In Case 81/72

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Walter Much, Director-General of the Legal Service of the Commission, acting as agent, assisted by Louis de la Fontaine, principal adviser in the Legal Service of the Commission, having chosen its address for service in Luxembourg at the offices of its legal adviser Emil Reuter, 4 boulevard Royal,

applicant,

v

COUNCIL OF THE EUROPEAN COMMUNITIES, represented by its Jurisconsult, Ernest Wohlfart, having chosen its address for service in Luxembourg at the office of J. N. van den Houten, Director of the Legal Service of the European Investment Bank, 2 place de Metz,

defendant,

Application for the partial annulment of Council Regulation (EEC, Euratom, ECSC) No 2647/72, of 12 December 1972 (OJ L 283, 20. 12. 1972, p. 1) adjusting the remuneration and pensions of the officials of the European Communities and other servants of those Communities,

THE COURT

composed of: R. Lecourt, President, R. Monaco and P. Pescatore, Presidents of Chambers, A. M. Donner, J. Mertens de Wilmars (Rapporteur), H. Kutscher, C. Ó Dálaigh, M. Sørensen, A. J. Mackenzie Stuart, Judges,

Advocate-General: J. P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Statement of facts and procedure

The facts on which the case is based and the procedure may be summarized as follows:

By Article 65 (1) of the Staff Regulations the Council shall each year review the remuneration of the officials and other servants of the Communities, in the light of a report by the Commission and shall consider

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

By paragraph 2 of the same provision, in the event of a substantial change in the cost of living, the Council shall decide, within two months what adjustments should be made to the weightings and if appropriate to apply them retrospectively.

Since 1966 according to the Commission, and indeed prior to it according to the Council, these annual reviews have taken account not only of the rise in the cost of living but also of the general increase in purchasing power within the Community, to ensure not only that they receive an increase in salaries, in real terms, justified by and parallel to the general improvement in the standard of living in the Community. The lack of a generally accepted means of measuring the increase in purchasing power gave rise to debates and difficulties each year in fixing the criteria to be taken into consideration, and the Council therefore invited the Commission to submit to it as soon as possible a document 'which might be used as the starting point of a thorough study, to be undertaken together, of the working methods to be used for the application of Article 65 of the Staff Regulations'.

Such a document was submitted to the Council on 2 June 1971, but since agreement could not be reached on the indices put forward by the Commission, the latter proposed a compromise solution for a trial period of three years, this involved the adjustment of salaries of the officials 'in the light of the *arithmetical mean* between two indices: one, a so-called "specific" index, derived from the alteration in salaries in the public service in the Member States, and the other from the total emoluments per head in the public service of the same States.'

In the course of its 192nd session, held on 20 and 21 March 1972, the Council, as it is expressed in the 'Summary of decisions' taken by it, 'recorded its agreement' to a text which states 'as an experiment and for a period of three years' a system of measuring the purchasing power of remunerations should be applied, involving a 'decision every year in the light of these two indices.'

On 27 September 1972, at the same time as the Report which it had to submit by virtue of Article 65 (1), the Commission forwarded to the Council a *draft regulation* providing for an increase of 3·75 % throughout the table of salaries, in respect of an increase in the cost of living in application of the criteria laid down by the Decision of 20 and 21 March 1972.

However the Council was unable to arrive at a decision on that basis but adopted, on 12 December 1972, the disputed Regulation which, in respect of the increase in purchasing power, fixed the increase in remuneration at 2·5 %: the Regulation also contains a number of other points which are not in dispute.

The Commission brought an action against this Regulation on 15 December 1972 and it was registered at the Court of Justice on the same day. The contested Regulation was published in the Official Journal on 20 December 1972 and came into force on 21 December 1972.

The Commission waived its right to submit a reply.

Upon hearing the report of the Judge-Rapporteur and upon hearing the Advocate-General, the Court decided to commence the oral procedure without preparatory inquiries.

The Council forwarded to the Court the extracts of the draft minutes of the 192nd and 217th sessions of the Council, held respectively on 20 and 21 March 1972 and 5, 6, and 8 December 1972.

The Advocate-General presented his Opinion at the hearing on 15 March 1973.

II — Submissions of the parties

The *Commission* submits that the Court should:

'declare null and of no effect Articles 1 to 4 of the Council Regulation of 12 December 1972 in so far as they lay down salary scales and other grants and allowances based on an increase in purchasing power which is limited to only 2·5 %'.

