Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 12 September 2013[1]

Case C-63/12

European Commission

v

Council of the European Union

(Action for annulment — Staff Regulations — Articles 64 and 65 — Articles 1, 3 and 10 of Annex XI — Annual adjustment of remuneration and pensions and the correction coefficients — Proposal for a regulation on adjustment according to the 'normal' method — Council decision not to adopt the proposal — Concept of a 'challengeable act' — Conditions for applying the exception clause)

Case C-66/12

Council of the European Union

v

European Commission

(Action for annulment — Action for failure to act — Staff Regulations — Articles 64 and 65 — Articles 1, 3 and 10 of Annex XI — Annual adjustment of remuneration and pensions and the correction coefficients — Proposal for a regulation on adjustment according to the 'normal' method — Action brought by the Council — Decision to bring proceedings before the Court — Majority rule applicable)

and

Case C-196/12

European Commission

v

Council of the European Union

1 — Original language: French.

(Action for failure to act — Staff Regulations — Articles 64 and 65 — Articles 1, 3 and 10 of Annex XI — Annual adjustment of remuneration and pensions and the correction coefficients — Proposal for a regulation on adjustment according to the 'normal' method — Council decision not to adopt the proposal — Failure to act)

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I – Introduction

1. The issue of the annual adjustment of the remuneration of officials and other servants of the European Union, which forms the common subject-matter of the proceedings in Cases C-63/12, C-66/12 and C-196/12, was examined recently by the Court and gave rise to the judgment of 24 November 2010 in Case C-40/10 Commission v Council,[2] whereby the Court partially annulled Council Regulation (EU, Euratom) No 1296/2009 of 23 December 2009,[3] which had determined a remuneration adjustment percentage lower than that proposed by the European Commission.

2. However, the context in which the questions raised in these three actions arise is different, requiring a more extended analysis than in the earlier case. In addition, new and delicate questions arise concerning the admissibility of the actions.

3. The Staff Regulations of officials and other servants of the European Union are laid down in Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down the staff regulations of officials and the conditions of employment of other servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission,[4] as amended by Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004,[5] and by Regulation (EU, Euratom) No 1080/2010 of the European Parliament and of the Council of 24 November 2010.[6]

4. Articles 1 and 3 of Annex XI to the Staff Regulations laid down the conditions under which, until 31 December 2012, the remuneration of those officials and other servants was automatically reviewed each year by the Council of the European Union, acting on a proposal from the Commission.

5. Article 10 of Annex XI to the Staff Regulations, however, introduced an 'exception clause' which allowed a derogation from that method of adjustment '[i]f there is a serious and sudden deterioration in the economic and social situation within the Union'. In such an event, it is for the Commission to submit 'appropriate proposals' to the Council, which will act in accordance with the ordinary legislative procedure.

2 — Case C-40/10 [2010] ECR I-12043.

3 — Regulation adjusting with effect from 1 July 2009 the remuneration and pensions of officials and other servants of the European Union and the correction coefficients applied thereto (OJ 2009 L 348, p. 10).

4 — OJ, English Special Edition 1968(I), p. 30.

5 — OJ 2004 L 124, p. 1.

6 — OJ 2010 L 311, p. 1 ('the Staff Regulations').

6. On 17 December 2010 the Council, noting that 'the latest financial and economic crises that have occurred within the [European Union] and that result in substantial fiscal adjustments and increased job uncertainty in several Member States create a serious and sudden deterioration of the economic and social situation within the [European Union]', requested the Commission, in conformity with Article 241 TFEU, to submit to it, on the basis of Article 10 of Annex XI to the Staff Regulations and in the light of objective data supplied by the Commission, appropriate proposals in time for the European Parliament and the Council to examine and adopt them before the end of 2011. [7]

7. The Commission having adopted on 13 July 2011 a report on that exception clause [8] concluding that there had been no serious and sudden deterioration in the economic and social situation within the Union, the Council challenged that conclusion and decided on 28 October 2011, by an 'overwhelming' majority of delegations, to make a further request to the Commission on the basis of Article 241 TFEU. Stating that it was 'convinced that the financial and economic crisis currently taking place within the [European Union] and resulting in substantial fiscal adjustments in most Member States constitutes a serious and sudden deterioration of the economic and social situation within the [European Union]', the Council, '[i]n this particular and exceptional context, and in the light of objective data reflecting the economic and social situation in autumn 2011', requested the Commission to implement Article 10 of Annex XI to the Staff Regulations and to submit an appropriate remuneration adjustment proposal. [9]

8. The Commission then submitted, on 24 November 2011, a communication providing further information, [10] in which it maintained that the conditions for applying the clause were not met, and submitted to the Council the same day a proposed adjustment in respect of the 2011 annual review, [11] with a view, first, to increasing remuneration and pensions by 1.7%, that rate resulting from the purely mechanical application of the calculation method set out in the Staff Regulations, and, secondly, to adjusting the correction coefficients [or 'weightings'].

9. Taking the view that the Commission's refusal to submit a proposal under Article 10 of Annex XI to the Staff Regulations was based on inadequate and erroneous grounds, the Council, in a 'decision' of 19 December 2011, [12] decided not to adopt the proposal for a regulation.

10. On 3 February 2012 the Commission brought an action, for annulment of that act, registered as Case C-63/12.

11. At the same time as bringing that action for annulment, the Commission, which on 25 January 2012 had sent the Council a letter of formal notice, in the event that the latter's attitude might be viewed as being inaction constituting failure to act within the meaning of Article 265 TFEU, on 26 April 2012 brought an action for failure to act registered as Case C-196/12.

12. For its part, the Council brought an action on 3 February 2012 for annulment and, in the alternative, for failure to act, against both the communication and the proposal for a regulation, that action being registered as Case C-66/12.

7 — Council Document No 17946/10 ADD 1, 17 December 2010.

8 — Report from the Commission to the Council on the exception clause (Article 10 of Annex XI to the Staff Regulations) (COM(2011) 440 final; 'the report on the exception clause').

9 — Council document 16281/11 of 31 October 2011 (decision adopted by written procedure concluded on 4 November 2011).

10 — Communication from the Commission to the Council providing supplementary information to the Commission Report on the exception clause of 13 July 2011 (COM(2011) 829 final; 'the communication').

11 — Proposal for a Council Regulation adjusting with the effect from 1 July 2011 the remuneration and pension of the officials and other servants of the European Union and the correction coefficients applied thereto (COM(2011) 820 final; 'the proposed regulation').

12 — Council Decision 2011/866/EU concerning the Commission's proposal for a Council Regulation adjusting with the effect from 1 July 2011 the remuneration and pension of the officials and other servants of the European Union and the correction coefficients applied thereto (OJ 2011 L 341, p. 54; 'the contested decision').

13. The Commission, supported by the European Parliament, considers that the Council, in the context of the procedure for the adjustment of remuneration laid down in the Staff Regulations, was required to follow the Commission's proposal for a regulation. According to the Commission and the European Parliament, the Council was not permitted to depart from the automatic application of the calculation method provided for in the Staff Regulations, in order to take the economic and social crisis into account, unless it was acting on a proposal to that effect from the Commission.

14. The Commission thus seeks, primarily, annulment of the contested decision, whilst seeking in the alternative, by means of an action for failure to act, a ruling from the Court that by not adopting the proposal for a regulation the Council failed to fulfil its obligations under the Staff Regulations.

15. The Council, supported by a number of Member States,[13] challenges the Commission's application and its supporting arguments. According to the Council and those Member States, the Staff Regulations confer on the Council the power to refuse to adjust remuneration where it considers that the conditions for applying the exception clause are met.

16. The Council, with the support of the same Member States, together with three others,[14] seeks annulment of the communication in so far as the Commission therein refused definitively to submit appropriate proposals on the basis of Article 10 of Annex XI to the Staff Regulations, and of the subsequent proposal for a regulation. In the alternative, it seeks a ruling from the Court establishing, under Article 265 TFEU, an infringement of the Treaties by reason of the fact that the Commission failed to act.

17. Although the three cases have not formally been joined, the overlapping of these actions and the common nature of the pleas raised with regard to the substance justify the delivery of a single Opinion.

18. In this Opinion I shall contend that the contested decision constitutes a challengeable act, which will lead me to suggest to the Court that it should declare, first, that the action for annulment brought by the Commission is admissible and, secondly and as a consequence, that the action for failure to act brought by the Commission at the same time is inadmissible.

19. I shall also argue that the existence of a serious and sudden deterioration in the economic and social situation within the Union constitutes a condition for applying the procedure laid down in Article 10 of Annex XI to the Staff Regulations, so that the Council is only entitled to reject the proposal for a regulation according to the 'normal' method if, and only if, that condition is met.

20. I shall add that, in the event of failure by the Commission and the Council to agree on the existence of such deterioration, it is for the Court to ensure that the inter-institutional balance is maintained by exercising its power of review over the Commission's assessment, limited to consideration of whether or not there has been a manifest error of assessment.

21. I shall also contend that the Commission did not commit a manifest error of assessment in taking the view, in the light of objective data, that the economic crisis confronting the Member States in 2010 did not constitute a circumstance allowing the exceptional procedure laid down in Article 10 of Annex XI to the Staff Regulations to be initiated.

22. I shall conclude from this that the Commission's action for annulment should be upheld and that the contested decision should be annulled.

13 — The Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Kingdom of Spain, the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland.

14 — Ireland, the French Republic and the Republic of Latvia.

23. In so far as the fact that the Commission's action for annulment is well founded consequently entails that the Council's action is not well founded, I shall suggest to the Court, in the interests of the sound administration of justice and procedural economy, not to give a ruling on the admissibility of the Council's action and to dismiss it on its substance.

24. I shall conclude, in the alternative, that the Council's action is inadmissible, arguing that the decision to bring proceedings before the Court should have been adopted by the qualified majority laid down in Article 16(3) TEU and that that irregularity affecting the decision, on which the Commission is entitled to rely, means that the action is inadmissible.

II – Relevant provisions of the Staff Regulations

25. The relevant provisions are Articles 64, 65 and 65a of the Staff Regulations and Articles 1, 3, 10 and 15 of Annex XI thereto, entitled 'Rules for implementing Articles 64 and 65 of the Staff Regulations'.

26. Article 64 of the Staff Regulations provides:

'An official's remuneration expressed in euros 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 …'

27. Article 65 of the Staff Regulations provides:

'1. The Council shall each year review the remuneration of the officials and other servants of the Union. 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 Union [Eurostat] 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 Union.

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

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

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

28. Article 65a of the Staff Regulations provides that the rules for implementing Articles 64 and 65 of those Staff Regulations are set out in Annex XI to the Staff Regulations.

29. Article 1(1) of Annex XI to the Staff Regulations provides that '[f]or the purposes of the review provided for in Article 65(1) of the Staff Regulations, Eurostat shall draw up every year before the end of October a report on changes in the cost of living in Brussels, the economic parities between Brussels and certain places in the Member States, and changes in the purchasing power of salaries in national civil services in central government'.

30. Article 3 of Annex XI to the Staff Regulations provides:

‘1. Under Article 65(3) of the Staff Regulations, the Council, acting on a Commission proposal and on the basis of the criteria set out in Section 1 of this Annex, shall take a decision before the end of each year adjusting remuneration and pensions, with effect from 1 July.

2. The amount of the adjustment shall be obtained by multiplying the Brussels International Index by the specific indicator. The adjustment shall be in net terms as a uniform across-the-board percentage.

…

6. The institutions shall make the corresponding positive or negative adjustment to the remuneration and pensions of the officials, former officials and other persons concerned with retroactive effect for the period between the effective date and the date of entry into force of the decision on the next adjustment.

…’

31. The factors to be used for calculating the annual adjustment, listed in Section 1 of Annex XI to the Staff Regulations, are changes in the cost of living in Brussels, the economic parities between Brussels and certain places in the Member States, and lastly changes in the purchasing power of salaries in national civil services in central government in eight Member States listed in the last subparagraph of Article 1(4)(a) of that annex. [15]

32. Article 10 of Annex XI to the Staff Regulations, which is the sole article in Chapter V of that annex, headed ‘Exception clause’, provides:

‘If there is a serious and sudden deterioration in the economic and social situation within the Union, assessed in the light of objective data supplied for this purpose by the Commission, the latter shall submit appropriate proposals on which the European Parliament and the Council shall decide in accordance with Article 336 [TFEU]’.

33. Lastly, Article 15 of Annex XI to the Staff Regulations, which is in Chapter 7 of that annex, entitled ‘Final provision and review clause’, reads:

‘1. The provisions of this Annex shall apply from 1 July 2004 to 31 December 2012.

2. They shall be reviewed at the end of the fourth year particularly in the light of their budgetary implications. To this end, the Commission shall submit a report to the European Parliament and the Council and, where appropriate, a proposal to amend this Annex on the basis of Article 336 [TFEU].’

15 — The following Member States: the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand-Duchy of Luxembourg, the Kingdom of the Netherlands and the United Kingdom. The same provision, after giving that list, states that the Council, acting on a Commission proposal under Article 65(3) of the Staff Regulations, may adopt a new sample which represents at least 75% of the European Union gross domestic product (GDP) and which will apply from the year following its adoption.

III – Procedure before the Court

A – *Case C-63/12*

34. The Commission brought its action for annulment before the Court by application of 7 February 2012. The Council lodged its defence on 2 April 2012, the Commission lodged its reply on 11 May 2012 and the Council lodged its rejoinder on 2 July 2012.

35. By order of the President of the Court of 25 April 2012, the European Parliament was granted leave to intervene in support of the form of order sought by the Commission. The Parliament lodged its statement in intervention on 11 June 2012. The Council lodged its observations on that statement on 27 July 2012.

36. The Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Kingdom of Spain, the Kingdom of the Netherlands and the United Kingdom were granted leave to intervene in support of the form of order sought by the Council by order of the President of the Court of 6 July 2012.

37. Those Member States lodged their statements in intervention on the following dates: the Czech Republic on 19 September 2012, the Kingdom of Spain on 20 September 2012, the United Kingdom on 24 September 2012 and the other Member States on 21 September 2012.

38. The Commission submitted its observations on those statements in intervention on 4 January 2013.

39. The Commission claims that the Court should:

— annul the contested decision, and

— order the Council to pay the costs.

40. The European Parliament contends that the form of order sought by the Commission should be granted.

41. The Council contends that the Court should:

— dismiss the action for annulment as being inadmissible;

— in the alternative, dismiss the action as being unfounded; and

— order the Commission to pay the costs.

42. The Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Kingdom of Spain, the Kingdom of the Netherlands and the United Kingdom contend that the form of order sought by the Council should be granted.

B – *Case C-66/12*

43. The Council brought its claim for annulment before the Court by application of 9 February 2012. The Commission lodged its defence on 23 March 2012, the Council its reply on 11 May 2012 and the Commission its rejoinder on 22 June 2012.

44. By order of the President of the Court of 20 April 2012, the European Parliament was granted leave to intervene in support of the form of order sought by the Commission. The European Parliament lodged its statement in intervention on 11 June 2012. The Council submitted its observations on that application on 27 July 2012.

45. The Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, Ireland, the Kingdom of Spain, the French Republic, the Republic of Latvia, the Kingdom of the Netherlands and the United Kingdom were granted leave to intervene, in support of the form of order sought by the Council, by order of the President of the Court of 6 July 2012.

46. With the exception of the Republic of Latvia, which did not lodge a statement, those Member States lodged their statements in intervention on the following dates: the Czech Republic on 19 September 2012, the Kingdom of Spain on 20 September 2012, the Kingdom of Denmark, the Federal Republic of Germany and the Kingdom of the Netherlands on 21 September 2012, Ireland on 24 September 2012 and the French Republic on 25 September 2012.

47. The Commission submitted its observations on those statements in intervention on 4 January 2013.

48. The Council claims that the Court should:

— annul the communication and the proposal for a regulation;

— in the alternative, find established an infringement of the Treaties by reason of the fact that the Commission failed to submit appropriate proposals to the European Parliament and the Council on the basis of Article 10 of Annex XI to the Staff Regulations, and

— order the Commission to pay the costs.

49. The Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, Ireland, the Kingdom of Spain, the French Republic, the Republic of Latvia, the Kingdom of the Netherlands and the United Kingdom contend that the form of order sought by the Council should be granted.

50. The Commission contends that the Court should:

— dismiss the action; and

— order the Council to pay the costs.

51. The European Parliament contends that the form of order sought by the Commission should be granted.

C – *Case C-196/12*

52. The Commission brought its action for failure to act before the Court by application of 26 April 2012. The Council lodged its defence on 18 June 2012, the Commission its reply on 30 July 2012 and the Council its rejoinder on 17 September 2012.

53. By order of the President of the Court of 4 September 2012, the Federal Republic of Germany, the Kingdom of Spain, the Kingdom of the Netherlands and the United Kingdom were granted leave to intervene in support of the form of order sought by the Council, whilst the European Parliament was granted leave to intervene in support of the form of order sought by the Commission.

54. The statement in intervention of the Federal Republic of Germany was lodged on 16 October 2012, that of the Kingdom of Spain on 24 October 2012, that of the United Kingdom on 14 November 2012 and those of the Kingdom of the Netherlands and of the European Parliament on 16 November 2012.

55. The Commission and the Council submitted their observations on those statements in intervention on 16 January 2013 and 21 January 2013, respectively.

