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

say that that decision may profoundly affect the future course of relations between the Community Institutions and their staffs. In view of the importance of the matter, I propose, if I may, to rehearse the facts that have given rise to the present dispute fairly fully.

Article 65 of the Staff Regulations (as amended) provides as follows:

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

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

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

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

My Lords, the application of this Article appears to have given rise annually to unrest and conflict.

Up to 1965 increases were granted in application of it which, in the main, reflected only increases in the cost of living, for, until that date, the Council's policy was on the whole aimed only at maintaining the purchasing power of the remuneration of the staff. The Council states, however, and this is not, as I understand it, contested by the Commission, that in the case of these increases, the Council decided at its discretion and never made adjustments automatically. It considered its decisions in the context of the economic and social policy of the Communities and, in so doing, took into account increases in salaries in the public services and the needs of recruitment.

As from the annual review of 1966, the Commission urged that European officials should benefit from the general increase in the level of real incomes in the Community. The Commission based its proposals in this respect for 1966 on certain parameters taken from the statistics of Member States from which it was possible to measure increases in salaries in real terms.

But agreement was never reached on a formula which would have enabled the unrest and the conflicts to which I have referred to be resolved.

With a view to putting an end to the arguments and to the strikes which these conflicts repeatedly engendered, the Council, on 14 December 1970, 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 by the Commission after consultation with representatives of the staff on 2 June 1971. A feature of this document was that it proposed an annual increase in the purchasing power of the salaries of the staff by reference to a single index, that of 'Gross internal product by volume per employed person'. It was acknowledged by the document that implementation of some

of the proposals contained in it would require *inter alia* the amendment of Article 65.

Not all the proposals contained in that document were acceptable to the Council. Protracted negotiations and discussions followed between the Council, the Commission and the representatives of the staff.

By letter dated 20 March 1972, the Commission, at the invitation of the Council, put forward what was described in that letter as a compromise scheme which would, in the view of the Commission, solve, for a period of three years, the problem of the adjustment of the salaries of the staff.

After examination of this proposal by an *ad hoc* working group, the Council on 21 March 1972 decided to approve it subject to certain modifications. The text so adopted contained the following introductory paragraph (I read the French, there being, I think, no authentic English version):

'A titre expérimental et pour une période de trois ans, le système décrit ci-dessous sera d'application. Il cadre avec les dispositions de l'actuel article 65 du statut des fonctionnaires.'

I would translate that as follows:

'As an experiment and for a period of three years, the system described below will be applied. It is within the framework of the provisions of the present Article 65 of the Staff Regulations.'

The system so described was in two parts. Part II was concerned with the adjustment of the weightings referred to in Article 65 to take account of changes in the cost of living. This is not germane to the present dispute and I need not, I think, say any more about it at this stage.

It is in Part I of the scheme that the genesis of the dispute is to be found.

Part I was concerned with changes in purchasing power. It specified two indices in the light of which the Council was to make an annual decision. (I use the phrase 'in the light of' to translate the French 'sur la base de', as does, incidentally, the authentic English text of Article 65 (1). Of these indices, one, an index of changes in salaries in the public service in Member States in the past year, was to be compiled by the Statistical Office of the Communities in accordance with the method used theretofore but with certain improvements. The representatives of the staff were to be fully informed by the Commission of the statistical data relevant to this index. The other index, an index of total emoluments per head in public services, was to be derived from published national accounts.

I mentioned that the Council had adopted the text proposed by the Commission with modifications. Of these modifications two in the text of Part I must be referred to. First, the Commission had proposed that the Council should enter into an undertaking ('engagement') to supply information to the Commission for the compilation of the first index, and to agree certain figures with the Commission in that connection. There is no such undertaking in the text approved by the Council. Secondly, the Commission had proposed that the Council's annual decision should be taken 'sur la base de' the arithmetical mean between the two indices. The text adopted by the Council merely states that the decision will be taken 'sur la base de' the two indices.

There are two other features of the scheme adopted by the Council to which I must refer. First, it envisaged, as part of the adjustments to be made in 1972, a once-for-all allowance to compensate for the fact that any increases related to purchasing power were to take effect from 1 July and not 1 January. Secondly, a rider provided (and again I read the French):

'Il est entendu que l'application de la nouvelle méthode pour une période expérimentale de trois années ne peut

donner lieu à la création de "droits acquis".'

This I would translate as follows:

'It is understood that the application of the new method for an experimental period of three years cannot give rise to "vested rights".'

