OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 29 JUNE 1982 [1]

Mr President,
Members of the Court,

1. Introduction

The case on which I am to speak today concerns a third dispute between the Commission and the Council, on which the Court is asked to adjudicate, regarding the provision made in Article 65 of the Staff Regulations for the annual adjustment of the remuneration and pensions of officials and other servants of the European Communities. The two previous disputes resulted in the judgments of this Court in Case 81/72 ([1973] ECR 575) and Case 70/74 [1975] ECR 795). Briefly, the first-mentioned judgment laid down the important principle that when, within the powers conferred upon it by Article 65 of the Staff Regulations, the Council undertakes to abide by certain criteria for a fixed period in making the annual adjustment, the principle that the legitimate expectation of those affected must be protected implies that the Council is bound to fulfil such undertakings (paragraphs 8, 9 and 10 of the decision).

That case concerned a decision of 21 March 1972 whereby the Council committed itself for three years. This one concerns the application of the method of adjustment which was adopted by the Council on 29 June 1976. However, the general principle laid down by the Court on the earlier occasion must be considered, in the light of the terms in which it was expressed and of its purpose, equally applicable in considering the regulations which have now been adopted by the Council. Most important, therefore, is the basic principle inherent in the new method that the system of adapting remuneration is part and parcel of a policy which aims to guarantee, in the medium term, that the remuneration of European officials will keep pace with trends in the average remuneration for the various categories of national civil servants.

The Council regulations challenged here, however, Regulation No 187/81 (Official Journal 1981, L 21, p. 18) and Regulation No 397/81 (Official Journal 1981, L 46, p. 1), have the effect of bringing about, to a greater or lesser degree, a downward divergence from the average increase in remuneration recorded during the reference period for the various categories of national civil servants. In the case of the lowest-paid officials the divergence is relatively small. By applying a system which would be described in the Netherlands as "centen in plaats van procenten" [pennies instead of percentages] all other salaries are raised by the same net monthly amount of BFR 1 107. The result is that the percentage increase for all higher-paid officials is much lower. The average total increase allowed is 1.5%, compared with the increase of 3.3% which was recorded in the case of national civil servants during the reference period. The policy on pay laid down in the relevant regulations thus represents a definite departure from the policy pursued with regard to remuneration since 1966, which was designed to maintain pur-

1 — Translated from the Dutch

chasing power whilst allowing real incomes to increase in parallel with those of national civil servants. Neither of those objectives is complied with in the regulations at issue. For further details of the background to the dispute, which I have summarized very briefly, I refer the Court to the Report for the Hearing.

As far as the merits of this case are concerned, I must first point out that in my opinion too a change in economic circumstances may in fact necessitate a departure from continuing increases in real incomes and even a diminution of purchasing power. The situation in many Member States at present shows that such a necessity may well occur. Where such a departure is made, however, care must be taken that to ensure the guarantees provided for Community staff in the Staff Regulations and the Council Decision of 29 June 1976 are preserved in order to comply with the terms of the principle laid down in the Court's judgment of 1974, to which I have referred, that the legitimate expectation of members of staff affected thereby must be protected.

The Commission considers that those guarantees have been violated by the regulation in question in a number of respects. In order to single out clearly what I consider to be the decisive points I shall to some extent re-arrange the order of the relevant submissions. As far as the arguments put forward by the Commission and the Council in support of those submissions are concerned, I refer for the sake of brevity to the Report for the Hearing.

2. First submission

In the first submission the Commission alleges that Article 65 (1) of the Staff Regulations has been infringed by the Council inasmuch as it was stated that Regulation No 187/81, and therefore the various provisions in Regulation No 387/81, were based on "the worsening of the general economic situation in the Community during the reference period, brought about particularly by the increased cost of energy", whereas Article 65 (1) of the Staff Regulations requires it to adopt decisions on the adjustment of remuneration and pensions in accordance not with the "economic situation" but with the "economic and social policy of the Communities".

I consider that first submission to be well founded and sufficient to justify a declaration that the regulations at issue are void. Apart from the numerous other cogent arguments adduced by the Commission in support of that submission I would like to stress in particular that in my view in a crisis such as the present one the requirement laid down in the Staff Regulations that the Council must make these adjustments "as part of the economic and social policy of the Communities" constitutes in fact the strongest guarantee under the Staff Regulations of an even-handed policy in such matters. Precisely when a crisis requires changes of policy, the provision ensures that the adverse affects of such changes will not be brought to bear solely, or with disproportionate harshness, on Community Staff. The Commission was thus correct, I think, to point out that the letter and spirit of the provision in the Staff Regulations are not in favour of equating "the economic and social *policy* of the Communities" with the "*economic situation* in the Communities". To do so would deprive the requirement imposed by the Staff

