In Case 33/80

RENATO ALBINI, a former official of the Commission of the European Communities and nine other former officials of the Commission, represented and assisted by Raimondo Marini-Clarelli of the Rome Bar, with an address for service in Luxembourg at the Chambers of Victor Biel, Advocate, 18 A Rue des Glacis,

applicants,

v

COUNCIL OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, John Carbery, acting as Agent, with an address for service in Luxembourg at the office of Douglas Fontein, director of the Legal Department of the European Investment Bank, Kirchberg,

and

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Joseph Griesmar, and by Oreste Montalto, a member of the Legal Department, acting as Agents, with an address for service in Luxembourg at the office of its Legal Adviser, Mario Cervino, Jean Monnet Building, Kirchberg,

defendants,

APPLICATION in the terms set out in the pleadings,

THE COURT (First Chamber)

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

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

gives the following

JUDGMENT

Facts and Issues

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

I — Facts and procedure

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

In the version in force until the end of 1978, Article 63 of the Staff Regulations of Officials provided that:

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

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

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

The relevant parity was BFR 12.50 to DM 1 and BFR 8 to LIT 100.

In accordance with Article 17 of Annex VII to the Staff Regulations, an official may have part of his emoluments transferred, either regularly or on an exceptional basis, to a country other than the one in which he performs his duties. Until 31 March 1979 Article 17 (4) provided that such transfers were to be made through the institution to which the official belonged "at the official rate of exchange in force at the date of the transfers". The "official rate of exchange" within the meaning of that provision was the last parity accepted by the International Monetary Fund, which had not been altered since 1 November 1969 (for example, BFR 13.66 to DM 1).

After the collapse in 1971 of the international system of fixed exchange rates, which is at the heart of those provisions, the parities came to reflect less and less the purchasing power of the currencies involved and their value on the international money market. Officials who made transfers to countries the value of whose currency had increased in relation to the parities notified to the International Monetary Fund were thus able to realize gains on the exchange rate, as compared with transfers made in normal market conditions.

In accordance with the legal position existing prior to 1 April 1979 the weighting provided for in Article 64 of the Staff Regulations to reflect the living standards at the place where the official performed his duties had to be applied to the whole of the remuneration including the part to be transferred to another country pursuant to Article 17 of Annex VII. This led to a parallel increase in the weighting for officials assigned to countries such as Italy, the United Kingdom and Ireland, where the value of the currency had decreased in relation to the parities notified to the International Monetary Fund and to a reduction in the weighting for officials assigned to countries whose currency had gained in value in relation to the parities of the Fund.

Pensioners were able to derive special advantages from these provisions. If they declared their domicile to be in a country whose currency had diminished in value, the weighting in respect of that country was applied to their pension in accordance with Article 82 (1) of the Staff Regulations. Article 45 of Annex VIII to the Staff Regulations gave them the opportunity of having their pensions paid in the strong currency of their country of origin or of that of the seat of the institution to which they belonged. This state of affairs was condemned by Mr. Advocate General Mayras in his opinion in Case 28/74 *(Gillet,* [1975] ECR 475).

From 1974 onwards the Commission has submitted proposals to the Council with a view to abolishing the anomalies in the rules governing the payment of remuneration and pensions brought about by the break-down in the international system of fixed exchange rates.

The proposal for a Council regulation amending the Staff Regulations of Officials, submitted to the Council by the Commission on 13 June 1974 (Official Journal, C 88, p. 25) provided for an amended version of Article 17 (4) of Annex VII to the Staff Regulations as follows:

"Transfers provided for in paragraphs (2) and (3) shall be made on the basis of the par values referred to in the last paragraph of Article 63 of the Staff Regulations; the amounts transferred shall be multiplied by a coefficient representing the difference between the weighting for the country in whose currency the transfer is made and the weighting for the country in which the official is employed."

