OPINION OF MR ADVOCATE GENERAL JACOBS
delivered on 7 November 1991 *

My Lords,

1. In this case the Commission seeks the partial annulment, pursuant to Article 173 of the EEC Treaty, of Council Regulation (EURATOM, ECSC, EEC) No 2258/90 of 27 July 1990 correcting the remuneration and pensions of officials and other servants of the European Communities and adjusting the weightings applied thereto (Official Journal 1990 L 204, p. 1). The Commission wishes to have the regulation annulled only in so far as it omits to establish a specific weighting applicable to the salaries of staff employed in Munich.

The background to the dispute

2. The Commission and the Council have been in disagreement for some time over the need to fix a specific weighting for Munich, although it does not seem to be disputed that the cost of living is appreciably higher in that city than in the rest of Germany (with the exception of Berlin). As part of the procedure for annual review of salaries, in June 1989 the Commission proposed the fixing of a specific weighting for Munich, but the proposal was not accepted by the Council. In June 1990 the Commission submitted to the Council a proposal for a regulation containing three elements, namely: (a) a general rectification of the salaries payable to Community officials, (b) an adjustment of the weightings for certain countries and (c) the fixing of a specific weighting for Munich. When that proposal was examined by COREPER it became apparent that there was a qualified majority in favour of the first two elements and that none of the delegations supported the third element. The Commission therefore agreed to sever the third element and put it forward in a separate proposal, which was not accepted by the Council, while the other two elements were adopted by means of the contested regulation.

3. It may also be noted that several officials posted to Munich have brought actions against the Commission before the Court of First Instance as a result of the failure to fix a specific weighting for Munich. In Case T-134/89 *Hettrich* the Court of First Instance dismissed the application and an appeal is now pending before the Court of Justice. In Case T-22/90 *Brambilla* the proceedings before the Court of First Instance have not yet terminated.

* Original language: English.

The relevant legislation and case-law

4. Article 64 of the Staff Regulations provides as follows:

'An official's remuneration expressed in Belgian francs shall, after the compulsory deductions set out in these Staff Regulations or in any implementing regulations have been made, be weighted at a rate above, below or equal to 100%, depending on living conditions in the various places of employment.

These weightings shall be adopted by the Council, acting by a qualified majority on a proposal from the Commission as provided for in the first indent of the second subparagraph of Article 148(2) of the Treaty establishing the European Economic Community and 118(2) of the Treaty establishing the European Atomic Energy Community. 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.'

5. Article 65 of the Staff Regulations provides as follows:

'1. The Council shall each year review the remunerations 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 [the] economic and social policy of the Communities, remuneration should be adjusted. Particular account shall be taken of any increases in salaries in the public service and the needs of recruitment.

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

3. For the purposes of this Article, the Council shall act by a qualified majority on a proposal from the Commission as provided for 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.'

6. Point II.1.1. of the annex to Council Decision 81/1061/EURATOM, ECSC, EEC of 15 December 1981 amending the method of adjusting the remuneration of officials and other servants of the Communities (Official Journal 1981 L 386, p. 6) provides:

'*Cost-of-living trends*

The Statistical Office of the European Communities shall draw up, in agreement with the national statistical departments of the Member States, the joint indexes

enabling trends of price increases borne by European officials in the various places of employment to be measured and thus enabling the geographical weightings in Article 64 of the Staff Regulations to be updated.

Every five years the Statistical Office of the European Communities shall verify, in agreement with the statistical departments of the Member States, whether the ratios between weightings accurately reflect purchasing power equivalences between salaries paid to staff serving in the capitals of the Member States.

Such a check shall be made for other places of employment when objective factors suggest that there is a danger of considerable distortion in relation to data recorded in the capital of the country concerned.'

7. The provisions of Articles 64 and 65 of the Staff Regulations have been the subject of considerable litigation. The relationship between the two provisions was described by the Court in the following terms in Case 194/80 *Benassi* v *Commission* [1981] ECR 2815:

'... the function of the weighting mentioned in Article 64 of the Staff Regulations is to ensure that the remuneration of all officials has the same purchasing power, whatever their place of employment. On the other hand, the weighting mentioned in Article 65 is a means available to the Council for adjusting the remuneration of all officials and servants of the Communities.'

8. The meaning of the expression 'place of employment' in Article 64 was clarified in a series of judgments delivered in 1982. In Case 158/79 *Roumengous Carpentier* v *Commission* [1982] ECR 4379, the Court held for example that:

'... in order that the rule contained in Article 64 of the Staff Regulations to the effect that account must be taken of living conditions in the various "places of employment" may be observed, that expression must be understood as meaning not only the capitals of the Member States but the exact places where the duties of a sufficiently large number of officials and other employees of the Communities are performed.'