56. The Commission contends that the Court should:

— declare that by not adopting the proposal for a regulation the Council failed to fulfil its obligations under the Staff Regulations, and

— order the Council to pay the costs.

57. The European Parliament contends that the form of order sought by the Commission should be granted.

58. The Council contends that the Court should:

— dismiss the action; and

— order the Commission to pay the costs.

59. The Federal Republic of Germany, the Kingdom of Spain, the Kingdom of the Netherlands and the United Kingdom contend that the Court should grant the form of order sought by the Council.

IV – The actions in Cases C-63/12 and C-196/12

A – *Admissibility of the actions*

1. Observations of the main parties and of the interveners

60. The Council argues that the action for annulment is inadmissible, on the ground that the contested decision is not an act having independent legal effects, since in adopting that decision it neither amended nor definitively rejected the proposal for a regulation but merely, for the sake of transparency, set out the reasons why it was not able to adopt the proposal.

61. The Commission challenges that view, and proposes that a distinction should be drawn between the two aspects of the proposal for a regulation which the Council refused to adopt.

62. With regard, first, to adjustment of the remuneration and pensions of officials and other servants of the European Union, the Commission maintains that the action for annulment is admissible, since the contested act's nature as a decision is clear both from the form of legal instrument used and from its content.

63. With regard to its form, the Commission points out that the contested decision is one of the European Union's legal acts listed in Article 288 TFEU, that it was published in the Official Journal of the European Union in the L series dedicated to EU legislation, and that the decision states that its legal basis is the Staff Regulations, inter alia Article 65 thereof and Annexes VII, XI and XIII thereto, and Article 20 of the Conditions of Employment of Other Servants of the European Union.

64. So far as the substance of the contested act is concerned, the act undeniably has independent legal effects, since the result of the contested decision is that there is no annual adjustment of remuneration and pensions, which are therefore frozen. The Commission, which questions how the Council could adopt the proposal without first revoking the decision not to adopt it, considers that the distinction which the Council seeks to draw between a 'decision not to adopt' and a 'decision to reject' is not based on any established typology.

65. With regard, secondly, to adoption of the correction coefficients applying to remuneration and pensions, the Commission, finding that the contested decision contains no reasoning on this point, concludes from this that it must be held, primarily, that even if formally the Council adopted a decision of refusal, its attitude must be regarded as an unlawful failure to act that may be challenged by means of an action for annulment.

66. The Council, which refers to the case-law of the Court according to which, in order to ascertain whether contested measures are acts, it is necessary to look to their substance,[16] replies that the argument that the contested decision has the effect of freezing the salaries of officials and other servants of the European Union is based on the false premise that the mere fact that the Commission submitted a proposal on the basis of Article 3 of Annex XI to the Staff Regulations is sufficient to impose an unconditional obligation on the Council to act on that basis. It adds that the question whether officials are entitled to the adjustment proposed by the Commission is conditional on the Council deciding on that adjustment, which presupposes a choice between two mutually exclusive legal bases, namely, Article 3 of the Staff Regulations and Article 10 of Annex XI thereto.

67. Lastly, the Council points out that the contested decision is not final and has no effect on the legal existence of the proposal for a regulation, which it could adopt at any time without revoking the earlier act, under the lex posterior derogat priori rule.

68. The European Parliament concurs with the Commission's arguments. It maintains that the distinction drawn by the Council between a decision not to adopt and a decision to reject must be considered to be artificial, and that it is important to take into account, when assessing the nature of the decision, the fact that it constitutes the Council's response to an obligation to adjust remuneration and pensions 'before the end of each year' and to the proposal submitted by the Commission in that context.

69. The intervening Member States support the Council's position, making reference to the Council's arguments. The Federal Republic of Germany adds that the contested decision does not have any legal effects since it does not conclude any procedure, nor does it render the proposal for a regulation devoid of purpose. The decision merely represents an intermediate stage in the procedure initiated by the Commission for the purpose of determining the annual adjustment of remuneration, a procedure that will not be concluded until the Council has adopted a regulation adjusting remuneration with retrospective effect to 1 July 2011.

2. My appraisal

70. As I shall demonstrate, the action that should be brought against the contested decision, in both its aspects, is an action for annulment and not an action for failure to act.

71. The Commission's action for annulment and action for failure to act have in fact one and the same purpose, since they are intended to bring about the censuring of the conduct of the Council in refusing to adopt the proposal for a regulation by calling into play the exception clause. Since that conduct may prima facie, on the one hand, be regarded as being expressly a decision while representing, implicitly, a

16 — The Council cites Case 60/81 *IBM* v *Commission* [1981] ECR 2639, and Case T-64/89 *Automec* v *Commission* [1990] ECR II-367.

possible failure on the part of the Council to carry out the annual adjustment of remuneration and adopt the correction coefficients, the Commission has contested that act from two different angles, by bringing both an action for annulment and an action for failure to act, to which the Council has responded by bringing an action for annulment and, in the alternative, an action for failure to act.

72. The indecision on the part of the Commission and the Council as to which legal remedy to pursue reveals the legal uncertainty surrounding determination of the respective scopes of an action for annulment and an action for failure to act, particularly where the conduct at issue constitutes a refusal. Although that uncertainty is due to the complexity of the theoretical underpinning of those two remedies and certain changes in the relevant texts, it can also be attributed to developments in case-law which have revealed a degree of vagueness. Be that as it may, the fact that doubts may be expressed regarding the dividing line between the two types of action, by two EU institutions moreover, seems to me to be particularly disturbing when the system for judicial review of the lawfulness of acts of the European Union is supposed to comply with a principle of completeness [17] and consistency in order to ensure respect for the principle of effective judicial protection.

73. The latter principle, affirmed in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, and reaffirmed in Article 47 of the Charter of Fundamental Rights of the European Union, means that any unlawful measure adopted by an institution, body or agency of the European Union may be challenged where it has adverse effects.

74. From the point of view of ensuring the broadest possible judicial protection, it might be argued that it is necessary, primarily, to avoid any lacuna in the review of legality and, hence, to ensure that a negative decision of an institution, body or agency of the European Union may, where it has binding legal effects, be reviewed by the Court, the guarantor of legality, regardless of whether that review is initiated by means of an action for annulment or an action for failure to act.

75. It would be necessary therefore to allow the existence of two competing remedies, by accepting that applicants, when necessary, have the right to choose freely the remedy by which they seek to challenge a negative decision.

76. In the spirit of that approach, it should be noted that both legal remedies pursue a common aim, which is expressed in decisions of the Court by the words '[they] merely prescribe one and the same method of recourse' [18] or by the statement of the principle that 'in the system of legal remedies provided for by the treaty there is a close relationship between [them]'. [19]

17 — The Court has repeatedly held that the Union based on the rule of law rests on the establishment of a complete system of legal remedies and procedures designed to confer on the Court of Justice jurisdiction to review the legality of acts of the institutions, bodies, offices and agencies of the European Union (see, inter alia, the judgment of 14 June 2102 in Case C-533/10 *CIVAD* [2012] ECR, paragraph 32 and case-law cited).

18 — See Case 15/70 *Chevalley* v *Commission* [1970] ECR 975, paragraph 6; Case C-68/95 *T. Port* [1996] ECR I-6065, paragraph 59; and order of 1 October 2004 in Case C-379/03 P *Pérez Escolar* v *Commission*, paragraph 15. Those decisions conclude that individuals, who may bring an action for annulment against a measure of an institution not addressed to them provided that the measure is of direct and individual concern to them, must be able to bring an action for failure to act against an institution which they claim has failed to adopt a measure which would have concerned them in that way.

19 — See Case 13/83 *European Parliament* v *Council* [1985] ECR 1513, paragraph 36.

77. However, despite their common aim, those two remedies remain different in their nature, [20] in the conditions governing their admissibility and the way in which they are implemented and, to a lesser extent, in the effects they are capable of having. [21] I am therefore convinced that it is neither in the interest of applicants nor in the interest of the sound administration of justice to permit overlapping. It is, on the contrary, essential to draw a clear demarcation line between the two remedies, ensuring that each is mutually exclusive of the other and their harmonious coexistence on the basis of a 'systematic' design. [22] This is not a purely theoretical question, because it calls for an analysis of whether the two types of action are complementary or competing and also of their level of autonomy or dependence. [23] It also has a significant practical aspect, because the opportunity for applicants to pursue the remedy best suited for censuring the unlawful act, in order to promote the effectiveness of the review of legality, is dependent on the answer given to that question.

78. Therefore, before making a more detailed assessment of the Council's conduct and the remedy that should be pursued in order to challenge its legality, I shall begin by setting out the rules which govern judicial review of 'negative' conduct, that is to say conduct whereby an institution, body or agency of the European Union expresses a refusal, as I consider those rules to stand in the light of the current case-law of the Court.

a) Judicial review of conduct constituting a refusal on the part of an institution, body or agency of the European Union

79. I think that the following proposition may be stated as certain. Since an action for annulment under Article 263 TFEU censures unlawful action on the part of an institution (i), whilst an action for failure to act under Article 265 TFEU censures its inaction (ii), a refusal to adopt an act must be challenged by means of an action for annulment (iii).

i) An action for annulment under Article 263 TFEU censures unlawful action on the part of an institution

80. Under Article 263 TFEU, the Court is to review the legality of acts of the institutions, inter alia, those of the Council, other than recommendations and opinions.

81. In order for an act to form the subject-matter of an action for annulment, two conditions must be satisfied.

82. First, it is necessary for a legal act, a 'provision', to have actually been adopted by one of the institutions of the European Union.

20 — Unlike the ECSC Treaty which, in defining failure to act as 'the implied decision of refusal to be inferred from the silence' (Article 35), made it a particular aspect of an action for annulment, the EC Treaty conferred autonomy on the action for failure to act, defining it as being an action 'to have the [infringement of the Treaty resulting from failure to act] established' (Article 175 of the EC Treaty, which became in turn Article 232 EC and Article 265 TFEU).

21 — Those effects are not fundamentally different and are stated in a single provision, namely, the first paragraph of Article 266 TFEU, which requires the institution at issue to 'take the necessary measures to comply with the judgment of the Court of Justice'. However, whereas the annulment of an act entails the immediate, retrospective removal of that act from the legal order, the establishment of the institution's failure to act, without entailing an immediate change in the legal situation, requires the institution concerned to adopt the act which it has refused to take.

22 — On this question, see, inter alia, thesis of Berrod, F., *La systématique des voies de droit communautaires*, Dalloz, Paris, 2003; Ritleng, D., *Pour une systématique des contentieux au profit d'une protection juridictionnelle effective*, 'Mélanges en hommage à Guy Isaac: 50 ans de droit communautaire', PU Toulouse, 2004, p. 735, and Lenaerts, K., *La systémique des voies de recours dans l'ordre juridique de l'Union européenne*, 'Mélanges en hommage à Georges Vandersanden', Bruylant, Brussels, 2008, p. 257.

23 — See, on this subject, thesis of Berrod,. F., op. cit., No 388, p. 356, and No 392, p. 359. The author summarises the dialectic tension which exists between the two actions, noting the 'consubstantial link' between them, whilst stating that the action for failure to act has, nevertheless, an 'existential autonomy' in relation to the action for annulment.

83. Secondly, according to settled case-law, developed in the context of actions for annulment brought by Member States or institutions, 'any measures adopted by the institutions, whatever their form, which are intended to have binding legal effects' are regarded as challengeable acts, within the meaning of Article 263 TFEU. [24] Where the action for annulment is brought by a natural or legal person against an act addressed to that person, the binding legal effects of that act must be capable of affecting the interests of the applicant by bringing about a distinct change in its legal position. [25]

84. The criterion of a binding legal effect is of particular importance when assessing whether or not an interim measure which forms part of an administrative procedure involving several stages is open to challenge. In principle, in order to be open to challenge the act must be final. According to the words used by the Court, it must be the 'definitive expression of [the institution's] intentions', [26] so that interim measures intended to pave the way for the final decision, such as those which express a provisional opinion of the institution, cannot be regarded as being challengeable acts. [27]

85. Thus it was held that a proposal for a regulation submitted by the Commission to the Council cannot be regarded as a challengeable act since it is only a provisional act, the purpose of which is solely to pave the way for adoption of the final decision without finally determining the position that will be taken by the Council. [28]

86. On the other hand, an interim act which has 'independent legal effects' must be capable of forming the subject-matter of an action for annulment. [29]

87. Lastly, I should like to add that whilst interim measures which are not in the nature of a decision may not themselves be the subject of an action for annulment any legal defects therein may, none the less, be relied upon in an action directed against the definitive act for which they represent a preparatory step. [30]

ii) An action for failure to act under Article 265 TFEU censures inaction on the part of an institution

88. Article 265 TFEU provides that, should the European Parliament, the European Council, the Council, the Commission or the European Central Bank, in infringement of the Treaties, fail to act, the Member States and the other institutions of the Union may bring an action before the Court of Justice to have the infringement established.

89. An action for failure to act may also be brought by any natural or legal person making a complaint to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion.

90. The action is admissible only if the institution, body, office or agency concerned has first been called upon to act and if, within two months of being so called upon, the institution, body, office or agency concerned has not 'defined its position'.

24 — See Joined Cases C-463/10 P and C-475/10 P *Deutsche Post and Germany* v *Commission* [2011] I-9639, paragraph 36 and case-law cited.

25 — See order of 14 May 2012 in Case C-477/11 P *Sepracor Pharmaceuticals (Ireland)* v *Commission*, paragraph 51 and case-law cited.

26 — See Joined Cases 23/63, 24/63 and 52/63 *Henricot and Oth*ers v *High Authority* [1963] ECR 217.

27 — See, inter alia, *IBM* v *Commission*, paragraph 10, and order in *Sepracor Pharmaceuticals (Ireland)* v *Commission*, paragraphs 55 and 56.

28 — Order of 15 May 1997 in Case T-175/96 *Berthu* v *Commission* [1997] ECR II-811, paragraphs 21 and 22.

29 — See order in *Sepracor Pharmaceuticals (Ireland)* v *Commission*, paragraph 58 and the case-law cited.

30 — See *IBM* v *Commission*, paragraph 12, and the judgment of 21 June 2012 in Joined Cases T-264/10 and T-266/10 *Spain* v *Commission* [2012] ECR, paragraph 13.

91. According to settled case-law, the remedy of an action for failure to act 'is founded on the premise that the unlawful inaction on the part of [the institution at issue] enables [the matter to be brought] before the Court in order to obtain a declaration that the failure to act is contrary to the Treaty, in so far as it has not been repaired by the institution concerned'. [31]

92. Setting that rule against the subject-matter of an action for annulment allows the dividing line to be drawn between the two remedies that are intended to ensure direct review of the legality of measures taken by institutions of the European Union. Whereas an action for annulment censures the expression of an intention which takes the form of a legal act having binding legal effects, an action for failure to act on the other hand censures an institution for unlawfully failing to act. In other words, the review of legality is achieved by means of an action for annulment where the institution concerned has erred through commission and by means of an action for failure to act where it has erred through omission.

93. It is in this fundamental distinction that the answer to the question of which action should be brought against a decision of refusal lies.

iii) Refusal to adopt an act must be challenged by means of an action for annulment

94. Although the apparent clarity of the distinction between an action for annulment and an action for failure to act has been clouded by the conceptual differences between the definition of an action for failure to act contained in the ECSC Treaty and that given in the EEC Treaty, [32] consideration of the question of which remedy must be pursued in order to censure the unlawfulness attaching to a negative decision appears to me, none the less, to show clearly that a refusal is an act capable of forming the subject-matter of an action for annulment.

95. A refusal to take a decision is equivalent to a decision since it is the expression of an intention, even if it is negative, and a decision of refusal must comply with the same rules of competence and form as a positive decision.

96. The case-law clearly follows that principle of equivalence and there are many judgments in which actions for annulment brought against decisions of refusal have been declared to be admissible. [33]

97. However, in an obiter dictum in its judgment in Case 302/87 European Parliament v Council, [34] the Court accepted that the Council's failure to submit a draft budget could be the subject of an action for failure to act brought by the Parliament, stating that 'a refusal to act, however explicit it may be, can be brought before the Court under Article 175 since it does not put an end to the failure to act'. [35] That statement, which has been described in legal literature as 'mysterious', [36] owes more to considerations regarding the European Parliament's capacity to bring proceedings than to an intention to expand the scope of an action for failure to act. Subsequent case-law reverted however to a more orthodox position. [37]

31 — See Case C-107/91 *ENU* v *Commission* [1993] ECR I-599, paragraph 10 and case-law cited.

32 — It should be noted, in particular, that because in the ECSC Treaty silence is equated to an implied negative decision, a contagion effect has taken hold causing any rejection decision, even an express decision, to be covered by the remedy of an action for failure to act. See, on this question, Soldatos, P., 'L'introuvable recours en carence devant la Cour de justice des Communautés européennes', Cahiers de droit européen, 1969, p. 316 et seq.

33 — See, inter alia, Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1961] ECR 1; Joined Cases 166/86 and 220/86 *Irish Cement* v *Commission* [1988] ECR 6473, concerning the rejection of a complaint against the granting of aid; Case C-123/03 P *Commission* v *Greencore* [2004] ECR I-11647, concerning the Commission's refusal to pay default interest on the refunded amount of a fine; and Case C-322/09 P *NDSHT* v *Commission* [2010] I-11911, concerning the decision not to initiate the formal procedure for the investigation of State aid.

