

JUDGMENT OF THE COURT
1 June 1994 *

In Case C-136/92 P,

Commission of the European Communities, represented by Gianluigi Valsesia, Principal Legal Adviser, and Lucio Gussetti, of the Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremliis, of the Legal Service, Wagner Centre, Kirchberg,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Second Chamber) of 26 February 1992 in Joined Cases T-17/89, T-21/89 and T-25/89 between Augusto Brazzelli Lualdi and Others, Cleto Bertolo and Others and Helga Alex and Others, and the Commission of the European Communities, seeking to have that judgment set aside,

the other parties to the proceedings being:

Augusto Brazzelli Lualdi and others, officials and members of the staff of the Commission of the European Communities, represented by Giuseppe Marchesini, Avvocato with a right of audience before the Corte di Cassazione of Italy, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 4 Avenue Marie-Thérèse, who contend principally that the appeal is inadmissible and alternatively that it should be dismissed as unfounded and that the judgment of the Court of First Instance should be revised and their claims at first instance allowed in full.

* Language of the case: Italian.

THE COURT,

composed of: O. Due, President, G. F. Mancini, J. C. Moitinho de Almeida, M. Díez de Velasco, D. A. O. Edward (Presidents of Chambers), C. N. Kakouris, R. Joliet (Rapporteur), F. A. Schockweiler, G. C. Rodríguez Iglesias, F. Grévisse, M. Zuleeg, P. J. G. Kapteyn and J. L. Murray, Judges,

Advocate General: C. O. Lenz,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 5 October 1993,

gives the following

Judgment

- 1 By application lodged at the Registry of the Court of Justice on 28 April 1992, the Commission of the European Communities brought an appeal under Article 49 of the Statute of the Court of Justice of the EEC and the corresponding provisions of the Court of Justice of the ECSC and EAEC, against the judgment of the Court of First Instance of 26 February 1992 in Joined Cases T-17/89, T-21/89 and T-25/89 *Brazzelli and Others v Commission* [1992] ECR II-293 in so far as it was ordered to pay to Brazzelli Lualdi and 618 other officials or members of the staff of the European Communities ('the officials') compensatory interest for the damage suffered by them when their arrears of remuneration were calculated, as a result of the loss of purchasing power of those arrears between 1 January 1984 and November 1988.

- 2 In their response lodged on 31 July 1992 the officials sought principally to have the appeal dismissed as inadmissible, and in the alternative, on the basis of Article 116 of the Rules of Procedure of the Court of Justice, the same forms of order as those sought at first instance, which included not only the compensatory interest granted to them by the Court of First Instance but also default interest.

- 3 It appears from the judgment of the Court of First Instance (paragraph 1) that Mr Brazzelli Lualdi and the other applicants are all officials or members of the staff of the European Communities, assigned to the Joint Research Centre at Ispra (Varese, Italy). Their action before the Court of First Instance related to the adjustment of their salaries to the cost of living at the place of their employment.

- 4 Under the first paragraph of Article 63 of the Staff Regulations of officials of the European Communities an official's remuneration must be expressed in Belgian francs and paid in the currency of the country in which the official performs his duties.

- 5 In order that officials, irrespective of their place of employment, should enjoy equivalent purchasing power for the remuneration which they receive, the first paragraph of Article 64 of the Staff Regulations provides: 'An official's remuneration expressed in Belgian francs shall ... be weighted at a rate above, below or equal to 100%, depending on living conditions in the various places of employment.' The second paragraph of Article 64 states that the weightings are to be adopted by the Council, acting on a proposal from the Commission.

- 6 Article 65 of the Staff Regulations adds:

'1. The Council shall each year review the remunerations of the officials and other servants 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 ...

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.'

7 In application of those provisions the Council had adopted in 1976 a first method of adjusting the remuneration of officials and other servants of the Communities. By 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 (OJ 1981 L 386, p. 6) the Council adopted a new method. The second paragraph of point II, 1.1 of the annex to that decision provides that every five years the Statistical Office of the European Communities is to 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. The third paragraph adds that a check is to 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.

