of the European Union and the correction coefficients applied thereto;**

2. **Maintains the effects of Articles 2 and 4 to 17 of Regulation No 1296/2009 until the entry into force of a new regulation adopted by the Council of the European Union in order to ensure compliance with this judgment;**

3. **Orders the Council of the European Union to pay the costs;**

4. **Orders the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Republic of Lithuania, the Republic of Austria, the Republic of Poland, the United Kingdom of Great Britain and Northern Ireland and the European Parliament to bear their own costs.**

[Signatures]