Regulations entirely of its value as a guarantee for officials. One is compelled by both the wording and the purpose of this obligation to interpret it as requiring any reduction applied to real incomes, in particular, to be accompanied, if not by a directive, then at least by an express and demonstrably effective recommendation to the Member States under Article 103 of the EEC Treaty to pursue a similar policy. It is quite clear from the file on the case that there was no question of any such directive or recommendation. I refer in this context to Annex I to the Council's defence and to the supplementary observations made by its representative in the course of the oral proceedings in reply to a question raised by me. The Council's attempt to represent the regulations themselves as a recommendation of that nature to the Member States (by setting an example) must likewise be rejected in the light of the wording and aim of Article 65 of the Staff Regulations. Moreover, since the Community's total wages bill is so small such attempts must in any case be rejected as lacking in merit. It is flying in the face of all experience to believe that national policies can be influenced by an example of this kind. It is well known that there are even considerable doubts about whether it is possible to use the far weightier factor of national civil servants' remuneration as a method of setting the trend of an incomes policy.

3. The second, third, fourth and fifth submissions

In the second submission the Commission alleges "infringement of Article 65 (1) of the Staff Regulations inasmuch as the contested regulations, which bring about a reduction in the purchasing power of European officials with effect from 1 July 1980, are contrary to the policy on pay pursued during the reference period July 1979 to June 1980 in the national public service, whereas the provision of the Staff Regulations in question required the Council to take account of any increases in salaries in the public service".

In the light of the judgment delivered by this Court in 1973 to which I referred earlier, it appears to me desirable to examine this submission in conjunction with the three which follow it. Those submissions, the full text of which may be found in the Report for the Hearing, clearly support the second one. The third submission relies in addition on the alleged creation of customary law entitling staff to the maintenance of purchasing power when remuneration is adjusted and subsequently to have such purchasing power modified to keep pace with increases in purchasing power at the national level, especially that of national civil servants. I regard this contention as a weak one from the start since in the context of a *broader change of Community policy* an economic crisis is surely, as I noted earlier, capable of justifying a reduction in purchasing power. I consider the arguments which were put forward by the Commission in that context relevant only in so far as they extend to the methods of adjustment laid down by the Council in 1976. In the light of the judgment of this Court of 1973, to which reference has already been made several times, the fourth submission is considerably stronger because it refers directly to the principle laid down by the Court to the effect that the expectation justifiably aroused by a decision of the Council must be protected, in this instance the expectation that the basic principle of the

parallel development of the remuneration of Community staff with that of national civil servants which was laid down in the Council Decision of 1976 would not be abandoned. The fifth submission also seeks to establish that there was an infringement of the method adopted in June 1976 and frustration of the legitimate expectation to which it gave rise, but this time on the ground that the fourth criterion was applied to the exclusion of the first three (those derived from the basic principle of parallel development of purchasing power) in a manner repugnant to the law ("dans des conditions erronées en droit"). I should like to remind the Court in this context that the fourth criterion of the method adopted in 1976 concerns the general economic and social macro-economic indicators of the economic and social policies of the Member States, such as the gross domestic product *per capita* of the working population and the total *per capita* emoluments in the general national economy. As far as that particular criterion is concerned, I am the first to support the Commission's view that it must be interpreted in the light of the requirement imposed by the Staff Regulations that the policy on the adjustment of salaries must be established in the light of the economic and social policy of the "Communities". Thus only if circumstances have necessitated the adoption of a broader change of Community policy can other indicators not expressly referred to in the fourth criterion provide useful pointers with regard to the policy to be adopted with regard to the remuneration of Community officials which may compensate in some respect for the effects of applying other criteria in the 1976 methods. I say compensate *in some respects,* since I share the Commission's view that this criterion, like the others in the 1976 method — in the absence of a more flexible policy, of course — must be interpreted in the light of that method's basic premise, to which I referred earlier: namely, that the remuneration of European officials must keep pace with that of national civil servants in the medium term, which is the strict interpretation of the last sentence of Article 65 (1) of the Staff Regulations adopted by, and binding upon, the Council. The result is that the fifth submission also appears to be directly related to the second.

Now if I wish to examine those four submissions together, I must first dispose of the Council's argument based on the wording of Article 65 to the effect that the Council is bound merely to "have regard to" the evolution of remuneration at the national level, without having to accord it any decisive influence. The basic principle in the 1976 method, however, interprets the requirement in the Staff Regulations as *guaranteeing* parallel evolution in the medium term.

The Council is basically correct when it states, in its rejoinder, that the principle of parallel evolution in the 1976 method does not imply that there must be automatic index-linking. That must be true in view of the possibility that, even upon careful appraisal, the Council may not attach the same weight to each of the various specific criteria in the method. It rightly points, furthermore, to the differences which exist as compared with the 1972 method. Nevertheless, it is more important to realize that any interpretation of all the individual criteria in the 1976 method the result of which does not reflect actual changes in the

remuneration of national civil servants during the determinant reference period under that method is difficult to reconcile with the method's basic principle.