In that series of judgments the Court held that the Community institutions should have fixed a specific weighting for the staff employed at the Joint Research Centre at Ispra in the province of Varese, where the cost of living was 2.76% higher than in Rome.

The subject-matter of the action

9. Before dealing with the substance of the case it is necessary to deal with a preliminary point raised by the Council concerning the nature of the contested act. The Council criticizes the Commission for seeking the annulment of Regulation No 2258/90 in so far as it omits to establish a specific weighting for Munich. The Council observes that, although the

Commission's original proposal included a specific weighting for Munich, that part of the proposal was severed in the course of the legislative procedure and was put forward in the form of a separate proposal. That severance took place because it became apparent that, without it, the entire proposal was in danger of being rejected. According to the Council, the action for annulment should be directed against the decision to reject the separate proposal concerning the Munich weighting, rather than against the regulation finally adopted. In support of its contention the Council adduces the draft minutes of the 1423rd session of the Council which clearly refer to two separate proposals. The Council concedes that the alleged defect in the framing of the action is not such as to render the action inadmissible, but it considers none the less that the defect should be corrected 'pour la bonne forme'.

10. The Council's objection need not detain us long. It is clear that the Commission proposal that led ultimately to the adoption of Regulation No 2258/90 provided for the fixing of a specific weighting for Munich and that by the time the legislative procedure came to fruition that part of the proposal had vanished without trace. The moment when, and the reasons why, the reference to a specific weighting for Munich ceased to have a place in the draft regulation have no bearing on the issue before the Court and it little matters whether the action for annulment is directed against the failure to include such a weighting in the regulation adopted or the failure to provide for it in a separate instrument. The only issue before the Court is whether the Council, having been seised of the Commission's proposal, was obliged to fix a specific weighting for Munich.

11. It may be noted that the Council has not raised any objection to the Commission's proceeding by way of an action for annulment under Article 173 of the Treaty, even though the action is essentially based on the Council's failure to act, for which a remedy under Article 175 might have seemed more appropriate. In my view, the proceedings have properly been brought under Article 173. Proceedings under Article 175, which can only be brought after the institution concerned has first been called upon to act and has failed to define its position, would not be appropriate where, as in the present case, the Council has acted but is alleged to have acted unlawfully by failing to enact a part of the measure proposed by the Commission. In such a case, although it may seem unusual to seek the annulment of a regulation in so far as it omits a particular provision, any objection could only be purely formal; in substance, the issue is the same whether a regulation is unlawful by reason of including, or by reason of omitting, a particular provision. In the present case, the contested regulation, which applies to all Community servants, is alleged to discriminate against those employed at Munich. Whether it does so by a specific provision, or by the absence of a specific provision, is of no account; in either event, in my view, the regulation itself can be challenged. It is therefore, in my view, open to the Court to entertain such an action under Article 173 of the Treaty and, if the action is well founded, to declare the regulation void in so far as it fails to include the provision in issue. Nor is it entirely novel to

annul a measure in so far as it fails to include a particular provision: see e. g. Case 346/85 *United Kingdom* v *Commission* [1987] ECR 5197.

The substance of the action

12. The Commission pleads four separate submissions: (a) breach of Article 64 of the Staff Regulations, (b) breach of the obligation to state the reasons on which the contested measure was based, (c) breach of rules that the Council had imposed on itself and (d) breach of the general principle of non-discrimination.

13. Since Article 64 is founded on the principle of non-discrimination (its object being to ensure that the remuneration of officials has the same purchasing power irrespective of their place of employment), it seems logical to consider the first and fourth submissions jointly.

14. The Commission infers from the legislation and case-law cited earlier (paragraphs 4 to 8) that two conditions must be satisfied before it becomes necessary to fix a specific weighting for a place of employment other than a capital:

(a) a sufficiently large number of officials or other servants of the Community must be employed there;

(b) (here I paraphrase) there must be a significant difference in the cost of living.

That analysis is expressly endorsed by the Council.

15. The parties are also in agreement that the second of the two criteria is satisfied in the present case. On that point there is indeed little room for argument. Price surveys carried out by the Statistical Office of the European Communities, in cooperation with the Statistisches Bundesamt, showed that at the end of 1987 the cost of living in Munich was 8% higher than in Bonn, which was then, and continued to be at the material time for the purposes of this case, the capital of the Federal Republic. The Commission points out that specific weightings have recently been introduced for Culham, namely a weighting of 99.3 compared with 103.9 for London, and for Berlin, namely a weighting of 109 compared with 99.3 for Bonn. Moreover, in *Roumengous Carpentier* and the related judgments the Court held that a difference of 2.76% was sufficient to justify the fixing of a specific weighting. Nothing turns, in my view, on the fact that the Court there referred to Article 65(2) of the Staff Regulations and not, as might have been expected, to Article 64.