On 1 April 1977 the Commission submitted to the Council a proposal for a Council regulation introducing the European unit of account (EUA) into the Staff Regulations of Officials (Official Journal, C 99, p. 5). That proposal was rejected by the Staff Regulations Committee to which it had been referred. The Council obtained the opinion of the European Parliament and of the Court of Justice. By resolution of 7 July 1977 (Official Journal, C 183, p. 55) the Parliament approved the proposal taking note of "the Commission's assurance that its proposal will in no way affect the real value of the payments made to officials in the form of remuneration, pensions and allowances". At the sitting the Commissioner responsible for administration, Mr Tugendhat, stated: "The object of the Commission's system is financial neutrality, and what we think that our system can achieve is an equality of purchasing power. What we want is that a Commission official of a given grade, whether he is working in Brussels or Luxembourg or London or any other part of the Community, should be able to buy exactly the same quantity of goods as his equal in another part of the Community ... The problem of transfers is also one that has pre-occupied the Commission. There is a proposal for an amendment of the Staff Regulations now under consideration. In our view, that amendment must be adopted no later than the present dráft regulation and that, I think, covers another point about which there has been concern".

The Council did not succeed in 1978 in adopting the regulation proposed by the Commission on 6 October 1976 (Official Journal, C 271, p. 5) "on the procedure for applying the European unit of account (EUA) to the legal acts adopted

by the institutions of the European Communities". The Commission therefore set to work to bring up to date, in the light of the situation thereby created, the exchange rates in respect of remuneration for officials which was envisaged by the proposals of 1 April 1977. In an annex to its Report in 1978 on the yearly survey of the level of remuneration (COM. (78) 673 final of 29 November 1978) the Commission sent the following communication to the Council on which neither the Parliament, the Court of Justice nor the Staff Regulations Committee was consulted:

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

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

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

On 21 December 1978 the Council adopted Regulation No 3085/78 (Official Journal 1978, L 369, p. 6), amending, with particular reference to the monetary parities to be used, Regulation No 259/68 laying down the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of the Communities, Regulation No 2530/72 and Regulation No 1543/73 concerning certain special measures. The regulation embodies the wording of the communication from the Commission of 29 November 1978 and also the formula contained in the proposal of 1 April 1977 concerning the weighting to be applied to amounts transferred. The regulation fixes 1 July 1978 as the relevant date for calculating remuneration paid in a currency other than Belgian francs on the basis of the exchange rates used for the implementation of the General Budget of the Communities and goes on to state that that date shall be changed at the time of the annual review of remuneration.

Hand in hand with the bringing up to date of the rates of exchange, the Council adopted Regulation No 3086/78 of 21 December 1978 (Official Journal, L 369, p. 8) adjusting the weightings applicable to the remuneration and pensions of officials and other servants of the European Communities following the amendment of the provisions of the Staff Regulations concerning the monetary parities to be used in implementing the Staff Regulations, which amended the value of the weightings according to the various places of employment, in such a way that every official or temporary employee employed elsewhere than in Belgium or Luxembourg received the same level of remuneration in April 1979 as his remuneration for the preceding month. Since

the point of departure — the amount of the remuneration in Belgian francs — remained in effect *ex hypothesi* the same as regards payment transactions and the end of the procedure — the amount of the payment in national currency — ought itself normally to remain the same, therefore as soon as one of the parameters of payment, for example the rate of exchange, was altered it was then necessary to adjust the second parameter (weighting) in such a way as to ensure the neutrality of the transaction.

In fixing the weighting referred to in Article 64 of the Staff Regulations, the Council and the Commission have, since 1967, used the following procedure for comparing the level of prices between Brussels and the various other places of employment. The Statistical Office of the European Communities, in conjunction with the competent national offices, carries out regular price surveys in respect of goods and services considered as representing typical items of household expenditure for officials in the various places of employment. In respect of each item the relationship is calculated between the price in Brussels and the price prevailing in the town which is used as the point of reference for the place where the official performs his duties. by the use of this weighting it is possible to calculate the relative purchasing power of currencies in the countries where the officials of the Community perform their duties. For example, the index calculated using the "Fisher" method expresses in a single figure the relationship of prices in Brussels to those in Rome and vice versa. This figure is used for calculating the weightings within the Community because it expresses the relationship of prices from one town to another in a reversible manner and because it is therefore possible to make not only bilateral price comparisons but also multilateral ones. According to this method, the weighting is obtained by dividing the "Fisher" index calculated as described above, by the corresponding rate of exchange used to convert the remuneration of officials into the respective national currencies in accordance with Article 63 of the Staff Regulations. In October and November 1975 a comparative study of prices was carried out in all the capitals of the Community.