34 — Case 320/87 [1987] ECR 5615.

35 — Paragraph 17.

36 — See Simon, D., *Le système juridique communautaire*, PUF, Paris, 2nd Ed., 1998, No 379, p. 402.

37 — See *NDSHT* v *Commission*, paragraphs 44 to 56.

98. Further, in order to determine whether or not a decision of refusal constitutes a challengeable act, case-law distinguishes between whether or not the refused act was capable of having definitive legal effects. Thus, the Court has repeatedly held that a decision which amounts to a rejection must be appraised in the light of the nature of the request to which it constitutes a reply.[38] That rather cryptic wording, which is subject to some variation in drafting,[39] is in fact the reflection of the following proposition as regards negative decisions. A refusal to adopt an act may be the subject of an action for annulment where such an action could have been directed against the act which the institution has refused to adopt. Thus, if the refused act is capable of having definitive legal effects the refusal may be the subject of an action. Conversely, if the act whose adoption has been refused does not have such effects the refusal to adopt it cannot be referred to the Court by means of an action for annulment.

99. A refusal to act must therefore be challenged by means of an action for annulment, whatever form the refusal takes.

100. That is so, first, in the event of express refusal. Where the institution responds with an express rejection, the remedy of an action for failure to act ought not to be used since the applicant is entitled, within the time limit laid down in the TFEU, to bring an action for annulment which enables the applicant to obtain a declaration that the act adopted by the institution is unlawful.

101. An express refusal may take two different forms.

102. First, it may be an outright refusal to take the decision sought.[40]

103. Secondly, it may be the adoption of an act that is contrary to the one that has been sought. In that case, the decision taken cannot be challenged by means of an action for failure to act, since, according to the explanation given in a number of judgments, that action 'refers to failure to act in the sense of failure to take a decision or to define a position, and not the adoption of a measure different from that desired or considered necessary by the persons concerned'.[41]

104. The Court even held, in its judgment in Case C-301/90 Commission v Council,[42] in an action for annulment brought by the Commission against a Council regulation which corrected the remuneration and pensions of officials and other servants of the Communities and adjusted the correction coefficients applying thereto, that the adoption of an act unlawfully failing to incorporate a

38 — See Case 42/71 *Nordgetreide* v *Commission* [1972] ECR 105, paragraph 5, which concerned the Commission's refusal to amend the list of products to which the system of compensatory amounts would apply. See, to the same effect, Joined Cases C-15/91 and C-108/91 *Buckl and Others* v *Commission* [1992] ECR I-6061, paragraph 22), which concerned the Commission's refusal to re-establish a levy on imports of certain agricultural products. See, also, orders of 6 April 2006 in Case C-408/05 P *GISTI* v *Commission*, paragraph 10, and of 15 December 2011 in Case C-411/11 P *Altner* v *Commission*, paragraph 7 and the case-law cited, concerning the Commission's refusal to institute infringement proceedings. The latter order explains the absence of an action for annulment against that refusal by the exclusion of an individual action against acts which the Commission may adopt in the context of infringement proceedings governed by Article 258 TFEU, in so far as those acts are addressed to the Member States and not to individuals. Two other explanations are generally given for excluding such an action, namely the absence of binding legal effect of reasoned opinions issued by the Commission and the Commission's discretion, both to assess the existence of an infringement and to initiate infringement proceedings. The latter explanation seems to me to result from confusion between a condition for admissibility and a substantive condition. The existence of a discretion on the part of the institution at issue should not lead to inadmissibility of an action for annulment (in the event of express rejection of an application to bring infringement proceedings) or of an action for failure to act (in the event of no position being adopted after notice is given of infringement proceedings), but should render it unfounded, precluding consideration that the institution's act, or failure to act, is unlawful.

39 — *Buckl and Others* v *Commission*, calls for an appraisal based on the 'nature' of the request, whilst *Nordgetreide* v *Commission*, calls for an appraisal of the 'object' of the request.

40 — See, inter alia, Case C-312/00 P *Commission* v *Camar and Tico* [2002] ECR I-11355, concerning an action for annulment directed against the Commission's refusal to adopt a regulation under Article 16(3) of Council Regulation (EEC) No Regulation No 404/93 of 13 February 1993 on the common organisation of the market in bananas (OJ 1993 L 47, p. 1) in order to adjust the tariff quota fixed by Article 18 of Regulation No 404/93 to deal with the effect on banana production in Somalia of the exceptional floods in 1997 and 1998.

41 — See Case 8/71 *Deutscher Komponistenverband* v *Commission* [1971] ECR 705, paragraph 2. Similar wording was used in the judgments in *Irish Cement* v *Commission*, paragraph 17; *Buckl and Others* v *Commission*, paragraph 17; and *ENU* v *Commission*, paragraph 10. See also order of 17 November 2010 in Case T-61/10 *Victoria Sánchez* v *European Parliament and Commission*, paragraph 38.

42 — Case C-301/90 [1992] ECR I-221.

Commission proposal could be challenged by means of an action for annulment. In that case, finding that the Commission proposal concerned inter alia the introduction of a specific correction coefficient for Munich (Germany) and that the regulation adopted by the Council on the basis of that proposal did not contain provisions to that effect, the Court concluded that the Commission was entitled to commence an action for annulment of that regulation, since it considered that, by such failure, the Council had failed to perform an obligation under the EEC Treaty.[43] Thus, where an institution has acted, but has failed to enact a part of the measure proposed, the illegality resulting therefrom may, according to that judgment, be censured by means of an action for annulment.[44]

105. The same is true, secondly, in the case of an implied decision of refusal, with, however, the fundamental qualification that the implied decision cannot result from the silence or inaction of an institution unless there is an express provision of EU law to that effect. It is clear from established case-law that, 'where there are no … express provisions laying down a deadline by which an implied decision is deemed to have been taken and prescribing the content of the decision, an institution's inaction could not be deemed to be equivalent to a decision without calling into question the system of remedies instituted by the Treaty'.[45] None the less, 'in certain particular circumstances … an institution's silence or inaction may exceptionally be considered to constitute an implied refusal'.[46]

106. These, in brief, are the guiding principles governing actions against negative decisions.

107. The following two further points should be made.

108. First, it should be noted that the absence of a decision due to failure to achieve the required majority is not equivalent to a refusal to take a decision.

109. The judgment in Case C-27/04 Commission v Council,[47] given in a case which concerned the implementation of the Stability and Growth Pact, illustrates that distinction. In an action for annulment brought by the Commission against the Council's 'failure to adopt' the formal instruments contained in the Commission's recommendations pursuant to Article 104(8) and (9) EC[48] in order to compel the Federal Republic of Germany and the French Republic to reduce their government deficit, the Court held that the action was inadmissible in so far as the failure to adopt in question was the result of the failure to achieve the majority required for adopting a decision in that regard. The Court also held that there is no provision of EU law prescribing a period on the expiry of which an implied decision is deemed to arise and establishing the content of that decision.[49]

43 — Paragraph 14.

44 — In point 11 of his Opinion in that case, Advocate General Jacobs states that, although it may seem unusual to seek the annulment of a regulation in so far as it omits a particular provision the issue is, in substance, the same 'whether a regulation is unlawful by reason of including, or by reason of omitting, a particular provision'. I do not find that explanation wholly convincing. In a case like this, the unlawfulness has nothing to do with the regulation adopted, which is not unlawful per se, but is the result of failure to take a decision. Moreover, adoption of a provision other than the one that was sought and failure to adopt a provision appear to me to be two different things. Treating them as being equivalent means that partial failure to act on an application is interpreted as being an implied refusal, which does not appear to me to be possible for the reason given in point 105 of this Opinion.

45 — See order of 13 December 2000 in Case C-44/00 P *Sodima* v *Commission* [2000] ECR I-11231, paragraph 24. See also, *Commission* v *Greencore*, paragraph 45; and orders of 24 March 2011 in Case T-36/10 *Internationaler Hilfsfonds* v *Commission* [2011] ECR II-1403, paragraph 38; and of 13 November 2012 in Case T-278/11 *ClientEarth and Others* v *Commission* [2012] ECR, paragraph 32. Those two orders provide an apposite example of a provision that treats the failure of an institution to reply within the prescribed time limit as being equivalent to a negative reply. The provision concerned is Article 8(3) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43), which provides that failure by the institution to reply within the prescribed time limit to a confirmatory application for access to a document is to be 'considered as a negative reply'. However, civil service law is the main area in which this type of provision is to be found, although it is found in other areas. See, for various illustrations, Mariatte, F., and Muñoz, R., *Contentieux de l'Union européenne / 2 — Carence — Responsabilité*, Lamy Axe droit, Paris, 2011, p. 29.

46 — *Commission* v *Greencore*, paragraph 45. I am not aware of any decisions of the Court of Justice or of the General Court which apply that exception in finding the existence of exceptional circumstances.

47 — Case C-27/04 [2004] ECR I-6649.

48 — Article 126(8) and (9) TFEU.

49 — Paragraph 32 of that judgment.

110. I would add that it does not appear to me that Case C-76/01 P Eurocoton and Others v Council, [50] in which the Court held that the Council's failure to adopt a proposal for a regulation imposing definitive anti-dumping duties constituted a challengeable act, can be adduced as a contrary argument. Although it may cause confusion in that it implies that the mere fact of voting constitutes 'a position' even where the majority required for adoption of the regulation is not achieved, [51] that judgment, which takes into account the specific aspects of an anti-dumping proceeding, seems to me to be explained mainly by the existence, in the context of such a proceeding, of a period beyond which the Council is no longer entitled to adopt the Commission proposal, so that failure to adopt the proposal within the prescribed time limit could be considered to constitute implied rejection. [52]

111. Secondly, as the Commission and the Council agree, it is apparent from settled case-law concerning the admissibility of actions for annulment that it is necessary to look to the substance of the contested acts, as well as the intention of their authors, to classify those acts. [53]

112. It is in the light of the abovementioned principles that I shall establish which remedy should be pursued against the Council's conduct, looking to find whether or not that conduct constitutes a decision which is open to challenge.

b) Appraisal of the Council's conduct

113. Does the contested 'decision', in which the Council decided not to adopt the proposal for a regulation submitted on the basis of Article 10 of Annex XI to the Staff Regulations, constitute a decision that may be challenged by means of an action for annulment?

114. In my view, this question should undoubtedly be answered in the affirmative.

115. I note first of all that it is at the expense of distorting the sense of its own decision that the Council states that it did not act on the proposal for a regulation — which it did not amend or definitively reject — but merely set out the reasons why it was not able to adopt that proposal. Far from simply containing an explanatory statement, the contested decision in fact contains an operative part in which the Council 'decides not to adopt the Commission's proposal'.

116. The act adopted by the Council is therefore in the nature of a decision.

117. That act is also final, since it concludes the process of adjustment, according to the 'normal' method, of the remuneration and pensions of officials and other servants of the European Union and of the correction coefficients applied thereto for 2011, given that Article 3(1) of Annex XI to the Staff Regulations provides that the Council regulation must be adopted 'before the end of each year'. In that regard, it should be noted that the Council's argument that it is a holding reply, of a temporary nature, is in complete contrast both to the grounds of the contested decision and to the position which that institution defends in the present proceedings. As is clear from recital 14 in the preamble to the contested decision, the Council considered that only the procedure laid down in Article 10 of Annex XI to the Staff Regulations could be applied in order to take the economic crisis into account. In the mind of the Council, there is therefore no question of any resumption of the procedure in the event, inter alia, that the Commission managed to convince it that there was no possibility of applying

50 — Case 76/01 P [2003] ECR I-10091.

51 — Paragraphs 58 and 59.

52 — Paragraph 64.

53 — Case C-521/06 P *Athinaïki Techniki* v *Commission* [2008] ECR I-5829, paragraph 42.

the exception clause. The Council therefore clearly showed its intention to abandon definitively the procedure under the 'normal' method provided for in Article 3 of Annex XI to the Staff Regulations in favour of the special procedure provided for in Article 10 of that annex in the event of serious economic crisis.

118. The Federal Republic of Germany's argument that the contested decision merely represents an intermediate stage in the procedure initiated by the Commission for the purpose of determining the annual adjustment of remuneration appears to me to originate from confusion between the two types of procedure, which, as the Kingdom of the Netherlands rightly points out, are mutually exclusive.

119. As the Council bases its argument on the terms in which the contested decision is worded, it should be added that the proposed distinction between a decision 'not to adopt' and a decision 'to reject' seems to me to be more specious than astute. The Council did not refrain from adopting a position on the proposal for a regulation because, for example, it failed to achieve the required majority, but took a decision which was the equivalent of an outright rejection of the proposal.

120. It should also be noted that the act which the Council refused to adopt is a regulation which, had it been adopted, would clearly have had legally binding effects both for the institutions of the European Union and for officials and other servants, who since 1 July 2011 have been deprived of the increase to which they would have been entitled if the Council had adopted the proposal for a regulation.

121. Lastly, the Commission's argument that a distinction should be drawn between the two aspects of the proposal for a regulation, since the refusal concerning the adjustment of the correction coefficients should be considered, in the absence of a statement of reasons, to be an unlawful failure to act, originates in my view from confusion between failure to state the reasons for a decision and the absence of a decision.

122. In view of the foregoing, the action for annulment should be declared to be admissible whilst the action for failure to act should be declared to be inadmissible.

B – *Whether the action in Case C-63/12 is well founded*

1. Observations of the main parties and of the interveners

a) Preliminary remarks

123. The Commission's action for annulment (Case C-63/12) and the Council's action (Case C-66/12) do not concern the same subject-matter, since the former is directed against the contested decision, whilst the latter challenges two of the Commission's three preparatory acts. [54]

124. None the less, it is common ground and not disputed by the parties that the Council's criticisms as to the substance, made in the context of the action it has brought, are the same as the pleas raised by it as to the substance in the defence against the Commission's action for annulment.

125. As the Council stated in its defence in Case C-63/12, the substantive question raised in both cases is whether or not the conditions for applying the exception clause were met. The applications and other pleadings submitted by the parties in that case make frequent reference to the arguments put forward in Case C-66/12.

54 — The communication and the proposal for a regulation.

126. Although that method of submitting pleas, by means of partial reference to annexed documents, does not appear to me to call in question their admissibility it allows, and in my view even compels, an overall examination of those arguments.

127. Thus, the following arguments, although devoted to an examination of whether the action in Case C-63/12 is well founded, will also take into account the arguments put forward by the parties in the context of the action in Case C-66/12.

b) The arguments in support of the application

i) The Commission

128. The Commission criticises the Council for refusing to adjust both remuneration and pensions and the correction coefficients.

– The refusal to adjust remuneration and pensions

129. As its primary submission, the Commission puts forward one plea having two parts: first, the Council misused its powers and, secondly, the Council acted ultra vires.[55]

130. The Commission submits in the first part of that plea, alleging infringement of Articles 3 and 10 of Annex XI to the Staff Regulations, that the Council committed an abuse of process and infringed the principle of institutional balance in considering that the conditions of Article 10 of that annex were met and, consequently, in refusing to adopt the proposal to adjust remuneration and pensions when the Commission had not submitted a proposal to it on the basis of that article and when the exceptional measure provided for in that provision must be adopted jointly by the European Parliament and the Council.

131. The Commission adds, in the second part of that plea, that the Council, which had no discretion, infringed Article 65 of the Staff Regulations in refusing to adopt the proposal for a regulation and that, if the Council considered that the Commission had improperly failed to make a proposal under Article 10 of Annex XI to the Staff Regulations, it was open to it to refer the matter to the Court and, if appropriate, to apply for interim measures. Moreover, in departing from the proposal for a regulation, the Council infringed the principle patere legem quam ipse fecisti.

132. In the alternative, the Commission submits that the Council erred in law by infringing the conditions for the application of the exception clause. It considers that the contested decision is flawed by an ‘inadequate and erroneous’ statement of reasons since the conditions for applying the exception clause are not met.

133. Noting that according to settled case-law the Commission has a wide margin of discretion where assessment of a complex economic or social situation is required,[56] the Commission states that it used 15 economic indicators commonly accepted, in particular by the Member States themselves, and that the choice of the period between 1 July 2010 and the beginning of November 2011 for its assessment is justified since a sudden deterioration in the situation is necessarily to be identified over a fairly short period.

55 — See the heading of main plea appearing between paragraph 38 and paragraph 39 of the Commission’s application.

56 — The Commission cites, with regard to State aid, Case 138/79 *Roquette Frères* v *Council* [1980] ECR 3333, paragraph 25; Joined Cases 142/84 and 156/84 *British American Tobacco and Reynolds Industries* v *Commission* [1987] ECR 4487, paragraph 62; Case C-174/87 *Ricoh* v *Council* [1992] ECR I-1335, paragraph 68; and Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 25; and with regard to dumping, Case T-210/95 *EFMA* v *Council* [1999] ECR II-3291, paragraph 57.

134. The Commission adds that application of the method would lead to passing on to officials of the European Union the effects of the loss of purchasing power suffered by some national civil servants, and considers that it carried out an analysis of the deterioration in public finances, relied on by the Council, which cannot be described as 'sudden' since it dates back to a time before the sharp fall in economic activity in the years 2008-09.