8 In order to check whether the weightings correctly reflected the change in the cost of living which had occurred between 1 January 1976 and 31 December 1980, the Statistical Office carried out enquiries in 1980 and 1981. Since there were no figures available for rents paid by European officials in the capitals, the rents payable by officials were assessed on the basis of the rents paid on 1 January 1981 by the general population in each Member State considered as a whole. On the basis of those enquiries the Commission prepared a proposal for a regulation amending the weightings which it submitted to the Council on 17 July 1984. In order to reduce the risks of error resulting from the calculation of the cost of accommodation the

Commission proposed that weightings should be altered upwards or downwards only where the difference exceeded 2.5%. Its proposal provided in addition that the new weightings should take effect on 1 January 1981.

- 9 When that proposal was debated the Council stated that it appeared contrary to Article 64 of the Staff Regulations to adjust only weightings in respect of which the difference exceeded 2.5%. It refused to adopt the proposal.
- 10 The Commission thereupon instructed the Statistical Office to make a survey of the rents which had been paid on 1 January 1981 by European officials in the various capitals. When the survey had been carried out the Commission submitted a new proposal to the Council on 23 December 1985. The second proposal retained 1 January 1981 as the date when the weightings should take effect.
- 11 On 26 November 1986 the Council adopted Regulation (EEC, Euratom, ECSC) No 3619/86 correcting the weightings applicable in Denmark, Germany, Greece, France, Ireland, Italy, the Netherlands and the United Kingdom to the remuneration and pensions of officials and other servants of the European Communities (OJ 1986 L 336, p. 1).
- 12 That regulation departed in two respects from the Commission's second proposal. In the first place, it rejected the results of the survey on rents. Secondly, it fixed the date the new weightings should take effect not as 1 January 1981 but as 1 July 1986.
- 13 By application lodged at the Registry of the Court on 15 January 1987 the Commission thereupon sought the annulment of that regulation on the basis of the first paragraph of Article 173 of the EEC Treaty.

- 14 Parallel with that action, Augusto Brazzelli Lualdi, Cleto Bertolo, Helga Alex and other officials or staff employed at Ispra brought actions on 23 December 1986, 1 October 1987 and 10 February 1988 respectively claiming in the first place the annulment of some of their salary slips for 1986 and 1987 in so far as they applied Regulation No 3619/86 and secondly the award of default interest and compensation for the pecuniary loss which they considered they had suffered by reason of the delay which, in their opinion, had occurred in the adjustment of the weightings applicable to their remuneration.
- 15 The proceedings relating to the three actions were stayed until the Court had given judgment in the action brought by the Commission.
- 16 That judgment was delivered on 28 June 1988 (Case 7/87 *Commission v Council* [1988] ECR 3401). It declared Regulation No 3619/86 void for infringement of Article 64 of the Staff Regulations.
- 17 The Council thereupon adopted Regulation (ECSC, EEC, Euratom) No 3294/88 of 24 October 1988 correcting, with effect from 1 January 1981, the weightings applicable in Denmark, Germany, Greece, France, Ireland, Italy, the Netherlands and the United Kingdom to the remuneration and pensions of officials and other servants of the European Communities (OJ 1988 L 293, p. 1).
- 18 Since that regulation met the officials' claims in relation to the adjustment of their salaries and the Commission had proceeded in November 1988 to correct their salaries, the officials did not pursue their claim for annulment of their salary slips. However, they persisted in their claims in relation in the first place to the payment of default interest for the period extending from the time the arrears of remuneration ought to have been paid to that of their actual payment and secondly for compensation for the damage arising from the loss of purchasing power which affected those arrears.

- 19 The written procedure took place entirely before the Court of Justice, which made an order on 15 November 1989 referring the cases to the Court of First Instance.
- 20 On 2 April 1990 the Court of First Instance ordered the cases to be joined for the purposes of the oral procedure and judgment.
- 21 In its judgment the Court of First Instance points out first of all that in support of their claim for default interest, the applicants put forward a single plea in law, based on the Commission's delay in paying to them the arrears of remuneration due to them.
- 22 In that respect the Court found, at paragraphs 23 to 26 of the judgment, first, that before 24 October 1988, the date on which the Council adopted Regulation No 3294/88, none of the Community institutions knew whether the weightings in force would be adjusted and, if they were, what new weightings would apply. The Court inferred that, before that date, the applicants did not have any vested right to receive payment of arrears of remuneration and, similarly, that the Community institutions were under no obligation to pay such arrears, nor was it possible for them to do so. In those circumstances, up to that date, there could not be any question of delay in the payment of a debt due. The Court found, secondly, that after the Council adopted Regulation No 3294/88, the Commission proceeded in November 1988 to calculate and pay the arrears of remuneration due under the regulation. It concluded that the Commission diligently discharged its obligation to make payment and that in that respect, no delay could be imputed to it.
- 23 It followed that the applicants' claim for the award of default interest had to be dismissed.