On 27 September 1972, the Commission presented to the Council the Report required by Article 65 (1) to enable the Council to decide upon the adjustments to be made in 1972. This Report was accompanied by a draft regulation which, consistently with the new scheme adopted by the Council, provided essentially for three adjustments:

1. An adjustment in respect of increases in the cost of living;

2. An adjustment in respect of changes in purchasing power, consisting in increases of 3·75 % throughout the table of salaries — 3·75 % being the arithmetical mean between the two chosen indices, the first of which evinced a rise of 3·6 % and the second a rise of 3·9 %.

3. A once-for-all allowance.

During the discussions in the Council on these proposals it became apparent that certain governments could not accept them. In particular those governments could not accept the proposed increases in respect of changes in purchasing power. These increases appeared to them inconsistent with the current fight against inflation. They did not dispute the Commission's figures, as such, nor did they wish to depart from the Decision of 21 March. They argued however that that Decision, having been expressly made within the framework of Article 65, could not preclude the Council from having regard also to the economic and social policy of the Communities. Indeed, they said, the Council was bound, by Article 65, to have regard to that policy. In the view of these governments, the figures thrown up by the chosen indices were no more than factors to be taken into account by the Council in reaching its decision, that decision itself being one as to which the Council retained a wide discretion.

Other governments represented in the Council, as well as the Commission, contended for a different interpretation of the Decision of 21 March. To them that Decision meant that increases in respect of changes in purchasing power must be awarded within the bracket set by the two indices. The minimum that could be awarded in that respect was accordingly 3·6 %.

The disagreement within the Council led to renewed conflict with the staff, which resulted in strike action on its part.

That disagreement also threatened to make it impossible for the Council to reach any decision at all.

It was in those circumstances that in the early hours of 9 December 1972 the Council finally took a decision in principle, subsequently confirmed by means of the Council's written procedure, whereby the following increases in salaries were awarded:

1. A cost-of-living increase corresponding in effect to what had been proposed by the Commission and as to which there is no dispute;

2. An improvement of purchasing power of 500 Belgian francs plus 1·3 % throughout the table of salaries, equivalent to an average of 2·5 %;

3. A once-for-all allowance, as to which, again, there is no dispute.

This Decision formed the basis of a formal Regulation of the Council dated 12 December 1972 and published in the *Official Journal of the Communities* on 20 December 1972, the partial annulment of which is the object of the present application.

To be precise, the relief sought by the Commission is the annulment of Articles 1 to 4 of the Regulation in so far as the provisions contained in those Articles involve an increase in purchasing power

of only 2·5 %. The provisions of Articles 5 and 6 of the Regulation, which relate to the cost-of-living increases and to the once-for-all allowance are not impugned.

The Commission's case is that, by its Decision of 21 March 1972, the Council laid down, on the basis of an agreement made with the Commission and with the concurrence of the representatives of the staff, rules for the application of Article 65 which were legally binding and of which the Regulation in question was in breach.

It is clear from the pleadings, and was emphasized by Counsel at the hearing, that both parties are anxious that the Court should rule upon the interpretation of the Decision of 21 March 1972, for the real dispute between them is as to its interpretation rather than as to its nature.

But, my Lords, the Court cannot shut its eyes to the question whether that decision had any and if so what legal effect, for this Court is a Court of law. It is not a Court that has any jurisdiction over moral issues or over political issues. Justice no doubt it must do, but Justice according to law, and law alone. I would respectfully echo the words of the late Advocate-General Dutheillet de Lamothe when, in Case 22/70 *Commission* v *Council* (Rec. 1971 at p. 288), he said:

'La compétence que vois tirez de l'article 173 du traité ne fait pas de vous "un arbitre amiable compositeur" entre les autres institutions de la Communauté, ni ne vous confère la charge de rendre des "avis consultatifs" comme ceux que peut émettre la Cour de Justice internationale de La Haye'.

So that, if Your Lordships should come to the conclusion that, in the final analysis, the dispute between the parties in this case is not one that is justifiable in a Court of law, Your Lordships must fearlessly so hold, notwithstanding the disappointment that will thereby be caused to many.

Was the Decision of 21 March 1972, then, one that could have legal effect? I think not.

The *fons et origo* of the Council's power to legislate in matters concerning the staff is Article 24 (1) of the Merger Treaty. This provides:

'The Council shall, acting by a qualified majority on a proposal from the Commission and after consulting the other institutions concerned, lay down the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of those Communities'.