135. The Commission also submits that it incorporated the downward revision in growth projections, which was reflected in the decisions of the Member States with regard to national public sector salaries, and analysed the credit crisis, which existed since at least 2008, if not since 2007. As regards the decline in asset prices, it considers that the Council should have explained the relevance of that factor, which is part of the normal business cycle and is extremely ephemeral. In the Commission's view, the fluctuations in the unemployment rate during 2011 did not demonstrate a serious and sudden deterioration in the economic and social situation.

– The refusal to adjust the correction coefficients

136. According to the Commission, adjustment of the correction coefficients is distinct from the adjustment of remuneration, since the latter, carried out on the basis of Article 65 of the Staff Regulations, concerns adjustment of the general level of remuneration in relation to Brussels (Belgium) ('variation over time'), whilst the former, carried out on the basis of Article 64 of the Staff Regulations, is intended to maintain substantive equality between officials and recipients of pensions wherever their place of employment or residence within the European Union ('variation over space').

137. The Commission complains that the Council, in refusing to adjust the correction coefficients, once more infringed Articles 1 and 3 of Annex XI to the Staff Regulations, and Article 64 thereof, and failed to give reasons for its decision, since the reasons for the decision relate exclusively to the adjustment of remuneration and pensions and the legal basis is presented as being Article 65 of the Staff Regulations, with no mention of Article 64 of the Staff Regulations.

ii) The European Parliament

138. The European Parliament supports the Commission's analysis. It considers, in particular, that the Council infringed the Parliament's prerogatives as co-legislator since, in adopting the contested decision, in reality it applied Article 10 of Annex XI to the Staff Regulations, although initiation of the exception clause requires recourse to the ordinary legislative procedure.

139. The Parliament points out the detrimental consequences for the inter-institutional balance that result from acting ultra vires in the way that the Council did when, departing from the 'normal' method laid down in the Staff Regulations, it altered the political choice made at the time the Staff Regulations were adopted. According to the European Parliament, which recalls the provisions of Article 13 TEU, under which each institution must exercise its own powers whilst respecting those of the others, if the Council, for political reasons connected with the financial crisis, had wanted to change the method it should have followed the ordinary legislative procedure in which political choice is exercised by the two co-legislators, acting on a proposal from the Commission and after consultation with the other institutions concerned.

c) The arguments in support of the defence

i) The Council

– The refusal to adjust remuneration and pensions

140. The Council initially contests the pleas that it misused its powers and acted ultra vires.

141. The Council considers, first, that the decision it took is not based on Article 10 of Annex XI to the Staff Regulations, but reflects its position on application of the 'normal' method.

142. Since the Council considers that the finding that there has been a serious and sudden deterioration in the economic and social situation is not exclusively a matter for the Commission and that the Council and the European Parliament each have discretion in that regard, the Council contends that if, in exercising its discretion, it finds that the conditions for applying that article are met or, in the event that it does not have such discretion, it considers that the Commission's analysis is flawed by a manifest error of assessment, it then has no other option than not to adopt the adjustment proposal and to bring at that time an action for a declaration that the Commission's conclusion has no basis in law. Confronted with the Commission's refusal to submit a proposal on the basis of the exception clause, the Council decided, in a transparent and consistent manner, not to adopt the proposal for a regulation, whilst at the same time deciding to refer the matter to the Court for it to determine whether the Commission's refusal to apply the exception clause was well founded. According to the Council, the Commission's view would compel it to adopt a regulation according to the 'normal' method, which the Council considers to be unlawful, and, hence, to adopt a self-contradictory approach.

143. The Council states, secondly, that the procedure under Article 10 of Annex XI to the Staff Regulations can be broken down into three separate stages: first, an assessment of the economic and social situation within the Union in the light of objective data supplied by the Commission, and, where appropriate, the finding of a serious and sudden deterioration therein, the Council and the European Parliament each having discretion in that regard; secondly, the submission of proposals on the initiative of the Commission, which, however, exercises circumscribed powers where the conditions for the application of the exception clause are met; and, lastly, adoption by the European Parliament and the Council of the measures proposed by the Commission.

144. The Council contends that the contested decision is clearly placed in the first stage of the procedure and that in the absence of a proposal from the Commission it could not act on the basis of Article 10 of Annex XI to the Staff Regulations. In the interests of transparency and in order to maintain its position pending a judgment of the Court deciding whether or not the conditions for applying the exception clause were met, the Council did no more than set out the reasons why it considered that it was not able to adopt the proposal for a regulation.

145. The Council goes on to explain the reasons why the plea alleging infringement of the conditions for applying the exception clause, raised by the Commission in the alternative, does not appear to it to be well founded.

146. The Council contends that, even if the Commission enjoys a wide discretion to assess the economic and social situation within the Union, and a possible serious and sudden deterioration in it, the Council has a similar discretion.

147. Recalling the case-law of the Court concerning the requirement to state reasons laid down in Article 296 TFEU,[57] the Council contends that the contested decision is not a legal act and that, even if it is none the less regarded as having legal effects, that decision contains 16 recitals which make known the reasons for the Council's position, and accordingly no complaint can be made that the statement of reasons is inadequate.

148. It contends also that no complaint can be made that the decision concerned was flawed by manifestly incorrect reasoning. Whilst agreeing with the Commission on the general criteria to be taken into consideration in order to determine whether the conditions for applying Article 10 of Annex XI to the Staff Regulations are met, the Council considers that the Commission applied those criteria and classified the facts incorrectly, drawing the wrong conclusions from the data which it took into account.

149. While not denying that a serious and sudden deterioration in the economic and social situation must be found to exist over a fairly short period, the Council contends, first, that the reference period should not be the same as that covered by the 'normal' method.

150. First, such a restriction fails to take economic reality into account and leads to results that destroy de facto the effectiveness of the exception clause, since a crisis will more often than not span two reference periods. The Council criticises the Commission's approach in that respect for having the consequence that a single event, namely a serious and sudden deterioration in the economic and social situation within the Union, is artificially divided into a number of 'mini-crises'. Taking the example of a crisis lasting eight months which begins to manifest itself in March of year n, that is to say, four months before the end of the reference period, it points out that, for purposes of the annual adjustment exercise for the period 1 July of year n to 30 June of year n + 1, the Commission would take into account only the last four months of the crisis, the repercussions of which on the economic and social data are, thus, evened out by the effect of averaging over a year.

151. Thus, according to the Council, the approach adopted by the Commission makes application of the exception clause extremely difficult, if not impossible, and overlooks the purpose of that clause, which is to enable a rapid response to be made in a crisis. That clause can therefore be applied not only at the end of the year, instead of the annual adjustment according to the 'normal' method, but also during the course of the year in the event of the occurrence of a serious and sudden deterioration in the economic and social situation.

152. Secondly, the issue of whether, in the event of a serious and sudden crisis, the remuneration of officials would not be adjusted with sufficient speed should be assessed not in the abstract but taking into account the specific circumstances of the particular case and the need for a rapid response, without waiting for the austerity measures taken by Member States to affect the salaries of their civil servants with, as a consequence, a delayed impact on the salaries of European Union officials.

153. Thirdly, the Commission's approach overlooks the fact that once a crisis has ended the dials are not simply reset at zero, since it takes time to build up public finances and businesses' capital reserves.

154. The Council concludes from this that the Commission's failure to take adequate account of what happened before the start of the reference period, which had significant repercussions on the economic and social situation during the period between 1 July 2010 and the beginning of November 2011, and the incorrect and over-restrictive interpretation of the criteria for initiating the exception clause, significantly distorted the Commission's conclusions, as the Council found in recital 7 in the preamble to the contested decision.

57 — The Council refers, by way of example, to Case C-413/06 P *Bertelsmann and Sony Corporation of America* v *Impala* [2008] ECR I-4951.

155. The Council also contends that the creativity of Member States in so far as austerity and budget consolidation measures are concerned is not reflected in any of the indicators used by the Commission, which did not ask for any information regarding those measures and merely took into account the fall in the purchasing power of national civil servants in the eight reference Member States, as passed on in the result of the 'normal' method, although that very simplified indicator is not representative either of the economic and social situation within the Union as a whole or of the fiscal austerity measures affecting the civil service in many Member States.

156. The Council notes in that regard that at the end of 2011 only four Member States were not subject to the Excessive Deficit Procedure and that the growth in public debt within the European Union, already very high after the crisis of 2008 and 2009, again accelerated following the economic downturn in the second half of 2011.

157. In order to illustrate the budget consolidation measures adopted by governments of the Member States, the Council notes that the Spanish Government, after adopting in April 2011 a stability programme providing for a fiscal effort of over 1.5% of GDP until 2013, adopted additional emergency measures on 30 December 2011. It adds that the Italian Government implemented additional measures in mid-August 2011, totalling a net amount of EUR 59.8 billion, approximately 3.5% of GDP, before adopting a new set of measures, representing 1.3% of GDP, in order to achieve a balanced budget in 2013.

158. The Council also refers to the description of the budget consolidation measures given in the 2011 autumn forecast of the Commission's Directorate General (DG) for Economic and Financial Affairs, expressing surprise that in that context the Commission had not taken those measures into consideration, although they constituted reliable evidence of the seriousness and suddenness of the economic and social crisis.

159. According to the Council, the Commission also failed to take into account the trend in the purchasing power of civil servants in those Member States which are not in the sample of eight Member States listed in Article 1(4) of Annex XI to the Staff Regulations, although that information was significant. [58]

160. The Council also considers that the Commission ignored the large number of other consolidation measures adopted by Member States affecting their national public services and the measures taken at EU level, such as the European Stability Mechanism (ESM), reform of the Stability and Growth Pact, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union or the two Commission proposals of 23 November 2011 [59] for putting in place an arrangement at EU level to strengthen budgetary surveillance in the Member States of the euro area.

161. In the Council's view, the Commission completely disregarded the fact that the crisis, which initially only affected some Member States, became a severe crisis of confidence for the whole of the European Union, in particular for the Member States of the euro area, and the fact that the very high level of public debt in the Member States is a factor aggravating that crisis. The Council does not understand therefore how, despite the significant deterioration in economic growth which the Commission itself has noted, the Commission can conclude that economic and social conditions cannot be described as 'extraordinary'.

58 — The Council refers both to the forecasts of DG Economic and Financial Affairs of March 2011, showing a forecast fall in remuneration in 17 of the 19 Member States concerned, and to Eurostat document A65/11/12 of March 2011, entitled 'Forecast of the trend in purchasing power of national officials to July 2011'.

59 — Proposal for a regulation of the European Parliament and of the Council on the strengthening of economic and budgetary surveillance of Member States experiencing or threatened with serious difficulties with respect to their financial stability in the euro area (COM(2011) 819 final) and the proposal for a regulation of the European Parliament and of the Council on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficits of the Member States in the euro area (COM(2011) 821 final).

162. The Council also complains that the Commission over-simplified the presentation of the credit crisis, failed to take into account the fall in asset prices and failed to take sufficiently into account the situation on the labour market, where there is very high unemployment.

163. More generally, it criticises the Commission for deciding that an element of assessment already reflected in the results of the 'normal' method could not be taken into account for the purposes of applying the exception clause, although there are two separate stages in the process of assessing the economic and social situation. It is necessary, first, to examine the situation taking into account all the relevant factors, and it is only then, if a serious and sudden deterioration in the situation is identified, that there is a need to examine whether that deterioration is reflected with sufficient rapidity in the adjustment of remuneration according to the 'normal' method. In the view of the Council, the picture of the economic and social situation within the Union is necessarily incomplete or distorted if some of the relevant factors are rejected from the outset.

164. The Commission replies that the exception clause is not intended to be used unless there are extreme developments within the European Union, and then only if the 'normal' method is not capable of measuring them. In its view, the medium-term effects of a crisis are taken into account by that method, so that recourse to the exception clause is not justified.

165. The Commission also criticises the Council for failing to define the reference period that should be adopted and the criteria that should be selected in order to obtain objective data.

– The refusal to adjust the correction coefficients

166. First, the Council, whilst agreeing with the Commission that the purpose of adjusting the correction coefficients is different from that of the annual fixing of the level of remuneration, contends none the less that none of the provisions of Annex XI to the Staff Regulations provide that the Council must decide on such adjustment before the end of the year, and that the differences between the correction coefficients applying since 1 July 2010 and those proposed by the Commission remain overall within a range which ensures a substantive and rational correspondence of salaries.

167. Secondly, the Council contends that it was not under an obligation to state reasons since its decision does not constitute a legal act, and that in any event the adjustment of correction coefficients constitutes an ancillary aspect which, as a result, is not required to form the subject of a specific statement of reasons.

ii) The Member States

– The Czech Republic

168. The Czech Republic supports the observations submitted by the Council. In particular, it criticises the Commission, first, for restricting the assessment of the economic and social situation within the Union, in terms of time, to the reference period used for the application of the 'normal' method, secondly, for taking into account only certain indicators, separately, without carrying out continuous observation of the trends and, thirdly, for incorrectly assessing the fiscal austerity measures adopted or notified by the Member States. According to the Czech Republic, the Commission, which applied the 'normal' method although that method takes into account only the trend in the purchasing power of civil servants in eight Member States, did not take into consideration the situation in the European Union as a whole. Furthermore, the Commission contradicts itself by refusing to take into account the situation in Hungary, on the pretext that that Member State is not one of those whose situation is taken into account for the purposes of applying the 'normal' method, whilst also refusing to take into account the situations of the Kingdom of Spain, the French Republic and the Italian Republic, on the ground that they are already reflected by application of the 'normal' method.

– The Kingdom of Denmark

169. The Kingdom of Denmark contends that Case C-40/10 Commission v Council does not preclude the Council being involved in the issue of whether or not the conditions for applying Article 10 of Annex XI to the Staff Regulations are met. In its view, in submitting a proposal for the adjustment of remuneration according to the 'normal' method, although the conditions for applying that method were not met, the Commission failed in its duty of sincere cooperation. Considering that it is of the utmost importance that, in a crisis, effective measures should be adopted swiftly to prevent the situation from deteriorating, the Kingdom of Denmark states that, having experienced a fall of almost four points in its GDP between 2008 and 2011 as a consequence of the world economic crisis, it reduced the operating costs of government departments, reviewed income tax brackets and froze civil servants' remuneration.

– The Federal Republic of Germany

170. The Federal Republic of Germany contends that the Commission does not have a monopoly when it comes to assessing the existence of a serious and sudden deterioration in the economic and social situation within the Union, within the meaning of Article 10 of Annex XI to the Staff Regulations, and that therefore the Council is not required to follow 'blindly' any proposal submitted by the Commission. In its view, although the Commission has the power of initiative, the Council and the European Parliament, which have responsibility for approving the European Union budget, have none the less, according to the principle of institutional balance, the power to determine whether the conditions for initiating the exception clause in Article 10 of Annex XI to the Staff Regulations are met.

171. The Federal Republic of Germany adds that the Council had no choice but to refrain from approving the proposal for a regulation and that the contested decision does not call in question the binding effect of Annex XI to the Staff Regulations, but ensures that it is possible for the Council to bring an action against the Commission for failure to apply the exception clause.

172. Moreover, the Federal Republic of Germany considers that the Commission reports of 13 July and 25 November 2011 are inaccurate and that the objective data provided do not permit any conclusion to be drawn other than the existence of a serious and sudden deterioration in the economic and social situation. It disputes the existence of a principle of parallelism between the trend in the remuneration of European Union officials and that in the remuneration of national civil servants.

– The Kingdom of Spain

173. The Kingdom of Spain contends that the question which the Court should settle is fundamentally one of fact, since it is a matter of determining whether the economic circumstances which existed within the European Union in December 2011 required the application of Article 10 of Annex XI to the Staff Regulations.

174. It considers that at the time the Commission submitted its proposal for a regulation sufficient data existed to show that there was a serious, exceptional and widespread crisis, whose effects were not reflected by the 'normal' method, and which subsequently worsened. In its view, the 2011 autumn economic forecasts, published by the Commission on 10 November 2011, do not reflect the position the Commission maintains in the present action, since they show that the forecast for growth in DGP fell from 1.8% in 2011 and 1.9% in 2012, to a forecast of 1.6% and 0.6% respectively.

– The Kingdom of the Netherlands

175. The Kingdom of the Netherlands considers that as the Council took the view that the European Union was facing a serious economic crisis it was legitimate for it to reject the proposal for a regulation, since the adjustment procedure according to the 'normal' method and the exceptional procedure laid down in Article 10 of Annex XI to the Staff Regulations are mutually exclusive. The Kingdom of the Netherlands stresses that, although the Commission provides objective data for the assessment of the economic and social situation it does not have sole power to carry out that assessment. The Council possesses, in the context of the exception clause, discretionary power to carry out such an assessment.

176. Moreover, the Kingdom of the Netherlands maintains that no distinction can be made between the concept of a general economic crisis and that of a deterioration in the situation as covered by the exception clause, which cannot be limited to a crisis caused by 'external events'. It adds that the Commission committed an error of assessment in not drawing a clear distinction between the procedure under Article 65(1) of the Staff Regulations and the exception clause and, in particular, in restricting analysis of the data to the data used in the context of the 'normal' method, without taking into consideration statistics that were valid for the European Union as a whole, and in excluding certain data, such as asset prices or the crisis in market confidence with regard to public debts. The effect of that error of assessment is to deprive the exception clause of any effectiveness. Lastly, it challenges the application, in the context of the exception clause, of the rule of parallelism between the trends in remuneration in the European Union civil service and in the civil services of the Member States.