- 24 The Court of First Instance then stated that in support of their claim for compensation for damage resulting from the loss of purchasing power the applicants put forward two pleas in law based, first, on infringement of Article 64 and 65 of the Staff Regulations and, secondly, on the incorrect implementation of the aforementioned judgment in *Commission v Council*.
- 25 In that respect the Court considered, at paragraphs 38 to 40 of the judgment, that the regulation adjusting the weightings should have been adopted by 1986 at the latest for, at that time, the Council possessed all the information needed. However, it considered that even if the Council had adopted such a regulation by 1986, the procedure which preceded the adoption of the regulation, that is to say the enquiries and the proposals submitted by the Commission to the Council, had already taken too long. In the Court's view, the legislation could, in fact, — and therefore should — have been adopted as early as 1 January 1984. The Court considered that there was wrongful delay and that the applicants had suffered damage consisting in the loss of purchasing power of the arrears of remuneration which should have been settled during the first quarter of 1984 and which were not settled until several years later. It pointed out in that respect that, by producing relevant statistics, which were not contested by the Commission, the applicants had proved to the requisite legal standard the deterioration in purchasing power.
- 26 In those circumstances the Court ordered the Commission to pay to the officials compensatory interest for the damage suffered by them as a result of the loss of purchasing power of those arrears between 1 January 1984 and November 1988. It added that the amount of such interest should be calculated on the basis of the official statistics of the Community concerning changes in purchasing power in the various Member States and, if possible, the amount should be determined by agreement between the parties.
- 27 In support of its claim to have that judgment set aside the Commission puts forward three pleas in law, the first being that the Court of First Instance misinterpreted Community law in relation to default interest and compensatory interest, the second that there was insufficient and contradictory reasoning in paragraphs 23 to 26 and 38 to 40 of the judgment and the third that Community law relating to proof of damage was misinterpreted and misapplied.

- 28 In their response the officials contend, principally, that the pleas in law in the appeal are inadmissible. Alternatively they claim that the judgment of the Court of First Instance should be set aside on two grounds, namely breach of the general principles governing compensation for damage and contradiction between the grounds and the operative part of the judgment as well as infringement of the prohibition of discrimination.
- 29 It needs to be emphasized at this stage that in an appeal the Court does not have to consider the whole case which came before the Court of First Instance but only the parts of the judgment delivered by the Court of First Instance which are challenged in the appeal. Furthermore it has to consider those parts solely in the light of the pleas in law put forward in the appeal for the purpose of having the judgment set aside.

The Commission's appeal

The Commission's first plea: misinterpretation of Community law in relation to default interest and compensatory interest

- 30 In its first plea in law the Commission criticizes the Court of First Instance for having drawn a distinction, as regards interest due in the event of belated payment of the officials' remuneration, between default interest and compensatory interest whereas no such distinction is to be found in the case-law of the Court of Justice.
- 31 In the Commission's view, for the compensation of damage caused by the belated payment of sums due, the Court has laid down a system of interest peculiar to Community law. Such interest is payable only if two conditions are met: first of all

the debtor should be at fault; secondly the debtor should have been warned by the creditor. The Commission considers, furthermore, that such interest takes account by implication of monetary depreciation.

32 In the officials' view that first plea in law is inadmissible on three grounds.

33 First of all, as regards default interest, the Commission was not unsuccessful in its submissions, as the second paragraph of Article 49 of the EEC Statute of the Court of Justice requires as a condition of admissibility of an appeal, for the claim for such interest was dismissed by the Court of First Instance. Next, that plea in law, which does not relate to a claim for the revision of the paragraph in the judgment relating to default interest, contains no form of order within the meaning of Article 113 of the Rules of Procedure of the Court. Finally, the plea in law refers not to any breach of a Community rule or general principle of law but to incompatibility with the case-law of the Court. Apart from the fact that the case-law in relation to interest is not settled, such incompatibility is no ground for an appeal.

