OPINION OF ADVOCATE GENERAL LENZ
delivered on 19 January 1994 *

Mr President,
Members of the Court,

A — Introduction

1. The applicant's husband was a member of the Court of Auditors of the European Communities who had taken up his duties on 18 October 1987. On 15 March 1992, during his term of office, [1] he died in a road accident.

2. On 22 July 1992 the Head of the Personnel Division of the Court of Auditors sent the applicant a letter, to which was annexed a decision ('avis') of the same date on the determination of the survivors' pensions for the applicant and her two children. The survivors' pensions were calculated on the basis of Article 16(1) and (2) of Council Regulation (EEC, Euratom, ECSC) No 2290/77 of 18 October 1977 determining the emoluments of the members of the Court of Auditors. [2]

3. Those provisions, in the version currently in force, read as follows: [3]

'1. The widow and dependent children of a member or former member of the Court of Auditors to whom pension rights have accrued at the time of his death shall be entitled to a survivor's pension.

* Original language: German.

1 — Under Article 188b(3) of the EC Treaty (which is identical to the former Article 206(4) of the EEC Treaty), the members of the Court of Auditors are appointed for a term of six years.

2 — OJ 1977 L 268, p. 1. The text of that Regulation has since been amended several times, most recently by Council Regulation (EEC, Euratom, ECSC) No 1084/92 of 28 April 1992 (OJ 1992 L 117, p. 1). For the purposes of the present proceedings the only relevant amendment is that by Council Regulation (Euratom, ECSC, EEC) No 1416/81 of 19 May 1981 (OJ 1981 L 142, p. 1), which gave Article 16(1) of Regulation No 2290/77 its present form.

3 — Article 16(1) appears at first sight to contain three subparagraphs. The Court of Auditors accordingly refers in the defence to the first, second and third subparagraphs of that paragraph. The applicant, on the other hand, regards the first two subparagraphs as belonging together and thus counts only *two* subparagraphs (the section containing the rule applicable in the event of the death of the member during his term of office forming the second subparagraph). I shall use below, for the sake of clarity, the designations chosen by the Court of Auditors.

That pension shall be equal to a percentage of the pension accruing to the member or former member of the Court of Auditors under Article 10 at the date of death, namely:

— for a widow 60%,

— for each child where the mother is still alive 10%,

— for each child where both father and mother are dead 20%.

However, if the death of the member of the Court of Auditors occurs during his term of office,

— the survivor's pension for the widow shall be equal to 36% of the basic salary received at the time of death,

— the survivor's pension for a first orphan of both father and mother shall not be less than 12% of the basic salary received at the time of death. Where several orphans of both mother and father are left, the total amount of the survivor's pension shall be divided equally among the orphans entitled.

2. The total amount of these survivors' pensions shall not exceed the amount of the pension of the member or former member of the Court of Auditors on which they are calculated. The maximum total survivors' pensions payable shall be divided, where applicable, between the beneficiaries in accordance with the above percentages.'

Article 10 of the Regulation, referred to in the second subparagraph of Article 16(1), provides that the amount of the pension is 4.5% of the basic salary last received for each full year in office and one-twelfth of that sum for each complete month. The maximum pension is 70% of the basic salary last received (Article 10(1), second sentence).

4. The decision of 22 July 1992 started by calculating the pension which Mr H. would, purely mathematically, have been entitled to under Article 10 on the date of his death. Since he had then been in office for four years and four completed months, he would have been entitled to a pension of a total of 19.5% of his last basic salary, in other words, a sum amounting to LFR 100 689. On the basis of that amount, the two children of the

deceased were each entitled under the second subparagraph of Article 16(1) to a survivor's pension of LFR 10 069 monthly (10% of the pension the deceased would have been entitled to). In the case of the children, no deductions were made for sickness insurance contributions or taxes.

The widow's pension for Mrs H. was calculated on the basis of the third subparagraph of Article 16(1), since Mr H. had died during his term of office. The result was a sum of LFR 185 888 monthly (36% of the deceased's last basic salary). The Court of Auditors deducted sickness insurance contributions and taxes, so that a widow's pension of LFR 156 440 was finally determined.

5. The Court of Auditors then applied to the pensions thus calculated the provisions of Article 16(2) on maximum payments. In so doing, it took the view that the total amount of the survivors' pensions calculated for Mrs H. and her children could not exceed the amount of the pension Mr H. would have been entitled to at the date of his death. That maximum amount was assessed by the Court of Auditors at LFR 90 799. The Court of Auditors arrived at that figure by deducting sickness insurance contributions and taxes from the deceased's (hypothetical) pension of LFR 100 689.

Since the total amount of the survivors' pensions for Mrs H. and her children was LFR 176 578 (LFR 156 440 + LFR 10 069 + LFR 10 069), which exceeded the said maximum of LFR 90 799, the Court of Auditors reduced the survivors' pensions proportionately.

The result of that calculation was that the Court of Auditors determined a widow's pension of LFR 80 444 for Mrs H. and a pension of LFR 5 178 for each of the two children.

6. In the abovementioned covering letter sent with the decision the Head of the Personnel Division of the Court of Auditors indicated that the Financial Controller of the Court of Auditors had refused for legal reasons to waive application of Article 16(2) [4] in determining the survivors' pensions, as had been done by two other Community institutions in two previous cases. The Financial Controller's opinion had been submitted to the competent authority of the Court of Auditors 'for a decision'. The writer of the letter concluded by promising to inform Mrs H. of the decision to be taken.

7. In a letter of 12 October 1992 the Head of the Personnel Division of the Court of Auditors informed Mrs H. that the Court of Auditors had decided not to change the deci-

4 — The letter incorrectly refers here to 'Article 16(1)'.

sion determining the survivors' pensions which had been communicated to Mrs H. with the letter of 22 July 1992, but to apply Article 16(2) of Regulation No 2290/77 strictly.

8. Mrs H. thereupon brought an action before the Court of Justice, where her application was received on 14 December 1992, seeking a declaration that the decision of the competent authority of the Court of Auditors of 12 October 1992 determining the survivors' pensions for herself and children was void. In her application, she argues in essence that the maximum pension rule in Article 16(2) of Regulation No 2290/77 is not applicable if the survivor's pension is calculated on the basis of *the third subparagraph* of Article 16(1). She also argues that the Court of Auditors was not entitled to deduct sickness insurance contributions and taxes when determining the survivors' pensions.

9. On 11 January 1993 Mrs H. brought a complaint under Article 90(2) of the Staff Regulations of Officials of the European Communities against the decision of the Court of Auditors of 12 October 1992. The Court of Auditors rejected the complaint in a letter of 12 February 1993 from its president. Mrs H. thereupon brought an action before the Court of First Instance in her own name and that of her children (Case T-33/93). Those proceedings have not yet been decided.

B — Opinion

Preliminary observation

10. From the procedural point of view, the present case raises above all the question whether the dependants of a member of the Court of Auditors can proceed against the decision of that institution which adversely affects them on the basis of Article 173 of the EC Treaty [5] or whether they can seek a legal remedy only in accordance with Article 179, in other words, under the conditions applying to servants of the Community. A decision on this point is in my opinion of wider importance in two respects. Firstly, it would be natural for the procedural classification applying to actions brought by *dependants* of a member of the Court of Auditors to be applied also to comparable actions brought by the *member* himself. Secondly, it should be noted that the decision in this case relating to the Court of Auditors will also be of influence for analogous proceedings against other Community institutions.

5 — The application in the instant case was lodged *before* the entry into force of the Maastricht Treaty, by which the title of the EEC Treaty was changed to 'Treaty establishing the European Community' (EC Treaty). For simplicity I shall refer in this Opinion to the relevant provisions of the EC Treaty which are now in force, pointing out any changes which may have been made from the provisions of the EEC Treaty.

11. As regards the substance of the case, the Court will have to explain how the provision on the calculation of survivors' pensions in the third subparagraph of Article 16(1) of Regulation No 2290/77 and the provision on maximum pension payments in Article 16(2) of that Regulation are to be interpreted. Since Article 16(1) and (2) of Regulation No 2290/77 has the same content as Article 15(1) and (2) of Regulation No 422/67/EEC, 5/67/Euratom of the Council of 25 July 1967 determining the emoluments of the President and members of the Commission and of the President, Judges and Advocates General and Registrar of the Court of Justice and of the President, Members and Registrar of the Court of First Instance, [6] this question too is of more general significance.