– The United Kingdom

177. According to the United Kingdom, in the light of the objective data supplied by the Commission, the Council may determine that there has been a serious and sudden deterioration in the economic and social situation and therefore decide not to accept a proposal submitted by the Commission under Article 3 of Annex XI to the Staff Regulations.

178. The United Kingdom considers moreover that the Commission based its analysis on the false premise that the principle of parallelism should be preserved, although application of Article 10 of Annex XI to the Staff Regulations merely requires an objective finding of a serious and sudden deterioration in the economic and social situation.

179. The United Kingdom adds that the Commission's approach is wholly inconsistent with the objective of the exception clause and contends that the seriousness of the crisis can hardly be doubted, whilst its suddenness has been reflected in the urgency of the measures which the Member States and the institutions themselves have had to adopt.

2. My appraisal

180. The questions which lie at the heart of the present proceedings between the Commission and the Council concern the role and respective powers of the institutions concerned in the event that assessments of the economic and social situation diverge.

181. 'Purely horizontal' conflicts [60] between the Commission and the Council over determining the level of remuneration for officials and other servants of the European Union have always been a matter of fundamental importance as regards ensuring institutional balance. [61] The judgments delivered by the Court in the context of such conflicts provide valuable material for answers which should be recalled prior to closer examination of the pleas put forward by the Commission in the light of what can be learned from those judgments and the particular circumstances of this new conflict.

a) The case-law of the Court concerning the role and respective powers of the Commission and the Council in the procedure for the adjustment of remuneration

182. The Court has delivered four judgments concerning the procedure for the annual adjustment of remuneration and pensions, in which it held that the Council's powers under the 'normal' method are subject to self-imposed limitation and the Commission has a duty to take the initiative under the exception clause.

183. Although there is no need to recall in detail the origin and historical evolution of the method of adjusting the remuneration and pensions of officials and other servants of the European Union, [62] I would point out that the provisions contained in Annex XI to the Staff Regulations, entitled 'Rules for implementing Articles 64 and 65 of the Staff Regulations', were adopted in order to avoid conflicts between the EU institutions and their officials and other servants as regards the adjustment of remuneration.

184. Taking those objectives into account, the Court has held that the Council itself set the limits on the discretion resulting from Article 65 of the Staff Regulations and has required it to remain within those limits.

185. In Case C-40/10 Commission v Council the Court, describing the version of Annex XI to the Staff Regulations in force as 'the culmination of a continuous development … characterised by the setting of an ever more precise and restrictive framework for the method of annual adjustment of remuneration,' [63] held that the Council had, by the adoption of that annex, adopted provisions for the implementation of that article and, by that 'framework', restricted its discretion resulting from that article. In the words of the Court, 'the Council, by a unilateral decision, bound itself, for the period of validity of [A]nnex [XI to the Staff Regulations], in the exercise of its discretion under Article 65 of the Staff Regulations, to comply with the criteria laid down exhaustively in Article 3 of that annex', [64] from which it concluded that, in the context of Article 3, the Council was not entitled to claim a discretion going beyond the criteria laid down in that article.

60 — I adopt the terminology proposed by K. Lenaerts in his thesis 'Le juge et la constitution aux États-Unis d'Amérique et dans l'ordre juridique européen', Bruylant, Brussels, 1988, No 298, p. 343.

61 — See, for an analysis of those conflicts from the point of view of the separation and regulation of power relationships between institutions, Lenaerts, K., op. cit., Nos 295 to 307, p. 340 et seq.

62 — Five methods have been successively adopted since 1972 under the following provisions, namely, the Council Decision of 20 and 21 March 1972; 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 (OJ 1981 L 386, p. 6); Council Decision 87/530/Euratom, ECSC, EEC of 20 October 1987 amending the method of adjusting the remuneration of officials and other servants of the Communities (OJ 1987 L 307, p. 40); Council Regulation (ECSC, EEC, Euratom) No 3830/91 of 19 December 1991 amending the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of those Communities in respect of detailed rules for adjusting the remuneration (OJ 1991 L 361, p. 1); Council Regulation (EC, Euratom) No 2181/2003 of 8 December 2003 concerning transitional measures to be adopted for the reform of the Staff Regulations, in particular with regard to pay and pension (OJ 2003 L 327, p. 1); and Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities (OJ 2004 L 124, p. 1).

63 — Paragraph 63 of that judgment.

64 — Paragraph 71 of that judgment.

186. The judgment in Case C-40/10 Commission v Council, which restates and upholds the approach taken by the Court in Case 81/72 Commission v Council,[65] and Case 70/74 Commission v Council,[66] therefore requires the Council to comply with the limits which the Council itself set with regard to its decision-making powers, meaning that it is required to follow the 'normal' method except where it has recourse to the procedure laid down in Article 10 of Annex XI to the Staff Regulations.

187. That judgment also adds some clarification regarding the application of the exception clause procedure and the possibility of taking into account a serious economic crisis.

188. That procedure makes it permissible, 'in an extraordinary situation, to disregard on an ad hoc basis the method laid down in Article 3 of Annex XI to the Staff Regulations, without amending it or repealing it for the following years',[67] by '[enabling] the institutions to react in the face of sudden events which require an ad hoc reaction rather than a comprehensive amendment of the "normal" method of adjusting remuneration'.[68]

189. In the view of the Court, that procedure constitutes 'the only' means of taking account of an economic crisis in the adjustment of remuneration and therefore of disapplying the criteria laid down in Article 3(2) of Annex XI to the Staff Regulations.[69]

190. The Court added that the exercise of the powers conferred on the Commission by Article 10 of Annex XI to the Staff Regulations did not constitute a mere option for the Commission, from which it must be concluded that the Commission's power to take the initiative during the normal legislative process, in the context of the particular procedure under Article 10, becomes a duty to take the initiative.[70]

191. Lastly, the Court has held that, by virtue of Article 241 TFEU, the Council may request the Commission to submit to it any appropriate proposal.[71]

192. That judgment is instructive on two main points.

193. The first point concerns the relationship between the two procedures laid down in Articles 3 and 10, respectively, of Annex XI to the Staff Regulations. The relationship between those two mutually exclusive procedures is, according to the Court, that of the rule and the exception. The 'normal' method procedure must, as a general rule, be applied so long as Annex XI to the Staff Regulations is in force, whilst the 'special' procedure, enabling a serious economic crisis to be taken into account, can be used only by way of an exception. The wording of Case C-40/10 Commission v Council clearly focuses on the exceptional nature of the procedure under Article 10 of Annex XI to the Staff Regulations, describing as 'extraordinary' the situation which allows recourse to such a mechanism, which makes it possible to react to 'sudden' events requiring an 'ad hoc' reaction, where, under the 'normal' method, the remuneration of officials would not be adjusted with sufficient speed.

65 — Case 81/72 [1973] ECR 575. In paragraph 9 of that judgment the Court held that 'by its decision of 21 March 1972, the Council, acting within the framework of the powers relating to the remunerations of the staff conferred on it by Article 65 of the Staff Regulations, assumed obligations which it has bound itself to observe for the period it has defined'.

66 — Case 70/74 1975 [ECR] 795. In paragraph 20 of that judgment the Court held that 'by its decision of 20 and 21 March 1972 the Council intended for the implementation of Article 65 [of the Staff Regulations] to bind itself for a definite period to observe fixed criteria'.

67 — Paragraph 74 of that judgment.

68 — Paragraph 75 of that judgment.

69 — Case C-40/10 *Commission* v *Council*, paragraph 77.

70 — Ibid., paragraph 79.

71 — Ibid., paragraph 80.

194. The second instructive point concerns the decision-making process for determining the level of remuneration and pensions. That process involves a twofold transformation in relation to the usual decision-making system: first, the Council's discretion is transformed into an obligation to apply the 'normal' method unless the exception clause comes into play, and secondly, the Commission's power to take the initiative becomes a duty to have recourse to the exception clause where the relevant conditions are met.

195. It remains to be determined on what basis the institutional balance must be established where the Commission and the Council differ in their assessments of whether there exists a serious and sudden economic crisis which justifies application of the exception clause.

b) Resolution of the conflict between the Commission and the Council over the existence of a 'serious and sudden deterioration in the economic and social situation found within the European Union'

196. At the hearing, discussion focused, at the Court's initiative, on the conditions for triggering the exception clause where the Council and the Commission disagree over the existence of a serious economic crisis. That question would appear to determine whether or not it is possible for the Council to reject a Commission proposal based on application of the 'normal' method. If the exception clause procedure is triggered merely by the 'dialogue' between the Council and the Commission, the triggering of that procedure should render a proposal for a regulation submitted by the Commission on the basis of the 'normal' method unlawful and thus allow the Council to refuse to adopt it.

197. I shall therefore focus initially on that difficulty before going on to study the various pleas put forward by the Commission in support of its action for annulment.

i) Analysis of the conditions for triggering the procedure laid down in Article 10 of Annex XI to the Staff Regulations

198. Article 10 of Annex XI to the Staff Regulations does not state which institution is to carry out, in the light of 'objective data supplied … by the Commission', the assessment needed in order to determine whether the exception clause is applicable. The way in which that provision is worded makes it difficult even to determine what each institution is responsible for, since it combines the use of the passive voice, in the word 'assessed', and a present indicative, signalling an action to be taken by the Commission, which is to 'submit' appropriate proposals. Although it is not possible to determine clearly from that wording whether it is for the Commission and it alone to assess the situation or whether the Council may conduct its own assessment, in actual fact I think that the question which arises is not so much of ascertaining whether each of the two institutions may carry out its own assessment in the light of the 'objective' data which we know must be supplied by the Commission, but of determining how, in the event of differing assessments, that inter-institutional disagreement must be resolved.

199. In relation to the question whether the Council is entitled to refuse to adopt the proposal for adjustment of remuneration and pensions according to the 'normal' method on the ground that it considers that there exists a serious economic crisis which justifies application of the exception clause procedure, the parties' answers took the form of antithetical propositions: either the Council's request under Article 241 TFEU itself triggers the exception clause procedure, or, conversely, that procedure can be triggered only on the initiative of the Commission, with the consequence that the Council has no alternative, in the event of the Commission's refusal, but to seek a declaration from the Court that the Commission has exceeded the limits of its discretion in its assessment of the economic and social situation.

200. The first proposition, which confers seminal force on the dialogue between the Commission and the Council — or, to use a less euphemistic word, the disagreement between the two institutions [72] — from which the exception clause procedure would emerge, seems to me to resolve the issue of when that procedure is to be initiated by paralipsis. Without actually saying so, that position presupposes the acceptance that the Council's request under Article 241 TFEU obliges the Commission to submit a proposal for a regulation on the basis of Article 10 of Annex XI to the Staff Regulations and that if, none the less, the Commission submits in response a proposal for a regulation on the basis of Article 3 of that annex, that proposal will be transformed, by virtue of the Council's disagreement, into an 'appropriate proposal' under the exception clause.

201. The second proposition is more traditional. It makes the triggering of the exception clause procedure dependent on a substantive condition, the existence of a serious and sudden economic and social crisis, and on a procedural condition, the submission by the Commission of an appropriate proposal.

202. For my part, I cannot support the first proposition and I have no hesitation in proposing that the Court should adopt the second, in favour of which I am persuaded by a number of arguments.

203. The first argument is based on the text and falls into two parts.

204. First, it is clear that Article 10 of Annex XI to the Staff Regulations is drafted in terms which clearly lay down the condition that there must be a 'serious and sudden deterioration in the economic and social situation within the Union' as a condition for the triggering of the exception clause procedure. In using the words '[i]f there is', that article refers to the objective existence of such deterioration. If the EU legislature had intended to make the Council's intention the decisive factor in that procedure it would have used another form of words to that effect. [73] The rejection of the 'normal' method and the accompanying application of the 'special' procedure are therefore clearly dictated by the existence of a crisis that meets the criteria of seriousness and suddenness required by that provision.

205. Secondly, Article 10 of Annex XI to the Staff Regulations provides that the Commission is to 'submit appropriate proposals' to the European Parliament and to the Council. In a situation where there is dialogue of conflict such as that which has existed between the Council and the Commission on the subject of the adjustment of remuneration since 1 July 2011, it is only at the expense of a twofold distortion of the sense of the content of the Commission proposal, submitted on the basis of the 'normal' method and addressed solely to the Council, that it could be contended that it is equivalent to a proposal made to the European Parliament and the Council on the basis of Article 10.

206. The second argument is based on the existing case-law of the Court concerning application of the exception clause.

207. It appears to me that mere respect for the judgment in Case C-40/10 Commission v Council, and for the logic of that judgment, finally lays to rest an interpretation that would give the Council power to take the initiative in order to trigger the procedure laid down in Article 10 of Annex XI to the Staff Regulations. In the view of the Court, application of that article is 'dependent' on a proposal from the Commission, [74] and consequently for it to be dependent on an initiative from the Council would

72 — The discussions between the Commission and the Council show all the signs of a dialogue of the deaf.

73 — For example, Article 10 could have provided for recourse to the exception clause 'if the Council [or the European Parliament] considers that there exists a serious and sudden economic crisis'.

74 — Paragraph 78 of that judgment.

represent an abrupt departure from that approach. The idea that a Commission proposal based on the 'normal' method would trigger the exception clause procedure where it encountered opposition from the Council constitutes, to my mind, a sophism which would involve distorting the sense of the Commission proposal.

208. The Court has also held that, under the procedure laid down in Article 10 of Annex XI to the Staff Regulations, the Council has no power other than that which it has according to general law under Article 241 TFEU. That article confers on the Council merely a power to provide a 'stimulus', by enabling it to request the Commission to undertake any studies the Council considers desirable for the attainment of the common objectives, and to submit to it any appropriate proposals. Thus, although the exercise of the powers conferred on the Commission by Article 10 of Annex XI to the Staff Regulations does not constitute a mere option for that institution,[75] the fact remains that the Council does not have a competing power of initiative, enabling it to assume the role of the Commission in the event of failure to act and to take the place of the Commission in triggering the exception clause procedure.

209. The third argument concerns respect for the principle of institutional balance.

210. That essential principle means that each of the institutions must exercise its powers with due regard for the powers of the other institutions.

211. However, the principle of self-imposed limitation on the Council's powers adopted in the traditional approach to the decision-making process for the adjustment of remuneration sits uneasily with granting the Council total freedom to trigger the exception clause procedure.

212. I would point out in that regard that, according to the interpretation given by the Court, the decision-making process resulting from the 'normal' method for adjusting remuneration involves a limitation on the Council's decision-making powers, and the Council is restricted, for the period of validity of Annex XI to the Staff Regulations, in the exercise of its discretion under Article 65 of the Staff Regulations. That process also involves the participation of the Commission, so that the result is 'a type of decision-making by consensus, which involves the Council losing its right to depart unilaterally from its earlier decision of principle in cases of specific application'.[76]

213. Since applying the exception clause necessarily goes hand in hand with disapplying the 'normal' method, to allow the Council to trigger the exception clause procedure on its own initiative and merely by claiming that a serious economic crisis exists, amounts to undermining that concept of balance and giving the Council the opportunity not only to call into question the Commission's participation, but also to circumvent the criteria laid down in Article 3 of Annex XI to the Staff Regulations.

214. Moreover, I consider that the Council's assertion that it has not definitively surrendered its discretion and would resume it if an economic crisis were to occur is not in accordance with the new configuration of institutional balance resulting from the Lisbon Treaty.

215. That argument would mean that Article 10 of Annex XI to the Staff Regulations is to be regarded as an exception to the automatic adjustment procedure laid down in Article 3 of that annex, leading to the return of the Council's decision-making powers under Article 65 of the Staff Regulations.

75 — Paragraph 79 of that judgment.

76 — Lenaerts, K., op. cit., No 305, p. 354.

216. Such an interpretation, even assuming it was valid before the Lisbon Treaty, is no longer possible since the entry into force of that treaty, which changed the division of powers between the institutions, to the benefit of the European Parliament.

217. In that regard, I would point out that Article 336 TFEU provides that the Staff Regulations of officials are to be laid down under the ordinary legislative procedure. The reference to that provision made in Article 10 of Annex XI to the Staff Regulations is wholly unambiguous and means that the exception clause procedure is to be regarded not as a resumption by the Council of the decision-making powers provided for in Article 65 of the Staff Regulations, but as a return to the ordinary legislative procedure. It is therefore not possible to reason that the Council regains, under Article 10 of Annex XI to the Staff Regulations, freedom to exercise the discretion that it had agreed to limit by obliging itself to comply with the rules laid down in Articles 1 and 3 of that annex.

218. The fourth argument concerns the requirements of judicial review.

219. In a Union based on the rule of law with a system of remedies ensuring judicial review of the conformity of acts adopted by the institutions of the Union with the higher rules of law and fundamental principles, an interpretation of Article 10 of Annex XI to the Staff Regulations that would make the dialogue of conflict between the Commission and the Council the factor triggering the exception clause would, to my mind, have the fundamental drawback of precluding any judicial review of the decision to have recourse to the exception clause.

220. If the procedure originates solely from the 'dialogue' between the Council and the Commission, which takes place both before and after the Commission submits its proposal, it is not possible to carry out judicial review, even limited, either before or after the adoption of a regulation.

221. The Commission cannot take precautions to prevent the adoption of a regulation since, even if it indicates its disagreement by submitting a proposal based on the 'normal' method, that proposal will be treated as being an 'appropriate proposal' that may properly be considered by the Council and the European Parliament under the exception clause.

