JUDGMENT OF THE COURT (FIRST CHAMBER)
11 MARCH 1982 [1]

Luigi De Pascale
v Commission of the European Communities

(Former official — Rate of exchange for calculating pension)

Case 164/80

Officials — Pensions — Determination of pension rights — Payment of benefits — Distinction — Amount of benefits affected by exchange rates and weightings — No encroachment upon pension rights

(Staff Regulations of Officials, Annex VIII, Chapter 2 and Articles 45 and 46)

The provisions of Annex VIII to the Staff Regulations draw a clear distinction between the determination of "pension rights" covered by Chapter 2 of the annex and the "payment of benefits" governed by Articles 45 and 46 of the annex. Although changes in the amounts actually paid to the pensioner which were solely due to the effect of the rates of exchange and the weightings affected the payment of benefits under Articles 45 and 46, they did not encroach upon the pension rights as determined in accordance with Chapter 2 of the annex.

In Case 164/80

LUIGI DE PASCALE, a retired official of the Commission of the European Communities, residing at 10 Largo Damiano Chiesa, Rome, represented by Marcel Slusny of the Brussels Bar, with an address for service in Luxembourg at the Chambers of V. Biel, 18A Rue des Glacis,

applicant,

1 — Language of the Case: French.

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Joseph Griesmar, actig as Agent, assisted by Daniel Jacob of the Brussels Bar, with an address for service in Luxembourg at the office of O. Montalto, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION in the terms set out in the pleadings,

THE COURT (First Chamber)

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

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

gives the following

JUDGMENT

Facts and Issues

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

I — Facts and procedure

1. This case should be seen against the background of the following provisions:

As regards the payment of pension entitlement, two provisions in the Staff Regulations of Officials are particularly relevant in the present instance:

Article 45 of Annex VIII to the Staff Regulations, which allows pensioners to elect to have the amounts due to them paid in whichever of the following three currencies they choose: the currency of their country of residence, that of their

country of origin or that of the country where the institution to which the official belonged has its seat; and

Article 82 of the Staff Regulations, which provides that pensions "shall be weighted in the manner provided for in Article 64 and Article 65 (2) for the country of the Communities where the person entitled to the pension declares his home to be". The provision stipulates that "payment of such pensions shall be effected in accordance with the terms contained in Article 63 in respect of payment of remunerations".

In the version in force until 31 March 1979, Article 63 of the Staff Regulations of Officials provided that:

"An official's remuneration shall be expressed in Belgian francs. It shall be paid in the currency of the country in which the official performs his duties. Remuneration paid in a currency other than Belgian francs shall be calculated on the basis of the par values accepted by the International Monetary Fund, and in force on 1 January 1965."

The relevant parity was LIT 12.5 to BFR 1.

Pensioners were able to derive special advantages from these provisions. If they declared their domicile to be in a country whose currency had diminished in value, they could elect to have their pensions paid in the strong currency of their country of origin or of that of the seat of the institution to which they belonged. This state of affairs was condemned by Mr Advocate General Mayras in his opinion in Case 28/74 *Gillet* [1975] ECR 475.

With a view to abolishing the anomalies in the rules governing the payment of remuneration and pensions brought about by the breakdown in the international system of fixed exchange rates, the Commission submitted to the Council on 1 April 1977 a proposal for a regulation introducing the European unit of account (EUA) into the Staff Regulations (Official Journal C 99, p. 5), which was rejected by the Staff Regulations Committee which had been consulted. In order to bring the rates of exchange up to date it was suggested that, under Article 63 of the Staff Regulations, remuneration should be "calculated on the basis of the value" of the currency in which payment was made "in terms of the European unit of account on 1 January 1977", which date could be changed at least once a year. The Council obtained the opinion of the European Parliament and of the Court of Justice. By resolution of 7 July 1977 (Official Journal C 183, p. 55) the Parliament approved the proposal, requesting the Commission "to introduce, in good time, the administrative arrangements needed to ensure that the application of the European unit of account does not disrupt existing administrative practices or even temporarily harm the interests of the European Civil Service", and taking note of "the Commission's assurances that its proposals will in no way affect the real value of the payments made to officials in the form of remuneration, pensions and allowances". At the sitting the Member of the Commission responsible for administration, Mr Tugendhat, stated: "The object of the Commission's system is financial neutrality, and what we think that our

system can achieve is an equality of purchasing power. What we want is that a Commission official of a given grade, whether he is working in Brussels or Luxembourg or London or any other part of the Community, should be able to buy exactly the same quantity of goods as his equal in another part of the Community . . . ."

The Council did not succeed in 1978 in adopting the regulation proposed by the Commission on 6 October 1976 (Official Journal C 271, p. 5) on the procedure for applying the EUA to the legal acts adopted by the institutions of the European Communities. The Commission therefore set to work to bring up to date, in the light of the situation thereby created, the exchange rates in respect of remuneration for officials which was envisaged by the proposal of 1 April 1977. In an annex to its Report in 1978 on the yearly survey of the level of remuneration (COM(78) 673 final of 29 November 1978) the Commission sent the following communication to the Council on which neither the Parliament, the Court of Justice or the Staff Regulations Committee was consulted:

". . . The first two paragraphs of Article 63 are replaced by the following: 'Officials' remuneration shall be expressed in Belgian francs. It shall be paid in the currency of the country in which the official performs his duties. Remuneration paid in a currency other than Belgian francs shall be calculated on the basis of the exchange rates used for the implementation of the general budget of the European Communities on . . .