34 The Commission's first plea in law must be declared admissible. Since the Commission challenges the distinction between default interest and compensatory interest which the Court of First Instance drew and considers that according to its interpretation of the case-law only interest *sui generis* is due in the event of delay in the payment of remuneration, it in fact challenges, by implication but clearly, the operative part of the judgment of the Court of First Instance which ordered it to pay compensatory interest.

35 However, this first plea in law is unfounded. The Court of Justice itself has had to distinguish default interest from compensatory interest, in particular in cases relating to the belated settlement of officials' remuneration (see the judgments in Case 158/79 *Roumengous Carpentier v Commission* [1985] ECR 39, paras 8 to 14; in Joined Cases 532/79, 534/79, 567/79, 600/79, 618/79, 660/79 and 543/79 *Amez*

and Others v Commission [1985] ECR 55, paras 11 to 17; in Case 737/79 *Battaglia v Commission* [1985] ECR 71, paras 6 to 13; in Case 174/83 *Amman and Others v Council* [1985] ECR 2133, para. 13; in Case 175/83 *Culmsee and Others v CSE* [1985] ECR 2149, para. 13 and Case 176/83 *Allo and Others v Commission* [1985] ECR 2155, para. 19); it held *inter alia* that because of matters of procedure peculiar to those cases the claims for compensatory interest were inadmissible while those relating to default interest were admissible but unfounded. In those circumstances it is not possible to hold that the distinction which the Court of First Instance drew has no basis in the case-law of the Court.

- 36 Accordingly the Commission's first plea in law must be rejected.

The Commission's second plea in law: insufficient and contradictory reasoning

- 37 In the second plea in law the Commission claims that the reasoning in the judgment is insufficient and contradictory. It subdivides the plea into three parts.

The first part

- 38 The Commission considers first of all that the reasoning in the judgment concerning the distinction between default interest and compensatory interest is insufficient and contradictory. It is insufficient because the Court of First Instance has not explained why it departed from the definition of interest propounded in the case-law of the Court of Justice. It is contradictory inasmuch as the Court of First Instance found on the one hand, at paragraphs 23 and 26 of the judgment, that before Regulation No 3294/88 was adopted the Community institutions were under no obligation to pay the arrears of remuneration and that after the regulation was adopted the Commission paid them diligently, but on the other hand con-

sidered at paragraph 38 that there was wrongful delay because the legal basis for the 5-yearly adjustment should have been established by 1986 when the Council had all the information needed to adopt a regulation in accordance with the requirements of the Staff Regulations.

39 The officials' reply that that first part is inadmissible because the complaint concerns paragraphs 23 to 26 of the judgment, that is to say the grounds of the judgment which relate to default interest, and that in those paragraphs the Court of First Instance found for the Commission.

40 The first part of the second plea in law is admissible. As was stated at paragraph 34 above, the Commission criticizes the distinction which the Court of First Instance drew between default interest and compensatory interest and concluded that only interest *sui generis* is due. The Commission's objections therefore challenge the grounds in the Court's judgment on which it was ordered to pay compensatory interest. The Commission has an interest in putting forward such objections.

41 Nevertheless, the first part is unfounded.

42 First of all, in stating at paragraph 35 of the judgment that the Court had consistently held that, in order for the applicants to be able to claim compensatory interest, they had to demonstrate fault on the part of the institution, the existence of certain and quantifiable damage and a causal link between the fault and the alleged damage, the Court of First Instance did not depart from the case-law of the Court. In the judgment in Case 111/86 *Delauche v Commission* [1987] ECR 5345, para. 30, the Court of Justice held that in a claim for damages brought by an official the Community could be held liable for damages only if a number of conditions were satisfied as regards the illegality of the allegedly wrongful act committed by the institutions, the actual harm suffered and the existence of a causal link between the act and the damage alleged to have been suffered. The reasoning of the Court of First Instance cannot, therefore, be considered to be insufficient.

- 43 Furthermore, the reasoning is not contradictory. The Court of First Instance clearly distinguished between the delay in adopting the legislation adjusting the remuneration of officials which it considered to be excessively long and unjustified and therefore constituted a fault (paragraph 39 of its judgment) and the time taken for payment of the remuneration after the legislation was adopted, which it regarded as normal (paragraph 26 of the judgment). In that respect the contested judgment cannot be regarded as vitiated by lack of reasoning.
- 44 In those circumstances the first part of the second plea in law must be rejected.