222. Nor may review take place a posteriori, since if the Commission seeks annulment of the regulation ultimately adopted by the European Parliament and the Council it cannot rely in support of its action on the absence of an economic crisis, since the lawfulness of applying the exception clause procedure is not, by definition, conditional upon the existence of such a crisis.

223. Let us imagine that the Council, without relying on the existence of an economic crisis and even expressly acknowledging that such a crisis did not exist, has none the less formally requested the Commission to submit to it a proposal on the basis of the exception clause solely on the ground that application of the 'normal' method would lead to an overly great increase in the level of remuneration. If the lawfulness of the decision to apply the exception clause resulted merely from the inter-institutional 'dialogue', that unlawful circumvention of the 'normal' method could not be censured.

224. The fact that the European Parliament has its say and can put forward, during the ordinary legislative procedure, its own assessment of the economic and social situation does not seem to me to justify that approach, since involvement of that institution in the decision-making process is not intended to mitigate the absence of judicial review.

225. The procedure laid down in Article 10 of Annex XI to the Staff Regulations is designed to be an exception that is as limited as possible, and consequently its triggering cannot be free of conditions. The lawfulness of action by the institutions in the context of that procedure must remain conditional upon the existence of a particular factual situation, namely an economic crisis, which must, in addition, meet certain criteria with regard to seriousness and suddenness.

226. From a more general point of view, it is permissible to be sceptical when faced with an approach which ultimately has the effect of establishing, outside the field of the common foreign and security policy (CFSP), a category of acts whose legality cannot be reviewed. There are two possible justifications for such an approach, namely, the political dimension of the assessment at issue and the technical nature of the subject-matter. Those justifications are the same as those that are usually given in the academic legal literature in order to explain why the Courts of the European Union decide not to forego any review but to exercise limited review, in particular where they must undertake a complex economic assessment.[77] In my view, there is no particular reason why the Court should, as regards the implementation of Article 10 of Annex XI to the Staff Regulations, not only limit its review but forego it altogether.

227. There is a strong body of case-law demonstrating the capacity of the Court to deploy all procedural resources in order to assume fully its judicial responsibilities in the most complex areas, in particular where compliance with institutional balance or fundamental principles is at issue.

228. For my part, I do not see any valid reason why the Court should relinquish its power to review legality or should restrict itself to exercising an emasculated form of review, limited to a mechanical finding that there is an inter-institutional 'dialogue' with a triggering effect. According to the principle of institutional balance, each of the EU institutions at issue must assume its share of responsibility and the Court, in its role as custodian of the Treaties, has a duty to carry out a review, the extent of which it may vary, where appropriate.

229. I shall sum up as follows. The interpretation whereby the procedure under Article 10 of Annex XI to the Staff Regulations is triggered by the dialogue between the Commission and the Council appears to me to be contrary to the letter of that article, to the interpretation given of it by the Court, to the principle of institutional balance and to the requirements of a review of legality. On the contrary, the application of the extraordinary procedure requires that the existence of a serious and sudden deterioration in the economic and social situation within the Union be objectively established. In the event of failure by the Commission and the Council to agree between them on the existence of such deterioration, it is incumbent on the Court to carry out a judicial review of the Commission's assessment.

230. Those premises having been established, I shall now examine the pleas for annulment put forward by the Commission.

ii) Assessment of whether the pleas for annulment are well-founded

231. The Commission does not seem to me to have taken particular care to differentiate between the grounds of review which it relies on in support of its action for annulment. In particular, in the first part of its main plea it claims that the Council does not have the power to adopt the contested decision, whilst complaining that the Council misused procedure and infringed at the same time the 'formal requirements', the principle of institutional balance, the principle patere legem quam ipse fecisti and Articles 3 and 10 of Annex XI to the Staff Regulations.

232. Taking the list of grounds of review contained in the second paragraph of Article 263 TFEU, I shall examine in turn the plea alleging misuse of powers, the plea criticising the Council for a breach of the rule of law in considering that it was entitled not to adopt the proposal for a regulation and the plea alleging infringement of the conditions for applying the exception clause as a result of inadequate and incorrect reasoning.

77 — See, to that effect, approach of Ritleng, D., 'Le contrôle de la légalité des actes communautaires par la Cour de justice et le Tribunal de première instance des Communautés européennes', 1998, No 683, p. 583.

– The plea alleging misuse of powers

233. The plea alleging misuse of powers, by which the Commission criticises the Council for evading the procedure laid down in Article 3 of Annex XI to the Staff Regulations in order to deal with the circumstances of the present case, cannot succeed, and for two different reasons: either the complaint is indistinguishable from infringement of the FEU Treaty or it is unfounded.

234. First, misuse of powers, of which misuse of procedure is a 'category',[78] can logically occur only where the author of the act enjoys a wide discretion. It is not, however, possible to envisage it in connection with the exercise of circumscribed powers.[79] In that event, misuse of powers is necessarily the same as infringement of the Treaty, since if the measure adopted by the institution is not the one that was required under the relevant rules it is unlawful, without there being any need to question the motives of its author.

235. The decision which the Council is required to take under the 'normal' method of adjustment of remuneration involves the exercise of a circumscribed power. Therefore, it seems to me that the criticism concerns a breach of the legislation, without there being any need to question the motives of the Council.

236. Secondly, as is clear from consistent case-law, a misuse of powers exists where an institution has taken a measure with the exclusive or at least main purpose of achieving an end other than that stated or of evading a procedure specifically prescribed by the Treaties for dealing with the circumstances of the case.[80]

237. In the present case, misuse of powers would presuppose that an objective was sought other than that of taking into account the existence of a serious economic crisis.

238. In this case, the Commission does not in any way demonstrate that the motives for the contested decision were other than those set out in the recitals to that decision. As for the error that may have been committed by the Council in the assessment of the existence of a serious economic crisis, that is not a misuse of powers but an infringement of the Treaty.

– The plea alleging a breach of the rule of law by the Council, which should not have considered that it was entitled not to adopt the proposal for a regulation

239. The plea criticising the Council for refusing to adopt the proposal for a regulation and for applying in fact Article 10 of Annex XI to the Staff Regulations seems to me to be unfounded.

240. First, contrary to what the Commission contends, the Council, to which the proposal for a regulation had been submitted, merely refused to apply the 'normal' method, without adopting a measure under the exception clause procedure.

241. Secondly, I consider that the Council, which was granted power under Article 65 of the Staff Regulations and Articles 1 and 3 of Annex XI thereto to carry out the annual adjustment of remuneration according to the 'normal' method, is also entitled to refuse to do so if the relevant conditions are not met.

78 — See Joined Cases 32/87, 52/87 and 57/87 *ISA and Others* v *Commission* [1988] ECR 3305, paragraph 8 and case-law cited.

79 — See, to that effect, Cases T-489/93 *Unifruit Hellas* v *Commission* [1994] ECR II-1201, paragraph 84, and T-52/09 *Nycomed Danmark* v *EMA* [2011] ECR II-8133, paragraph 103. See also thesis of Ritleng, D., op. cit., No 193, p. 182.

80 — See, to that effect, Case C-442/04 *Spain* v *Council* [2008] ECR I-3517, paragraph 49 and case-law cited.

242. The existence of a serious and sudden economic crisis allows the Council to refuse to adopt the proposal for adjustment according to the 'normal' method, since it requires the Commission to submit an appropriate proposal based on the exception clause.

– The plea alleging infringement of the conditions for applying the exception clause as a result of inadequate and incorrect reasoning

243. I shall dismiss from the outset, as regards the main question of the refusal to adjust remuneration, the claim of inadequate reasoning, since the contested decision contains 16 recitals setting out the reasons why the Council considered that it was not able to adopt the proposal for a regulation.

244. It therefore remains for me to examine whether the contested decision is flawed by incorrect reasoning.

245. There has long been settled case-law of the Court to the effect that, as a general rule, the Courts of the European Union carry out a limited review of complex economic appraisals, and only censure manifest errors of assessment. According to a formula often repeated by the Court, review of a measure involving such an appraisal must be limited to checking that the rules of procedure and on the statement of reasons have been complied with, that the facts relied on in making the contested decision are accurate, and that there has been no manifest error in assessing those facts or any misuse of powers. [81]

246. An examination of whether the economic and social situation within the Union has seriously and suddenly deteriorated involves an appraisal in the light of complex objective data, requiring the use of many indicators.

247. It is clear therefore that the Courts of the European Union must confine their review of such an appraisal to checking whether the statement of reasons is adequate, whether the facts relied on are accurate and whether there has been any manifest error of assessment.

248. Before examining in greater detail the various complaints made by the Council and the intervening Member States, I shall summarise the Commission's appraisal of the economic and social situation.

249. The report on the exception clause analyses the conditions for applying that clause, stating that the deterioration in the situation must not only be serious and sudden, but also such 'that the method would not be able to take [it] properly into account, due to its exceptional nature in terms of either timing or magnitude'. [82] It is based, in fact, on the premise that '[t]he principle of parallelism with national officials in terms of changes in purchasing power … has to be maintained also at a time of economic downturn in the European Union', [83] which means that the exception clause must not be applied where the 'normal' method has the 'ability to capture properly economic and social developments within the [European Union] through their effect on salaries of national civil servants'. [84]

81 — See Joined Cases C-341/06 P and C-342/06 P *Chronopost and La Poste* v *UFEX and Others* [2008] ECR I-4777, paragraph 143 and case-law cited, and order of 25 April 2002 in Case C-323/00 P *DSG* v *Commission* [2002] ECR I-3919, paragraph 43.

82 — Paragraph 4, p. 5.

83 — Paragraph 4.2, p. 7.

84 — Idem.

250. The report on the exception clause adds, in paragraph 4.1, that 'deterioration' is a term used to describe a worsening of the economic and social situation, that the question whether the deterioration is serious should be determined 'with reference to both the magnitude and duration of the identified economic and social impacts', whilst that of whether it is sudden has to be considered 'with regard to the speed and predictability of [those impacts]', so that, according to the Commission, 'it is particularly important to distinguish normal fluctuations of the economic cycle from those caused by external events'.

251. Next, examining the 'objective' indicators that may be used, the report on the exception clause, which states that the indicators should comply with a set of relevant and widely accepted principles, chooses 15 indicators relating to economic activity,[85] public finances,[86] the labour market[87] and the economic climate,[88] relying on the European Economic Forecasts released by DG Economic and Financial Affairs on 13 May 2011.

252. Lastly, finding that those indicators show that the recession ended in the autumn of 2009 and that the economic recovery in the European Union continues to make headway, the report on the exception clause notes that there has been no serious and sudden deterioration in the economic and social situation within the Union 'during the reference period of 1 July 2010 to mid-May 2011' and there has been no event that has not been or could not be captured by the 'normal' method, and concludes that it is not appropriate to submit a proposal under Article 10 of Annex XI to the Staff Regulations.

253. In its communication, based on 'the latest developments in the European Union since the Spring European Economic Forecast',[89] and in particular the economic forecasts released by DG Economic and Financial Affairs on 10 November 2011, the Commission appears more circumspect and gives a more qualified assessment of the situation.

254. The Commission confirms the conclusion of the earlier analysis whilst noting, none the less, the worsening economic outlook and an 'on-going slowdown of economic activity', which continues however to be reflected by the application of the 'normal' method.

255. According to the communication, although those forecasts show worsening trends for 2011 as compared to the forecast released in the spring and show that 'the European economy is currently experiencing a turmoil',[90] the European Union is not facing an extraordinary situation in which the remuneration of European Union officials 'would not be adjusted quickly enough to take account of measures taken by the Member States for national civil servants'.[91]

256. The complaints which the Council and the intervening Member States make about the Commission's assessment can be classified into four categories depending on whether they relate to the period to be taken into account in order to assess the economic and social situation, the nature and number of relevant indicators, the geographical area within which the deterioration must take place or, lastly, the maintenance of the principle of parallelism between the trend in remuneration and pensions of officials and other servants of the European Union civil service and that in the remuneration of national civil servants.

85 — GDP growth, domestic demand, inventories, net exports, private consumption, public consumption, total investment, and inflation (HICP) within the Union.

86 — General government balance and public debt within the Union.

87 — Total employment rate, unemployment rate and compensation of employees within the Union.

88 — Economic Sentiment Indicator and employment expectations within the Union.

89 — Paragraph 1, sixth paragraph, p. 3.

90 — Paragraph 3, fourth paragraph, p. 11.

91 — Paragraph 3, ninth paragraph, p. 12.

257. I shall examine those four sets of complaints in turn in order to determine whether the Commission committed a manifest error of assessment.

258. The first complaint concerns the period to be taken into consideration.

259. I take the view that the Commission did not commit a manifest error of assessment in taking as the period for examination the period from 1 July 2010 to mid-May 2011, on the ground that there was no need to take into account the earlier period since it had already been taken into consideration in respect of the preceding exercise, and that mid-May 2011 was the date for which the latest information was available.

260. It should be noted, generally, that Article 10 of Annex XI to the Staff Regulations does not allow just any crisis to be taken into account, only one which stands out particularly due to its 'suddenness'. In order to determine whether an event is sudden, it seems logical to look at its duration and to consider that an event that is difficult to pinpoint in time and which is the result of a gradually evolving process is not sudden.

261. It follows, in my view, that the suddenness criterion, required under EU law, precludes long-lasting crises, however deep, from being taken into account and means that the period of assessment must be limited in time.

262. Moreover, it should be noted that the Court affirmed, in its judgment in Case C-40/10 Commission v Council, the principle that application of the exception clause requires a deterioration in the situation which the 'normal' method cannot take into account with sufficient speed, since that method operates with a time-lag. [92] The Council does not dispute that principle and refers to it in its written observations.

263. It is therefore clear from the case-law of the Court that the justification for application of the exception clause lies in the fact that the 'normal' method cannot take a sudden crisis into account with sufficient speed. It is therefore necessary to identify an event, or series of events, that occurs during a specific, recent period.

264. So far as the start of the assessment period is concerned, the Commission contends that the period prior to 1 July 2010 had not been taken into consideration because it came under the preceding exercise, in respect of which the Council had not sought application of the exception clause.

265. I note, moreover, that the Council does not criticise the Commission directly for not taking into consideration the crisis of 2008 and 2009, but rather complains that the Commission did not take into account the 'persistent effects' of that crisis on the economic and social situation during the reference period, stating that the crisis 'had the effect of making the economic and social situation in many Member States extremely fragile'. [93]

266. However, the fact that the crisis of 2008 and 2009 might have had effects persisting into the reference period does not undermine the Commission's choice, since the indicators used measure only the consequences of new events occurring during that period.

92 — That time-lag is due to the fact that, according to the provisions of Article 1(2) and (4) of Annex XI to the Staff Regulations, the Brussels International Index takes into account the changes between June of the previous year and June of the current year and the specific indicators calculated by Eurostat reflect changes in the real remuneration of civil servants in central government, between the month of July of the previous year and the month of July of the current year. In paragraph 70 of that judgment, the Court took that time-lag into account, stating that the changes in salaries in the Member States which occurred between July of the previous year and July of the current year reflected the decisions on the remuneration of civil servants taken by the authorities of those Member States in the light of the economic situation prevailing during that period.

93 — See paragraph 40 of the Council's rejoinder in Case C-63/12.

267. It is clear that the Commission measured the economic and social situation overall during the reference period, and did not exclude any effects produced by the earlier crisis. In particular, although it took into account, logically, the 'beginnings' of economic recovery in 2010, the Commission also mentioned the worrying state of public finances and the negative impact of actions by the Member States, pointing out inter alia that the aggregate budget deficit in public spending grew from less than 1% of GDP in 2007 to almost 7% of GDP in 2009.

268. As regards the end of the assessment period, it should be added that the Commission and the Council appear, in fact, to agree implicitly on the fact that the end of the period should be the date on which the most recent data became available.

269. The criticism that the Commission's approach fails to acknowledge economic reality and deprives the exception clause of any effect is based, in short, on a mistaken view of that approach. Contrary to what the Council maintains, it is not apparent from the Commission's analysis that the Commission's approach is that the start and end of the crisis should exactly coincide with the reference period covered by the 'normal' method. Thus, the Commission did not wait for that period to end in order to carry out its analysis and assess whether Article 10 of Annex XI to the Staff Regulations was applicable. It is clear, however, from its report on the exception clause and from its communication that if it had found a deterioration in the economic and social situation between July 2010 and mid-May 2011, hence during a period other than the reference period, it might have regarded application of the exception clause to be justified.

270. In short, it is not apparent that the Commission committed a manifest error of assessment in its choice of the period for assessing the situation.

271. The second complaint relates to the nature and number of the relevant indicators.

272. The Council contends that the assessment of the economic and social situation for the purposes of applying the exception clause must be made in the light of the economic and social situation in the broadest sense and cannot be made in the light of the two, main, criteria for the annual adjustment under the 'normal' method. In particular, it criticises the Commission for taking into account only the fall in the purchasing power of national civil servants in the eight Member States serving as a reference for the application of the 'normal' method and disregarding the large number of other consolidation measures that affect national civil services. It also criticises the Commission for failing to take into consideration a number of other basic indicators.