The time of adoption of the challenged measure

Subject-matter of the application

12. Only measures which are intended to have legal effects can be the subject of an action for annulment under Article 173 of the EEC Treaty. [7] There is no doubt that the determination by the Court of Auditors of the survivors' pensions for Mrs H. and her two children is an act in the nature of a decision which produces legal effects. However, it is not entirely clear *when* that decision was adopted. From the 'avis' of 22 July 1992 and the two letters from the Head of the Personnel Division of the Court of Auditors dated 22 July 1992 and 12 October 1992 it can probably be deduced that the determination of the survivors' pensions took place on 22 July 1992, but was made subject to the suspensory condition of approval by the 'competent authority' of the Court of Auditors. It was therefore that approval which made the determination of the survivors' pensions legally binding. The Head of the Personnel Division of the Court of Auditors informed the applicant in his letter of 12 October 1992 that such approval had been given, but without specifying the *time* when that had been done.

13. The question of the time when the decision was adopted can ultimately be left undecided, however. It should be observed firstly that the Court of Auditors has at no time disputed the applicant's contention that the determination took place on 12 October 1992. Above all, however, it must be pointed out that the question could in any case be relevant only from the point of view of compliance with the time-limit laid down in the third paragraph of Article 173 of the EC Treaty. However, as the period of two months could only start running from the

6 — OJ, English Special Edition 1967, p. 222. The Regulation has since been amended on several occasions, most recently by Council Regulation (EEC, Euratom, ECSC) No 3762/92 of 21 December 1992 (OJ 1992 L 383, p. 4).

7 — Judgment in Case 22/70 *Commission* v *Council* [1971] ECR 263, paragraph 42.

notification in the letter of 12 October 1992, there can be no doubt that that time-limit was complied with in the present case. [8]

Whether measures of the Court of Auditors can be challenged

14. Under the wording of the original version of Article 173, an action for annulment could be brought against certain acts of the Council and the Commission. Following the amendment of that provision by the Maastricht Treaty, Article 173 of the EC Treaty now also makes certain acts of the European Parliament (and of the future European Central Bank) amenable to actions for annulment. Neither the old nor the new version mentions the Court of Auditors, however, so that it might appear doubtful whether acts of the Court of Auditors can be challenged by an action for annulment under Article 173. [9]

15. The general possibility of bringing an action for annulment under Article 173 to challenge acts of the Court of Auditors which are intended to produce legal effects can however, in my opinion, scarcely be doubted any more, since the Court's decision in the *Maurissen* case. [10] In that case the Court had to decide *inter alia* on an application by a trade union against two decisions of the Court of Auditors (relating to participation in trade union activities within the Court of Auditors).

16. In his Opinion in the case Mr Advocate General Darmon came to the conclusion that such an application could be founded on Article 173. He rightly stated, citing the Court's judgment in *Les Verts* , [11] that the letter of Article 173 does not prevent such an interpretation. In that decision the Court held that an action brought under Article 173 against the European Parliament was admissible, although that article (in the version then in force) did not mention the Parliament. In its judgment the Court relied on the fact that the Community is a 'Community based on the rule of law', in which neither the Member State nor the Community institutions can avoid a review of the question whether the measures adopted by them are in conformity with the Treaty. [12] It concluded that:

' An interpretation of Article 173 of the Treaty which excluded measures adopted by

8 — Under Article 81(1) of the Rules of Procedure of the Court of Justice, the period of time allowed for commencing proceedings against measures adopted by an institution runs from the day following the receipt by the person concerned of notification of the measure. Under Article 81(2) of the Rules of Procedure and Article 1 of Annex II to those rules, the time-limit is extended by two days for applicants from Belgium.

9 — There is also no provision in the Treaty with respect to the Court of Auditors analogous to Article 180, by which jurisdiction is conferred on the Court of Justice to decide proceedings against certain acts of the European Investment Bank, under the conditions laid down in Article 173.

10 — Judgment in Joined Cases 193 and 194/87 *Maurissen and others* v *Court of Auditors* [1989] ECR 1045.

11 — Judgment in Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339.

12 — Ibid., paragraph 23.

the European Parliament from those which could be contested would lead to a result contrary both to the spirit of the Treaty as expressed in Article 164 and to its system.' [13]

17. As Mr Advocate General Darmon rightly said in his Opinion in the *Maurissen* case, that analysis by the Court can be applied without limitation to measures adopted by the Court of Auditors. [14] The reason why the Court of Auditors is not mentioned in Article 173 is probably that its function is as a rule limited to acts (the preparation of reports, observations and opinions) which do not produce legal effects and thus can in any event not be contested. [15] I therefore agree with Mr Advocate General Darmon that it is of no relevance in this respect whether the Court of Auditors was to be classified as a Community institution or not. [16]

18. Since this point relates to the *general* possibility of bringing an action for annulment under Article 173 against acts of the Court of Auditors, it is not relevant in this respect that the applicant in the present case might perhaps have a legal remedy using another method provided for in the Treaty, namely an action under Article 179. [17]

19. In the *Maurissen* judgment, the Court considered whether the application by the trade union under Article 173 was admissible and held that it was admissible with respect to one of the two contested decisions by the Court of Auditors, without going into the question whether acts of the Court of Auditors were open to challenge at all in proceedings under Article 173. [18] However, since the Court was aware of that problem on the basis of the Advocate General's observations in his Opinion, the conclusion to be drawn from the decision can only be that the Court recognized that it is possible in principle to bring an action for annulment against acts of the Court of Auditors under Article 173 of the EC Treaty.

The admissibility of proceedings under Article 173

20. The Court of Auditors has (for reasons which are both understandable and proper) consciously refrained from expressing an

13 — Ibid., paragraph 25.

14 — *Maurissen*, p. 1064, paragraph 53.

15 — Ibid., Opinion of Mr Advocate General Darmon, p. 1065, paragraph 57.

16 — Ibid., p. 1064, paragraph 54. It is thus also irrelevant that the Court of Auditors is now expressly recognized as an institution of the Community by Article 4(1) of the EC Treaty (as amended by the Maastricht Treaty).

17 — This point will be discussed in the following section (paragraph 20 et seq.).

18 — *Maurissen* , cited above, paragraph 29 et seq. (especially paragraph 49). With respect to the other decision of the Court of Auditors challenged by the trade union, the application was declared inadmissible as being out of time.

opinion on the admissibility of the application. For that reason, the central procedural point raised by the present proceedings was not addressed until the hearing before the Court. That is the question whether the present application was capable of being founded on Article 173 or whether the applicant should instead have acted under Article 179.

21. Under Article 179 of the EC Treaty, the Court of Justice has jurisdiction in any dispute between the Community and its servants within the limits and under the conditions laid down in the Staff Regulations or the Conditions of Employment. That jurisdiction was transferred to the Court of First Instance by the Council Decision of 24 October 1988 [19] taken on the basis of Article 168a of the EC Treaty (see Article 3(1)(a) of the decision).

22. There is no provision in the Treaty which explains the relationship between Articles 173 and 179. However, it follows from the system and purpose of the legislation that an action which is within the scope of Article 179 *in principle* cannot be based on other provisions relating to admissibility. Article 179 may be regarded in this respect as a *lex specialis* for the field of disputes involving officials.

It follows from the Court's case-law that the unlimited jurisdiction conferred by Article 179 enables the Court also to give judgment on compensation for any damage suffered by an official or other servant of the Community as a result of the contested measure. A claim for compensation based on Article 178 and the second paragraph of Article 215 of the EC Treaty is therefore inadmissible in this field. [20] That case-law can also be applied without further ado to actions for annulment under Article 173 brought against *measures in individual cases* adopted by Community authorities which stem from the employment relationship. [21] In such cases too, priority must therefore be given to the Article 179 procedure. [22]

That interpretation also corresponds to the purpose of the preliminary procedure to be complied with in the context of an application under Article 179. Article 90(2) of the Staff Regulations of Officials of the Euro-

19 — OJ 1988 L 319, p. 1.

20 — Judgments in Case 9/75 *Meyer-Burckhardt* v *Commission* [1975] ECR 1171, paragraph 7, and Case 48/76 *Reinarz* v *Commission and Council* [1977] ECR 291, paragraphs 9 to 12.