The *Council* submits that it relies on the judgment of the Court of Justice to decide whether the Decision of 21 March 1972 constitutes a rule of law relating to the application of the Treaties, and what interpretation it is thought fitting to give to this Decision and in particular to point I (c)'.

III — Pleas and arguments of the parties

The pleas and arguments of the parties may be summarized as follows:

A — Pleas of the applicant

According to the Commission the contested Regulation infringes Article 65 of the Staff Regulations, combined with the Decision of 20 and 21 March 1972. This Decision binds the Council, in so far as the Council has not formally repealed it. Not only has there been no such repeal, but also, in the course of the discussions occasioned by the remunerations problem, the Council proclaimed its intention to observe in their entirety the contents of the Decision. It is, then, the interpretation and scope of this Decision which divides the parties.

Regarding this, two issues must be clarified: the first relates to the scope of the Decision of 20 and 21 March 1972 combined with Article 65 of the Staff Regulations, the second relates to the interpretation of the words 'in the light of these two indices' at point I (c) 'Procedure', under the heading 'System of adjustment of remunerations' in the same Decision.

1. On the first issue

(a) The *Commission* disputes the view that the Decision of 20 and 21 March cannot result in a restriction of the freedom of appraisal which the Council possesses by virtue of Article 65.

Such an interpretation contradicts the objective of the Decision, good employer-staff relations, which were to be ensured precisely by the fact that, for a trial period, the Council restricted its freedom of appraisal by taking account of objective factors in its calculations. As this objective constitutes the basis of the agreement reached on the method of calculation, an interpretation upholding the unlimited power of appraisal of the Council violates the principles of confidence and good faith.

(b) The interpretation followed by the Council is further refuted by the fact that in the contested Regulation, the Council implemented all the essentials of its Decision of 20 and 21 March 1972, except that relating to the increase in purchasing power.

(c) Finally, the very wording of the Decision argues in favour of the Commission's interpretation. It is stated there that there shall be an experiment limited to a period of three years, at the end of which the agreed method of calculation shall be reconsidered, and that this Decision shall not create 'vested rights'. These precautions would have been superfluous if the text only had the significance attributed to it by the Council.

2. On the second issue

In the second place the Commission disputes the thesis that the use of the words 'in the light of the two indices' in

the Decision of 20 and 21 March 1972 merely implies a recognition in principle of the two indices as factors of appraisal but does not mean that the norms which they establish must be taken into account in decisions on salaries.

The term 'in the light of the two indices' in fact originated in the proposal which the Commission put forward as a compromise on 20 March 1972; as all the interested parties had agreed that exclusive reliance on the alteration in salaries in the public services of the Member States furnished inadequate criteria, the Commission suggested, with a view to verification, recourse to a supplementary index derived from total emoluments. To ensure the automatic application of the two indices laid down, the Commission proposed that their arithmetical mean should constitute the coefficient of increase in salaries. This rigidly automatic application met with objections in the Council, which led to the deletion from the text of the words 'of the arithmetical mean', but there was never any doubt at the time of the discussions that both indices must be taken into consideration.

If, then, the Council has retained a margin of appraisal, this can only be within the bounds of the two indices; it cannot be considered to have retained a discretion to establish a coefficient of increase below both indices.

As the two indices produced respective coefficients of 3·6 % and 3·9 %, the contested Decision violates the rules of calculation established as imperative by the Decision of 20 and 21 March 1972, in that it lays down a rate of only 2·5 %.

B — Pleas of the defendant

The *Council* points out in the first place that since before 1966, an adjustment in salaries necessitated by the rise in the cost of living did not follow automatically, and it retained a power of appraisal, in particular to consider whether an increase in salaries in real terms was appropriate.

Turning then to the admissibility of the action, the Council points out that the contested act is a Regulation enacted in an 'area covered by the three Communities'. Whilst the action is unobjectionable in relation to Article 173 of the EEC Treaty and Article 146 of the Euratom Treaty, it is *per contra,* inadmissible in so far as founded on Article 38 of the ECSC Treaty, as the Commission has not invoked lack of competence on the part of the Council, or infringement of an essential procedural requirement, the sole grounds allowed by this provision.

At the hearing of 20 February 1973, the Council stated that it waived this objection of inadmissibility.

On the merits, the Council disputes in the first place that the contested Regulation infringes Article 65 of the Staff Regulations. Whilst pointing out that all the members of the Council have declared their intention to respect the system adopted by the Council's Decision of 20 and 21 March 1972, the defendant considers that it is for the Court of its own motion, to determine whether this system constitutes a rule of law relating to the application of the Treaty, the noncompliance with which would found an action for annulment.