No one suggests, or could suggest, that the decision in question was an exercise of this power. For one thing, it is a power that has always been exercised by regulation and the Decision of 21 March 1972 was not, and could not take effect as, a regulation, if only because it was not published in the *Official Journal*. More important, for I do not overlook the decisions of this Court to the effect that the nature of an act should be judged from its substance and content, rather than from its form, is the fact that, if anything is clear about the decision in question, it is that it was intended to have effect within the framework of the existing Staff Regulations and not by way of amendment of them or of addition to them.

The only other relevant power of the Council is that conferred on it by Article 65 (1). But that is a power which arises each year in September and which is exercisable on the basis of data which cannot be available until July. It cannot therefore be exercised in March for a period of three years ahead.

It was suggested on behalf of the Commission that the Decision of 21 March 1972, although not taken in exercise either of the power conferred on the Council by Article 24 (1) or of that contained in Article 65 (1), could be regarded as a *sui generis* provision for giving effect to Article 65 (1). But, my Lords, there is no power for the Council to prescribe unilaterally provisions of

that kind affecting the staff of the Communities as a whole. Provisions for giving effect to the Staff Regulations are the subject of Article 110. By virtue of this, such provisions are to be adopted by each institution for its own staff, after consulting its Staff Committee and the Staff Regulations Committee. Article 110 also envisages rules adopted by agreement between the institutions, but no such agreement is pleaded in this case.

Thus, if one looks only at the Treaties and at the relevant Regulations, the conclusion seems clear that the Decision of 21 March 1972 could have no legal effect, but should be regarded merely as a policy decision. In saying this I do not overlook either Article 145 or Article 164 of the EEC Treaty (or their equivalents in the other Treaties). But, in so far as Article 145 ascribes to the Council the power to take decisions, its scope is limited by the words 'in accordance with the provisions of this Treaty'. Nor does Article 164 require the Court to treat as law that which is not. In *Commission* v *Council* (already cited) it empowered the Court to hold that a decision of the Council that was intended to have legal consequences was open to challenge under Article 173 even though it did not take any of the forms envisaged by Article 189. But that is very far from saying that a decision of the Council can have legal effect even though there was no legal power for the Council to make it. Let me not be misunderstood. I do not mean by that that the Council had no power at all to make the Decision of 21 March 1972. I mean only that its power to do so was political. The fact is that the Council is as much a policy-making body as a law-making body, and one must not confuse policy and law. This indeed is what the Court in effect held in Cases 90 and 91/63 *Commission* v *Luxembourg and Belgium* (Rec. 1964, p. 1221, at p. 1232) when it decided that the resolution of the Council there in question was devoid of legal effect.

My Lords, I have considered whether there is any principle to be derived from case law, either from the case law of this Court or from the case law of the Courts of Member States, which would enable one to escape from the foregoing conclusion.

It is noteworthy that the very learned Counsel who appeared for the Commission was unable to cite any authority to support the existence of any such principle. Nor have I been able to find any.

Counsel for the Commission invoked the maxim *Legem patere quam fecisti*. My Lords, it is with considerable diffidence that I embark on a discussion of the principle expressed in that maxim, since it is one that is unknown to English law.

This is not surprising since it is a general principle of English law that a body to which a discretion has been entrusted, be it administrative or legislative, may not bind itself in advance as to how it will exercise that discretion. The authorities to this effect are legion. One *Ellen Street Estates Ltd* v *Minister of Health* [1934] 1 KB 590 was cited in argument on behalf of the Council. That case was concerned with the relationship between two Acts of Parliament. The first, an Act of 1919 relating to the assessment of compensation for the compulsory acquisition of land had provided:

'The provisions of the Act or order by which the land is authorized to be acquired, or of any Act incorporated therewith, shall, in relation to the matters dealt with in this Act, have effect subject to this Act, and so far as inconsistent with this Act those provisions shall cease to have or shall not have effect'.

Then came an Act of 1925 authorizing the compulsory acquisition of land for certain housing purposes and containing provisions as to compensation which were inconsistent with those of the Act of 1919. It was held that the provisions of the later Act must prevail. The same principle applies to bodies having

subordinate legislative powers. For instance in *William Cory & Son Ltd* v *London Corporation* [1951] 2 KB 476 it was held that the defendant corporation could not bind itself by contract as to the manner in which it would exercise a power to make by-laws which it had as health authority for the Port of London. Lord Asquith in that case likened a term in a contract which purported to place such a fetter on the authority to a rope of sand. 'You cannot', he said, 'break a rope of sand. It starts broken'.