The Commission urges the Council to adopt the aforementioned article before the end of the year as well as Article 17 of Annex VII which is the result of the Council's studies relating to the amendment to the Staff Regulations . . .

The . . . regulation should come into effect on 1 January 1979 . . . and should apply from 1 April 1979. However, for pensioners in receipt of allowances whose net financial benefits will be less than those under the existing arrangements, the regulation will apply only from 1 October 1979."

On 21 December 1978 the Council adopted Regulation No 3085/78 (Official Journal L 369, p. 6), amending, with particular reference to the monetary parities to be used, Regulation No 259/68 laying down the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of the Communities, Regulation No 2530/72 and Regulation No 1543/73 concerning certain special measures. The regulation embodies the wording of the communication from the Commission of 29 November 1978. The regulation fixes 1 July 1978 as the relevant date for calculating remuneration paid in a currency other than Belgian francs on the basis of the exchange rates used for the implementation of the general budget of the Communities and goes on to state that that date shall be changed at the time of the annual review of remuneration.

Hand in hand with the bringing up to date of the rates of exchange, the Council adopted Regulation No 3086/78 of 21 December 1978 (Official Journal L 369, p. 8) adjusting the weightings applicable to the remuneration and pensions of Officials and Other Servants of the European Communities following the amendment of the provisions of the Staff Regulations concerning the

monetary parities to be used in implementing the Staff Regulations, which amended the value of the weighting according to the various places of employment (in the case of serving officials) or residence (in the case of pensioners) so that all those entitled and living in countries other than Belgium or Luxembourg would have such benefits as they could have received in the currency of their place of residence maintained at the amount to which they were entitled, in that same currency, from the institution on the day prior to that on which Regulation No 3085/78 took effect.

2. In practical terms the effect of Regulation No 3086/78 is that persons living in Italy, for example, who elected to have their pension paid in lire, continue to draw the money due to them in the same nominal amount of lire. However, in the case of pensioners living in Italy who are paid at their own request in the "strong" currency of their country of origin or that of the country where their institution has its seat, the effect of the alteration to the weighting applicable to the country of residence (which fell, pursuant to Regulation No 3086/78, from 146.8 to 70.3 — cf. the corrigendum to Official Journal L 77, 29 March 1979 substituting the weighting of 70.3 for 74.4 mentioned in Regulation No 3086/78) is to reduce the nominal amount of the pension paid in the currency in question.

On 19 October 1979 the applicant, a former official of the Commission, who was drawing his pension in Italy, received a letter from the defendant informing him that pursuant to Regulation No 3085/78 his pension was calculated from October 1979 on the basis of the weighting applicable for his country of residence (74.9) and the exchange rate prevailing on 1 July 1978, which brought his pension to BFR 34 910, and that the difference between that amount and his pension for September 1979 (which was BFR 72 850) would be reduced at the rate of one tenth per month. On 27 December 1979 the applicant submitted a complaint under Article 90 of the Staff Regulations on the subject of his pension statement for October 1979. The Commission did not take a decision thereon within the four-month period laid down by the Staff Regulations.

3. The present application was received at the Court Registry on 14 July 1980.

The written procedure followed the normal course.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court (First Chamber) decided to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

The *applicant* claims that the Court should:

Declare Council Regulations Nos 3085 and 3086/78 inapplicable;

Declare the decisions by which the monthly pension payments due to the applicant since October 1979 were reduced to be null and void;

Declare the implied decision rejecting the applicant's complaint to be null and void;

Giving judgment under its unlimited jurisdiction, order the other party to pay

to the applicant by way of damages the amounts of which he was deprived from October 1979, namely BFR 200 000 subject to the right to amend during the course of the proceedings, together with ordinary interest thereon;

Order the other party to pay the costs.

The *Commission* contends that the Court should:

Dismiss the application as unfounded;

Order the applicant to pay the costs.

III — Submissions and arguments of the parties

1. The *applicant* submits that Article 24 of the Merger Treaty provides that the Council is to lay down the Staff Regulations of Officials after consulting the other institutions concerned, and "institutions concerned" must mean the institutions which employ officials and other servants. Yet it is clear from the preamble to Regulation No 3085/78 that neither the Economic and Social Committee nor the Court of Auditors was consulted. Moreover, such consultation as there was concerned only the substitution — presented as a neutral measure — of the European unit of account for the Belgian franc, and did not cover all the provisions contained in Regulations No 3085 and No 3086/78.

As for the Parliament, it was consulted on a different document, the purpose of which was, moreover, represented as being without any effect on officials' remuneration. Any doubt on that point will be removed by examining the wording of the Resolution of 7 July 1977, quoted above, which can only be understood in so far as the effect of the measures contemplated had not been revealed to the Parliament.

The preamble to Regulation No 3085/78 indicates that the Commission submitted its proposal after obtaining the opinion of the Staff Regulations Committee. Since there is no provision in Article 82 for such consultation it must be assumed that the Commission was applying Article 110 of the Staff Regulations by analogy. Therefore, applying the rule *patere legem quam ipse fecisti,* the Commission ought likewise to have consulted the Staff Committee.

The application of Regulation No 3085/78 is a breach of the principle of vested rights. Moreover, by drastically amending the conditions laid down in the Staff Regulations so as to bring about a considerable reduction in pensions the Commission has radically altered the whole structure of the Staff Regulations and undermined fundamental conditions in such a manner as to compromise the applicant's decision to agree to be bound by Staff Regulations.