The second part

- 45 In the second part the Commission objects that the Court of First Instance held it responsible for the whole delay in paying the arrears of remuneration without taking account of the fact that in 1986 it had submitted to the Council the results of the statistical checks needed for the 5-yearly adjustment and that the delay subsequent to 1986 was due to the pursuit of its action before the Court against the regulation adopted by the Council in respect of its proposal. It considers that in those circumstances the arrears of remuneration were determinable from 1986 and that accordingly only default interest is due.
- 46 The officials consider that that objection is inadmissible. They contend that the criticism which the Court of First Instance made related to the length of the delay for which the Commission was responsible in preparing the proposal for a regulation. That is an assessment of fact against which there is no appeal.
- 47 In that respect it must be borne in mind that according to Article 168a of the EEC Treaty and the corresponding provisions of the ECSC and EAEC treaties there is a right of appeal on points of law only. That restriction is referred to in the first

paragraph of Article 51 of the EEC Statute and the corresponding provisions of the ECSC and EAEC Statutes of the Court of Justice, which specify the grounds on which an appeal lies, namely lack of competence of the Court of First Instance, a breach of procedure before it which adversely affects the interests of the appellant and the infringement of Community law by the Court of First Instance.

- 48 It must also be borne in mind that the appeal may rely only on grounds relating to the infringement of rules of law, to the exclusion of any appraisal of the facts, and is therefore admissible only in so far as it is claimed that the decision of the Court of First Instance is incompatible with the rules of law the application of which it was called upon to ensure (see the judgments in Case C-283/90 P *Vidranyi v Commission* [1991] ECR I-4339, paras 11 to 13; in Case C-346/90 P *F v Commission* [1992] ECR I-2691, paras 6 and 7 and in Case C-53/92 P *Hilti v Commission* [1994] ECR I-667, para. 10).
- 49 The Court of First Instance thus has exclusive jurisdiction to find the facts except where the substantive inaccuracy of its findings is apparent from the documents submitted to it. In the present case the findings of the Court of First Instance relating to the events which preceded the adoption of Regulation No 3294/88 (paragraph 11 of the judgment), which are not challenged, can no longer be questioned. The Court of First Instance has also exclusive jurisdiction to assess those facts. In the present case the same is true of its assessment that the transmission on 23 December 1985 by the Commission to the Council of the second proposal relating to weightings could have taken place more speedily so that the legislation could have been adopted as early as 1 January 1984 (paragraph 39 of the judgment). On the other hand, when the Court of First Instance has found or assessed facts, the Court of Justice has jurisdiction to exercise the review required of it by Article 168a of the EEC Treaty provided that the Court of First Instance has defined their legal nature and determined the legal consequences. In the present case that applies to the assessment by the Court of First Instance that the slowness of the preparatory procedure constituted a fault (paragraph 39 of the judgment).
- 50 Within those confines the second part must be declared admissible.

- 51 It is, however, unfounded. The Court of First Instance considered that the Commission's fault lay in not having submitted to the Council until 1986 a proposal which could have been adopted already in 1984 (paragraph 39). In classifying the Commission's conduct thus the Court of First Instance committed no mistake of law.
- 52 It must nevertheless be observed that the Court of First Instance did not specify the causal link between that fault and the damage suffered by the officials between 1986 and 1988. The Commission did not, however, plead that ground in its appeal. The Court cannot therefore uphold it. It is therefore necessary to consider the Commission's plea in law from the sole aspect with which it deals, namely that, assuming a fault such as that found by the Court of First Instance, only default interest is due.
- 53 In that respect it follows from the judgments in Case 174/83 *Ammann v Council* [1986] ECR 2647, paras 19 and 20, in Case 175/83 *Culmsee v ESC* [1986] ECR 2667, paras 19 and 20, in Case 176/83 *Allo v Commission* [1986] ECR 2687, paras 19 and 20, in Case 233/83 *Agostini v Commission* [1986] ECR 2709, paras 19 and 20, in Case 247/83 *Ambrosetti v Commission* [1986] ECR 2729, paras 12 and 20 and in Case 264/83 *Delhez v Commission* [1986] ECR 2749, paras 20 and 21 that an obligation to pay default interest can arise only where the amount of the principal sum owed is certain or can at least be ascertained on the basis of established objective factors. The same judgments stated that the powers conferred on the Council by Article 65 of the Staff Regulations for adjusting the remuneration and pensions of officials and other servants and for fixing the weightings applicable to such remuneration and pensions involve the exercise of a discretion. No certainty exists as to the amount by which the remuneration and pensions will be adjusted or the manner in which the weightings will be fixed until the Council has exercised those powers and adopted the regulation.
- 54 In the present case, as the Court of First Instance rightly pointed out (paragraph 23 of its judgment), before Regulation No 3294/88 was adopted none of the Community institutions knew whether the weightings applicable would be subject to an adjustment and, in the event that they would, what new weightings would