The applicants, who are former Commission officials receiving their pension in Italy, lodged, within the specified period, a complaint within the meaning of Article 90 (2) of the Staff Regulations of Officials in order to challenge the decisions contained in the said regulations. At the time the present action was brought no decision had been taken on those complaints.

The application was registered at the Court on 24 January 1980.

The Council and the Commission put forward objections of inadmissibility on 28 and 29 February 1980 respectively.

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

II — Conclusions of the parties

The *applicants* claim that the Court should:

— Annul Regulation No 3086/78 of the Council of the European Communities or, at least, declare it to be inapplicable to the applicants;

— Annul Regulation No 3085/78 of the Council or, at least, declare it to be inapplicable to the applicants;

— In the alternative: Order the defendants to pay to the applicants a compensatory allowance calculated in such a way as to avoid any diminution of the pension paid to the applicants before the entry into force of Regulations Nos 3085 and 3086/78;

— In any event, order the defendants, the Council and the Commission, to pay the costs.

The *Council*, applying by separate document for determination of a preliminary objection under Article 91 of the Rules of Procedure, contends that the Court should declare the applications to be inadmissible as regards the Council.

The *Commission*, applying by separate document for determination of a preliminary objection under Article 91 of the Rules of Procedure, contends that the Court should:

— After receiving any observations in reply from the applicants, close the written procedure and, if appropriate, decide that there is no need to open the oral procedure;

— Dismiss the application as inadmissible;

— Order the applicants to pay the costs.

III — Submissions and arguments of the parties

The *applicants* maintain that the pension scheme for officials of the Communities is a contributory scheme. Article 83 (2) of the Staff Regulations provides that officials shall contribute one-third of the cost of financing the pension scheme. The remaining two-thirds are financed by the Communities. It is therefore clear that the pension is nothing other than a form of deferred remuneration and not a kind of gratuity given by the employer.

All officials of a given grade and a given seniority pay the same amount on the one hand by way of a direct deduction and on the other hand by way of a corresponding contribution from the employer, regardless of their nationality or of their place of employment. In reality all deductions are made in Belgian francs by deduction at source and without the application of any weighting mechanism.

The applicants point out that under this scheme an official who has paid a given sum, identical to the amount paid by other officials of the same grade and seniority, is intended to receive a pension of the same amount as that enjoyed by others corresponding to the contributions which he has paid by way of deduction from salary and to the payments made by the employer.

On the other hand, under the pension scheme now adopted, the applicants contend that the amount of the pension depends not only upon the amounts paid by the official but also on the country where he declares himself to be resident at the time of his retirement.

As a result of the system of weighting which has been adopted officials entitled to pensions, living in certain countries, receive a lower pension than that to which they are entitled on the basis of the contributions which have accumulated in their favour. For example an official entitled to a pension and resident in Belgium receives a pension higher by 34% than the pension received by a retired official of the same grade and seniority resident in Italy, even where both have made the same contributions and the same amounts have been paid on behalf of both to make up their pension.

The applicants maintain that it is unlawful to apply a weighting to reduce the amount of a pension to the place of residence and of the cost of living prevailing there since to do this is to limit the freedom of movement of the pensioner precisely at the moment when he has the most need of that freedom. The amount of the pension should be determined purely and simply by the amount of contribution which no one has any right to influence or to vary on the basis of geographical monetary criteria.

The applicants consider that as a result of the adoption of the contested regulations, which has resulted in the pensions' being reduced by more than one-half, their legitimate expectations have been frustrated.

Article 45 of Annex VIII to the Staff Regulations provides that "beneficiaries may elect to have their pensions paid in the currency either of their country of origin or of their country of residence or of the country where the institution to which the official belongs has its seat".

Until the contested regulations were adopted the rate of exchange applicable was that fixed by the International Monetary Fund on 1 January 1965 (for Italy BFR 8 = LIT 100) and the weighting was 146.8. Since the adoption of Regulations Nos 3085 and 3086/78 the relevant rate of exchange has been that used for the implementation of the General Budget of the European Communities fixed on 1 July 1978 (BFR 3.83 = LIT 100) and the weighting figure is 70.3.