In this respect, it is impossible to rely on the case law of the Court to the effect that a decision without particular legal form is an act within the meaning of Article 173, as, the question at issue in the present case is different, namely, which decisions must lie deemed to constitute a rule of law relating to the application of the Treaty.

The same holds true for the combination of Article 65 with the Decision of 21 March 1972, as it is doubtful 'whether a Regulation and an informal Decision taken by the Council constitute together a rule of law which could be violated by an implementing provision of the Regulation, the provision itself being enacted as a Council Regulation'. Rather, the question is one of the interpretation given to Article 65 by an

informal act, which according to the case law of the Court, however, (Case 74/69, Hauptzollamt Bremen v Krohn, Rec. 1970, p. 451) does not prossess the binding force provided for in Article 189 of the Treaty.

According to the Council, it is a question of a decision *sui generis* which constitutes an arrangement in implementation of Article 65 of the Staff Regulations. In any case, there can be no question of collective bargaining as, by the same Article 65 and the principles governing the civil service, the power of decision pertains to the Council and cannot be shared with the staff. If, then, the Council wished to impose an obligation on itself, it none the less retains complete freedom of interpreting and implementing its decision, without being subject to judicial control, in that this voluntary undertaking is not cast in the form of a rule of law.

Should the Court hold that the contested Decision constitutes a rule of law relating to the application of the Treaty, the defendant disputes that there has been an infringement of such a rule.

The defendant observes in the first place, that the Commission itself admits that the contested act leaves the Council a discretionary power of appraisal. The only differences of opinion concern the extent of this power. According to the Commission it can be exercised only within the bounds of the rates established by the indices adopted. According to the defendant, on the contrary, the margin of appraisal is more extensive, deriving from the use of the expression 'in the light of' which was preferred to the more restrictive 'according to' or 'in accordance with'.

Article 65 (1) of the Staff Regulations moreover uses the same expression in connection with the report by the Commission without the Council ever having considered itself bound by this report.

Finally, the fact that the contested act expressly states that the system adopted 'is within the framework of the provisions of the present Article 65 of the Staff Regulations', indicates that the principle of freedom of decision of the Council expressed in that provision was maintained; consequently the defendant preserves the power of reviewing whether, and to what extent, 'as part of the economic and social policy of the Communities, remunerations should be adjusted'. The present trend of Community economic policy is to refrain from generally inflationary measures, such as unwarranted increases in wages and salaries, and this justifies the decision to remain slightly below the specified indices.

Grounds of judgment

1 The purpose of the action is the annulment of Articles 1 to 4 of Council Regulation No 2647/72 (OJ L 283, 20. 12. 1972, p. 1) adjusting the salaries and pensions of the officials of the European Communities and of the other servants of these Communities, to the extent to which these articles fix scales of salaries and other grants and allowances by adjusting them, on the basis of an increase in purchasing power limited to 2·5 %;

2 By Article 65 (1) of the Staff Regulations, the Council shall each year review the remunerations of the officials and other servants: 'in the light of a report

by the Commission and based on a joint index prepared by the Statistical Office of the European Communities in agreement with the national statistical offices of the Member States: the index shall reflect the situation as at 1 July in each of the countries of the Communities';

The object of this review is thus to determine whether, as part of the social and economic policy of the Communities, remunerations should be adjusted.

For several years, the Council and the Commission, with the collaboration of the organizations representing the staff, have carried out the necessary adjustments.

It is admitted that these adjustments must seek not only to adjust salaries in relation to the increase in the cost of living, but equally, to give officials and servants the benefit of the increases in the level of incomes recorded in the Community.

As the calculation of the increase in incomes engendered difficulties each year between the organizations representing the staff and the institutions concerned, by a Decision of 14 December 1970 the Council invited the Commission to submit to it 'a document which might be used as the starting point for a thorough study, to be undertaken together, of the working methods to be used for the application of Article 65 of the Staff Regulations'.

3 In implementation of this Decision the Commission, in collaboration with the organizations representing the staff, submitted proposals to the Council substituting, in connection with the increase in purchasing power in real terms, for the 'joint index' referred to in Article 65 (1), sub-paragraph 1, and the so-called 'specific' index derived from the alteration in salaries of the national public services previously used a single index derived from 'the total emoluments per head'.

It concluded by pointing out that these proposals might well entail the adjustment of Articles 64 and 65 of the Staff Regulations.