apply. Before the date of the adoption of the regulation it was thus neither certain nor ascertainable what was owing to the officials and therefore default interest could not begin to run.

- 55 The second part of the Commission's second plea in law must therefore be rejected.

The third part

- 56 In the third part the Commission complains that the Court of First Instance ordered it to pay compensatory interest for a delay which, according to the Court itself, was the responsibility of the Council. In the Commission's view, the officials ought to have claimed compensation for their damage from the Council under Article 215 of the EEC Treaty.

- 57 In that respect it suffices to observe that this complaint was not made by the Commission before the Court of First Instance and is therefore inadmissible.

- 58 Pursuant to Article 48(2) of the Rules of Procedure of the Court of First Instance, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or fact which come to light in the course of the procedure.

- 59 To allow a party to put forward for the first time before the Court of Justice a plea in law which it has not raised before the Court of First Instance would be to allow it to bring before the Court, whose jurisdiction in appeals is limited, a case of

wider ambit than that which came before the Court of First Instance. In an appeal the Court's jurisdiction is thus confined to review of the findings of law on the pleas argued before the Court of First Instance.

- 60 In those circumstances the third part of the Commission's second plea in law must be rejected as inadmissible.

The Commission's third plea in law: misinterpretation and misapplication of Community law relating to proof of damage

- 61 In its third plea in law the Commission claims that the Court of First Instance, at paragraph 40 of its judgment, misinterpreted and misapplied Community law relating to proof of damage.

- 62 At paragraph 40 the Court of First Instance regarded it as established that, by virtue of the wrongful delay, the officials had suffered damage consisting in the loss of purchasing power of the arrears of remuneration which should have been settled during the first quarter of 1984 but were not until several years later. It added that it was not a question of seeking evidence of individual losses, but of verifying whether facts existed which could be objectively proved on the basis of precise data which had been made public. It considered that by producing relevant statistics, which had not been contested by the Commission, the officials had thus proved to the requisite legal standard the deterioration in purchasing power which affected their arrears of remuneration during the period in question.

- 63 In the Commission's view that statement is contrary to the general principles of law on compensation for damage. It is for those who wish to obtain compensation to establish that they have suffered individual damage. Such individual damage is

not established by merely producing statistics. Furthermore reassessment of the sums due could come only from a Community legislative measure, which does not exist in the present case.

64 In the officials' view the third plea in law concerns the assessment of the evidence, which is the sole prerogative of the Court of First Instance and cannot therefore be challenged in an appeal.

65 The third plea in law is in fact inadmissible. In that respect it should be pointed out that the fact that the officials received in November 1988 arrears of remuneration which the Court of First Instance held, as it alone has power to hold, ought to have been paid to them in 1984, indeed constitutes damage. The Court of First Instance pointed out at paragraph 30 of its judgment that the arrears had thus lost a part of their real value.

66 The Court of Justice has no more jurisdiction, on principle, to examine the evidence which the Court of First Instance accepted in support of those facts than to find the facts themselves. Since the evidence was duly obtained and the rules and general principles of law relating to the burden of proof were observed, as also were the rules of procedure in relation to the taking of evidence, it is for the Court of First Instance alone to assess the value which should be attached to the items of evidence produced to it. The pleas in law seeking to criticize that assessment cannot be accepted by the Court. For the same reasons, once the Court of First Instance has found the existence of damage, it alone has jurisdiction to assess, within the confines of the claim, the most appropriate compensation.

67 The Commission's third plea in law cannot therefore be upheld.

68 It follows from all those considerations that the Commission's appeal must be dismissed.

The officials' cross-appeal

69 The Commission observes that the cross-appeal made by the officials in their response is inadmissible. That objection should be considered first.