As a result of the new rules the applicants' pensions have been reduced by more than one-half. The applicants consider that this state of affairs has entailed very severe consequences for pensioners whose contributions were made in Belgian francs, who live in weak currency countries and have arranged their standard of living on the basis of the pensions which they were receiving and who are now faced with a drastic reduction in the amounts paid.

According to the applicants, Article 64 of the Staff Regulations provides that weightings are to be determined according to the living conditions in the various Member States; Article 65 provides for weightings to be determined by means of an arithmetical calculation. In the case of Italy, the calculation is as follows: at a rate of exchange of BFR 8 to LIT 100 the relevant weighting would be 146.8. Since the present rate of exchange is BFR 3.83 to LIT 100 the new weighting to be applied is found from the equation $8 : 146{,}8 = 3.83 : x$, so that

$$x = \frac{146 \cdot 8 \times 3 \cdot 83}{8} = 70 \cdot 28$$

rounded up to 70.3 which is in fact the new weighting figure.

The applicants contend that a proper and equitable weighting cannot be derived from a simple mathematical computation.

The weighting ought to be calculated objectively, taking into account the movement in living costs and in the purchasing power of currencies in the various Member States of the Community. The weighting should be arrived at after an appropriate statistical survey has been carried out by the various national statistics offices in conjunction with the Statistical Office of the European Communities, on the basis of a uniform standard of reference.

The applicants maintain that the European Parliament was not consulted on Regulations Nos 3085 and 3086/78.

The purpose of the Commission's proposal of 1 April 1977 (Official Journal 1977, C 99), which was approved by the Parliament (Official Journal 1977, C 183), was to introduce the European unit of account into the Staff Regulations of Officials and to fix the value of the unit of account in relation to the various currencies as at 1 July 1977. On the other hand Regulation No 3085/78 of 21 December 1978 (Official Journal 1978, L 369) was merely intended to bring up to date, in relation to other currencies, agreed rates of exchange in Belgian francs as at 1 July 1978. The references in the preamble to Regulation No 3085/78 mention the opinion of the Parliament which was delivered a year and a half earlier on the Commission's earlier proposal dated 1 April 1977 concerning the introduction of the European unit of account.

The applicants consider that it is not permissible, in respect of an amended text, to use an opinion concerning a previous text which differs from the amended text in an essential point.

In raising an objection of inadmissibility the *Council* requests the Court to give a ruling at this stage on the preliminary objection, pursuant to Article 91 (1) of the Rules of Procedure of the Court.

As regards the application to annul Regulations Nos 3085 and 3086/78 the Council considers that this action would be admissible only if it complied with the rules laid down by Articles 90 and 91 of the Staff Regulations. That is not so in this case.

The Council maintains on the one hand that the applicants have never lodged with it a complaint within the meaning of Article 90 (2) of the Staff Regulations, and on the other hand the Council cannot be considered as the appointing authority as regards the applicants who are former officials of the Commission. Regulations Nos 3085 and 3086/78 do not constitute acts adversely affecting the applicants and thus capable of being challenged by means of the remedies provided by Article 91 since that article merely grants rights of appeal to officials adversely affected by acts of the appointing authority (Article 90 (2)).

Neither does the Council believe that the application for annulment may be based upon Article 173 of the EEC Treaty since Regulations Nos 3085 and 3086/78 apply to all officials and retired officials of the Communities. It cannot therefore be said that this is a "decision" addressed to the applicants or a decision of "direct and individual concern" to the applicants, although in the form of a regulation.

Moreover, the Council state that, even if the actions were based upon Article 173 they would nevertheless be inadmissible since the proceedings were not instituted within the period specified in that article.

The Council considers that the request of the applicants that Regulations Nos 3085 and 3086/78 should be declared to be inapplicable as regards them is based on Article 184 of the Treaty.