Certain exceptions to this general principle have been recognized. Thus in *Birkdale District Electric Supply Co Ltd* v *Southport Corporation* [1926] AC 355, the House of Lords, whilst asserting (not for the first time) the existence of the general principle, held that it did not prevent a commercial company which had taken over a statutory undertaking (for the supply of electricity) from binding itself by contract not to raise its charges above a certain level. Of more interest perhaps is the exception first suggested by Denning J. (as he then was) in the much discussed case of *Robertson* v *Minister of Pensions* [1949] KB 277 and recently applied by Cumming Bruce J. (as he then was) in *Re L. (AC) (an infant)* [1971] 3 AER 743. This exception, which is based on estoppel, is however of very limited scope. It does no more than to enable a Court to hold a public authority bound by an assurance it has given to a particular individual as to the view it will take on the facts of his case. My Lords, so far as English law is concerned, there is no exception to the general principle that could possibly apply in circumstances such as those of the present case.

I apprehend that the law of Scotland is the same. Indeed some of the classic authorities in this field are decisions of the House of Lords in Scottish cases — *Ayr Harbour Trustees* v *Oswald* [1883] 8 AC 623 is a well-known example — and our Courts have, in developing this branch of the law, relied indiscriminately on English and Scottish authority.

Of course, English and Scottish law do not deny to a public authority the capacity to adopt a policy according to which it will exercise a particular discretion. But they insist that such a policy must remain flexible and that it must not amount to an abdication of the discretion. See for instance, in England *R. v Port of London Authority* [1919] 1 KB 176 and *Schmidt* v *Secretary of State for Home Affairs* [1969] 2 Ch 149, and, in Scotland, *Kilmarnock Magistrates v Secretary of State for Scotland* [1961] SC 350. Moreover, the adoption of a policy cannot give rise to legal rights or obligations.

My Lords, such researches as I have been able to make have not revealed any relevant Irish authority on this matter.

Of course, the correct view may be that the law of the new Member States cannot be relevant to the solution of a dispute that arose before their accession.

I turn therefore to the Continental systems, in which the maxim *Legem patere quam fecisti* is recognized, to seek to ascertain its meaning and its scope.

It seems that, in those systems, that maxim has been interpreted to mean, at its widest, that when a public authority has adopted a rule for dealing with a particular category of cases, it may not, so long as the rule stands, depart from it in any individual case falling within that category. But this does not preclude the authority from changing the rule.

The point was vividly made in a decision of the French Conseil d'État of 25 June 1954 in a case brought by the *Syndicat national de la meunerie à seigle* (The National Rye Millers Association) (D. 1955, J. p. 49). By the combined effect of a Decree of 22 March 1947 and a further Decree of 1 October 1948 the French Government had laid down a method of fixing cereal prices which was to apply for the years 1947-48 to 1951-52 inclusive. To this method it gave effect annually by decrees published in August. But in February 1951 it published a Decree amending that of

August 1950 so as to render the method in question no longer applicable for the 1950 harvest. It was the validity of this last decree that was challenged by the applicant association. The Conseil d'État held it to be valid. In his opinion, the Commissaire du Gouvernement, Monsieur Donnedieu de Vabres, said this:

'Nous sommes donc en présence de deux actes réglementaires successifs, et le principe que vous avez toujours affirmé en ce domaine est qu'un acte réglementaire peut, à tout moment, être abrogé ou modifié par l'autorité qui l'a émis *Blanchet et autres,* 17 mars 1911, D.P. 1913.3.72). Le principe *patere legem quam fecisti,* qui vous conduit couramment à annuler les actes individuels pris par une autorité contrairement à des dispositions réglementaires qu'elle a elle-même prises *(Philharmonique de Fumay,* 17 mai 1907, D.P. 1908.3.112), ne saurait jouer dans le cas d'une succession d'actes réglementaires émanant de la même autorité. Il ne saurait en être ainsi alors même que la seconde décision a un objet plus particulier que la première.'

And:

'Le Gouvernement a le droit de modifier à tous moments ses règlements et il ne saurait renoncer à ce droit sans manquer à la mission qui lui est donnée par le législateur. Il n'en va autrement que si le législateur l'a expressément invité à statuer pour une époque déterminée, ou si l'objet de la délégation comporte nécessairement une telle solution.'