Lastly, the Commission gave a most solemn undertaking to ensure that the measures put forward by it with a view to substituting the European unit of account for the Belgian franc for calculating pensions would be strictly neutral and would not, in the words of the Parliament, affect the real value of the payments made to officials in the form of remunerations, pensions and allowances.

Implementation of the provisions in question involves discrimination. In particular, one of the implementing measures decided upon by the defendant is that certain types of transfer may be carried out on the old basis of calculation for a period of five years. The applicant wonders why similar measures, although for longer periods perhaps, are not applied to pensioners, whose social and financial position is certainly not better than that of serving officials.

In any case it is incumbent on the Commission to ensure that implementation of the regulations adopted by the Council does not adversely affect the interests of pensioners in any way. In the discharge of its duty to assist officials, of which Article 24 of the Staff Regulations is an example, it ought in the present instance to have included in the implementing measures transitional compensatory provisions with regard to the applicant's pension or his wife's survivor's pension.

2. In its defence the *Commission* observes that as regards the instances of lack of consultation neither the Economic and Social Committee nor the Court or Auditors are institutions within the meaning of the Treaties and accordingly the Council was not legally obliged to seek their opinions. According to the provision in Article 1 of the Staff Regulations the Economic and Social Committee and the Court of Auditors shall be treated as institutions of the Communities solely "for the purposes of the application of the Staff Regulations", not in connection with the establishment or amendment of them. Moreover, Regulation No 3085/78 is in fact a provision based in principle on Article 24 of the Merger Treaty and not on Article 110 of the Staff Regulations. It is an effective amendment to the Staff Regulations and as such falls exclusively within the purview of the Council; it must not be viewed as a general provision for giving effect to the Staff Regulations within the meaning of Article 110; the twofold consultation provided for in that article is not therefore required in this case.

As to the allegation of insufficient consultation the Commission observes that the applicant's view would be well founded if, after a first proposal from the Commission was put forward, and before the Council adopted any decision on it, a quite new proposal was submitted, that is to say, one concerning other matters or making substantial amendments (cf. *a contrario* Case 41/69 ACF *Chemiefarma* [1970] ECR 661). For the same reasons the consultative procedure provided for in Article 24 of the Merger Treaty does not have to be repeated every time a minor alteration is made. In this case by a communication of 29 November 1978 the Commission suggested to the Council that Article 1 of the initial proposal of April 1977 be reworded. A comparison with the last-mentioned texts shows clearly that the new provisions do not amount to a substantial amendment. In the case of pensions, in particular, updating the relevant exchange rates on the basis of the European unit of account had the same financial consequences as those resulting from the application of Regulation No 3085/78. In fact, the exchange rates used for implementing the general budget of the Communities as at 1 July 1978 were strictly related to the value of the currencies considered (Belgian francs on the one hand, other currencies on the other) with respect to the European unit of account on the same date.

The Parliament was certainly not led into error but acted on full knowledge of the circumstances. Its opinion was that it was "appropriate ... to abandon the exchange ratios introduced in 1965", and it noted the Commission's assurance that its proposal would "in no way affect the real value of the payments to officials in the form of remunerations, pensions and allowances". From the report of the Committee on Budgets, moreover, it emerges that "as regards pensions ... the transition to the EUA system ... will likewise entail no change, to the extent that the pensions are paid in the currency of the country of residence of the beneficiary. However, there will no longer be any advantage to be gained from opting, pursuant to Article 45 of Annex VIII to the Staff Regulations, for payment in currencies other than of the country of residence."

The Court has defined the extent of the obligation to consult the Parliament in two recent judgments (Case 138/79 *Roquette* and Case 139/79 *Maizena* [1980] ECR 3333 and 3393) as a requirement which "implies that the Parliament has expressed its opinion", without prejudice to the cases, judgment on which was reserved by the Court, where the Parliament, by its own conduct and regardless of all efforts made by the Council to obtain its opinion, makes it impossible to observe the requirement of consultation.

As regards the breach of general principles the defendant considers that the applicant's criticisms are totally without foundation. The applicant educes from the concept of "vested rights" an opinion contrary to the case-law of the Court (cf. Case 28/74 cited above in which it was held that "an official cannot in any case claim a vested right unless the facts giving rise to that right arose under a particular set of Staff Regulations prior to the amendment decided upon by the Community authority"). That is precisely the view which appears to have been taken also by the national courts and by the Administrative Tribunal of the United Nations (see *Puvrez*, 4 December 1961, Clunet Reports 1963, p. 117). That ruling is the logical consequence of the view that the official's relationship is governed not by contract but by regulations (cf. the opinion of Mr Advocate General Gand in Case 20/68 *Pasetti-Bombardella* [1969] ECR 235, at p. 250), a view which has been endorsed by the most authoritative sources (cf. Professor P. Weil, "La nature du lien de fonction publique dans les organisations internationales", Revue Générale de Droit International Public 1963, p. 274). It also forms the corollary of the principle that administrative measures must not be retroactive. The "advantages lawfully acquired" by the applicant are fully safeguarded as regards the favourable conditions which were applied on payment of his pension prior to 1 October 1979. On the other hand, it is no longer possible to speak of a "vested right" to have those same favourable conditions maintained in force as regards pension payments made after the Staff Regulations were amended.