On the rejection of these proposals by the Council, chiefly because they departed from the framework of Article 65, the Commission proposed a means of adjustment in the light of the arithmetical mean between two indices, the one derived from the alteration in salaries in the public services in the Member States in the course of the preceding year and the other from the total emoluments per head in the public services in the same Member States.

4 On 20 and 21 March 1972, the Council decided to apply, as an experiment and for a period of three years, a 'system of adjusting remunerations', involving recourse to the said two indices for the rise in the purchasing power of remunerations.

It emerges from the minutes of these proceedings that the Council, rejecting the automatic application of the arithmetical mean between the two indices which were adopted, defined their operation as follows: 'decision each year by the Council in the light of these two indices. In the course of the third year, this method of calculation shall be checked by a thorough study of the total national emoluments and the total Community emoluments, to verify the validity of the system and to carry out any necessary structural adjustments'.

5 In the report which the Commission presented to the Council on 27 September 1972 in implementation of Article 65 of the Staff Regulations, the Commission finding that the two indices respectively disclosed, as at 1 July 1972, an increase in the purchasing power of national salaries of 3·6 % and 3·9 %, proposed a gross real increase of Community remunerations equal to the arithmetical mean of the said indices, *viz.* 3·75 %.

However, by the contested Regulation the Council established the increase in salaries referable to the increase in purchasing power at 2·5 %, that is to say, below the lower index.

The applicant maintains that in failing to increase the salaries at least to the level of the lower index, *viz.* 3·6 %, the Council has infringed Article 65 of the Staff Regulations in conjunction with the Decision of 21 March 1972.

Whilst declaring that in adopting the disputed Regulation it felt bound 'by the system adopted on 21 March 1972', the Council, without itself formally raising the plea, suggests that the Court should decide of its own motion 'whether this system constitutes a rule of law'.

A — On the nature and effect of the Decision of 21 March 1972

6 The nature and effect of the Decision of 21 March 1972 must be appraised within the framework of the Council's implementation of the task assigned to it by Article 65 of the Staff Regulations.

By that provision, the Council shall each year review the remunerations paid by the Communities, in the light of a report drawn up by the Commission.

Furnished with this report, the Council is called upon to 'consider' the question of a possible adjustment of remuneration within the context of the economic and social policies of the Communities, of which the policy with regard to the emolument of the Community services forms part.

In consequence of this consideration, by paragraph 3 of the same Article, the Council shall 'act' on the proposal of the Commission.

7 This provision thus leaves to the Council the choice of the means and forms best suited to carry out an emoluments policy in conformity with the criteria laid down by Article 65.

The Council, which is responsible for the organization of the staff, may, as part of the means of implementation of Article 65, incorporate procedures of collective bargaining, similar to those practised in the Member States, according to their various methods.

The Council is free to divide up the decision-making process into successive phases, in accordance with a practice usual in the Community, and to decide certain questions of principle first, in order to facilitate the application of subsequent implementing measures.

8 There is no doubt that in deciding on the act of 21 March 1972, the Council had gone beyond the stage of preparatory consideration and had entered on the phase of decision-making.

The Council acted, on the proposal of the Commission, following consultations between the latter and the organizations representing the staff.

Both the antecedents and the terms of the Decision taken make it clear that the Council intended to bind itself to observe fixed criteria, in the working out of subsequent measures relative to the periodic determination of remunerations.

This intention shows itself particularly in the provisions whereby the system established by the Decision 'shall be applied' as an experiment and for a period of three years, from the affirmation that 'it is within the framework of the provisions of the present Article 65 of the Staff Regulations', from the

statement of an 'operative date' and finally from the insertion of an express reservation by which the application of the new method for an experimental period 'cannot give rise to vested rights'.

In the course of the oral procedure, moreover, the Council repeatedly emphasized that it acknowledged itself to be bound by this act, that it still intended to respect it, and that the disagreement turned exclusively on the interpretation of the Decision.

9 It appears, therefore, that by its Decision of 21 March 1972, the Council, acting within the framework of the powers relating to the remunerations of the staff conferred on it by Article 65 of the Staff Regulations, assumed obligations which it has bound itself to observe for the period it has defined.

10 Taking account of the particular employer-staff relationship which forms the background to the implementation of Article 65 of the Staff Regulations, and the aspects of consultation which its application involved, the rule of protection of the confidence that the staff could have that the authorities would respect undertakings of this nature, implies that the Decision of 21 March 1972 binds the Council in its future action.