That this principle is applicable in the field of legislation relating to the rights of public servants is clear—see Duez et Debeyre, Traité de Droit Administratif, p. 710, where the point is in particular made that such servants have no 'droits acquis' in the maintenance in force of regulations about their salaries.

There are decisions of the Belgian Conseil d'État to the same effect (see Buttgenbach, Manuel de Droit Administratif, Tome I, pp. 354 and 611) and I have found nothing but authorities consistent with it in the laws of other Member States. Indeed I should have been surprised to find otherwise because, in Cases 7/56 and 3/57 to 7/57 *Algera and others* v *Assembly* (Rec. 1957, p. 85) Mr Advocate-General Lagrange said this (at pages 154-155):

'Il est, en effet, de principe que les décisions *individuelles,* lorsqu'elles sont conformes à la loi, ne peuvent pas être l'objet d'un retrait: ceux qui en sont l'objet tiennent donc de ces décisions un droit *subjectif* dont ils sont fondés à exiger le respect. C'est ce qui distingue ces décisions des actes de caractère réglementaire ou législatif qui, sauf dispositions contraires, sont applicables de plein droit aux agents en fonctions, sans que ces derniers soient admis à invoquer des "droits" subjectifs prétendument acquis sous l'empire de la législation ou de la réglementation antérieure; il suffit que ces actes n'aient pas d'effet rétroactif, suivant les principes généraux. Ainsi, par exemple, une nouvelle échelle de traitement, même moins élevée, une nouvelle limite d'âge, même plus basse, seront applicables aux fonctionnaires qui sont en activité au jour de l'entrée en vigeur de l'acte fixant cette échelle de traitement ou cette limite d'âge. Au contraire une décision individuelle (par exemple une nomination, un avancement) crée un droit acquis à sons maintien du jour où elle est parfaite, dès lors qu'elle a été légalement prise.

Cette solution, qui répond à la nécessité d'assuer la stabilité des rapports juridiques et correspond, dans l'ordre des relations unliatérales de droit public, aux effets du contrat dans les relations plurilatérales, est commune aux principes du droit de nos six pays.'

Mr Advocate-General Lagrange's researches did not of course cover the law of Denmark, but (if and in so far as this is relevant) enquiries that I have been able to make have led me to believe that the law is in substance the same in that country.

I conclude that the maxim *Legem patere quam fecisti* is of no assistance in the present case, nay, more, that, even if the Council's Decision of 21 March 1972 had been taken in exercise of an express legal power, the Council could not thereby have precluded itself from overriding it at any time, because it was not a decision relating to any individual case, but one intended to apply generally and impersonally to the fixing of the salaries of all the employees of the Communities.

Nor does it seem to me that the application of the principles of law so clearly evinced by the authorites can be negated by the fact that the decision was reached after negotiations with representatives of the staff or by the fact that it was based on a 'compromise solution' proposed by the Commission. For, to say that it could, would be to say precisely that which those authorities deny, *viz* that a body in the position of the Council can bind itself not to change its own legislation. It is true that in the law of certain Member States (notably the Federal Republic of Germany and the Netherlands) a promise given by a public authority as to the manner in which it will exercise a discretionary power vested in it can to some extent and in certain circumstances have a binding effect. But I apprehend that the application of that doctrine is confined to promises given in individual cases and that it cannot be invoked to fetter a legislative power. Moreover, the Hoge Raad of the Netherlands has held (see *Nederlandse Dok- en Scheepsbouwmaatschappij* v *Landsmeer*, 4 January 1963 NJ 1964 No 204) that a public authority can depart even from a promise given in an individual case if there is a material change in circumstances and that, in such a case, a Court may not substitute its judgment of those circumstances for that of the authority concerned, unless the latter is obviously unreasonable. My Lords, I think that Your Lordships can take judicial notice of the fact that, throughout Western Europe, there was a dramatic intensification of the fight against inflation between March and December 1972. One could hardly say that it was 'obviously unreasonable' for the Council to heed this.

My Lords, Counsel for the Commission sought to base an argument on the proposition that the Decision of 21 March 1972 imposed obligations not only on the Council, but also on the Commission. But my Lords, by virtue of what legal power could the Council impose such obligations on the Commission? Surely it was political common sense, not law, that demanded that the Commission should have regard to that decision in framing its report for the 1972 review of salaries.

I would therefore dismiss this action on the ground that the Decision of 21 March 1972 had no legally binding effect on the Council. Notwithstanding its undeniable political importance, it was, in law, no better than a rope of sand.