21 — The question whether this is also the case for legal remedies against *regulations* need not be examined here (see on this point, for example, S. Van Raepenbusch, 'Le contentieux de la fonction publique européenne', *CDE* 1992, p. 564, at pp. 572f). The case-law in this field appears not to be altogether consistent. For example, in its judgment in Joined Cases 87 and 130/77, 22/83, 9 and 10/84 *Salerno* v *Commission and Council* [1985] ECR 2523, the Court held that the application brought by several members of the staff of the European Association for Cooperation (an association entrusted by the Commission with certain tasks) against a regulation laying down conditions for their appointment as Community officials was admissible under the second paragraph of Article 173, but dismissed them as unfounded. The Court based its decision on costs, however, on Article 70 of the Rules of Procedure (under which the institutions are to bear their own costs in proceedings by servants of the Communities), although that provision is applicable only to actions based upon Article 179 (Judgment in Case 64/80 *Giuffrida and Campogrande* v *Council* [1981] ECR 693, paragraph 9).

22 — That view is shared by E. Grabitz in: Grabitz (ed.), *Kommentar zum EWG-Vertrag* (updated to September 1992), paragraph 3 on Article 179.

pean Communities states that any person 'to whom these Staff Regulations apply' may submit to the appointing authority a complaint against an act adversely affecting him. Under Article 91(2) of the Staff Regulations, an action before the Court of Justice is admissible only if a complaint has previously been submitted under Article 90(2) and has been rejected. The object of that preliminary procedure 'is to enable and encourage an amicable settlement of [a] difference which has arisen between officials or servants and the administration'. [23] It is clear that that rule would fail its object if the persons concerned were entitled in such cases to bring an action for annulment under Article 173 immediately, without previously going through the preliminary procedure under Articles 90 and 91 of the Staff Regulations.

23. The question therefore arises whether the present application could have been based on Article 179. A precondition for that would be that the Staff Regulations applied to Mrs H. (and her two children). The Court has, however, recognized that dependants of deceased officials or servants can also bring proceedings under Article 179 if they derive rights from the Staff Regulations or the Conditions of Employment of Other Servants [24] of the European Communities. [25]

24. In the present case, however, the applicant does not rely on the Staff Regulations (or the Conditions of Employment of Other Servants), but claims the right to survivors' pensions granted to her and her children by Regulation No 2290/77. That right derives from the fact that the applicant and her children are the surviving relatives of Mr H.

However, it is evident that Mr H. as a member of the Court of Auditors was not an official or other servant within the meaning of the aforesaid provisions. In my opinion, this follows simply from the Protocol on the Privileges and Immunities of the European Communities of 8 April 1965. Chapter V of the Protocol (Articles 12 to 16) is entitled 'Officials and Other Servants of the European Communities'. Article 16 of the Protocol states that the Council shall determine the categories of officials and other servants to whom the provisions of that chapter apply. Under Article 21, which is in Chapter VII ('General Provisions'), Articles 12 to 15 apply to the Judges, Advocates General and Registrar of the Court of Justice. That provision would not have been necessary if those persons were in any event to be regarded as officials or other servants of the Community. Since under Article 188b(9) of the EC Treaty (previously Article 206(10) of the EEC Treaty) the provisions of the Protocol also apply to the members of the Court of Auditors, the latter too are not to be regarded as officials or servants within the meaning of the Staff Regulations or the Conditions of Employment of Other Servants.

23 — Judgment in Case 58/75 *Sergy* v *Commission* [1976] ECR 1139, paragraph 32.

24 — Under Article 73 of the Conditions of Employment of Other Servants, the provisions of Title VII of the Staff Regulations, concerning appeals (Articles 90 and 91), apply by analogy to such servants.

25 — See the judgments in Case 18/70 *Duraffour* v *Council* [1971] ECR 515 and Case 24/71 *Meinhardt* v *Commission* [1972] ECR 269.

25. If the provisions of the Staff Regulations applied to members of the Court of Auditors, that would also result in part in consequences which were not compatible with the rules relating to their office. The provisions in Title III ('Career of Officials') on recruitment (Article 27 et seq.), for example, cannot apply to members of the Court of Auditors, since their nomination and appointment are regulated in the Treaty itself (Article 188b of the EC Treaty, formerly Article 206 of the EEC Treaty). Again, the provisions of Title V (Article 62 et seq.) on remuneration clearly cannot be applied to the members of the Court of Auditors, since their emoluments are determined by the provisions of Regulation No 2290/77.

26. The fact that Regulation No 2290/77 prescribes that the provisions of the Staff Regulations shall apply in certain fields makes no difference. Under the first paragraph of Article 12 of Regulation No 2290/77 the social security scheme provided for in the Staff Regulations applies to members of the Court of Auditors, with respect to sickness, occupational disease, industrial accident and birth and death benefits. Under the second paragraph of Article 12 of that Regulation, this also applies to former members of the Court of Auditors, subject to certain conditions. Under Article 19a of the Regulation, Article 66a of the Staff Regulations (relating to a special levy) applies '*mutatis mutandis*' to the members of the Court of Auditors. The members of the Court of Auditors are thus equated with officials of the Communities in this respect. However, that does not mean that they must be regarded as officials of the Communities simply for that reason.

27. It could be argued, however, that the members of the Court of Auditors must be treated *in the same way as* officials with respect to the areas for which Regulation No 2290/77 refers to the Staff Regulations. That would mean that to that extent they would also have to comply with Articles 90 and 91 of the Staff Regulations and first submit a complaint before bringing an action before the Court.

That it is *possible* for a member of the Court of Auditors in such a case first to submit a complaint in accordance with Article 90 of the Staff Regulations and then to proceed under Article 179 is shown by the Court's decision in the *Kontogeorgis* case. [26] In that case the applicant, a former member of the Commission, had applied to become affiliated to the health insurance scheme for officials of the European Communities, on the basis of Article 11 of Regulation No 422/67. [27] He lodged a formal complaint against the Commission's refusal. After the complaint had been rejected, he brought an action before the Court. As Mr Advocate General Jacobs noted in his Opinion, this

26 — Judgment in Case 163/88 *Kontogeorgis* v *Commission* [1989] ECR 4189.

27 — Cited above (footnote 6). Article 11 of that Regulation has the same content as Article 12 of Regulation No 2290/77.

was an application under Article 179. [28] The Advocate General concluded that in view of the fact that the case concerned, at least indirectly, the interpretation of the social security scheme provided for in the Staff Regulations, it had been 'clearly convenient and appropriate' for the special prelitigation procedure to be used. [29] He therefore considered that the action under Article 179 was admissible.

The Court did not expressly address the point in its judgment. However, by dismissing the application as *unfounded* and deciding on costs in accordance with Article 70 of the Rules of Procedure (which relates to proceedings between the institutions and servants of the Communities), it indicated that it shared the Advocate General's view. It can therefore be concluded from that judgment that a member of the Commission *can* proceed under Article 179 in the area in question. In my opinion, however, it does not follow from the decision that he *must* make use of that possibility and is therefore not allowed to bring an action under Article 173.

Since the provisions at issue in the abovementioned case correspond to the provisions in force for members of the Court of Auditors, the judgment in the *Kontogeorgis* case can be applied directly to the position of such persons.

28. With the view put forward by Mr Advocate General Jacobs in the *Kontogeorgis* case as a starting point, it could be argued that the carrying out of a prelitigation procedure under Article 90 of the Staff Regulations is appropriate in *all* cases in which the subject-matter is that of a typical staff case. That the present case is such a case is surely evident. The determination of the pension of a member of the Court of Auditors or his surviving relatives is in my opinion no different in substance from the determination of the pension of an official of the Communities or his surviving relatives. The privileges and special rights of members of the Court of Auditors are not affected in any way by the calculation and determination of survivors' pensions. It is therefore equally sensible in both cases for disputes with respect to methods of calculation first to be discussed in a complaint procedure and settled if possible before being referred to the Community judicial institutions for examination. That would also meet the requirement of lifting the burden of avoidable disputes from the Community jurisdictions and reserving their resources for the fulfilment of their highest task, that of ensuring compliance with the law in interpretation and application of the Treaties.

29. A counter-argument to that view could be that the complaint provided for in Arti-

28 — [1989] ECR 4194, at p. 4196 (paragraph 7 et seq.). The applicant had mistakenly based his application on Article 172 of the EC Treaty and Article 22(3) of the Staff Regulations.