273. It seems to me that the first criticism must fail because it is factually incorrect, in that the Commission did not assess the economic and social situation on the basis of the results of applying the 'normal' method, which takes into account the trend in the purchasing power of civil servants in the eight reference Member States. As I stated above,[94] the assessment was carried out on the basis of a bundle of 15 indicators supposed to cover both the economic and the social spheres. It should be noted, inter alia, that the Commission took into account the trends in remuneration in the public sector at the level of the European Union as a whole. It did not fail to take into account the fiscal austerity measures adopted by the Member States, since it observed that the consequences of the crisis would continue to be felt for a long time by civil servants 'because of the need to make significant fiscal retrenchments in the coming years'.[95]

274. The second criticism concerning the omission of certain basic indicators appears to me to be unfounded.

94 — See above, point 251 of this Opinion.

95 — See report on the exception clause, paragraph 5.2.5, fifth subparagraph, p. 23.

275. By merely providing that the assessment should be carried out on the basis of objective data supplied by the Commission, without giving a list, even for guidance purposes, of the relevant indicators, the EU legislature provided that institution with some discretion in selecting the indicators of trends in the economic and social situation. Moreover, due to the particularly vague nature of the concept of an economic and social situation, the process of assessment necessarily includes elements that can be improved upon.

276. In those circumstances, it is not enough for the Council to claim that other indicators, in addition to the 15 listed, were available, if it is to show that the Commission's analysis is based on a manifest error of assessment.

277. Moreover, some of the indicators proposed by the Council quickly reveal their own limitations, such as the ephemeral indicator of the perception of public debt by players on the financial markets.

278. It has not therefore been established that the understanding of the situation resulting from the Commission's analytical framework stems from a manifest error of assessment.

279. The third complaint concerns which geographical area to take into account.

280. The Council and the intervening Member States in essence criticise the Commission, first, for limiting its analysis to the situation in the Member States comprising the reference sample in order to establish the specific indicators used in the 'normal' method and, secondly, for failing to take into account the particular situations of some Member States which gave rise to risks for the European Union as a whole.

281. That twofold complaint is unfounded.

282. First, it is clear from the report on the exception clause and from the communication that the Commission analysed data relating to the European Union as a whole and did not exclude one or more Member States on the pretext that they did not form part of the reference sample.

283. Secondly, the particular situations of some Member States are necessarily reflected in the general data relating to the European Union as a whole on which the Commission based its reasoning. Taking into account the economic and social situation 'within the European Union' means, logically, that the data reflect not only the situation of Member States experiencing a difficult economic environment, but also that of Member States which are in a better position. Also, it should be pointed out that the Commission did not ignore disparities that may exist between Member States. Thus, as regards the rate of unemployment, it took care to note the differences in trends between Member States, but, putting those factors into perspective in relation to the overall situation, it considered that the situations in some of the Member States did not justify application of the exception clause.

284. The fourth, more general complaint, concerns the maintenance in a crisis of the principle of parallelism between adjustment of the remuneration of officials and other servants of the European Union and of national civil servants. The Commission is criticised for giving too narrow an interpretation of the exception clause in contending that that clause should operate only where the worsening economic and social situation is not already reflected in the loss of purchasing power of national civil servants, which is passed on by application of the 'normal' method.

285. That complaint appears to me to have no more foundation than the previous complaints.

286. It is common ground that the 'normal' method of adjusting the remuneration of officials of the European Union has from the outset been based on a principle of parallelism between the trend in the purchasing power of officials of the European Union and the trend in the purchasing power of national civil servants. That principle has dictated the use of specific indicators, deemed to give a

picture that is as faithful as possible of the upward and downward trends in the purchasing power of remuneration in the national civil services. A worsening economic and social situation within the Union, as the Council itself recognised,[96] has an effect on the remuneration of national civil servants, so that it is reflected, albeit partially and with a certain time-lag, in the application of the 'normal' method.

287. Contrary to what the Council maintains, the Commission does not deny that the reduction in the purchasing power of officials of the European Union that might result from application of the method may be inadequate in the light of the seriousness and suddenness of a crisis affecting the European Union, but it considers that the crisis of 2011 did not have such an impact as to justify taking measures going beyond what had already been reflected by applying the 'normal' method.

288. The Council does not demonstrate that that assessment is based on a partial or incorrect analysis of the available data or that it ignored or downplayed some indicators in favour of other, less relevant indicators. Although the data providing the basis for the assessment are objective, their analysis of them and the determination of the degree to which individual data is to be characterised as representative are necessarily based on an element of subjectivity. None of the complaints made shows that the Commission's analysis goes beyond the scope of the powers conferred on that institution or is flawed by a manifest error of assessment.

289. Although the worsening economic and social situation within the Union may have an influence on wages policy and justify in some cases a reduction in purchasing power, such a development must be in accordance with the principles of a Union based on the rule of law and comply with the rules laid down in the Staff Regulations and the safeguards which the latter provide for officials and other servants of the European Union.

290. In the context of the powers conferred on it under Article 65 of the Staff Regulations, the Council has undertaken to follow for a specified period a binding and automatic procedure for adjusting remuneration, accompanied by a safeguard procedure under which the Commission must establish that there exists an 'aggravated' economic crisis, and requiring the Council and the European Parliament to decide subsequently whether action should be taken, according to the ordinary legislative procedure.

291. The strictness of the procedural and substantive conditions needed in order to apply the exception clause procedure do not justify the Council unilaterally exempting itself from those conditions, at the expense of failing to comply both with the provisions of the Staff Regulations and with the principle of protection of legitimate expectations, which officials and other servants of the European Union are entitled to rely on.

292. Naturally, there is nothing to preclude amendment of the Staff Regulations in order to lay down another procedure after 31 December 2012, the date on which the method ends.

96 — In recital 8 in the preamble to the contested decision the Council states that the financial crisis '[resulted] in substantial fiscal adjustments, inter alia, national officials' salary adjustments, in a great number of Member States'.

293. In that regard, in order to correct the imbalance between the mechanical approach of adjustment according to the 'normal' method and the absence of automatic application of the exception clause, the position of the European Parliament adopted at first reading on 2 July 2013 [97] precisely provides for the introduction of a new exception clause, which is automatic in so far as it comes into play automatically in the event of a decrease in the GDP of the European Union. [98]

294. It is ironic moreover to note that application of that new crisis clause would, in 2011, in view of the increase in GDP, [99] have led to acceptance of the proposal for a regulation.

295. In short, since I consider that the Commission's assessment is not flawed by a manifest error, I would recommend to the Court that it annul the contested decision in so far as it rejected the remuneration adjustment.

296. I shall only briefly touch on the question of the adjustment of the correction coefficients, which does not appear to me to raise any particular difficulty.

297. There are two alternatives.

298. Either, the exception clause procedure also applies to the adjustment of the correction coefficients and the decision refusing to adjust them is unlawful for the same reasons as that refusing to adjust remuneration.

299. Or, as I believe, Article 10 of Annex XI to the Staff Regulations does not justify refusal to adopt the correction coefficients and, in that case, the contested decision must be annulled, since it contains not the slightest reasoning to explain why the Council opposes such adjustment.

300. Accordingly, I suggest that the Court annul the contested decision in its entirety.

V – The action in Case C-66/12

301. I shall first of all set out the reasons why I suggest, primarily, that the Court reject this action, without it being necessary to rule on the Commission's plea of inadmissibility.

302. In the event that the Court should disagree, I shall, secondly and in the alternative, set out the reasons why I consider that that plea of inadmissibility should be upheld.

97 — Position with a view to the adoption of Regulation (EU) No .../2013 of the European Parliament and of the Council amending the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Union.

98 — See Article 1, point 53 of that position, which amends Annex XI to the Staff Regulations by introducing a new exception clause (new Article 11). If the change in GDP is between — 0.1% and — 1%, 33% of the value of the specific indicator will be taken into account immediately, the remaining 67% being carried forward to 1 April of year $n + 1$; if the change in GDP is between — 1% and — 3%, the value of the indicator will not be taken into account at all until 1 April of year $n + 1$; lastly, if GDP falls by more than 3%, no update will take place until the cumulative increase in GDP, measured from the current year, becomes positive again. Recital 4 of that position states that the purpose of that automatic crisis clause is 'to remedy the difficulties with the application of the method in the past'.

99 — According to Eurostat statistics, the real GDP growth rate of the European Union was 1.6% in 2011 [table showing real GDP growth rate (volume) available at http://epp.eurostat.ec.europa.eu/portal/page/portal/product_details/dataset?p_product_code=tec00115].

A – *Whether the action is well founded*

1. Observations of the main parties and of the interveners

303. Since the arguments of the Council, the Commission, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Kingdom of Spain, the Kingdom of the Netherlands and the United Kingdom have already been set out during the examination of whether the action in Case C-63/12 is well founded, I shall merely set out the submissions of Ireland and the French Republic.

a) Ireland

304. Ireland contends that a serious and sudden economic disturbance can be constituted by the likelihood of future fiscal disequilibrium amongst the Member States and considers that the Council is entitled to go beyond the objective data presented by the Commission in assessing the risk of a precipitation of the crisis.

305. Ireland criticises the Commission for not adequately taking into account the state of the public finances of the Member States, when this is the defining and fundamental element of the current economic crisis.

306. With regard to the Irish situation in particular, it states that it has implemented wide-ranging budgetary adjustments, which included inter alia reductions in civil service pay, and given various commitments in order to preserve its banking sector. Ireland also notes the significant contractions in real GDP in 2008, 2009 and 2010, followed, in 2011, by a contraction in gross national product (GNP), an increase in public debt, a worsening employment situation and a low level of inflation, which indicates the continuing weakness of Ireland's domestic economy.

b) The French Republic

307. The French Republic contends that the Court must conduct a normal review of the Commission's refusal to apply the exception clause, inter alia because the Commission has no discretion in the application of that clause and the complexity of the assessments to be made are not sufficient to justify limitation of judicial review.

308. That Member State supports the Council's arguments, both as regards limiting the relevant data to a specific timespan and as regards assessing the seriousness and suddenness of the situation.

309. It contends that the Commission did not take into account all the objective and relevant data and states that, particularly as regards the French Republic, the fiscal adjustment measures taken in response to the crisis have led to the blocking of changes in the two main components of the remuneration of civil servants following the freezing of the index point. In its view, the time-lag of a year resulting from the 'normal' method did not allow for sufficiently rapid adjustment.

310. The French Republic also considers that the Commission disregarded and downplayed the seriousness of the crisis and adopted an interpretation of Article 10 of Annex XI to the Staff Regulations that makes it extremely difficult, or impossible, to meet all the conditions allowing derogation from the 'normal' method.

311. Lastly, it states that the Commission, as guardian of the general interest of the European Union, has specific duties and that it cannot exempt officials of the European Union from the necessary collective effort agreed to by civil servants of the Member States in order to help reduce budget deficits and tackle a crisis of a seriousness unprecedented in the history of the European Union.

2. My appraisal

312. The Court has repeatedly held that the Courts of the European Union are entitled to assess, according to the circumstances of each case, whether the proper administration of justice justifies the dismissal of an action on the substance without a prior ruling on its admissibility. [100]

313. Recourse to this process of reversing the logical — or natural — order for examining issues is sometimes debatable. [101] None the less, if there is any situation in which the principles of economy of procedure and the proper administration of justice justify ruling on the substance of an action without examining its admissibility, it is one where dismissal of the action is required as a consequence of a decision taken in another, connected action.

314. That is precisely the situation here.

315. I noted above the connecting link between the three cases forming the subject of this Opinion and the overlapping of the pleas raised in those cases. [102]

316. If, as I suggest, the Court decides in Case C-63/12 to uphold the action for annulment of the contested decision on the ground that the Commission did not commit a manifest error of assessment in considering that the conditions for applying the exception clause were not met, [103] it must, accordingly, dismiss the action for annulment in which the Council criticises the Commission for committing a manifest error of assessment in two of the preparatory acts for the contested decision.

317. I would therefore recommend to the Court that it dismiss the action in Case C-66/12.

318. It is therefore only in the alternative that I shall examine the complex and delicate issue of the admissibility of that action.

B – *Admissibility of the action*

1. Observations of the main parties and of the interveners

319. The Commission submits that the action is inadmissible in its entirety, since the Council did not decide to bring that action by a qualified majority of its members, six delegations having indicated during the discussion within the Committee of Permanent Representatives (Coreper) that they would abstain and the item having been adopted without discussion at the meeting of the Environment Council on 19 December 2011.

100 — See, to that effect, Case C-23/00 P *Council* v *Boehringer* [2002] ECR I-1873, paragraphs 51 and 52; Case C-233/02 *France* v *Commission* [2004] ECR I-2759, paragraph 26; and the judgment of 25 April 2013 in Case T-526/10 *Inuit Tapiriit Kanatami and Others* v *Commission* [2013] ECR, paragraph 20.

101 — See, inter alia, points 46 to 53 of the Opinion of Advocate General Jääskinen in the case giving rise to the judgment of 7 March 2013 in Case C-547/10 P *Switzerland* v *Commission* [2013] ECR, and Bouveresse, A., 'Recevabilité et moyens d'annulation', Note on TEU, 24 April 2013, Case T-256/10, *Revue Europe*, Com. 257.

102 — See points 123 to 127 of this Opinion.

103 — I would point out that the arguments put forward by Ireland and the French Republic are not such as to call into question that finding.

320. The Commission contends that, since the entry into force of the Treaty of Lisbon, Article 16(3) TEU provides that the Council is to act by a qualified majority, except where the Treaties provide otherwise. Although the Council has made reference in the present case to the exception provided for in Article 240(3) TFEU, which allows the Council to act by a simple majority regarding procedural matters and for the adoption of its Rules of Procedure, a decision to bring proceedings before the Court, although it does not have binding legal effects, none the less does not constitute a merely procedural matter but contains a decision of principle on the merits, expressing the Council's objection to the Commission's conclusions regarding application of the method.

321. As the Council did not act by a qualified majority, its decision to bring proceedings before the Court should, according to the Commission, be held not to have been adopted. The procedural rules laid down by the Treaties are not at the disposal of the Member States or the EU institutions and are of fundamental importance. Moreover, where the applicant's intention to bring an action is not established the action must be declared to be inadmissible.

322. The Council replies that the decision to bring proceedings before the Court is, by definition, a procedural decision and not a substantive decision, since its purpose is not the adoption of an act or measure provided for by the Treaties and it does not contain any decision on the merits of the legal questions submitted to the Court.

323. Arguing that, before the entry into force of the Treaty of Lisbon, it always considered — and was not contradicted by the Commission — that the voting rule for a decision to bring judicial proceedings did not follow the rule laid down by the specific legal basis governing the matter to which the substantive questions submitted to the Court related, but was the default simple majority rule laid down in Article 205(1) EC, the Council contends that Article 16(3) TEU establishes the qualified majority vote not as a general principle, but merely as a default rule.

324. Further, even if a decision to bring proceedings before the Court had to be adopted by a qualified majority, it would be necessary, under the third subparagraph of Article 3(3) of the Protocol (No 36) on transitional provisions, annexed to the TEU and the TFEU, to obtain at least 255 votes in favour, representing at least two thirds of the members of the Council, since such a decision is not taken on a proposal from the Commission. Thus, paradoxically, the adoption of a decision to bring proceedings before the Court would be more difficult than the adoption of important political decisions, although there is no evidence that the authors of the Treaty of Lisbon envisaged reducing the opportunities for the Council to assert its rights before the Court and create an imbalance between the institutions of the European Union, with the Commission for its part acting by a majority of its members on whether to bring proceedings. [104]

325. The Kingdom of Spain adds that to limit the opportunity for bringing a legal challenge would undermine the principle of effective judicial protection, even though it was no objective of the Treaty of Lisbon to make it more difficult for institutions of the European Union to bring legal proceedings. Moreover, the qualified majority rule is not consistent with the practice of the other institutions, whose rules of procedure permit legal proceedings, and would undermine the principle of institutional balance by preventing an institution from bringing an action in order to protect its powers.

104 — See Article 250 TFEU.

326. The French Republic maintains that the only express Treaty provisions concerning the majority rule applicable as regards the Council bringing proceedings before the Court are those contained in Articles 245 TFEU and 247 TFEU in respect of an application for the removal of a member of the Commission, and contends that it is even more paradoxical to impose a stricter majority rule for bringing an action for annulment or an action for failure to act than for an application for removal, since the conditions for implementing removal procedures traditionally include protective rules, justified by the principles of the separation of powers and the principle of continuity of government.

327. The Federal Republic of Germany contends that the principle of effective judicial protection dictates that Article 240(3) TFEU should not be interpreted too narrowly. In the view of that Member State, the decision, even if it is unlawful, must be held to be valid by reason of the presumption of legality attaching to acts of the EU institutions so long as they have not been withdrawn or annulled.

328. The United Kingdom contends that, even if a qualified majority were required in respect of the decision, that qualified majority was provided by the Environment Council on 19 December 2011, since the item, being listed as an 'A item' on the agenda, was adopted by consensus of the Council, and no member expressed an opinion, requested statements to be included in the minutes or suggested that the item might lead to further discussion justifying its withdrawal from the agenda.

329. The Commission questions the admissibility of the submission made by the United Kingdom as an intervener, since the Council, the applicant, does not deny taking its decision by a simple majority. As to the substance, it maintains that the adoption of an item 'without discussion' does not mean it was adopted unanimously, and it is clear from the note from the Coreper to the Council [105] and from the list of 'A' items proposed for adoption by the Council [106] that there was not a qualified majority of members of the Council in favour of the decision.