The Council points out that a declaration of the inapplicability of a regulation as a result of a preliminary objection of illegality may only be sought incidentally and with limited effect. The Court has already laid down that the annulment of an individual decision on the ground of the irregularity of the general decisions on which it is based can call in question the general decision only to the extent to which its effects take concrete shape in the individual

decision which is annulled (judgment of the Court of 13 June 1958 in Case 9/56 *Meroni & Co, Industrie Metallurgiche, SPA* v *High Authority,* [1957 and 1958] ECR 133 and judgment of the Court of 12 June 1958, Case *15/57 Compagnie des Hauts Fourneaux de Chasse* v *High Authority* [1957 and 1958] ECR 211). Thus the action in so far as it is brought under Article 184 is not admissible.

The Council considers that the claim by the applicants for a compensatory allowance can only be regarded as an action for damages under Article 215 of the Treaty. The Council considers that this claim is inadmissible in view of the judgment of the Court of 22 October 1975 (Case 9/75, *Meyer-Burckhardt* v *Commission* [1975] ECR 1171).

In their observations on the objection of inadmissibility raised by the Council the *applicants* point out that they all submitted in good time the complaint required by Article 90 of the Staff Regulations of Officials.

According to the applicants Regulations Nos 3085 and 3086/78 do constitute acts adversely affecting them since the amounts of pension entitlement for the month of June 1980 are reduced by more than one-half in relation to the pensions paid in the month of September 1979. The contested regulations were adopted by the Council and carried into effect by the Commission; that is why the applicants decided to institute proceedings against both the aforementioned institutions.

According to the applicants the exception contained in Article 184 of the Treaty is merely intended to allow a direct action to be brought against the Council in a case where it adopted the measures contested.

As regards the claim for a compensatory allowance the applicants maintain that this is justified by the general duty of assistance which the Community institutions owe towards their officials. The applicants do not see why such a general duty of assistance should not extend equally to pensioners, former officials or servants of the Community.

As regards its preliminary objection the *Commission* maintains that the application is inadmissible because it is directed against measures taken by an authority which was not the appointing authority as regards the applicants. The Court has already laid down in its order of 4 October 1979 in Case 48/79 *(Ooms and Others* v *Commission* [1979] ECR 3121) where, as in the present case, the applicants had sought the annulment of Regulations Nos 3085 and 3086/78, that:

"According to Article 91 (2) of the Staff Regulations actions by officials instituted under Article 179 of the EEC Treaty must be directed against the appointing authority and relate to acts or omissions of that authority which adversely affect the applicants. The action does not satisfy that condition since it relates to the annulment of a Council regulation."

The Commission observes that the action is likewise inadmissible under Article 173.

The Commission takes the view that an action by an official or former official may be brought only under Article 179. The jurisdiction conferred by Article 179 is exhaustive and precludes an overlapping or duplication of jurisdictions based on the ordinary law relating to rights of action.

By judgment of 22 October 1975 (Case 9/75 *Meyer-Burckhardt* v *Commission* [1975] ECR 1171) and the judgment of 17 February 1977 (Case 48/76 *Reinarz* v

Commission [1977] ECR 291) the Court held that:

. . . a dispute between an official and the institution to which he is or was answerable concerning compensation for damage is pursued, where it originates in the relationship of employment between the person concerned and the institution, under Article 179 of the Treaty and Articles 90 and 91 of the Staff Regulations . . .".

The Commission states that a judgment of the Court, pronounced in the context of an action for damages, remains of full force in the framework of an action for annulment (cf. the judgment of 22 October 1975, referred to above, in which the Court held that:

"Although the action for annulment and the action for damages are indeed distinct types of action, it is none the less the case that, within the context of disputes between officials and the institutions, Articles 90 and 91 of the Staff Regulations make no distinction between them as regards both the administrative and the contentious procedures to which they may give rise").

If an action for damages is founded from a procedural point of view solely on Article 179 the position can be no different as regards an action for annulment.

Even if it were to be held nevertheless that the ordinary law governing actions for annulment could apply in parallel and concurrently where an action against the Communities by one of their employees or former employees is for the annulment of an act of the Commission or the Council, the Commission claims that the action would still appear to be inadmissible because it does not fulfil the conditions laid down by Article 173 of the Treaty. In the first place the action was not brought within the period of two months laid down by Article 173. Secondly it does not satisfy the conditions laid down in the second paragraph of that article (cf. judgment of the Court in Case 48/79 already quoted ". . . since Regulations Nos 3085/78 and 3086/78 constitute neither a decision addressed to the applicants nor a decision which, although in the form of a regulation, is of direct and individual concern to them, the application is likewise inadmissible in so far as it is based upon Article 173 of the EEC Treaty").