29 — Ibid., p. 4197 (paragraph 9).

cle 90 must, in accordance with the wording of that provision, be submitted to the 'appointing authority'. The members of the Court of Auditors are, however, appointed by the Council, and it would certainly be strange if that institution were to have to decide on a complaint from a member of the Court of Auditors. The problem would be even more delicate in the case of members of the Court of Justice, for instance, who under Article 167 of the EC Treaty are appointed by common accord of the governments of the Member States.

Those doubts do not appear to me to be convincing, however. In cases of this type the reference to the 'appointing authority' ought sensibly to be understood as a reference to the institution for which the person in question acts or has acted. That the decision on a complaint by a member of an institution against that institution may be taken by a department (such as the personnel department) which is lower in rank than the person bringing that complaint seems strange only at first sight. Closer examination reveals that that result would merely be the consequence of an appropriate distribution of tasks. The *Kontogeorgis* case — where the applicant's complaint was dealt with by the Commission's Directorate-General for Personnel — demonstrates this clearly.

30. A more serious objection, on the other hand, is that in the field with which the present case is concerned — survivors' pensions — unlike the field of social security, there is no connection which could justify application of Articles 90 and 91 of the Staff Regulations. Those regulations could therefore be adduced by *analogy* at best.

It is certainly true that particular caution must be used, simply for reasons of legal certainty, in adducing provisions by analogy when it is a question of the requirements for admissibility of an application. Those reservations can, however, be dispelled in another way, as will be shown below. As to whether the use of analogy is permissible in the present case, it must be pointed out that the possibility of applying provisions of the Staff Regulation by analogy is by no means foreign to the Regulation in question here, Regulation No 2290/77, as is shown for example by the abovementioned Article 19a. It may also be pointed out that in this case the admissibility of an application under Article 173 cannot be derived directly from the wording of that provision, as has been seen above.

31. I am therefore of the opinion that the applicant in the present case could have submitted a complaint against the determination of the survivors' pensions by the Court of Auditors, and in the event of its rejection *could* have brought an action under Article 179. The applicant was, however, in my opinion *not obliged* to proceed by that route. There is no clear statutory rule from which

such an obligation might derive. From the Court's decision in the *Kontogeorgis* case it can be deduced at most that in such cases an action can be based on Article 179. In view of this uncertainty it would in my opinion be wrong to treat the present application as inadmissible. For as long as the Court of Justice or Court of First Instance [30] has not expressly ruled on the question whether in cases of this type an action under Article 173 can be brought immediately, or whether the Article 179 procedure must in fact be used, it should in my opinion be left to applicants to decide which of these two remedies to make use of. The action brought by Mrs H. under Article 173 must therefore be regarded as admissible. [31]

The applicant's entitlement to bring proceedings and the interpretation of the application

32. The present action was brought by Mrs H. In the application, however, the applicant not only challenges the proportionate reduction of the widow's pension determined in her case, but also complains of the reduction of the survivors' pensions determined for her children. Under Regulation No 2290/77, however, the children of a member of the Court of Auditors have an independent right to survivors' pensions which does not derive from their mother. A possible breach of that right could therefore be challenged only by the children themselves. The action before the Court of First Instance was indeed brought by Mrs H. in her own name and that of her children (see paragraph 9 above). It appears that the designation of the two children as applicants (in addition to the applicant) in the present proceedings was omitted by mistake, given that the power of attorney produced by the applicant's lawyer was granted by Mrs H. in her own name and also as legal guardian of her two children.

33. In my opinion, however, it is not necessary to discuss in detail the question whether the application can be interpreted by amending it and regarding it as an application brought both by Mrs H. and by her two children. According to the solution I propose (to be explained below), the decision of the Court of Auditors must be annulled in any case, since it is based on an incorrect interpretation of the maximum payment rule in Article 16(2) of Regulation No 2290/77. As a consequence, the reduction of the survivors' pensions for the two children will automatically be deprived of its foundation,

30 — Since the entry into force of Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 amending Council Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities (OJ 1993 L 144, p. 21), the Court of First Instance also has jurisdiction in actions brought by natural or legal persons pursuant to the second paragraph of Article 173 (with the exception of actions brought against measures under Article 113 of the EC Treaty). The present action by Mrs H. is not affected thereby, since at the time of the entry into force of the said decision the preliminary report provided for in Article 44(1) of the Rules of Procedure had already been presented (see Article 4 of the Decision).

31 — It may be noted in passing that the circumstance that the plaintiff in the present case, after bringing an action before the Court of Justice, submitted a complaint to the Court of Auditors in accordance with Article 90 of the Staff Regulations and after rejection of that complaint brought proceedings before the Court of First Instance on the basis of Article 179 is not relevant to the question of the admissibility of the present proceedings. The action before the Court of First Instance was brought purely as a precaution, as Mrs H.'s representative stated at the hearing before the Court of Justice. Mrs H.'s lawyer thereby sought in laudable fashion to protect his client against all eventualities. That must not, however, affect the decision on the admissibility of *these* proceedings.

as a result of its necessary and indivisible link with the reduction of Mrs H.'s widow's pension. [32]

The merits of the application

Applicability of Article 16(2) of Regulation No 2290/77

34. The *wording* of Article 16(2) of Regulation No 2290/77 does not permit any clear answer to the question whether that provision is applicable in cases of the present type.

The reference to the 'amount of the pension ... on which [the survivors' pensions] are calculated' under Article 16(1) appears admittedly to imply that Article 16(2) is not applicable if the widow's pension is determined, as here, under the third subparagraph of Article 16(1). In that case, the widow's pension is calculated, as stated above, on the basis of the *basic salary* which the deceased was last entitled to, and not on the basis of his *pension*. It should further be noted that in cases where the maximum payment rule in Article 16(2) applies, under the second sentence of Article 16(2) the maximum amount payable is to be divided between the beneficiaries 'in accordance with the ... percentages' prescribed in Article 16(1). At first sight such a division makes sense only if the percentages relate to the same amount, which is not the case here (the widow is to have 36% of the *basic salary*, while the children receive 10% of the *pension*). On the other hand, it must be noted that Article 16(2) refers to the amount of the pension of 'the member or former member' on which the survivors' pensions are calculated. The provision thus distinguishes between cases where a member dies during his term of office and cases where the member dies only after his term of office has expired. If the applicant's argument is correct, namely that Article 16(2) is not applicable if the survivors' pensions are calculated under the third subparagraph of Article 16(1) (in other words, in cases where the member dies during his term of office), the reference in Article 16(2) to the pension of the *member* would be meaningless.

35. The *context* and *structure* of the provision support the interpretation put forward by the Court of Auditors. On an unprejudiced reading, Article 16(2) by referring to the 'total amount of these survivors' pensions' refers to Article 16(1) as a whole. It is therefore immaterial that until 1981 the provision which is now contained in the third subparagraph of Article 16(1) was not a separate subparagraph, but formed part of the

32 — The applicant's complaint that the Court of Auditors was not entitled to deduct sickness insurance contributions and taxes when determining the survivors' pensions in any event concerns only the applicant herself (see paragraph 4 above).

previous subparagraph. [33] The applicant's argument that the third subparagraph of Article 16(1) is a special rule in relation to Article 16(2) and takes priority over that provision, as a *lex specialis*, is therefore difficult to reconcile with the position of the two provisions.

36. However, if on the basis of the above considerations the point of view were adopted that the maximum payment rule in Article 16(2) applied to every determination of survivors' pensions under Article 16(1), that would have curious consequences. Supposing that a member of the Court of Auditors dies before completing the first full month of his term of office, his widow would be entitled under the third subparagraph of Article 16(1) to a widow's pension of 36% of the basic salary received by her husband. Under Article 16(2), however, the maximum amount of the survivors' pensions payable to the widow (and her children) would be the amount of the pension which the member would have been entitled to at the time of his death. But since in the example, in accordance with Article 10, there would not yet be any entitlement to a pension, that would mean that no survivors' pensions whatever would be payable. [34] The legislature would thereby be granting with one hand what it immediately took away again with the other.