In order to prove an unfavourable change in the fundamental conditions of such a kind as to influence the applicant's decision to agree to be bound by the Staff Regulations, it must also be shown on what grounds the applicant relied, when he entered the service in

1958, to perceive that the pension scheme in force contained a guarantee for officials that it would remain unchanged so as to guarantee them for all time the advantages which existed before the reforms in question. The floating of currencies after 1971, in conjunction with the fact that the IMF rates continued to be used and the option afforded by Article 45 of Annex VIII to the Staff Regulations, brought about the unfair situation which conferred advantages on certain officials when in fact such treatment was in no way supported by the *ratio legis* of the provision.

The staff could not have been under any misapprehension any more than the Parliament as to the practical repercussions on pensions of the updating of exchange rates. An administrative circular distributed in May 1978 pointed out that "the re-calculation of the weightings would ensure that bringing the rates of exchange up to date will have no undesirable effects, since the currency in which payment is made is that (...) of the country of residence in the case of pensioners ...". Before that a circular distributed by the staff unions dated 23 February 1978 contained the following remark: "Many pensioners will find that their pension has been dramatically altered. The Commission must consider such problems on a case-by-case basis together with the Staff Committee in order to avoid unacceptable situations arising".

As regards alleged discrimination between officials, in particular where transfers of money are concerned, and pensioners the Commission contends that the only legal principle applicable is that there must be no arbitrary discrimination for which there are no objective grounds rather than that the principle of equality is applicable. The situations in this instance, however, are not the same or even comparable. According to the third subparagraph of Article 4 of Regulation No 3085/78 the new system was to be introduced, in the case of pensions and allowances which would be reduced, only from 1 October 1979, whereas the regulation was to apply from 1 April 1979, in particular as regards transfers. In addition the reduction in pensions was to be effected in stages. As to the transitional measures which were adopted at the time and to which the applicant refers they concern the calculation of national maintenance costs in determining entitlement to the allowance for persons treated as dependent children and therefore have nothing whatsoever to do with the comparison to which he refers.

The Commission is opposed to the adoption of any compensatory measures which, according to the applicant, should be based on the general duty of assistance which is incumbent upon the defendant. The latter has shown that such a wide definition of the duty of assistance conflicted with the fact that the employment relationship in the public service is governed by regulations. It would appear that an incorrect view of the concept of "vested rights" already raised is at the root of the matter. Article 24 of the Staff Regulations may not therefore be relied upon for that purpose (cf. the opinion of Mr Advocate General Dutheillet de Lamothe in Joined Cases 63 to 65/70 *Bode and Others* [1971] ECR 549, at p. 557) and the result of its being relied upon would be to render ineffectual the power of the authority responsible for the Staff Regulations to enact with immediate effect provisions adapting those regulations to economic realities even if such an adaptation were to erode or eliminate the advantages previously enjoyed.

3. In his reply the *applicant* observes that the text of Article 24 of the Merger Treaty refers to the institutions "concerned", and not to the institutions as listed in the Treaties, the reason being that where decisions relating to staff are concerned it is appropriate to consult all the "institutions" which employ officials; this applies to the Economic and Social Committee and the Court of Auditors. The distinction between "the purposes of the Staff Regulations", for which the two institutions in question must be consulted, and "amendment" of the Staff Regulations for which they need not be consulted will not bear scrutiny. If that theory were applied to the letter the result would be that the two institutions would not be considered sufficiently important to be consulted in their own right on amendments to the Staff Regulations, whereas they would be through the intermediary of the Staff Regulations Committee, which includes representatives of the institutions and of their staff and is required to be consulted under the second subparagraph of Article 10 of the Staff Regulations: this is precisely the situation which has arisen in this instance.

Furthermore, although in form the regulation is a measure falling solely within the Council's area of responsibility the fact remains that since Article 110 of the Staff Regulations provides that the Staff Committee must be consulted on the adoption of general implementing measures within each institution, the same must *a fortiori* apply to a measure such as the amendment of the Staff Regulations the effect of which in principle, is much wider in scope.

The Parliament was not consulted on all the new provisions. In the first place, in order to prove that the two new versions of Article 63 of the Staff Regulations were substantially the same it would have to be shown that transformation of the old position to that which was the result of the implementation of the amendment based on reference to the European unit of account did not involve any losses for pensioners other than technical ones. The same proof would be required as to the transformation from the European unit of account scheme to the new mode of conversion; yet no such evidence has been brought.

In order to determine whether and to what extent the Parliament was adequately informed of the consequences of the proposed reform the report by the Committee on Budgets must first be examined, from which it emerges that when the first reform was presented that Committee concerned itself principally with the substitution of the European unit of account for the IMF parities without taking into account the alterations which would result from withdrawal of the option provided for in Article 45 of Annex VIII to the Staff Regulations. The Parliament was never aware of the fact that for pensioners the difference was not purely nominal but meant that their pension might be reduced by up to more than 50%. The statements made by Mr Tugendhat in the course of the debate were quite unequivocal as to the neutrality of the operation. Moreover, consideration of the resolution embodying the opinion of the Parliament is sufficiently explicit both as to the intentions of that institution and as to the information which was given to it (cf. the preamble to the resolution).

As far as the *Roquette* and *Maizena* decisions are concerned, the dicta they contain cannot be reduced to the truism that Parliament has been consulted when it has delivered an opinion. Such an interpretation overlooks the fundamental

question of how substantial the second consultation was, what form it took and how effective it was. Even if a second consultation was not necessary the first must, in any case, be considered as non-existent since the Parliament was induced to deliver an opinion, which left no doubt as to its intention, by information which was inaccurate and in any case incomplete.