The Council contends that such a result is compatible with the principle because the latter guarantees parallel evolution only in the medium term. It maintains that this precludes an annual consolidation of trends and allows for parallel evolution to be assured once every five years, that is, with effect for the future. The first point to make is that since this case is concerned with the latest application of the 1976 method such an interpretation would deprive the method of any protective character as far as rights are concerned. As we know, the method — together with the basic principle which I have described — has in the meantime been replaced by a different method of adjusting remuneration. Nevertheless, it is at least as significant that the first three specific criteria of the method indicate plainly that the method must always be applied on the basis of the way in which national remuneration has developed in the past. Developments in the medium term may thus be taken into consideration either on grounds of legal certainty and the protection of legal rights or on the basis of the plain logic of the method only in so far as they relate to events in the past. Thus, for instance, regard may be had to an increase in the remuneration of Community staff over the past five years which proves in retrospect to have been too great in comparison with the evolution of the remuneration of national civil servants. Thus it emerges from the information which appears on page 9 of the Report for the Hearing that between 1975 and 1979 there was in fact a discrepancy in favour of Community staff of 0.4% and this discrepancy could in fact have been removed by the Council when it made its adjustments for 1980.

All that remains to be considered now is to what extent the application of the fourth criterion of the 1976 method, described above, might produce a different result. In that regard the third, fourth and fifth recitals in the preamble to the contested regulation, Regulation No 187/81, are of special interest. They read as follows:

"... the account taken of the increase in the cost of living and the real income of national civil servants must be moderated by the application of general economic and social factors; ... account should be taken, in this respect, of the worsening of the general economic situation in the Community during the reference period, brought about particularly by the increased cost of energy; ... however, consideration should be had in this situation of officials and other servants at the lowest end of the salary scale, whose purchasing power must be maintained;

... therefore, these officials and servants should be granted the increase proposed by the Commission, while other officials and servants should be granted an increase identical in terms of absolute value;

... the proposal before the Council also concerns various allowances, the amount of accrued pension, the adjustment of weightings applying to the salaries of persons referred to in Article 2 of Regulation (EEC, Euratom, ECSC) No 160/80; ... these factors should be adjusted accordingly ..."

Here, too, it is highly significant that the fourth criterion in the 1976 method refers just as clearly to the evolution

of the appropriate macro-economic indicators during the relevant reference period. In the course of the oral proceedings the Commission repeated its observation that according to Annex 3 to its reply those indicators, too, were positive and thus for that reason alone there is no justification for reducing the purchasing power of Community staff, especially as the first three criteria indicated a positive trend. The Council, on the other hand, maintained that it was not bound to give consideration solely to the factors expressly mentioned in the fourth criterion, but could include other macro-economic factors in its appraisal. I agree with that in principle but I have already pointed out that under the third sentence of Article 65 (1) of the Staff Regulations, that approach may be regarded as permissible, if at all, only if the more flexible policy adopted in consequence is placed in the context of a broader policy of flexibility pursued by the Community on the basis of Article 103 of the EEC Treaty, in particular. In that case the broader policy of flexibility must include directives, or at least clear recommendations, to the Member States to pursue a similar policy aimed at reducing the purchasing power of civil servants. As long as such a broader crisis policy does not exist the basic principle of parallel evolution adopted in the 1976 method must surely take precedence. That is precisely the case here, since none of the criteria expressly mentioned in the method is capable of justifying a deviation from the Communities' policy on pay such as that which has occurred.

In short, I am of the opinion that the second, fourth and fifth of the Commission's submissions in particular, taken together, are also well founded and that the Council regulations at issue must be declared void on that ground, too.

4. The sixth and seventh submissions

In the light of what I have said there is no need for me to examine the sixth submission in greater detail since it is of a subsidiary nature. As far as the requirement to state reasons is concerned, which is the principal concern in this submission, I would merely point out that in my view the Council may be criticized generally for giving far too summary an account of the reasons for the clear change of policy adopted in the contested Council regulations compared with the manner in which it had adjusted remuneration previously. The preamble to Regulation No 187/81 does not carry the conviction necessary to persuade the staff that the change of policy was to be accompanied by a careful and unbiased consideration of all the relevant criteria.

The seventh submission, as the Court is aware, is that there was an infringement of Article 65 (2) of the Staff Regulations and a failure to have regard to the principle of equal treatment for all officials and to the consequent obligation to guarantee them in their remuneration equivalent purchasing power regardless of their place of employment. The disregard of those principles was evident in the fixing of a uniform increase in remuneration and pensions with effect from 1 July 1980, thereby failing to have regard, as far as the weightings for

various places of employment, other than Belgium and Luxembourg, with a high inflation rate, were concerned, to the Commission's proposal for adjusting the weightings from 1 April 1980.