The admissibility of the cross-appeal

70 The Commission alleges that the officials' appeal does not observe the requirements of Article 49 of the EEC Statute of the Court of Justice because it was brought more than two months after the contested judgment was notified.

71 That argument cannot be accepted. Article 116(1) of the Rules of Procedure of the Court of Justice provides:

'A response may seek:

— to dismiss, in whole or in part, the appeal or to set aside, in whole or in part, the decision of the Court of First Instance;

— the same form of order, in whole or in part, as that sought at first instance and shall not seek a different form of order.’

72 In the present case, the form of order which the officials seek in their response is that the Commission pay the default interest which they had claimed at first instance but which the Court of First Instance denied them. Such a claim meets the requirements of Article 116. It follows that the only time-limit to which a cross-appeal is subject is that provided for in Article 115(1) of the Rules of Procedure of the Court of Justice for lodging a response, namely two months after service of the notice of appeal.

73 Since that time-limit was observed in the present case the cross-appeal is admissible. It is therefore necessary to consider the two pleas in law which the officials put forward in its support criticizing the judgment for not granting that default interest to them and for not taking into account the year 1982 in assessing the damage.

The officials' first plea in law: breach of the general principles on compensation for damage

74 The officials emphasize that it took more than eight years for them to obtain actual settlement of the arrears due to them. They allege that without default interest they have no means of redress if the institutions delay the adoption of a legislative measure beyond a reasonable period. Thus the institutions could be tempted to postpone *sine die* the adoption of measures in the matter in spite of the principle contained in Article 65(2) of the Staff Regulations which requires prompt action. Moreover, the Commission paid such interest to several hundred officials who thereupon withdrew their actions.

- 75 That argument cannot be accepted. As has already been stated in this judgment (paragraph 53) default interest, as the Court of Justice has held, can begin to run only from the time the debt due to the officials is certain and ascertainable, that is to say in the present case from the adoption of Regulation No 3294/88.
- 76 Moreover, the fact that the Commission may, without any legal obligation, have paid such default interest to certain officials is not capable of altering that view.
- 77 It follows that the first plea in law of the officials' cross-appeal must be rejected.

The officials' second plea in law: contradiction between the grounds and the operative part of the judgment and breach of the prohibition of discrimination

- 78 The officials allege in addition that although the Court of First Instance recognized, at paragraph 39 of the judgment, that the Commission was in possession of the relevant documents from the Statistical Office as early as January 1982, it limited in the operative part of its judgment compensation for the loss of purchasing power to the period beginning in 1984 and refused any compensation for the previous three years. There was thus a contradiction between the grounds and the operative part of the judgment. Furthermore, the refusal to grant compensation for a loss of purchasing power which was suffered for such a long period infringes the prohibition of discrimination between officials of the Community paid in different currencies.
- 79 That argument cannot be accepted. The plea in law thus put forward is confined to challenging the assessment by the Court of First Instance in relation to the period

when the contested regulation could and should have been adopted. As has already been held (paragraph 49), such an assessment relates only to the facts and cannot therefore be the subject of an appeal.

80 The officials also claim that the Court did not take into account the fact that the compensatory interest intended to compensate the loss of purchasing power between 1984 and 1988 would itself also depreciate between 1988 and the date on which it would be paid in compliance with the Court's judgment.

81 That argument cannot be accepted. As has already been found at paragraph 66, it is for the Court of First Instance alone to assess, within the confines of the claim, the method and extent of compensation for the damage.

82 The second plea in law in the cross-appeal must therefore also be rejected.

83 It follows from all the above considerations that the officials' cross-appeal must be rejected.

Costs

84 Under Article 122 of the Rules of Procedure, in proceedings between the Communities and their servants, Article 70 applies only to appeals brought by institutions.

Under Article 70, without prejudice to the second subparagraph of Article 69(3), the institutions are to bear their own costs.

85 The Commission must therefore be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Dismisses the appeals.

2. Orders the Commission to pay the costs.

Due

Mancini

Moitinho de Almeida

Diez de Velasco

Edward

Kakouris

Joliet

Schockweiler

Rodríguez Iglesias

Grévisse

Zuleeg

Kapteyn

Murray

Delivered in open court in Luxembourg on 1 June 1994.

R. Grass

O. Due

Registrar

President