As to the question of vested rights the applicant observes that the opinion of the Administrative Tribunal of the International Labour Organization in the *Lindsey* case is relevant to the general principle of the inviolability of salaries. That decision defines precisely the scope of the institution's right to modify its officials' remuneration: it may alter the separate components of the remuneration provided that the official's total remuneration remains at least the same as it was before. The same point was made by Mr Tugendhat to the Parliament in the sitting on 17 January 1980 when he said (in relation to the readjustment of salary scales) that "no member of staff would find that his net salary had been reduced from one month to the next as a result of the proposal we have submitted". A statement as clear as that disposes of that argument outlined by the Commission in the course of the hearing in Case 1253/79 *Battaglia* [1982] ECR 297, that the circumstances, namely those of the recession, were such as to justify an erosion of the principle of the inviolability of salaries. Yet it is the Commission itself which has brought an action against the Council with the aim of having the Court condemn the delay on the part of the latter in applying the procedures provided for in Article 65 of the Staff Regulations (Case 59/81). If the argument that the recession made it imperative to reduce or stop altogether the progressive increases in salaries and pensions holds good then measures of that kind must be applied primarily to the highest salaries, and not to pensioners.

It is in the interests of the Community institutions to apply the principle of stability; if officials with the necessary qualities, in particular independence and ability, are to be recruited it is essential to give them appropriate salaries, and especially to guarantee that those salaries will remain at least at the same level and may be reduced only if (an eventuality which has been wholly theoretical since 1945) there is an appreciable lowering of prices. The need for stability was so well appreciated by the Council that Article 65 (1) provides for an annual review of remuneration and paragraph (2) of the same article provides for adjustments to be made to the weightings within two months at the most in the event of a substantial change in the cost of living. Even if the absence of recognition of vested rights were possible in a set of staff regulations kept within the strict sense of the term, that supposition, which is a highly questionable one, could not apply to pensions when the pension rights were acquired before the official retired. In particular as far as the Staff Regulations are concerned, Article 10 of Annex VIII thereto defines clearly the date on which the entitlement to receive a retirement pension shall take effect. Were it possible, however, to apply the

regulations in question to a pensioner whose rights had not yet commenced to run, the applicant would not be affected, his rights having been determined long ago. It may therefore be stated that the Community institutions themselves, whilst rejecting the theory of vested rights, consider that the right of the authorities to amend the Staff Regulations unilaterally — but only in the interests of the service — does not go so far as to allow it to reduce official's pensions.

Alteration of the fundamental conditions upon which the applicant based his decision to agree to be bound by the Staff Regulations is unacceptable, for an official commits himself only in the light of the conditions offered to him under the Staff Regulations and with the conviction that whilst those Staff Regulations may be modified unilaterally (provided that he may defend his interests by any collective or individual means) any reduction in his pension is precluded except in the hypothetical case of a reduction in the cost of living. The question is not whether on his entry into service the applicant believed that Article 82 of the Staff Regulations gave him a guarantee against change but whether at that moment, and subsequently, he had reasonable grounds for believing that the total amount of his pension would not be reduced.

As to the defendant's ignoring the undertakings it had given that bringing the exchange rates up to date would have no adverse effect on the real value of payments made in the form of remuneration, pensions and allowances, the applicant finds it difficult to draw any conclusion from the statements made by the Commission concerning the administration's conduct after the Parliament had been consulted. The administrative circular distributed in May 1978 and the fictitious salary statements which were sent out were of little interest to pensioners since they could not base a court action on mere intentions and, moreover, there was still the possibility that the Council, with which negotiations were in progress, might be persuaded not to publish Regulation No 3085/78 as it stood.

As to the breach of the principle of equal treatment the applicant considers that no reasonable justification for discrimination is to be found in the objective material situations of the two groups of officials, pensioners on the one hand and serving officials on the other. In any system under which problems concerning salaries or pensions are resolved not on an *ad hoc* basis, but on the basis of objective rules applicable equally to all those who are in the same legal situation no provision of the Staff Regulations or implementing measure may be especially favourable to some, yet thoroughly unfavourable to others.

As far as the adoption of compensatory measures is concerned the applicant points out that the Commission is fundamentally liable and is therefore bound to make good the damage it has inflicted. The amendment complained of by the applicant was drawn up by the Commission's officers, then submitted to Parliament, and finally to the Council, as a neutral measure, which in fact it was not. *Bode* and the other cases cited by the defendant concerned a wholly

different set of circumstances, in which the officials were objecting to the consequences of measures adopted by their own government.

4. In its rejoinder the *Commission* emphasizes that the argument based on the composition of the Staff Regulations Committee affords no support whatsoever for the other party; the Economic and Social Committee and the Court of Auditors are to be treated as institutions of the Communities for the purposes of the Staff Regulations pursuant to Article 1 of the said regulations and therefore it goes without saying that they are represented on the Staff Regulations Committee. It is widely accepted that annulment on the ground of a breach of an essential procedural requirement is a sanction applied to the failure to effect a compulsory consultation, not failure to effect a consultation which is optional. As far as the Economic and Social Committee is concerned Article 198 of the Treaty provides that it must be consulted where the Treaty so provides; for Article 24 of the Merger Treaty to constitute a case where consultation is obligatory is inconceivable since the article refers merely to consultations with the institutions, which can only mean "institutions" within the meaning of the Treaties. Article 9 (3) of the Staff Regulations does not accord the Staff Committee any consultative role as regards amendments to the Staff Regulations (it provides that the Committee "may" be consulted only on "any difficulty having general implications concerning the interpretation and application of [the] Staff Regulations"). The fact that the Staff Committee must be consulted on the adoption of general implementing provisions for the Staff Regulations — which are dispositions of secondary law — does not mean that it must also be consulted when an amendment is made to the Staff Regulations, which are a primary source of law. In any case it is not the Council which consults the Staff Regulations Committee but in fact the Commission, pursuant to the third paragraph of Article 10 of the Staff Regulations. Lastly, the arguments concerning the advisability of consulting those committees apart from any legal obligation to do so fall outside the scope of that head of claim and need not therefore be examined.

