On those grounds,

THE COURT (First Chamber)

hereby:

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

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

Mackenzie Stuart Koopmans Bosco

Delivered in open court in Luxembourg on 30 May 1984.

J. A. Pompe
Deputy Registrar

T. Koopmans
President of the First Chamber

OPINION OF MR ADVOCATE GENERAL DARMON DELIVERED ON 15 MARCH 1984 [1]

Mr President,
Members of the Court,

1. Before Council Regulation No 2615/76 of 21 October 1976 entered into force, staff paid from research and investment appropriations had the status of local or establishment staff.

That regulation, which amended the Conditions of Employment of Other Servants of the European Communities (hereinafter referred to as "the conditions of Employment") and contained certain transitional provisions, conferred on such staff the status of temporary staff within the meaning of

1 — Translated from the French.

Article 2 (d) which the regulation inserted into the Conditions of Employment, that is to say they became "staff engaged to fill temporarily a permanent post paid from research and investment appropriations and included in the list of posts appended to the budget relating to the institution concerned".

Under Article 20 of the Conditions of Employment, as amended by Regulation No 2615/76, the salaries of those staff were fixed in accordance with a table which was the same as that appearing in Article 66 of the Staff Regulations of Officials of the European Communities except that the salaries of staff in Categories C and D were about 5% lower than those of officials in the same categories.

2. Mrs Helga Aschermann and the 47 other applicants are temporary staff, within the meaning of Article 2 (d) of the Conditions of Employment, who either acquired this new status under the transitional provisions of Regulation No 2615/76 or were engaged after the regulation entered into force. They are all in Category C or D.

Until December 1981 a number of regulations adopted pursuant to Article 65 (1) of the Staff Regulations adjusted in turn the remuneration of officials and temporary staff within the meaning of Article 2 (d) and Article 20 of the Conditions of Employment. Although those regulations maintained the 5% difference in salaries, the applicants did not challenge them or Regulation No 2615/76 which introduced the difference.

Then came Council Regulation No 3821/81 of 15 December 1981 which amended both the Staff Regulations and the Conditions of Employment and introduced on a temporary basis a "special levy", or crisis levy, calculated as a percentage of the salaries, pensions and termination-of-service allowances paid net by the Communities.

This percentage, which increases each year, is the same for all grade except Grade D 4, Step 1, which is not affected by it.

On 15 February 1982 the Council adopted two regulations to adjust with effect from 1 July 1980 (Regulation No 371/82) and 1 July 1981 (Regulation No 372/82) the tables of salaries contained in Article 66 of the Staff Regulations and Article 20 of the Conditions of Employment.

3. These are the two regulations which, together with the regulation introducing the crisis levy, the applicants, in their application lodged on 20 December 1982 in which they invoke Article 184 of the EEC Treaty and the corresponding provisions of the other Treaties, request the Court to declare inapplicable with effect from 1 January 1982. They also request the Court to declare that the Commission must restore their position, at least with effect from 1 January 1982, in such a way as to make their remuneration equal to that received by officials in the same category, and finally they seek an order requiring the Commission to pay an amount on account of costs, interest, and the costs of the proceedings.

The action was brought after the Commission, on 20 December 1982, had rejected a complaint lodged on 24 May 1982 by the applicants pursuant to Article 90 (2) of the Staff Regulations.

The Court will have to consider whether the application is admissible and, if so, whether it is well founded.

4. The Commission in fact raises an objection of inadmissibility arguing that:

The staff concerned did not comply with the requirements of Article 90 of the Staff Regulations because they did not lodge a request prior to their complaint;

In any event, the adoption of the disputed regulations by the Council cannot be regarded as a new fact which may substantially change their situation under Regulation No 2615/76.

The first submission advanced in support of the objection of inadmissibility does not seem to me to be relevant. The complaint whose rejection led to this action concerned the salary statements issued from February 1982, that is to say documents incorporating the Commission's decision to apply the contested Council regulations. Since such a decision was adopted and, as both the Commission and the applicants agree, it was indeed impossible for it not to be adopted, the applicants were entitled immediately to submit a complaint under Article 90 (2) of the Staff Regulations. It must, however, be noted that, after receiving the complaint submitted by the applicants on 24 May 1982, the Commission, in its letter of 20 December rejecting the complaint, made no mention of any need to submit a prior request.

Nevertheless, in my opinion the objection of inadmissibility should be upheld by reason of the second submission. The situation of which the applicants complain does in fact arise from Council Regulation No 2615/76. Despite the difference in pay complained of, that regulation considerably improved the situation of the staff concerned and this explains why no objection was raised against it at that time.

The 1981 regulation, which introduced the crisis levy, and the 1982 regulations maintained the percentage difference established in 1976. They did not increase it in any way. They do not constitute, any more than the Commission's recent proposal to eliminate this difference, a new fact, which substantially changed the circumstances in which the initial decision was adopted, to paraphrase the terms used by the Court in its judgment in *Tontodonati*. [1]

The present application should therefore be declared inadmissible on that ground.

5. If, however, the Court should take the view that the objection of inadmissibility must be dismissed, then in my view the application should be declared unfounded.

The application is in fact based on two submissions:

Contrary to the overriding principle of equal treatment, the applicants are discriminated against in comparison with the officials in the same category doing similar work or the other temporary staff not covered by Article 2 (d) of the Conditions of Employment;

Secondly, the Commission failed in its duty to look after the well-being of the applicants because it neglected to make their remuneration correspond to that of officials in the same categories (C and D).

1 — Judgment of 12. 7. 1973 in Case 28/72, *Tontodonati v Commission*, [1973] ECR 779, paragraph 3 at p. 784.

As the Commission rightly points out, the Court has consistently held that "discrimination in the legal sense consists of treating in an identical manner situations which are different or treating in a different manner situations which are identical." [1]

However, the applicants, who are temporary staff paid from research and investment appropriations, are not recruited on the basis of the same criteria or paid out of the same appropriations as the officials or the other temporary staff referred to in Article 2 (a), (b) and (c) of the Conditions of Employment; they are subject to special provisions. Consequently, even if they are graded in the same categories, for the purposes of the Staff Regulations and the Budget they are not in the same position as officials or other temporary staff.

As regards the submission that the Commission failed in its duty to look after the applicants' well-being, it serves no purpose since the Commission has not committed any breach of the principle of equal treatment. In any case, it is actively seeking to eliminate this difference in remuneration so far as the future is concerned and this initiative, taken for the benefit of the applicants, cannot be invoked against it.

I therefore propose that the application should be dismissed and the applicants ordered to pay their own costs.

1 — Judgment of 4. 2. 1982 in Case 1253/79, *Battaglia* v *Commission*, [1982] ECR 297, paragraph 37 at p. 322.