It is true that the disadvantages for the widow consequent on the application of Article 16(2) decrease as the term of office served by the member before his death increases (since the member's pension entitlement, and hence the maximum payment under Article 16(2), increases as his term of office increases). However, the disadvantages would not disappear until after eight years in office at the earliest. [35]

37. In view of those possible consequences, it is necessary to look at the *purpose* of the legislative provision, in so far as it can be seen from the legislation. It is perfectly clear that the introduction of the special procedure laid down in the third subparagraph of Article 16(1) for calculation of survivors' pensions was intended to *benefit* the dependants of a member who dies during his term of office. As far as the provision for orphans (where both father and mother are dead) of a member is concerned, this follows from the very text of the Regulation. The purpose of the provision in the *second* indent of the third subparagraph of Article 16(1), introduced by Regulation No 1416/81, was to fix a 'minimum rate' for orphans' pensions. [36] That provision accordingly gives the orphans of both father and mother, where the member of the Court of Auditors has died during his term of office, an orphan's pension of (a total of) not less than 12% of the member's last basic salary.

33 — Article 1(2) of Regulation No 1461/81 (see footnote 2) replaced the last sentence of Article 16(1) by the subparagraph in question here.

34 — Under Article 10 a member is entitled to a pension of 4.5% of the basic salary last received for each full year in office and one-twelfth of that sum for each complete month (see paragraph 3 above, *in fine*).

35 — After a term of office of eight years a member would be entitled to a pension of 36% of his basic salary (4.5% x 8).

36 — See the (single) recital in the preamble to Regulation No 1416/81 (cited above, footnote 2).

The provision in the *first* indent of the third subparagraph of Article 16(1) is also intended (as will be confirmed below) to place the beneficiary in a better position. In that provision, the widow of a member who has died during his term of office is awarded a pension of 36% of his basic salary, without — unlike in the *second* subparagraph of Article 16(1) — the length of the completed term of office being taken into account. That rule was clearly intended to counter the unfair consequences which might arise from the application of the general rule in the second subparagraph of Article 16(1). Under that provision the widow is entitled to widow's pension of 60% of the pension accruing to the member at the date of death. That dependency on the member's pension entitlement has the effect that the shorter the term of office of the deceased member, the smaller the widow's pension calculated in accordance with that provision. I refer to the extreme case, considered above (paragraph 36) in a slightly different context, where the widow would receive no widow's pension at all.

38. On the other hand, it must be observed that Article 16(2) expresses the intention of the legislature to *place an upper limit on the total amount of survivors' pensions payable*. That too is a legitimate objective which the legislature was reasonably entitled to pursue. It would certainly be strange if that rule were to be applied only if the survivors' pensions were calculated in accordance with the *second* subparagraph of Article 16(1). The surviving relatives of a member who had died during his term of office would thereby not only benefit from the special rule in the *third* subparagraph of Article 16(2), which as a rule leads to a pension which is more favourable (compared with the calculation under the second subparagraph), but their pensions would also be exempted from the maximum amount rule in Article 16(2). No reason can be seen for that *twofold* preferential treatment.

39. The applicant admittedly argues that Article 16(2) could still be applied if her opinion were followed. The maximum payment rule would however — if I understand the applicant correctly — in cases of the present type apply only to the survivors' pensions for the orphans, but not to the widow's pension. However, that interpretation is clearly not appropriate for doing justice to the legislature's intention of limiting the total amount of the survivors' pensions. The survivors' pensions for the children must be calculated in the present case under the second subparagraph of Article 16(1), as is not in dispute between the parties. Each child is therefore entitled to an orphan's pension of 10% of the pension his father was entitled to at the time of his death. The maximum amount laid down in Article 16(2) would thus be exceeded only if the member in question was survived by more than ten children — no doubt not precisely an everyday event. If the applicant's interpretation were followed, Article 16(2) would therefore

apply only in very rare cases. That cannot be right.

The applicant's interpretation would have the consequence that Article 16(2) essentially applied only to cases coming under the second subparagraph of Article 16(1), in other words, cases where a member of the Court of Auditors dies *after his term of office has expired*. The maximum payment rule would come into effect if a member was survived by a widow and more than four children or by more than five orphans of both parents. That this would be a limited number of cases does not give rise to doubts, contrary to the opinion of the Court of Auditors. It is a natural consequence of the rule laid down in Article 16(2), whose expediency is quite evident: the entitlement of the widow and children to survivors' pensions is limited to the amount which the member would have received as pension. On the other hand, I cannot (as stated above) see any reason why the entitlement to survivors' pensions should be limited as to amount in such cases, but no maximum limit applied in the case of death of a member *during his term of office*.

40. The provisional conclusion is that neither the wording of the provision nor its structure or its spirit makes it clear at a glance how the question at issue here is to be answered. Article 16, as the applicant's representative correctly stated at the hearing, is poorly drafted and thus throws up considerable problems. [37] A sensible answer can be found only if the *historical background* of the provision is examined (see paragraph 43 et seq. below).

41. The applicant's argument should first be considered, however, that the Court of Auditors could in any event not base its decision in the present case on Article 16(2), since in a number of comparable cases relating to other Community institutions (Commission and Court of Justice) the relevant authorities had decided not to apply that provision, without that being objected to by the Court of Auditors. The applicant appears to intend thereby to accuse the Court of Auditors of an action inconsistent with its previous actions *(venire contra factum proprium)*.

That argument must be rejected, without it being necessary to examine in more detail the cases referred to. Firstly, there can be no doubt that administrative acts of other institutions relating to their own personnel administration can in no way bind the Court of Auditors. Secondly, the applicant misun-

37 — As a further example of the inadequacy of the legislative provisions, one might point to the fact that the *third subparagraph* of Article 16(1) represents a special provision with relation to the *second subparagraph* of Article 16(1), which appears to lay down definitive rules for the area it relates to (the cases where a member dies during his term of office). Under that rule the widow would in all cases receive 36% of her husband's last basic salary. It turns out, however, that the rule in the second subparagraph of Article 16(1) can also be more advantageous for the widow. If the member's term of office has already lasted long enough to give him the highest possible pension entitlement (70% of his basic salary; see Article 10 of the Regulation), a calculation on the basis of the *second subparagraph* gives a pension of 42% (60% of 70%) of the basic salary. It cannot be supposed that the *third subparagraph* is to apply in such cases, although the legislative provision appears to prescribe this.

derstands the mission and function of the Court of Auditors, as the latter has correctly pointed out. The Court of Auditors does indeed, in accordance with Article 188c(2) of the EC Treaty (formerly Article 206a(2) of the EEC Treaty) examine whether all revenue has been received and all expenditure incurred in a lawful and regular manner and whether the financial management has been sound. It draws up an annual report in which it states the results of its examinations; [38] it may also at any time submit observations on specific questions (Article 188c(4) of the EC Treaty, formerly Article 206a(4) of the EEC Treaty). It is not the function of the Court of Auditors, however, to certify with binding effect that individual Community measures are proper. The fact that the Court of Auditors may not have criticized certain measures is therefore of no relevance for the present proceedings.

The fact that the Court of Auditors did not address the argument in question in the defence is also immaterial. The Court of Auditors stated unambiguously that in its opinion Article 16(2) is applicable in the present case. It would therefore be mistaken to suggest that by not adopting a position on the applicant's arguments, the Court of Auditors had thereby conceded that they were relevant and correct.

The historical background of the provisions

42. As stated above, the provisions in question here correspond in content to the rules applicable to the Commission and Court of Justice. For that reason, in examining the historical background of those provisions, one is justified in also considering the provisions relating to those institutions. It is sensible to begin with the earliest provisions of Community law in this field. This is the *Decision of the Council of 21 December 1953 determining the salaries, allowances and pensions of the President and Members of the High Authority*, [39] adopted on the basis of the ECSC Treaty.

43. The provisions of that decision which are of relevance here, Article 10(1) and (2), read as follows:

'1. The widow and orphans of a Member or former Member of the High Authority who has pension rights at the time of his death shall receive survivors' pensions. The basis for calculation of the survivors' pensions shall be the pension which has accrued to the Member or former Member up to the date of his death. However, if the Member has died during his term of office, the basis for calculation of the survivors' pensions

38 — See, most recently, the annual report concerning the financial year 1992, OJ 1993 C 309, p. 1.

39 — Official Journal, 24 March 1954, p. 275; there is no official English text of this Decision.

provided for above shall be a pension equal to 50% of the salary received at the time of death.