I consider that this submission, too, is well founded and am of the opinion that an express reference to this point is needed in the judgment of this Court in order to enable the Council to have regard to it when amending the regulations.

I concede that there is nothing in Article 65 (2) to justify the conclusion that there is an obligation to apply the article every quarter. However, a reasonable interpretation of the provision must lead to the conclusion that as soon as the Commission submits a proposal for adapting the weightings based on the fact that a substantial change in the cost of living has been recorded, the Council must take a decision thereon within two months. If the Council, too, cannot reasonably deny that there has been a substantial change in the cost of living, its decision in that regard must support the proposal and if necessary be retroactive to the date when the substantial change was recorded. As was briefly stated once again in the Report for the Hearing the yearly rate of inflation in the relevant places of employment apart from Belgium and Luxembourg varied from 20% to 89%. It cannot reasonably be denied that such rates of inflation — which are considerably greater than the rate of inflation in Belgium and Luxembourg — amount to a substantial change in the cost of living in those plases of employment and that in the present case the failure to apply weightings on that basis from 1 April 1980 amounts to both an infringement of Article 65 (2) of the Staff Regulations and a breach of the principle of equal treatment for all Community officials regardless of their places of employment.

5. Summary and conclusion

Briefly, then, my view is that the Commission's first, second, fourth, fifth and seventh submissions, taken together, are well founded. In particular, only the adoption within the terms of Article 103 of the EEC Treaty of a wider change of policy by the Community is able to justify, on the wording of Article 65 (1) of the Staff Regulations, a departure from the principle of parallel evolution of national and Community pay policies as far as civil servants are concerned, a principle which the Council undertook to observe in its decision of 29 June 1976 on the method, thus giving special effect to the last sentence of that provision of the Staff Regulations.[1] The fourth criterion of the decision on the method may, in the light of what is stated in the penultimate sentence of Article 65 (1) of the Staff Regulations, which is clear in that respect, justifying a departure from the principle of parallel evolution only, if at all, in the context of a wider change of policy than was the case.[1] The Council's refusal to apply weightings for places of employment other than Belgium and Luxembourg from 1 April 1980 is not compatible, in the light of the substantial change in the cost of living which had occurred, with Article 65 (2) of the Staff Regulations or with the principle of equal treatment for all Community staff regardless of their place of employment.

1 — Whether that principle must be maintained *even* in the context of a wider change of policy, in the light of the principle that legitimate expectations must be protected, is a question which need not be expressly resolved here since, as I have observed, there was no such wider change of policy on the part of the Community.

According to the reply given by the Commission and the Council on 27 May 1982 to the question raised by the Court in the oral procedure as to the cost of amending the regulations entirely as suggested by the Commission, such costs would amount to 6 850 940.27 European units of account for the second half of 1980. As to that, I would merely observe that the annulment of the contested regulations must, in my view, have the general consequence that remuneration and pensions will have to be adjusted, but it will not necessarily indicate the exact amount of the adjustment. As I said earlier, regard might be had here to the different results obtained by applying the various specific criteria contained in the 1976 method. Naturally, a careful assessment must include a statement of the reasons for allowing certain criteria more weight than others. In the course of the oral procedure the Commission's representative agreed in answer to a question put by the Court that the principle of parallel evolution did not necessarily imply that evolution of national and Community pay policies must be parallel in every respect. It is only the upward trend of remuneration during the reference period as a result of national governments' pay policies which must in all cases be followed. During the oral procedure an expert from the Statistical Office of the European Communities provided some useful comments on the nature and extent of the differences, to which I am content to direct the Court's attention.

In conclusion I propose, on the basis of my findings, that:

1. Council Regulation (Euratom, ECSC, EEC), No 187/81 of 20 January 1981 (Official Journal 1981, L 21, p. 18, replaced by the version published in Official Journal L 130 of 16 May 1981, p. 26) should be declared void.

2. Articles 1 (a), 2 (a), 2 (b) and the first paragraph of Article 11 of the supplementary regulation, Council Regulation (Euratom, ECSC, EEC) No 397/81 of 10 February 1981 (Official Journal 1971, L 46, p. 1, replaced by the version published in Official Journal L 130 of 16 May 1981, p. 28) should be declared void.

3. The first-mentioned regulation, together with the relevant provisions in the second regulation, should continue to have effect, as requested by the Commission and in accordance with the judgment of the Court in Case 81/72, until the entry into force of the regulations to be adopted following the judgment to be given in this case.

4. Each party should be ordered to pay its own costs, since neither party has requested the application of Article 69 (2) of the Rules of Procedure.