16. The dispute between the parties centres on the application of the first of the two criteria referred to above, namely the requirement that a sufficiently large number of officials or other servants of the Community must be employed in a place before it becomes necessary to fix a specific weighting for that place. Both parties refer to an administrative practice according to which the presence of 50 officials or other servants has been considered sufficient to justify fixing a specific weighting. I shall refer to that practice as 'the 50 persons rule'. Although in the present case there

were at the material time only 16 officials and other servants of the Community employed in Munich, the Commission none the less considered the fixing of a specific weighting for Munich justified because the weighting would also apply to approximately 100 teachers at the European School in Munich. Although the teachers are not servants of the Community, their salaries are adjusted in accordance with the weightings fixed for servants of the Community as a result of a decision of the Board of Governors of the European Schools. The Commission refers also to the staff of the European Patent Office. It does not appear that their salaries would be affected by a weighting fixed for Community officials, but the Commission considers their presence in Munich to be relevant, from the point of view of the statistical population to be taken into account, because their consumption habits resemble those of Community officials and they thus ensured that there was a large enough sample of persons with the appropriate earning characteristics to enable a cost-of-living survey to be carried out.

17. The Commission stresses that the 50 persons rule has never been regarded as a rigid rule of law. According to the Commission, the individual official's right to enjoy the same remuneration irrespective of his place of employment must be balanced against the cost and inconvenience of carrying out price surveys in order to establish whether the cost of living at one place of employment is significantly higher than in the capital. The Commission argues that the two criteria — namely, the number of persons employed in a particular place and the extent to which the cost of living at that place exceeds the cost of living in the capital — must be examined jointly. A particularly large discrepancy in the cost of living may justify the fixing of a specific weighting even though less than 50 servants of the Community will be affected by it (at least where the weighting will in fact be applied to other persons, such as teachers at the European School, in such a way as to bring the total number of persons affected over the threshold of 50); conversely, a specific weighting may be justified in the case of a much smaller discrepancy in the cost of living, where the number of persons affected is very large.

18. The Council argues that, even if the 50 persons rule was never formally established as a rule of law, it none the less constituted a practice recognized by both the institutions and had been relied on by the Commission when rejecting complaints lodged by officials based in Munich. According to the Council, the Commission failed to put forward any convincing argument for departing from the established practice in the present case. In particular, the Council rejects the suggestion that the teachers of the European School in Munich should be taken into account for the purposes of the 50 persons rule, since they are not servants of the Community. The Council accepts that Article 64 of the Staff Regulations is founded on the principle of equal treatment, inasmuch as it seeks to guarantee that servants of the Community have the same purchasing power irrespective of their place of employment. But the Council questions whether it is possible to ensure perfect equality of treatment in such a field. It suggests, citing the Opinion of Advocate General Capotorti in *Roumengous Carpentier* and the related cases [(1982] ECR 4379 at p. 4412-3), that the Community legislature is merely obliged to ensure 'substantial and reasonable equiva-

lence of treatment, allowing for possible minor differences'.

19. My opinion on these issues is as follows: in the first place, I do not believe that if the 50 persons rule is a valid criterion it can be said to be satisfied in the present case, since only 16 Community servants were employed in Munich at the material time. Contrary to what appears to be the Commission's view, I do not see how it is possible to take into account, for the purposes of that rule, the teachers at the European School in Munich. It may be that, as the Commission suggests, they would have benefited indirectly from a weighting fixed for Community servants employed in Munich, as a result of the legal instruments governing their terms of employment. But the fact remains that they are not servants of the Community. While there may be arguments for regarding teachers at the European Schools in Brussels and Luxembourg as Community servants for certain purposes, since those schools were created for the purpose of educating the children of Community servants, the same is not true of the Munich school, which cannot have been created for the purpose of educating the children of the 16 Community servants employed in Munich.

20. The Commission also seeks to rely on the presence in Munich of the staff of the European Patent Office, on the ground that their salaries and consumption patterns are comparable to those of Community servants. They thus ensured the presence in Munich of a sufficiently large statistical population to enable the cost of living for Community servants to be measured accurately. I do not find that argument convincing either. If the 50 persons rule is a valid criterion, it is so because the administrative burden of measuring the cost of living at a particular place would not be justified if fewer than 50 persons were concerned. The rule was not devised because it is statistically impossible to measure the cost of living accurately in a place where fewer than 50 international civil servants are employed. That is borne out by the fact that weightings are, as the Commission points out, fixed for cities in non-member countries where a handful of Community servants are posted. Such cities are presumably not all the seat of an international institution with sufficient members of staff to provide an accurate comparator.

21. Although the Commission has sought to reconcile the position it takes in relation to Munich with the 50 persons rule, the true issue in this case is in my view the validity of that rule.