Whilst this rule is primarily applicable to individual decisions, the possibility cannot by any means be excluded that it should relate, when appropriate, to the exercise of more general powers.

Furthermore, the adjustment each year of remunerations provided for in Article 65 only constitutes an implementing measure of an administrative rather than a legislative nature, and is within the framework of the Council's application of that provision.

11 The circumstance that Article 65 by endowing the Council with a wide power of appraisal with regard to the economic and social policy of the Communities, requires it to take account of all possible relevant factors, does not prevent it from pre-determining, under certain circumstances and conditions, in a first stage and for a limited time, the framework of, and the factors to be taken into account in, its decision.

In this respect, to justify its new attitude, the Council has invoked the risks of inflation which have been aggravated in the interval between the time when the Decision was adopted and the passing of the contested Regulation.

Furthermore, it appears that all the relevant factors had already been considered, both in the course of the preparatory studies and in the proceedings prior to the Decision of 21 March 1972.

Further, neither the minutes of the Council's proceedings of 5, 6 and 8 December 1970 nor the recitals of the contested Regulation, establish circumstances sufficient to justify the abandonment, after nine months, of the system which the Council had bound itself to respect.

There is reason to consider that this system, by its very nature has a slowing-down effect, since it provides for the adjustment of the remuneration of the officials and other servants of the Community only after a finding that national remunerations have already increased, and since, within the framework of Article 65 this adjustment is only made once a year, at a fixed interval.

In the circumstances, the Council has failed to found the contested Regulation on grounds sufficient to justify it in departing from its prior undertakings.

B — On the scope of the Decision of 21 March 1972

12 The defendant claims that the Decision of 21 March 1972 does not have the scope attributed to it by the applicant with regard to the limits which it imposes on the excercise of the discretionary power which Article 65 confers on the Council.

The defendant states in this respect that the decision taken each year on the level of remunerations must be, in accordance with the Decision of 21 March 1972, 'in the light of' these two indices, which implies that they are only norms of reference.

These indices thus constitute important points of appraisal but they may be called in question by taking other factors envisaged by Article 65 into consideration.

13 The use of the words 'in the light of' is chiefly to be explained by the circumstance that, in order to remain within the framework of Article 65, the reference to a single index, proposed by the Commission, was replaced by a reference to two indices and, further, for the proposal of the Commission to

retain the arithmetical mean of these two indices there was substituted the decision to depart from this automatic application by maintaining a bracket within which the Council would be free to appraise at what level the increase in remuneration should be fixed.

While the use of these terms, together with the statement that these two indices shall be taken into account, demonstrates the desire of the Council to create a margin of appraisal between these figures, that expression does not have the wide scope which the defendant attributes to it, which would nullify the obligatory effect found above.

It follows that in fixing the increases provided for in Articles 1 to 4 of the contested Regulation below the level established by the lower index calculated in conformity with the Decision of 21 March 1972, *viz.* 3·6 %, the Council has violated the rule relating to the protection of legitimate confidence in the implementation of Article 65 of the Staff Regulations.

14 These Articles 1 to 4 must therefore be declared void.

15 However, to avoid discontinuity in the system of remuneration, the second paragraph of Article 174 of the Treaty should be applied so that the Articles declared void shall continue to have effect until the Council passes a new Regulation in consequence of the present judgment.

Costs

16 By Article 69 (2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs, if there is a submission to that effect.

Neither of the parties has presented submissions regarding the costs.

Therefore each party should bear its own costs.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral arguments of the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic

Community, especially Articles 173 and 174, second paragraph;
Having regard to the Treaty establishing a single Council and a single Commission of European Communities, Article 24 thereof;
Having regard to Article 65 of the Staff Regulations;
Having regard to the Protocols on the Statute of the Court of Justice;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

hereby:

1. **Annuls Articles 1 to 4 of Council Regulation of 12 December, No 2647/72;**
2. **Declares that these Articles shall continue to have effect until the Regulation to be made in consequence of the present judgment comes into operation.**

Lecourt Monaco Pescatore Donner Mertens de Wilmars
Kutscher Ó Dálaigh Sørensen Mackenzie Stuart

Delivered in open court in Luxembourg on 5 June 1973.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 15 MARCH 1973

Mr President,
Members of the Court,

The Court is asked to adjudicate in this case upon a matter of great concern to the employees of all the Community Institutions and Your Lordships cannot but be conscious of the importance that those employees will attach to the Court's decision. It is not too much to