As regards the applicants' submissions as to the inapplicability to them of Regulations Nos 3085 and 3086/78, the Commission points out that the applicants may not invoke Article 184 of the Treaty. That article does not confer an independent right of action but envisages a declaration of the inapplicability of a regulation incidentally and with limited effect only in proceedings before the Court on the basis of another provision of the Treaty (cf. judgments of 14 December 1962 in Cases 31 and 33/62, *Milchwerke Heinz, Wöhrmann & Sohn KG and AF Lütticke GmbH* v *Commission* [1962] ECR 501). This action is brought independently and as a main action and therefore the applicants cannot rely on Article 184.

As regards the claim for a compensatory allowance, it is settled law, according to the Commission, that the Court cannot exercise unlimited jurisdiction where no action for annulment lies (judgment of 10 December 1969, Case 32/68, *Grasselli* v *Commission* [1969] ECR 505).

Furthermore the application, in so far as it seeks compensation, does not comply with Article 38 (1) of the Rules of Procedure because it completely omits to give any grounds in support of the claim.

In their observations on the objection of inadmissibility raised by the Commission, the *applicants* stress that their challenge to Regulation Nos 3085 and 3086/78 is mounted as much against the Council as against the Commission since those regulations were adopted by the Council and put into effect by the Commission. As either institution may be the appointing authority, the applicants leave a decision on this point to the Court.

The applicants consider that there is a right of action under Article 90 (2) of the Staff Regulations against the contested regulations. These are measures of a general nature adopted by the Council and put into effect as regards all pensioners and having damaging consequences for a number of them.

The applicants consider that the action is also admissible under the second paragraph of Article 173. In their view the contested regulations are decisions addressed to the applicants and although in the form of a regulation are of direct and individual concern to them.

The applicants maintain that their submissions as to the inapplicability of Regulations Nos 3085 and 3086/78 are put forward independently and as their primary claim. Therefore the Court has jurisdiction by virtue of Article 184 of the Treaty.

As regards the claim for the award of a compensatory allowance, the applicants maintain that it is admissible in view of the admissibility of the main action.

IV — Oral procedure

The parties presented oral argument at the sittings on 19 and 20 February 1981.

The Advocate General delivered his opinion at the sitting on 14 May 1981.

Decision

1 By an application received at the Court Registry on 24 January 1980 the applicants brought proceedings under Article 91 of the Staff Regulations of Officials against the Council of the European Communities and the Commission of the European Communities. The applicants, who are ten retired officials of the Commission, claim that the Court should:

(1) Annul or at least declare inapplicable to them Council Regulations Nos 3085/78 and 3086/78 of 21 December 1978;

(2) In the alternative award the applicants a compensatory allowance calculated in such a way as to avoid any reduction in the pensions paid to the applicants before the entry into force of Regulations Nos 3085/78 and 3086/78.

2 In the version in force until the end of 1978, Articles 63 and 64 of the Staff Regulations provided that: "An official's remuneration shall be expressed in Belgian francs. It shall be paid in the currency of the country in which the official performs his duties. Remuneration paid in a currency other than Belgian francs shall be calculated on the basis of the par values accepted by the International Monetary Fund on 1 January 1965. An official's remuneration expressed in Belgian francs . . . shall be weighted at a rate above, below or equal to 100%, depending on living conditions in the various places of employment. The weighting applicable to the remuneration of officials employed at the provisional seats of the Communities shall be equal to 100% as at 1 January 1962."

3 Article 82 of the Staff Regulations provides that the pensions of former officials "shall be calculated by reference to salary scales in force on the first day of the month in which entitlement commences. They shall be weighted in manner provided for in Article 64 and Article 65 (2) for the country of the Communities where the person entitled to the pension declares his home to be".

4 The third paragraph of Article 45 of Annex VIII (Pension Scheme) provides that: "Beneficiaries may elect to have their pensions paid in the currency either of their country of origin or of their country of residence or of the country where the institution to which the official belonged has its seat; their choice shall remain operative for at least two years".