22. The 50 persons rule seems to have been extracted by the Commission (and accepted by the Council) from the Court's judgments in *Roumengous Carpentier* and the related cases. There, it will be recalled, the Court held that the reference to 'places of employment' in Article 64 of the Staff Regulations must be interpreted as meaning 'not only the capitals of the Member States but the exact places where the duties of a sufficiently large number of officials and other employees of the Communities are performed'. Even though the rule has apparently been applied by the Commission

and the Council for almost a decade and has been invoked as a ground for rejecting complaints lodged by officials, I do not think that it can be regarded as being in any way binding on the Community legislature. It constitutes nothing more than a practice which the institutions may, or indeed must, depart from if the circumstances so require.

23. It is true that the Court has sometimes held that, where the institutions have adopted internal directives governing their administrative practice in relation to staff matters, they cannot depart from such directives unless they state special reasons for doing so: see, for example, Case 190/82 *Blomefield* v *Commission* [1983] ECR 3981 at p. 3993. But the Court explained that ruling on the ground that, otherwise, the principle of equality of treatment would be infringed. In the present case, the question is whether the very application of the rule in issue would infringe that principle. Moreover, as the Court noted in *Blomefield*, directives of the kind in issue cannot in any event derogate from the provisions of the Staff Regulations.

24. It is plain in my view that, at least in some circumstances, the application of the 50 persons rule will infringe the principle of equality. As the Court made clear in the *Benassi* judgment, Article 64 of the Staff Regulations is founded on that principle. Its purpose is to ensure that the effective remuneration of Community servants should not differ according to their place of employment. But if that is the underlying basis for Article 64 it is difficult to see what justification there can be for the 50 persons rule in circumstances where it leads to substantial inequality. The proposition that an individual official's right to invoke the principle of equality of treatment should be dependent on his suffering the misfortune of discrimination in the company of at least 49 other officials strikes me as untenable.

25. It is true that in *Roumengous Carpentier* the Court appeared to suggest that specific weightings need only be fixed for places at which a substantial number of persons are employed. But I do not think that the Court intended to create a rigid rule to that effect or to lay down the basis for a practice which consists in automatically fixing a specific weighting for a place where 50 or more officials work, whenever there is an appreciable discrepancy in the cost of living, and automatically refusing to fix a specific weighting for a place where fewer than 50 officials work, even though the discrepancy in the cost of living is really substantial. Moreover, I do not think that when Advocate General Capotorti spoke of 'substantial and reasonable equivalence of treatment, allowing for possible minor differences' he meant to suggest that gross discrimination could be inflicted on officials at certain locations, providing they were few in number. He simply meant that minor variations in the cost of living may be ignored for the purposes of Article 64 of the Staff Regulations without infringing the principle of equal treatment; as he said in the same passage, the aim of the Community legislature is not to ensure 'absolutely identical treatment'. Moreover, he regarded the difference of 2.76% which was in issue in that case as a substantial difference, as did the Court (paragraph 22 of the judgment). In my view, while it may

be legitimate to ignore a relatively small difference where very few persons are affected, nevertheless there must come a point where the variation is so great that it cannot be tolerated, regardless of the number of persons affected.

26. In the present case it is common ground that the cost of living was 8% higher in Munich than in Bonn. The result is that the 16 officials posted to Munich were 8% worse off, in terms of purchasing power, than officials posted to Bonn, Brussels, Luxembourg or any other place for which a specific weighting was fixed. Given the size of that discrepancy, the Council was in my view obliged to prevent those 16 officials from suffering severe discrimination by fixing a specific weighting for Munich. While arguments based on the disproportionate administrative burden entailed by having to carry out cost-of-living surveys for a comparatively small number of persons might carry some weight in ordinary circumstances, they cease to be valid when it is in fact known that there is a large discrepancy in the cost of living.

Conclusion

27. It follows that the Commission is entitled to succeed, without its being necessary to examine the second and third submissions, and that the contested regulation should be declared void in so far as it omitted to fix a specific weighting for Munich. The supplementary claim for a declaration that the provisions of the regulation continue to have effect until the adoption of a new regulation is in my view superfluous. If the Court merely annuls the regulation in so far as it omits a particular provision, then logically the provisions enacted by the regulation will in any case continue to have effect. Finally, it may be noted that, since neither of the parties has asked for costs, the appropriate order is that they should bear their own.

28. Accordingly I am of the opinion that the Court should:

(1) declare that Council Regulation No 2258/90 of 27 July 1990 correcting the remuneration and pensions of officials and other servants of the European Communities and adjusting the weightings applied thereto is void in so far as it omits to establish a specific weighting applicable to the salaries of staff employed in Munich;

(2) order the parties to bear their own costs.