2. The survivors' pensions shall be

a) for the widow	50%
(b) for each child where the mother is still alive	10%
(c) for each child where both father and mother are dead	20%

of the pension accrued to the deceased Member or former Member or of a pension equal to 50% of the salary received at the time of death, if the Member has died during his term of office. The survivors' pensions shall not exceed the amount on the basis of which they are calculated; the above percentages are to be reduced proportionately, if need be; on the death of the beneficiaries or if their entitlement to survivors' pensions lapses, the appropriate corrections shall be made in each case.'

Those provisions have the same content as the provisions of Article 10(1) and (2) of the *Decision of the Council* of 24 June 1954 *determining the salaries, allowances and pensions of the President, Judges, Advocates General and Registrar of the Court of Justice*. [40] The only difference is that in the latter Decision the maximum payment rule in paragraph 2 constitutes a separate subparagraph (the second subparagraph of Article 10(2)), whereas this is not the case in the Decision of 21 December 1953.

44. Regrettably, I have not been able to have sight of the *travaux préparatoires* relating to those decisions (and the legislative measures to be discussed below). [41] In view of the fact that the recitals in the preambles to those legislative acts are extremely lapidary, this is particularly unfortunate.

45. With respect to the decision of 21 December 1953, however, its content and spirit can both easily be read from the wording of the provisions in question. As can be seen from Article 10, the survivors' pensions are in principle calculated on the basis of the pension which the member was entitled to at the date of his death. The widow is allocated 50% of that pension, by way of widow's pension. Since under Article 6 of the decision, the maximum pension is 50% of the basic salary last received, the

40 — Official Journal, 6 July 1954, p. 437; there is no official English text of this Decision.

41 — For instance, according to the references in the preamble to the decision of 24 June 1954, that decision was based on a proposal from a committee. Neither that proposal nor the drafts of later legislative measures in this field appear ever to have been published, however.

widow's pension can amount to a maximum of 25% of the basic salary.

Despite those technical faults, however, the content of the provision is clear. If a member of the High Authority dies during his term of office, his widow is to receive a widow's pension equal to 25% (50% of 50%) of the salary last received by her husband. In this manner the widow is allocated a pension corresponding to the maximum amount which could have been arrived at by application of the general rule (under which the widow's pension corresponds to 50% of the member's *pension*). This is a clear indication of the intention to give favourable treatment to the widow (and orphans) of a member who dies during his term of office.

If the member dies during his term of office, however, the survivors' pensions are calculated not on the basis of his pension rights but on the basis of a sum equal to *one-half the salary* of the member. The rules governing those cases are not very happily formulated. Firstly, they contain an unnecessary duplication, in that Article 10(1) defines the sum to be used as the basis of calculation in each case, and the first sentence of Article 10(2) then again defines the sums to be used as a basis in each case (pension or a sum equal to 50% of the basic salary). It would have been much simpler and more appropriate if the first sentence of Article 10(2) had simply referred to the amount to be used as a basis of calculation under paragraph 1, as the maximum payment rule in the *second sentence* of Article 10(2) does. Secondly, according to the wording of that provision, the basis of calculation of the survivors' pensions is a *pension* equal to 50% of the salary received at the time of death. However, since a member who has died during his term of office did not receive a pension, but simply his ordinary salary, this is a *fiction*, the need for which is not evident, since the maximum payment rule in the second sentence of Article 10(2) does not refer to a pension, but to the *amount* which is the basis of the calculation.

46. The maximum payment rule in the second sentence of Article 10(2) provides that the total amount [42] of the survivors' pensions for the widow and orphans must not exceed the *amount on the basis of which they are calculated*. That maximum amount thus applies to *both types* of calculation of survivors' pensions. Since the basis of calculation in the one case is the member's pension, which can amount to 50% of the member's salary at most, and in the other case an amount equal to 50% of his salary, the effect of the maximum payment rule in the second sentence of Article 10(2) is that in both cases the total amount must not exceed 50% of the member's salary, in other words the *maximum pension that would have accrued to the member*. The objective reason for the restric-

42 — The German text of the Decision uses only the expression *Hinterbliebenenbezüge* ('survivors' pensions') at this point. However, it is clear from the French version (*Le total des pensions*), which under Article 100 of the ECSC Treaty is the only authentic version, that the text in fact means *Gesamtbetrag der Hinterbliebenenbezüge* ('total amount of the survivors' pensions'). That expression is also the one used at the corresponding point in Article 10 of the decision of 24 June 1954 (on the emoluments of the Members of the Court of Justice).

tion is immediately obvious; the survivors, taken together, are not to receive more than the member himself would have received.

47. Those rules applicable to members of the High Authority, and the corresponding rules for the Court of Justice, were replaced by new provisions in 1961/62 at the latest. [43] Since the European Economic Community and the European Atomic Energy Community had meanwhile been established, and it was not until 1965 that their executives were merged with the High Authority of the ECSC to form *one* Commission, there are a total of *four* legislative texts in the Official Journal — for the Court of Justice, for the High Authority of the ECSC, for the Commission of the European Atomic Energy Community, and for the Commission of the EEC — to regulate the question which is of relevance here.

48. The rules for the EEC Commission are in *Regulation No 63 of the Council determining the emoluments of members of the Commission.* [44] The provisions of Article 15(1) and (2) of that Regulation read as follows, corresponding to the text of the *French, Italian and Dutch* versions:

'1. The widow and dependent children of a member or former member of the Commission to whom pension rights have accrued at the time of his death shall be entitled to a survivor's pension.

That pension shall be equal to a percentage of the pension accruing to the member or former member under Article 9 at the date of death, namely:

for the widow	50%,
for each child where the mother is still alive	10%,
for each child where both father and mother are dead	20%.

However, if the death of the member of the Commission occurs during his term of office, the survivor's pension shall be calculated on the basis of a pension equal to 50% of the basic salary received at the time of death.

43 — In the regulation concerning the Court of Justice (on which see below), Article 22 provides that all previous provisions on emoluments shall be repealed, but the Decision of the Special Council of Ministers of the ECSC of 13 and 14 October 1958 shall, however, remain in force. That decision has not been published, so that the possibility cannot be excluded that it related also to the topic in question here. The point is of purely historical interest, however.

44 — OJ, English Special Edition 1952-1958, p. 255.

2. The total amount of these survivors' pensions shall not exceed the amount of the pension of the member or former member of the Commission on which they are calculated. The maximum total survivors' pensions payable shall be divided, where applicable, between the beneficiaries in accordance with the above percentages.'

Those provisions agree with the provisions in Article 15(1) and (2) of each of *Regulation of the Councils determining the emoluments of members of the Court of Justice (No 62 EEC) (No 13 EAEC),* [45] *Regulation No 14 of the Council determining the emoluments of members of the Commission* (of the EAEC) of 18 December 1961 [46] and the *Decision determining the emoluments of members of the High Authority* of 22 May 1962. [47]

49. Examination of those provisions shows that the basis of calculation for survivors' pensions has remained unaltered, as regards its content. As before, the widow in principle receives 50% of the pension her husband would have been entitled to at the date of his death; if the member dies during his term of office, the widow receives 50% of half his basic salary, in other words 25% of his basic salary. [48] The new version brought no changes of content in this respect.

In any event, the new version removed the deficiencies in the formulation of the earlier version. The amounts to be used as the basis of calculation are now defined only once, in paragraph 1. The maximum payment rule in paragraph 2 has already received the form which the present Regulation still use. The survivors' pensions for the widow and orphans must not exceed, in total, the amount of the *pension of the member or former member*. That phrase — which causes such difficulties in the interpretation of the provisions currently in force — is entirely appropriate in Article 15(2) of Regulation No 63, since under Article 15(1) the basis of calculation is the (actual) pension or a *fictional* pension equal to 50% of the basic salary. The reference to that fictional pension, which seemed strange in the 1953 and 1954 decisions, can now be explained by the connection with Article 15(2). The legislative provision is therefore now meaningful and coherent.

50. If the *German* version of those provisions is considered, however, the situation

45 — OJ, English Special Edition 1952-1958, p. 250. The Regulation is not dated.

46 — OJ, English Special Edition 1952-1958, p. 259.

47 — OJ, English Special Edition 1952-1958, p. 263.

48 — The new provisions speak of 'basic salary', whereas the decisions of 1953 and 1954 speak of 'salary'. It is questionable whether the new choice of words resulted in a change to the basis of calculation. In any event, the maximum pension payable amounts to 50% of the last basic salary (Article 9), corresponding to the provisions in the 1953 and 1954 decisions.

appears quite different. On the basis of that version, if the member dies during his term of office, the basis for calculation of the survivors' pensions is not 'a pension equal to 50% of the basic salary', but *'half the basic salary'*. The different wording has no consequences for the calculation of the pension as such, as the amount is still the same. However, it means that the reference in the maximum payment rule in Article 15(2) to the amount of the *pension* now has nothing to refer to.