5 On 21 December 1978 the Council adopted Regulation (Euratom, ECSC, EEC) No 3085/78 (Official Journal 1978, L 369, p. 6), Article 1 of which states that Article 63 of the Staff Regulations is replaced by the following:

"Officials' remuneration shall be expressed in Belgian francs. It shall be paid in the currency of the country in which the official performs his duties.

Remuneration paid in a currency other than Belgian francs shall be calculated on the basis of the exchange rates used for the implementation of the General Budget of the European Communities on 1 July 1978.

This date shall be changed, at the time of the annual review of remuneration provided for in Article 65, by the Council acting by a qualified majority upon a proposal from the Commission as provided in the first indent of the second subparagraph of Articles 148 (2) of the EEC Treaty and of 118 (2) of the Euratom Treaty.

Without prejudice to the application of Articles 64 and 65, the weightings fixed pursuant to these articles shall, whenever the above date is changed, be adjusted by the Council, which, acting in accordance with the procedure mentioned in the third paragraph, shall correct the effect of the variation in the Belgian franc with respect to the rates referred to in the second paragraph."

6 According to the provisions of Article 4 of the regulation it was to enter into force on 1 January 1979 and was to apply from 1 April 1979. However, for pensions and allowances of which the net amount became less than that under the existing arrangements, the regulation was to apply only from 1 October 1979. From that date the difference between the net amounts resulting from the implementation of that regulation and those received in September 1979 was to be reduced by $^1/_{10}$ per month.

7 On 21 December 1978 the Council also adopted Regulation (Euratom, ECSC, EEC) No 3086/78 adjusting the weightings applicable to the remuneration and pensions of officials and other servants of the European Communities following the amendment of the provisions of the Staff Regulations concerning the monetary parities to be used in implementing the Staff Regulations. Article 1 (2) of the regulation fixes *inter alia* the weighting applicable to pensions in accordance with the second subparagraph of Article 82 (1) of the Staff Regulations at 74.4 for Italy.

8 During March 1979 certain of the applicants submitted requests to the Commission to the effect that the Commission should propose to the Council

all necessary amendments to Regulations Nos 3085 and 3086/78 the legality of which was contested by the applicants. In a communication of 12 July 1979 the Commission refused those requests.

9 During October 1979 most of the applicants lodged complaints under Article 90 (2) of the Staff Regulations against the Commission's decision. The Commission maintained its view and the applicants have therefore brought this action.

10 The applicants maintain that the pension scheme for officials is a contributory one, financed as to one-third by the contributions of the officials. Therefore the pension is nothing other than deferred remuneration and is not a kind of gratuity granted by the employer. All officials of a certain grade and seniority pay the same amount of contribution by means of a deduction at source. All deductions are made in Belgian francs at source and without being weighted. The scheme presupposes that an official who has made contributions of the same amount as those paid by other officials of the same grade and seniority should receive a pension of the same amount as the pension enjoyed by other officials and that such pension should correspond both to the contributions which he has paid by way of deduction and to the payments made by the employer. The applicants consider that it is illegal to reduce the pension by applying a weighting depending on the place of residence and on the cost of living prevailing there because to do so would be to limit the freedom of movement of the pensioner at the very moment when he has the greatest need of it. Through the adoption of the contested regulations and the consequent reduction in their pensions by more than one-half, the legitimate expectations of the applicants have been frustrated.

11 By documents lodged on 28 and 29 February 1980 respectively, the Council and the Commission, in pursuance of Article 91 of the Rules of Procedure of the Court, put forward objections of inadmissibility relating to the action for annulment, to the claim for a declaration of the inapplicability of the regulations as regards the applicants and to the claim for a compensatory allowance.

12 As regards the action for annulment the Council and the Commission contemplate two possible bases for an action; either Article 91 of the Staff Regulations or Article 173 of the Treaty. According to the Council the action brought under Article 91 of the Staff Regulations is inadmissible on the following grounds: the applicants have failed to lodge a complaint with the Council within the meaning of Article 90 (2); secondly the Council is not the appointing authority as regards the applicants; Article 91 gives a right of action only against acts adversely affecting an official and such acts can only be those of the appointing authority. According to the Commission the right of action conferred by Article 91 of the Staff Regulations may only be exercised against an "act adversely affecting" an official and issuing from the appointing authority, whereas in the present case, the action relates to Council regulations, which do not constitute acts adversely affecting an official within the meaning of Article 90 (2) of the Staff Regulations.