2. My appraisal

330. Before examining the question whether a decision to bring an action for annulment or for failure to act requires a qualified majority within the Council, I consider it essential to determine, as a preliminary point, by what majority the decision was actually taken, since if it was taken by a qualified majority the objection of inadmissibility raised by the Commission would have no basis in fact.

331. First, the United Kingdom, as an intervener, calls on the Court to determine that majority, in a submission which, contrary to the arguments put forward by the Commission, cannot be declared inadmissible. The principle set out in Article 129(1) of the Rules of Procedure of the Court, that an intervention is to be limited to supporting the form of order sought by one of the parties, does not preclude an intervener from putting forward its own arguments.

332. Secondly, I consider that in any event it is for the Court, before which an objection of inadmissibility based on the absence of a majority is raised, to determine, if necessary of its own motion, by what majority the contested decision was taken.

105 — Council document 18771/11 of 16 December 2011 (Annexe B. 7 to Commission defence in Case C-66/12).

106 — Council document 18665/11 of 16 December 2011 (Annexe B. 8 to Commission defence in Case C-66/12).

333. In the light of the evidence supplied by the parties, inter alia the note from the Coreper to the Council showing that six delegations had indicated that they would abstain [107] and the list of 'A' items considered at the 3139th session of the Environment Council, it must be concluded that the decisions were not the subject of the 'special' majority vote required when the Council is not acting on a proposal from the Commission. [108]

334. It remains to be decided whether or not that majority is required in order to bring an action for annulment or an action for failure to act.

335. Before the entry into force of the Treaty of Lisbon, Article 205(1) EC provided that the default voting rule within the Council was 'a majority of its Members', that is a simple majority, all the Member States thus being on an equal footing.

336. In reality, that rule was artificial, with the Council generally voting unanimously or by a qualified majority, and voting by a simple majority only in a very small number of cases.

337. The substitution of the qualified majority rule for that of the simple majority as the common default rule was therefore considered to have put an end to that bizarre situation, by bringing the letter of the rules closer to reality.

338. That compelled the authors of the Treaty of Lisbon to list expressly the cases in which, as an exception, a simple majority is applicable.

339. Thus, the Treaty of Lisbon and Protocol No 1 amending the protocols annexed to the Treaty on European Union, to the Treaty establishing the European Community and/or to the Treaty establishing the European Atomic Energy Community, annexed to the Treaty of Lisbon, contain, among their 'horizontal amendments', provisions inserting the words 'acting by a simple majority' after 'the Council'.

340. Article 2, A(3) of the Treaty of Lisbon amends to that effect seven provisions of the TFEU, namely the first paragraph of Article 150 TFEU, the first paragraph of Article 160 TFEU and Article 242 TFEU, concerning the establishment of advisory committees [109] and the adoption of the rules governing the committees provided for in the Treaties, Article 241 TFEU, concerning requests to the Commission to undertake any studies and to submit to the Council any appropriate proposals, the last sentence of the last paragraph of Article 245 TFEU and Article 247 TFEU, concerning application to the Court in order that it may order the compulsory retirement of a member of the Commission and, lastly, Article 337 TFEU, concerning laying down conditions in which the Commission may collect any information and carry out any checks required.

341. Article 1, A, 7(a) and (b) of the abovementioned Protocol No 1, amends the second paragraph of Article 4 and the second paragraph of Article 13 of the Protocol on the Statute of the Court of Justice of the European Union, concerning the grant of an exemption with a view to engaging in an occupation and the appointment of assistant rapporteurs, respectively, and the first sentence of the first paragraph of Article 6 of the Protocol on the privileges and immunities of the European Communities, concerning the form of the laissez-passer that may be issued to members and servants of the institutions of the Communities by the Presidents of those institutions.

107 — The Kingdom of Belgium, the Hellenic Republic, the Italian Republic, the Grand-Duchy of Luxembourg, the Republic of Poland and the Portuguese Republic.

108 — See Article 3(3) of Protocol (No 36), abovementioned.

109 — The Employment Committee and the Social Protection Committee.

342. In addition, the Treaty of Lisbon amended Article 207 EC, concerning the organisation of the Council. The second subparagraph of Article 240(2) TFEU now provides that the Council is to decide by a simple majority on the organisation of its General Secretariat, whilst Article 240(3) TFEU states that the Council is to 'act by a simple majority regarding procedural matters and for the adoption of its Rules of Procedure'.

343. The authors of the Treaty of Lisbon therefore appear to have taken great care to list the cases in which voting may take place by a simple majority in derogation from the qualified majority rule, newly established as the default rule.

344. The difficulty lies in assessing the significance of their silence as regards the majority rule applicable to bringing the actions provided for in Articles 263 TFEU and 265 TFEU. [110]

345. The Council and the intervening Member States consider that the answer is to be found in the nature of the decision to bring proceedings before the Court, which is a 'procedural matter' within the meaning of Article 240(3) TFEU.

346. I do not share that view.

347. First, the term 'procedural matter' appears to me to refer to the Council's internal procedure and not to external procedures such as legal proceedings before the Courts of the European Union.

348. Secondly, even if the term 'procedural matter' did include legal proceedings I think there is a fundamental difference between the Council's decision to bring proceedings before the Court and establishment by the Council of the practical arrangements for initiating and then bringing an action. Although it is possible to accept that decisions taken in order to lay down the detailed rules for bringing an action may constitute procedural matters, the decision in principle to initiate the action cannot be treated in the same way as that category of matters. The Council's decision to exercise its right of access to the Courts of the European Union to obtain a review of the lawfulness of action or inaction on the part of another institution of the European Union and enforce the division of internal competences is an important decision which cannot be covered by the term 'procedural matter'. Whether the subject-matter of the action is a matter on which the Council has already adopted a position as to the substance in a separate decision does not alter the problem, since it is not possible to infer from the fact that the Council has already adopted a position that it has the implicit intention to bring proceedings before the Court nor, in the absence of any legislative basis, that the decision to bring proceedings before the Court may be excluded as being simply a procedural matter.

349. Nor do I think that the answer can be inferred, by an argumentum a fortiori, from Articles 245 TFEU and 247 TFEU, which provide that the Council is to act by a simple majority where an application is made to the Court for a ruling that a member of the Commission who no longer fulfils the conditions required for the performance of his duties, or has been guilty of serious misconduct, be compulsorily retired.

350. It does not seem to me very relevant to interpret those provisions relating to the European Union's institutional system, whose characteristics are fundamentally different from those of national constitutional arrangements, by comparing them with the provisions governing procedures for dismissing members of the executive under French or German law. [111]

110 — It should be noted that Article 218(11) TFEU, concerning obtaining the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties, also does not mention a specific majority rule.

111 — I would point out in particular that the principle of the separation of powers within the EU institutional system is of a different configuration from that which exists in a domestic legal system. See, to that effect, Georgopoulos, T., 'Doctrine de séparation des pouvoirs et intégration européenne', *La prise de décision dans le système de l'Union européenne*, 2011, p. 3.

351. To contend, as does the French Republic, that the provisions of the TFEU are intended to avoid proceedings being brought before the Court against members of the Commission is to extrapolate from national provisions, which are moreover open to debate.

352. The argument which the Council and some intervening Member States derive from the principles of judicial protection and institutional balance and, more broadly, from the requirements of a Union based on the rule of law, appears to me more robust, even if it is not very well put, in particular by the Council, which confines itself to a succinct assertion that there is no evidence that the authors of the Treaty of Lisbon envisaged reducing in such a radical manner the opportunities for the Council to assert its rights before the Court.

353. It is worth recalling that it is in order to respect 'the fundamental interest in the maintenance and observance of the institutional balance' [112] and by resorting to the 'scheme' [113] of the Treaties that the Court filled the Treaty's 'procedural gap' and gave the European Parliament the right to bring an action for annulment in order to protect its own prerogatives.

354. It remains to be determined whether the need to give the Council, as the possessor of intergovernmental legitimacy, the means to ensure the protection of its powers justifies disapplying the default rule laid down in Article 16(3) TEU in favour of the simple majority.

355. I am not totally convinced by the consideration that the principle of institutional balance requiring each institution to act within the limits of the powers conferred on it in the Treaties [114] means that there must be equal voting rules among the institutions of the European Union composing the decision-making triangle.

356. It is true that Article 250 TFEU provides that the Commission is to act by a majority of its members. Moreover, the Court, on the basis of the principle of collegiality, has stated that a decision to bring infringement proceedings against a Member State, taken by the Commission in the context of its role as custodian of the treaties, must be the subject of collective deliberation by the College of Commissioners and that all the information on which that decision is based must be available to the members of the college. [115]

357. As for the European Parliament, Article 231(1) TFEU states that, save as otherwise provided in the Treaties, it is to act by a majority of the votes cast. Moreover, Rule 128 of the Parliament's Rules of Procedure provides that a decision to bring an action before the Court of Justice may be taken by the President of the Parliament on its behalf, where it is made on a recommendation from the committee responsible, even in the absence of a vote by the Parliamentary Assembly. [116]

358. However, the voting rules applicable within those institutions are not directly comparable, since the ways in which they are organised differ radically.

359. Moreover, the line of argument based on applying unequal majority rules seems to me to be paradoxical, since to make the Council's decision subject to the qualified majority rule amounts, on the contrary, to equal application of the normal — default — rule laid down by the Treaties for each of the three institutions concerned.

112 — Case C-70/88 *European Parliament* v *Council* [1990] ECR I-2041, paragraph 26.

113 — Ibid., paragraph 14.

114 — Article 13(2) TEU.

115 — Case C-191/95 *Commission* v *Germany* [1998] ECR I-5449, paragraph 48, and Case C-1/00 *Commission* v *France* [2001] ECR I-9989, paragraph 80.

116 — The second sentence of Rule 128(3) of the Rules of Procedure provides that at the start of the following part-session, the President 'may' ask the plenary to decide whether the action should be maintained.

360. It is true that there is another aspect of the principle of institutional balance, which is that it requires that any infringement of the principle of the division of competences between institutions, should it occur, must be censured. Accordingly, the fact that the Council must adopt its decision to bring proceedings before the Court by a qualified majority may be interpreted as precluding it from exercising a legal challenge in a certain and effective manner. It is ultimately the effectiveness of the Council's right to bring proceedings which requires that it should have the opportunity to take its decision without the constraint of a particular majority.

361. Appreciative of that line of argument, I wondered whether it would not be possible, given that recourse to Article 240(3) TFEU appears to me to be dubious, to find in Article 16(1) TEU a limitation on the scope of the rule laid down in Article 16(3) TEU and to consider that that rule applies only to Council decisions that fall within Article 16(1) TEU, that is to say, where the Council exercises the legislative or budgetary function or the functions of defining or coordinating policies. Thus, since there are no rules in the treaties on the voting method applicable to a decision to bring legal proceedings, that question is one on which the Council is competent to act by virtue of its power to adopt rules for its own internal organisation.

362. None the less, such reasoning is open to three objections, which appear to me to be overwhelming.

363. The first objection is based on the Council's own observations, in which it states that before the entry into force of the Treaty of Lisbon the voting rule for a decision to bring proceedings before the Court did not follow that laid down by the specific legal basis governing the matter concerned but was the default rule laid down in Article 205(1) EC. Since, in my view, there is no doubt that the rule laid down in Article 16(3) TEU has replaced the one laid down in Article 205(1) EC as the default rule, it seems to me inconsistent to declare it inapplicable to decisions which unquestionably come within the scope of the former rule.

364. The second objection is based on the case-law of the Court.

365. I think first of all that I can detect in that case-law concern to confer the widest possible scope on the default majority rule, without any limitation. In Case C-426/93 Germany v Council,[117] the Court held that the article of the Treaty laying down a default majority rule within the Council 'would be otiose if the absence of a specific rule on voting in a Treaty provision meant that it could not be used as the legal basis for an act of the Council'.[118] If that article is not otiose, it is because it applies where the rule contained in it is not disapplied by an express provision laying down the relevant majority rule for the legal basis in question. Although that particular judgment predates the entry into force of the Treaty of Lisbon, that treaty did not alter the nature of the rule laid down in Article 16(3) TEU as being the general and default rule, and it is therefore difficult to interpret it narrowly in the absence of any express provision to the contrary.

366. I also find in the case-law of the Court interesting clarification on the legal nature of a decision to bring legal proceedings. In an infringement case, the Court held that the decision to apply to the Court, adopted by the Commission in the context of its role as guardian of the Treaty, 'cannot be described as a measure of administration or management'.[119] That decision, which may be transposed to an action for annulment, entails the destruction of the argument that that type of decision is not covered by the voting methods laid down in the Treaty and lies outside the Council's powers to adopt rules for its own internal organisation.

117 — Case C-426/93 [1995] ECR I-3723.

118 — Paragraph 18.

119 — *Commission* v *Germany*, paragraph 37.

367. The third, most fundamental, objection is based on the importance of the rules that govern the decision-making process within the Council and the system for weighting the votes allocated to the Member States. That extremely sensitive issue has constantly been the subject of discussions at intergovernmental conferences, and the authors of the Treaties have always, on the occasion of the successive Treaty changes, taken particular care to define expressly and precisely the voting arrangements for each of the legal bases on which the Council's action is based, without confining themselves to the scope of the functions referred to in Article 16(1) TEU.

368. All in all, I think that there are overwhelming objections to disapplying, in the case of a Council decision to bring an action for annulment or an action for failure to act before the Court, the qualified majority rule, which was established as a default rule by the authors of the Treaties.

369. It remains to be determined whether the irregularity affecting the Council decision causes the action to be inadmissible and whether the Commission may rely on that irregularity.

370. My answer to the first question is, without any hesitation, in the affirmative.

371. First, the rules concerning voting arrangements are basic rules and the Court attaches great importance to compliance with them, as is shown in case-law relating to the legal basis. The Court has thus held that the incorrect use of a Treaty article as a legal basis, resulting in the substitution of unanimity for qualified majority voting in the Council, cannot, in principle, be considered to be a purely formal defect since a change in voting method may affect the content of the act adopted. [120] To leave such essential rules unprotected by penalties in the event of infringement does not seem to me to be in accordance with the requirements of a Union based on the rule of law.

372. Secondly, contrary to what the Federal Republic of Germany contends, it is not possible to bring a claim that a Council decision is unlawful by means of an action for annulment, since it is clear from the case-law of the Court that the decision to commence legal proceedings cannot be considered to be a decision which is open to challenge. [121] It is therefore only by way of a preliminary objection, as a defence submission in an action brought by the Council, that infringement of the qualified majority rule may be relied upon.

373. The second question must also be answered in the affirmative.

374. As I stated above, voting rules are basic rules and censuring infringement of them does not exclusively concern the Member States, but contributes to respect for legality in a Union based on the rule of law. Moreover, case-law accepts, as a general rule, that pleas alleging infringement of the conditions for admissibility of an action for annulment are of a public policy nature, and as a result they may be raised by the Courts of the European Union of their own motion. Lastly, in a number of judgments the Court has examined the merits of a plea of infringement of the voting rules within an institution raised by the defendant, thus implicitly accepting its admissibility. [122]

375. In short, I consider that the contested decision was taken in breach of the qualified majority rule laid down in Article 16(3) TEU and that that irregularity, which the Commission is entitled to rely on, entails the inadmissibility of the Council's action in its entirety.

376. It is therefore unnecessary to examine the other pleas of inadmissibility raised by the Commission.

120 — Case C-211/01 *Commission* v *Council* [2003] ECR I-8913, paragraph 52.

121 — *Commission* v *Germany*, paragraph 47; Case C-131/03 P *Reynolds Tobacco and Others* v *Commission* [2006] ECR I-7795, paragraph 56; and Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 *Philip Morris International and Others* v *Commission* [2003] ECR II-1, paragraph 79.

122 — See, inter alia, Case C-251/09 *Commission* v *Cyprus* [2011] ECR I-13, paragraphs 13 to 17.

VI – Costs

377. Under Article 138(1) of the Rules of Procedure, which provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings, I consider that the claim that the Council should bear the costs in Cases C-63/12 and C-66/12 should be upheld, as should the claim that the Commission should bear the costs in Case C-196/12.

378. Under Article 140(1) of the Rules of Procedure, the European Parliament and the Member States which have intervened in the proceedings should bear their own costs in each of those cases.

VII – Conclusion

379. In the light of the foregoing, I propose that the Court should:

(1) In the action in Case C-63/12:

— annul Council Decision 2011/866/EU of 19 December 2011 concerning the Commission's proposal for a Council Regulation adjusting with effect from 1 July 2011 the remuneration and pension of the officials and other servants of the European Union and the correction coefficients applied thereto;

— order the Council of the European Union to pay the costs; and

— leave the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Kingdom of Spain, the Kingdom of the Netherlands, the United Kingdom of Great Britain and Northern Ireland and the European Parliament to bear their own costs.

(2) In the action in Case C-66/12:

— dismiss the action without examining its admissibility;

— order the Council of the European Union to pay the costs; and

— leave the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, Ireland, the Kingdom of Spain, the French Republic, the Republic of Latvia, the Kingdom of the Netherlands, the United Kingdom of Great Britain and Northern Ireland and the European Parliament to bear their own costs.

(3) In the action in Case C-196/12:

— declare the action to be inadmissible;

— order the European Commission to pay the costs, and

— leave the Kingdom of Spain, the Federal Republic of Germany, the Kingdom of the Netherlands, the United Kingdom of Great Britain and Northern Ireland and the European Parliament to bear their own costs.