As far as consultation with the Parliament is concerned the Commission is of the opinion that the subject of the comparison must be the situation as it would be under the proposal on the introduction of the European unit of account and the situation which arose on the entry into force of Regulation No 3085/78. There is no point here in comparing the previous situation with that which would have resulted from the adoption of the proposal on the introduction of the European unit of account.

The applicant's excursus on the interpretation of the Parliament's resolution is far from convincing; it attempts to give the text a meaning which it does not have by isolating certain passages rather than considering it as a whole. For instance, the fifth recital in the preamble to the resolution states that the rights of the staff will not be affected and that was in fact the case as regards pensioners because in the circumstances they could not claim that their vested rights had been infringed in any way. The Commission considers that any interpretation based on the opinion given by the Parliament on the text which was to become Council Regulation No 160/80 contributes nothing useful to the debate. The fact is that that regulation, adopted on 21 January 1980, dealt with a wholly different problem concerning what is known as the "nettoyage de la grille" [the readjustment of salary scales]. In any case on reading the report by the Committee on

Budgets it becomes clear that as far as pensions are concerned the adjustment envisaged entailed no guarantee against adverse financial effects, at least in so far as pensions paid in a currency other than that of a country of residence are concerned; the same observation may be made as regards the statements made by Mr Tugendhat. Finally, the applicant errs in insisting that the adjustment did away with the option contained in Article 45 of Annex VIII to the Staff Regulations.

The submission that there is a general principle of law in regard to international civil servants to the effect that an official's salary or pension may under no circumstances be reduced save in the event of a reduction in the cost of living cannot apply in this instance because in the case of pensioners the adjustment enabled those who had chosen to be paid in the currency of their place of residence to draw the same amount in that currency as they were entitled to draw prior to the entry into force of Regulations Nos 3085 and 3086/78.

The Court has rejected — quite unequivocally — the concept of vested rights upon which the applicant seeks to rely. The non-contractual nature of the relationship between the official and the administration, and hence the latter's power to amend the provisions of the Staff Regulations at any time, was confirmed very recently by Mr Advocate General Reischl in Joined Cases 161 and 162/80 *Carbognani* and *Coda Zabetta* [1981] ECR 543.

The applicant attempts in vain to find evidence in the various texts emanating from the Council or the Commission or even in the Treaty of any application of a "principle of the permanence of salary levels". No support whatsoever for the applicant is to be found in the preamble to the Staff Regulations of 1962; although the guarantee of an appropriate salary and pension constitutes one of the conditions essential to the independence of European public servants it is quite unreasonable to conclude that such independence necessarily implies the existence of a guarantee that officials may continue to receive for all time exchange advantages for which there is no justification. The same remark applies to the applicant's submissions based on Article 65 of the Staff Regulations. The argument that the applicant's pension rights were determined on the date on which he retired is untenable. The only right which vests in the official on that date is the right to receive a pension calculated on the basis of the provisions in force on that date and for the month in which he retires. There is no vested right, by contrast, to have that amount maintained unchanged in the future.

As to the alteration of the fundamental conditions on which the applicant based his decision to agree to be bound by the Staff Regulations, it must be recalled that the applicant was recruited in an era of great stability in the monetary sphere when the exchange advantages which certain pensioners have enjoyed since 1971 did not exist and when the applicant could neither foresee the advent thereof nor be convinced of their permanence being guaranteed by the Staff Regulations.

The claim for the adoption of compensatory measures was obviously submitted in the alternative and is thus based on the theory that the adjustment in question was wholly lawful. In the circumstances it cannot be maintained in this case that the Commission is fundamentally liable.

IV — Oral procedure

The parties presented oral argument at the sitting on 1 October 1981.

The Advocate General delivered his opinion at the sitting on 14 January 1982.

Decision

1 By an application lodged at the Court Registry on 14 July 1980 the applicant, a retired official of the Commission, brought an action under Article 91 of the Staff Regulations of Officials for the annulment of the Commission's decision reducing as from October 1979 the monthly pension payable to him and of the rejection of the complaint which he submitted against that decision.

2 In support of his action the applicant claims that Council Regulation (Euratom, ECSC, EEC) No 3085/78 of 21 December 1978 (Official Journal 1978 L 369, p. 6), which amended the provisions of the Staff Regulations with reference to the monetary parities to be used, and Council Regulation (Euratom, ECSC, EEC) No 3086/78 of the same date adjusting the weightings applicable to the remuneration and pensions of Officials and Other Servants of the European Communities following the amendment of the provisions of the Staff Regulations concerning the monetary parities to be used in implementing the Staff Regulations (Official Journal 1978 L 369, p. 8), are unlawful.