13 The Council and the Commission maintain that even if the action were based on Article 173 of the Treaty it would nevertheless be inadmissible because the contested regulations are not decisions addressed to the applicants or decisions which, although in the form of a regulation, are of direct and individual concern to the applicants. In any event, the application is inadmissible because it was not brought within the period of two months from the date of publication of the regulations.

14 As regards the claim for a declaration of the inapplicability of the regulations in question the Council and the Commission point out that such a claim could only be brought under Article 184 of the Treaty. However, that article only allows an applicant to invoke the invalidity of a regulation incidentally and with limited effect and then only in the framework of proceedings brought before the Court under a different provision of the Treaty. The right to call in question the legality of the regulation incidentally cannot found an action which seeks as its main object a declaration of inapplicability. The Council and the Commission therefore consider that the claim brought under Article 184 of the Treaty is inadmissible.

15 The Council takes the view that the claim for damages is likewise inadmissible. Such a claim conflicts with the case-law of the Court according to which proceedings by an official (or a former official) for damages when based on the employment relationship between the institution and the person concerned must be brought on the basis of Article 179 of the Treaty and

Articles 90 and 91 of the Staff Regulations. The action can thus only be brought against the appointing authority. The Commission adds that, where an official under Article 179 of the Treaty brings proceedings for the annulment of a measure adopted by an institution and at the same time for the award of damages to compensate for the damage he has suffered as a result of that measure, if the action for annulment is held to be inadmissible, in accordance with the case-law of the Court, this leads to the inadmissibility of the action for damages.

16 The applicants state in reply that they submitted their complaints within the time specified by the Staff Regulations. According to the applicants the contested regulations are acts adversely affecting them since they have resulted in a reduction by more than one-half of the amounts of their pension entitlement. The regulations were adopted by the Council and carried into effect by the Commission and it was for that reason that the applicants decided to institute proceedings against both institutions. The applicants certainly do not disagree with the Council's opinion that an application for a declaration of the inapplicability of a regulation may only be sought as an adjunct to other proceedings but that does not justify the conclusion which the Council draws. As regards the alternative claim for compensation damage suffered, this claim is justified by the general duty of assistance which Community institutions owe to their officials.

17 The objections of inadmissibility raised by the Council and the Commission must be upheld. The effect of Articles 90 and 91 of the Staff Regulations is that the complaint, and therefore the application to the Court, may only be directed against the appointing authority and that the act adversely affecting the official must be an act of that authority. Moreover, the action, in so far as it is based on Article 173, even if it were otherwise admissible, was not brought within the period laid down by that article. According to the case-law of the Court the possibility provided by Article 184 of the Treaty of invoking the inapplicability of a regulation does not constitute an independent right of action and may only be sought incidentally. In the absence of such an independent right of action the applicants cannot invoke Article 184.

18 As regards the claim for damages the case-law of the Court (in particular the judgment of 12 December 1967, *Müller* v *Commission* [1967] ECR 365, and the judgment of 20 October 1965, *Meyer-Burckhardt* v *Commission* [1975]

ECR 1171) lays down that where an official brings proceedings under Article 179 of the Treaty for the annulment of an act of an institution and for the award of compensation for the damage he has suffered as a result of that act, the claims are so closely connected that the inadmissibility of the application for annulment must entail the inadmissibility of the claim for compensation.

19 The application must therefore be dismissed as inadmissible.

Costs

20 Under Article 70 of the Rules of Procedure the costs incurred by the institutions in proceedings brought by employees of the Communities are to be borne by such institutions.

On those grounds,

THE COURT (First Chamber)

hereby:

1. **Dismisses the application as inadmissible;**

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

Koopmans O'Keeffe Bosco

Delivered in open court in Luxembourg on 16 July 1981.

A. Van Houtte
Registrar

T. Koopmans
President of the First Chamber