Since the versions of that provision in all the other (then) official languages agree, however, in basing the calculation of the survivors' pensions in such cases on the (fictional) pension, the German version is in all probability attributable to a translation error. It seems that the translator responsible for the German version regarded the formulation used in Article 15(1) as unnecessarily complicated and therefore replaced it by the simple reference to 'half the basic salary'. In so doing he clearly overlooked the fact that the following paragraph of Article 15 refers to the 'amount of the pension' and the complicated formulation in paragraph 1 was therefore both necessary and appropriate. This interference with the text is all the more surprising in that that formulation is already used in the decisions of 1953 and 1954 and the new legislation thus did not introduce any change of content in this respect. [49] The obvious comparison in this context is with some of the medieval scribes to whom we owe the written records of the Germanic *Leges*, who sometimes took considerable liberties with the text. [50]

The translator can certainly not be accused of lacking consistency or thoroughness. The supposed 'improvement' of the text of Article 15(1) occurs in all the four regulations and decisions adopted in this field in 1961 and 1962.

51. The mistake in the German versions of those legislative texts is of minor importance, however, in that in the interpretation of provisions of Community law, their content and purpose must be determined in the light of the versions of those provisions in all the official languages. [51] A comparison with the text of the relevant provisions in the other official languages shows quite clearly, however — as has been seen above — that the maximum payment rule in Article 15(2) was intended to apply to *all* cases of calculation of survivors' pensions.

49 — Apart from the reference, mentioned above, to 'basic salary' instead of salary (see footnote 48).

50 — Probably the most striking — and amusing — example is the manuscript of the *Lex Salica*, dating from the sixth or seventh century and written by the monk Agambert. See on this point e.g. H. Nehlsen, 'Zur Aktualität und Effektivität germanischer Rechtsaufzeichnungen', *Recht und Schrift im Mittelalter*, ed. P. Classen, p. 449, pp. 465 f.

51 — See for example the judgment in Case 29/69 *Stauder* v *Ulm* [1969] ECR 419, paragraph 3.

52. The 1961 and 1962 legislation I have just discussed was replaced in 1967 by a single text, *Regulation No 422/67/EEC, 5/67/Euratom of the Council of 25 July 1967 determining the emoluments of the President and members of the Commission and the President, Judges, Advocates General and Registrar of the Court of Justice*, which is still in force today in its current version. [52]

53. The provisions of Article 15(1) and (2) of that Regulation read as follows, corresponding to the *French, Italian and Dutch* versions:

'1. The widow and dependent children of a member or former member of the Commission or of the Court to whom pension rights have accrued at the time of his death shall be entitled to a survivor's pension.

That pension shall be equal to a percentage of the pension accruing to the member or former member of the Commission or of the Court under Article 9 at the date of death, namely:

for a widow	50%,
for each child where the mother is still alive	10%,
for each child where both father and mother are dead	20%.

However, if the death of the member of the Commission or of the Court occurs during his term of office, the survivor's pension shall be calculated on the basis of a pension equal to 50% of the basic salary received at the time of death. Where the member of the Commission or of the Court whose death occurs during his term of office has reached the maximum pension provided for in Article 9, the survivor's pension for the widow shall be equal to 30% of the basic salary received at the time of death.

2. The total amount of these survivors' pensions shall not exceed the amount of the pension of the member or former member of the Commission or of the Court on which they are calculated. ...'

54. Compared with the text of the 1961 and 1962 provisions, neither the first part of Article 15(1) nor Article 15(2) has thus been altered in content. That is incidentally also the case with the German version, which continues to refer to 'half the basic salary' for the purposes of calculating the pensions of the surviving relatives of a member who has died during his term of office; the mistake in the previous legislation has thus been passed on.

52 — See footnote 6 above and the corresponding text (with the present title of the Regulation).

55. A new sentence was now added at the end of Article 15(1), however. If a member dies during his term of office after reaching the maximum pension, his widow is to receive 30% of the basic salary last received. Under Article 9 of the Regulation the maximum pension is 50% of the basic salary, as before, so that under the previous rule (retained in the first two sentences of the second subparagraph of Article 15(1)) the widow could in no case have received more than 25% of the basic salary as widow's pension. It is therefore evident that this addition was intended to give more favourable treatment to the widows in question.

The new provision relates to the member's basic salary, not to a (fictional) pension. The maximum payment rule in Article 15(2) thus appears not to be applicable if the widow's pension is calculated on the basis of the new provision. This is of course basically the same problem as that which is at the centre of the present case.

In my opinion, however, it can scarcely be doubted that the legislature, when introducing that new provision, did not pursue the aim of freeing widows' pensions in the cases in question from the applicability of the maximum payment rule. Had that been the legislature's intention, one would have expected that Article 15(2) (which continues to refer to the pension of 'the member or former member') would also have been changed. If, on the other hand, it were to be suggested that Article 15(2) had not been adapted on the assumption that it was in any event not appropriate to apply it in cases of the type governed by the last sentence of Article 15(1), that would be to attribute to the legislature a precision in its use of legal terminology which would certainly be surprising in view of the foregoing (and following) discussion of the legislative history of the provision. If one were nevertheless willing to assume that there had been such an intention, the effect of the provision, understood in that way, would be that the widow of a member who died during his term of office would receive either 25% or 30% of the basic salary (according to whether the member had already reached the maximum pension or not), but in the former case the maximum payment rule in Article 15(2) would intervene, whereas in the latter case it would not. No reason can be seen for such a difference in treatment. That too supports the conclusion that my original opinion that Article 15(2) is applicable in both cases is correct.

56. The question then arises, however, *which* maximum total amount of survivors' pensions is to apply if the widow's pension is calculated on the basis of the last sentence of Article 15(1). In my opinion, there is no great difficulty in answering that question, however. The said provision relates to one of the cases of a member dying during his term of office. It is therefore appropriate to take

account of the maximum prescribed generally for such cases. The total amount of the survivors' pensions must therefore not exceed *half the basic salary*. As I have already stated, that amount corresponds to the *maximum pension* under Article 9.

57. The provisions of Regulation No 422/67/EEC, 5/67/Euratom were amended by *Regulation (ECSC, EEC, Euratom) No 2163/70 of the Council of 27 October 1970*. [53] That Regulation increased the maximum pension to 60%. At the same time the widow's pension provided for in the first indent of the second subparagraph of Article 15(1) was set at 60% of the pension of the member or former member.

58. That amendment naturally had the consequence that calculation of the widow's pension in accordance with the provisions laid down in Article 15(1) for cases where a member dies during his term of office might be less favourable for the widow than calculation according to the general method. In the latter case the widow now received a maximum of 36% of the last basic salary (60% of 60%), whereas a calculation in accordance with the two provisions which were in fact intended to give more favourable treatment to the widow of a member who died during his term of office (the second and third sentences of the second subparagraph of Article 15(2)) gave only 25% or 30% of the basic salary.

59. The legislature evidently soon became aware of the absurdity. Article 15 was re-amended by *Regulation (EEC, Euratom, ECSC) No 723/71 of the Council of 30 March 1971*, [54] the following sentence being substituted for 'the last two sentences of the second subparagraph of Article 15(1)': [55]

'However, if the death of a member of the Commission or of the Court occurs during his term of office, the survivor's pension for the widow shall, from 1 July 1970, be equal to 36% of the basic salary received at the time of death.'

60. The legislature's intention in introducing that amendment was evidently to do away with the above inconsistency and give the widow of a member who dies during his term of office a widow's pension equal to the maximum amount which would have resulted if the general rule (allowing 60% of his pension) were applied. As has been seen above, that purpose was already the basis of the first Community rules in this field in 1953 and 1954. [56]

53 — OJ, English Special Edition 1970, p. 724.

54 — OJ, English Special Edition 1971, p. 200.

55 — Article 3 of Regulation No 723/71. That provision also confirms that my numbering of the subparagraphs of the Regulation in question (see footnote 3) is appropriate.

56 — See paragraph 45 above, *in fine*.