3 The applicant is in receipt of a pension under Article 77 of the Staff Regulations. By virtue of the third paragraph of Article 45 of Annex VIII to the Staff Regulations, he could elect to have his pension paid in the currency either of his country of origin or of his country of residence or of the country where the institution to which he belonged before his retirement had its seat. The applicant, who took up residence in his country of origin, namely Italy, opted to have his benefits paid in the currency of the country where the Commission had its provisional seat, that is to say in Belgian francs.

4 Under Article 82 (1) of the Staff Regulations pensions are to be weighted in the manner provided for in Articles 64 and 65 (2) of the Staff Regulations for the country of the Communities where the person entitled to the pension declares his home to be. Payment of such pensions is to be effected in accordance with the terms contained in Article 63 in respect of payment of remuneration.

5 In the form which they took until the end of 1978, Articles 63 and 64 of the Staff Regulations provided as follows:

Article 63: "An official's remuneration shall be expressed in Belgian francs.

It shall be paid in the currency of the country in which the official performs his duties.

Remuneration paid in a currency other than Belgian francs shall be calculated on the basis of the par values accepted by the International Monetary Fund, and in force on 1 January 1965."

Article 64: "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 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."

6 Since 1971 the currencies of certain Member States, including the Italian lira, have suffered increasingly large reductions in value in relation to their values in 1965. During a first period extending until 1978 the Council did not alter the exchange rates laid down by Article 63 of the Staff Regulations However, in order to maintain the purchasing power of pensions paid in currencies which had fallen in value, it increased the weightings referred to in Article 64 of the Staff Regulations for the countries concerned.

7 The result was that in the case of pensioners residing in Italy who had opted to have their benefits paid in lire the reduction in the purchasing power of the amounts calculated on the basis of the former parities was offset by the increase in the weighting applicable to Italy. Those pensioners who, like the applicant, had chosen to have their benefits paid in Belgian francs the amount of which could be converted into lire at the rate of exchange prevailing on the day, and who therefore did not incur a similar risk of sustaining a reduction in purchasing power, nevertheless had their pensions adjusted by the same increase in the weighting, since the weighting was of general application.

8 Thus, between 1971 and 1978, the amounts actually paid to pensioners who resided in Italy but had chosen to have their benefits paid in Belgian francs rose progressively owing to the mere fact that they were adjusted by the increased weighting and were ultimately much higher than those paid to pensioners who resided in Italy and had opted for payment in lire.

9 Regulation No 3085/78 put an end to that system by replacing the former parities by the application of updated rates of exchange. At the same time Regulation No 3086/78 restored the weightings to their original function of alleviating the effects of the differences in living conditions by comparison with those existing in the countries in which the provisional seats of the Communities were situated. On that occasion the weighting applicable to Italy was substantially reduced.

10 Regulations Nos 3085/78 and 3086/78 applied from 1 April 1979. However, the third paragraph of Article 4 of Regulation No 3085/78 provides as follows:

"However, for pensions and allowances of which the net amount becomes less than that under the existing arrangements, the regulation shall only apply from 1 October 1979. From that date the difference between the net amounts resulting from the implementation of this regulation and those received in September 1979 shall be reduced by 1/10 per month."

11 On 19 October 1979 the Commission informed the applicant that the new system would be applied to his pension payments from 1 October 1979. The net amount of the benefit, which came to BFR 72 850 in September 1979, would be reduced to BFR 34 910. However, in accordance with the third paragraph of Article 4 of Regulation No 3085/75 cited above, the reduction would be made at the rate of one tenth per month from October 1979 until July 1980.

12 Since his complaint against that decision, which was lodged on 27 December 1979, evoked no response within the period of four months laid down by the Staff Regulations, the applicant brought this action.

13 The applicant first submits in support of his application the following arguments based on infringement of essential procedural requirements:

1. Article 24 of the Treaty of 8 April 1965 establishing a Single Council and a Single Commission of the European Communities shows that the Staff Regulations of Officials of the Communities could be validly laid down only after consultation with the other institutions concerned. The Economic and Social Committee and the Court of Auditors were institutions envisaged by that provision, and Regulation No 3085/78 was adopted without the required consultation.

2. The European Parliament was consulted on a proposal from the Commission which differed considerably from the texts of the regulations which were adopted by the Council and therefore there was in fact no true consultation with the Parliament on the text which was adopted by the Council.

14 Similar arguments in relation to Regulations Nos 3085/78 and 3086/78 were considered by the Court (First Chamber) in a number of disputes concerning the right of officials to effect transfers of funds under Article 17 of Annex VII to the Staff Regulations, in particular in its judgment of 4 February 1982 in Case 1253/79, *Battaglia*, [1982] ECR 297. For the reasons set out in that judgment the applicant's submissions are unfounded.

15 As far as the effects of the regulations are concerned the applicant first argues that the decision challenged and the regulations in question which it implements in his case could not deprive him of his established entitlement to a pension calculated in accordance with the provisions of Article 77 of the Staff Regulations. It is a fundamental principle of law that legislation may not deprive individuals of vested rights. Legislation which operates retroactively so as to deprive persons of vested pension rights is a breach of that general principle of law and is contrary to the practice of Member States in the matter of public service pension schemes.

16 It should be observed in that regard that the provisions of Annex VIII to the Staff Regulations draw a clear distinction between the determination of "pension rights" convered by Chapter 2 of the annex and the "payment of benefits" governed by Articles 45 and 46 of the annex. The arguments put

forward by the applicant are based on the assumption that his "pension rights" within the meaning of the Staff Regulations were reduced.