If that be the right conclusion, it is not necessary to consider the question of interpretation of the decision. But I have formed a view on that question and, in the exceptional circumstances of this case, I think in right to express it, briefly.

The controversy centres on the meaning of the phrase 'sur la base de ces deux indicateurs'. Does that phrase mean only that, in taking its decision at the annual review, the Council is to have regard, among other factors, to any changes in purchasing power and is to use the two indices as a guide to the quantum of such changes, or does it mean that the Council must make, in respect of changes in purchasing power, an adjustment to the salaries of the staff of which the quantum must be within the bracket set by those indices?

My Lords, I agree with the submission of Counsel for the Commission that philology and grammar alone will not afford an answer to that question. 'Sur la base de' is an elastic phrase. (Cf the remarks of Mr Advocate-General Roemer in another context in Case 5/71 *Zuckerfabrik Schöppenstedt* v *Council* (Rec. 1971, p. 975 at p. 997)). In order to

ascertain what the phrase means in the Decision of 21 March 1972, one must look at it in the context of that decision read as a whole and against the background of the circumstances in which it was taken.

The problem is deepened by one's suspicion that the phrase did not mean the same thing to all the parties to the decision. One is thus faced with the task, a task of a kind familiar to lawyers, particularly in the field of contracts, of objectively attributing to the authors of a document a common intention which, subjectively, they may not have shared.

To my mind, a powerful argument was put forward by Counsel for the Commission when he said that, unless the Council intended to limit its discretion in the manner contended for by the Commission, it failed to attain the very purpose of the compromise enshrined in its decision, which was to lay down a formula acceptable to representatives of the staff and so put an end to the annual conflicts with the staff.

But I have, after some hesitation, come to the conclusion that that argument must yield to even more powerful arguments put forward on behalf of the Council. The scheme adopted by the Decision of 21 March 1972 was expressly to have effect within the framework of Article 65. That article expressly requires the Council, at the annual review, to have regard not only to increases in salaries in the public service, but also to the economic and social policy of the Communities and to the needs of recruitment. The adoption of a scheme which compelled the Council to confine its attention to the former factor and ignore the latter two would be inconsistent with Article 65. Yet this would clearly have been the result of the Commission's interpretation of the scheme, if it had provided for the Council's annual decision to be taken 'sur la base de' a single index of salaries in the public sector, or on the arithmetical mean of two indices. It seems to me that it cannot make any difference that in the end the scheme provided for two indices to be considered, because there might be little or no divergence between the figures thrown up by them and, in any case, such divergence would not be related to the economic and social policy of the Communities or to the needs of recruitment. I may illustrate the point in this way: If the Commission is right and the Council were for three years confined (apart from giving effect to rises in the cost of living) to granting increases in salaries within the bracket of the two indices, the Council would be precluded, in any of those years, from awarding increases above that bracket even though convinced that this was necessary in the interests of recruitment.

Is that to say that the Decision of 21 March 1972 was an empty and pointless exercise? I think not. It is clear from the documents before the Court (particularly the Commission's document of 2 June 1971 and the minutes of the meeting of the Council of 21 March 1972) that much of the disagreement at that time was as to which index or indices were to be used to guide the Council in its annual decisions, and as to how such index or indices were to be compiled. To have secured agreement on that for an experimental period of three years was in itself an appreciable step forward, particularly bearing in mind that one of the indices that were chosen (that of total emoluments per head in public services) was appreciably more favourable to the staff than the only index theretofore relied on by the Council. In fact, however, one has only to read the Decision to see that it contained more besides. One need not, in order to give it content, hold that it confined the Council to the bracket.

I would, therefore, my Lords, if I thought that the question of interpretation of the Decision was justiciable in this Court, say that it should be decided in favour of the Council.

Lastly, my Lords, I must refer very shortly to an unappetizing argument about the admissibility of the action

which the Council broached in its defence but disclaimed at the hearing. In a nutshell this argument was that, since the regulation of which the validity is in issue is applicable to all three Communities, the action must be of a kind authorized not only by Article 173 of the EEC Treaty and Article 146 of the Euratom Treaty but also by Article 38 of the ECSC Treaty. My Lords, I think that Counsel for the Commission was right in saying that that argument is inconsistent with Article 30 of the Merger Treaty.

As regards costs, the position is that neither party has asked for them. I apprehend that, accordingly, following the precedent of *Commission* v *Council* (already cited) each party will bear its own costs.

I am therefore of the opinion that this action should be dismissed with no order as to costs.