Since the widow of a member dying during his term of office was now to receive 36% of the basic salary *in every case*, the legislature was now able to replace the two provisions previously applicable to such cases, the second and third sentences of the second subparagraph of Article 15(1), by a single provision and thereby at the same time simplify the text. The legislature could have achieved the desired result by deleting *the third sentence* of the said provision and making the appropriate changes to *the second sentence*. Instead the *second sentence* was deleted and the *third sentence* amended. The consequence was that the new provision no longer refers to a (fictional) pension, but provides that the widow's pension is to be calculated on the basis of the basic salary. Since Article 15(2) was not changed and continues to refer to the 'amount of the pension' which is the basis of calculation, the maximum amount rule now appears not to be applicable to such cases.

That cannot, however, be supposed to have been the legislature's intention. Rather, this is one more example of how an amendment to a provision, introduced with the best intentions, as a result of its lack of coordination with the context of the amended provision, creates new difficulties which the legislature was simply not aware of. This can easily be demonstrated in the present case. Until amended by Regulation No 723/71, the provisions on the calculation of survivors' pensions applied generally, that is, to widows *and orphans* , in cases of the death of a member during his term of office. The new version, by contrast, now relates only to the survivor's pension for the *widow*, so that the orphans' pensions are now to be determined in accordance with the first sentence of the second subparagraph of Article 15(1) (in other words, on the basis of the pension). However, there is no indication in Regulation No 723/71 that the rules on orphans' pensions were to be amended. That this was in fact an unintentional consequence is shown by the fact that in 1981 the legislature once more amended the amended provision, in order to improve pensions for orphans of both father and mother of a member of the Court of Auditors dying during his term of office. [57] It would not be at all surprising if the legislature were one day to adopt a further amendment to restore the favourable treatment of the other orphans too of a member dying during his term of office.

61. The last of the regulations amending Regulation No 422/67/EEC, No 5/67/ Euratom which is of relevance here also shows that this is an area where it is scarcely possible to claim that the legislature exercised particular care in dealing with it. As I have already explained, Regulation No 723/71 improved the position of the widow of a member dying during his term of office by increasing her pension to 36% of the basic salary, the maximum amount which would have resulted from application of the

57 — The passage in question (which forms the second indent of the third subparagraph of Article 16(1) of Regulation No 2290/77) was inserted into the relevant provisions by Regulation No 1416/81 (see footnote 2).

general method of calculation. However, *Regulation (ECSC, EEC, Euratom) No 1546/73 of the Council of 4 June 1973* [58] increased the maximum pension provided for in Article 9 of Regulation No 422/67/EEC, No 5/67/Euratom from 60% to *70%* of the basic salary, without making a corresponding adjustment to Article 15. The result was that the use of the general method for calculation of the widow's pension — under which the maximum possible is a pension of 42% of the basic salary (60% of 70%) — can again lead to more favourable circumstances for the widow than the provision in the second sentence of the second subparagraph of Article 15(1), by which the widow of a member dying during his term of office was in fact intended to be treated more favourably.

Conclusions for the present case

62. In adopting *Regulation No 2290/77* the legislature based itself on the provisions of Regulation No 422/67/EEC, No 5/67/Euratom applicable to the Commission and the Court of Justice. Article 15 of the latter Regulation was taken over unchanged into Regulation No 2290/77, where it is Article 16. [59] In so doing, the faults in the Regulation used as a pattern was therefore also taken over in full.

63. The legislative history of the original provisions shows that until the early seventies, despite all their faults in detail, they maintained *two common principles* over the years: firstly, the maximum payment rule in paragraph 2 was intended to apply to *all* cases of the calculation of survivors' pensions; and secondly, the total amount of the survivors' pensions was not to exceed the *maximum pension* in cases where a member died during his term of office.

Those provisions were simple to apply as long as the maximum pension was 50% of the basic salary and the survivors' pensions amounted to 50% of the figure on which they were calculated (pension or basic salary). The system became confused when those percentages were altered (first by Regulation No 2163/70) and as a result of various amendments the original method — calculation on the basis of the actual or a fictional pension — was no longer in harmony with the maximum payment rule in paragraph 2.

64. I am nevertheless of the opinion that the principles I have worked out can also be adduced for the interpretation of the provisions now in force. Specifically, that means that Article 16(2) is applicable in the present case. Contrary to the opinion of the Court of Auditors, however, in a case such as the

58 — OJ 1973 L 155, p. 8.

59 — The references in Article 15 to the 'Commission' and 'Court of Justice' were of course replaced in Regulation No 2290/77 by references to the 'Court of Auditors'.

present one which concerns the determination of the pension of the widow of a member who has died during his term of office, the maximum total amount of the survivors' pensions is not the amount of the pension the member would have been entitled to on the date of his death, but the *maximum pension* under Article 10 of the Regulation (70% of the basic salary last received by the member).

65. That conclusion is admittedly not immediately evident from the rules in force. However, as I have already stated, it is also not evident from those rules with any certainty how cases such as the present one are to be resolved. The solutions put forward by the parties to the present proceedings do indeed appear tenable, if one focuses only on the wording and context of the provision. But if one considers the spirit and purpose of the provision, such as emerges from its legislative history, neither of those two solutions produces an acceptable result.

If the opinion of the Court of Auditors were adopted, the consequence would be that the widow's pension would be drastically reduced or even completely abolished, depending on the length of the member's term of office. Such a result was certainly not intended by the legislature. On the other hand, if the applicant's opinion were followed, the pension payable to the widow of a member dying during his term of office would be completely exempted from the maximum payment rule in Article 16(2). No obvious reason can be discerned for such privileged treatment, especially in view of the historical background to the provision.

At the hearing before the Court the applicant's representative argued that the institution in question ought to act with generosity when determining survivors' pensions. However understandable that point of view is, it must be pointed out, however, that survivors' pensions must be determined on the basis of the legislative provisions, which must be interpreted correctly, as is necessary here.

66. The solution I have suggested, on the other hand, leads to appropriate results. The maximum possible amount of the survivors' pensions is limited to the amount the member himself would have had at his disposal in the most favourable case, in other words, the maximum pension. That that is reasonable requires no further discussion.

67. The result in the present case is that the contested decision cannot stand, since it incorrectly determined the maximum

amount to be applied under Article 16(2). The application must therefore be upheld.

Deduction of taxes and sickness insurance contributions

68. On the question whether it was permissible for the Court of Auditors to deduct sickness insurance contributions and taxes both from the pension payable to the applicant and from the maximum amount under Article 16(2), I can express myself briefly. In my opinion a distinction must be drawn between the widow's pension and the maximum amount under Article 16(2).

69. Let us first consider the *widow's pension*. Article 21 of Regulation No 2290/77 provides that the Regulation laying down the conditions and procedure for applying the tax for the benefit of the Communities shall apply to members of the Court of Auditors. If the pensions payable to members of the Court of Auditors are liable to tax, that should also be the case for the survivors' pensions. As to the sickness insurance contributions, reference must be made to Article 16(8) of Regulation No 2290/77. [60] Under that provision the widow and dependent children of a member are entitled to sickness benefits under the social security scheme provided for in the Staff Regulations of Officials of the European Communities 'if they are not eligible for benefits of the same nature and of the same level under another social security scheme'. The applicant does not argue that she can draw such benefits from another source, and the approach of the Court of Auditors thus appears justified.

70. The deductions also appear to be justified in principle with respect to the determination of the *maximum amount* under Article 16(2). As I have already said, it follows from Article 21 that the emoluments of members of the Court of Auditors are taxable. Under Article 12(1) the members of the Court of Auditors are entitled to the benefits of the social security scheme provided for in the Staff Regulations covering sickness, occupational disease, industrial accident and birth and death benefits. [61] Since the purpose of the maximum payment rule in Article 16(2) is in my opinion to limit the total amount of survivors' pensions to the amount *which would have been available to the member himself*, it appears consistent to deduct the contributions which would have been deducted from the member.

60 — The decision of 22 July 1992 refers in this respect to Article 12 of the Regulation. However, that inaccuracy (in any case not specifically complained of by the applicant) is in my opinion of no relevance for the present case.

61 — See footnote 26 above.

C — Conclusion

71. I therefore propose that the Court annul the decision of the Court of Auditors of 12 October 1992 determining the survivors' pensions for the applicant and her two children and order the Court of Auditors to pay the costs of the proceedings in accordance with Article 69(2) of the Rules of Procedure.