17 The changes which took place in the amounts actually paid to the applicant were due to the effect of the rates of exchange and the weightings. Whilst the changes affected the payment of benefits under Articles 45 and 46 of Annex VIII, they did not have the effect of encroaching upon the applicant's pension rights, as determined in accordance with Chapter 2 of Annex VIII, which continue to serve as the basis for the calculation of the benefits actually paid.

18 It follows that this submission is inapposite and that it is therefore unnecessary to consider it.

19 The applicant submits next that application of the disputed provisions entails discrimination. The Commission adopted certain administrative provisions for a five-year period in favour of certain recipients of benefits payable in respect of persons who are treated as dependants. It ought to have adopted similar measures in favour of pensioners such as the applicant.

20 It must be pointed out that the discrimination in the legal sense consists of treating in an identical manner situations which are different or treating in a different manner the same situations which are identical. The treatment enjoyed by persons who are counted as dependants has no bearing whatsoever on the applicant's situation and accordingly that submission must be rejected.

21 The applicant claims finally that the reduction in pension benefits paid, made pursuant to Regulations Nos 3085/78 and 3086/78, was in breach of certain general principles of law upheld by Community law. He claims in that regard that he was entitled to expect the continued payment of the benefits awarded to him, the level of which had guided him in choosing his mode of living during his years of retirement.

22 By that submission the applicant must be seen as claiming that there has been a breach of the principle of the protection of the legitimate expectation to which Community servants are entitled, that commitments which the institutions have entered into will be met.

23 The Commission put forward two arguments in defence of the lawfulness of the weightings laid down by Regulation No 3086/78. The result of maintaining the former system would have been to perpetuate without justification the increasingly manifest inequality of two categories of pensioners, which stemmed from the choice which they made pursuant to Article 45 of Annex VIII to be paid either in Belgian francs or in the currency of their country of residence. Moreover, the effect of the new system set up in particular by Regulations Nos 3085/78 and 3086/78 was specifically to restore the weightings to the functions assigned to them by the Staff Regulations rather than to use them to offset fluctuations in the rates of exchange.

24 It must be observed that the new system was introduced in order to rectify a situation which had deteriorated as a result of fluctuations in the rates of exchange and the prolonged application of temporary expedients designed to contend with those fluctuations. At the same time, it enabled the various categories of pensioners residing in weak currency countries to be restored to a situation in which they would be assured of equal treatment.

25 Since none of the Community institutions had committed themselves to maintaining a situation arising from the application of those temporary expedients which favoured a particular category of pensioners, the applicant's submission must be rejected in so far as it relates to the actual introduction of the new system.

26 With regard to the arrangements for its introduction, it should be recalled that it was the Council's reluctance to amend the provisions of the Staff Regulations concerning the rates of exchange which caused the progressive increase in the benefits due to the category of pensioners to which the applicant belongs. That increase occurred over a period of about seven years and yet the Council decided, by incorporating the third paragraph of Article 4 of Regulation No 3085/78, to make pensioners bear the loss of that

increase after a relatively short transitional period, a system of monthly reductions over a period of ten months being applied from 1 October 1979, that is to say six months after Regulations Nos 3085/78 and 3086/78 entered into force.

27 It should be emphasized that the deterioration in the situation which occurred before the adoption of Regulations Nos 3085/78 and 3086/78 was not in any way attributable to the conduct of the pensioners. The prolonged period of deterioration was due to the inaction of the Council, which failed to rectify exchange rates which no longer bore any relation to economic reality.

28 Whilst there may be some explanation for the Council's inaction it must none the less not be overlooked that pensioners benefiting from that inaction were entitled to expect the Council to take account of the situation in which they had been placed by the prolonged application of the system temporarily used. That is particularly true in the case of pensions, since they are intended to ensure that officials who have left the service of the Communities enjoy an adequate standard of living.

29 It follows that after failing to act for a period extending over a number of years, the Council could not, without failing to protect pensioners' legitimate expectations, lay down a transitional period for the progressive reduction of the amounts paid which lasted only ten months. A period of at least twice that length should have been envisaged for that process.

30 The submission put forward as to the failure to protect legitimate expectation is therefore well founded in so far as it relates to the period over which the transitional arrangements introduced by the third paragraph of Article 4 of Regulation No 3085/78 extended.

31 It follows that in the absence of transitional arrangements which were lawful, the Commission was not entitled to apply Regulations Nos 3085/78 and 3086/78 to the applicant and that consequently the contested decision must be annulled.

32 It is for the competent institutions to adopt the measures necessary to remedy the unlawfulness which has been established and in particular to introduce with retroactive effect suitable transitional arrangements.

Costs

33 Under Article 69 (3) of the Rules of Procedure the Court may order that the parties bear their own costs.

On those grounds,

THE COURT (First Chamber)

hereby:

1. **Annuls the Commission's decision reducing the applicant's pension pursuant to Article 4 of Council Regulation (Euratom, ECSC, EEC) No 3085/78 of 21 December 1978 (Official Journal 1978 L 369, p. 6), which was notified to the applicant by a memorandum of 19 October 1979.**

2. **Orders the parties to bear their own costs.**

Bosco O'Keeffe Koopmans

Delivered in open court in Luxembourg on 11 March 1982.

For the Registrar

H. A. Rühl

Principal Administrator

G Bosco

President of the First Chamber

OPINION OF MR ADVOCATE GENERAL CAPOTORTI

(see Case 127/80, p. 886)