

OPINION OF ADVOCATE GENERAL LENZ
delivered on 5 October 1993 *

*Mr President,
Members of the Court,*

A — Introduction

1. In the present case the Court is to give judgment in an appeal brought by the Commission against the judgment of the Court of First Instance of 26 February 1992 in an action brought by a total of 619 officials employed by the Joint Research Centre at Ispra (Joined Cases T-17/89, T-21/89 and T-25/89).¹ A decision has also to be given on the cross-appeal which the officials made in their response.

2. The officials had made certain claims before the Court² concerning the *alleged belated adoption of Regulation No 3294/88*,³

by which the weighting for their place of employment in connection with a five-yearly adjustment for the period from 1976 to 1980 (that is, up to 1 January 1981) was amended. That regulation was adopted after the Court of Justice had annulled the adjustment which had been made by Regulation No 3619/86⁴ on the ground that it infringed Article 64 of the Staff Regulations.⁵ The officials had *claimed that the Court should order the Commission:*

- (a) to make compensation for the damage arising from the loss of purchasing power which affected the arrears of remuneration which were paid to them by virtue of Regulation No 3294/88;
- (b) to pay default interest from the date when the said arrears fell due until the date of their actual payment.⁶

* Original language: German.

1 — [1992] ECR II-293.

2 — The claims were originally brought before the Court of Justice which by orders of 15 November 1989 after completion of the written procedure referred the cases to the Court of First Instance. Concerning particulars of the procedure see paragraphs 1 and 12-18 of the contested judgment.

3 — Council Regulation of 24 October 1988 correcting the weightings applicable in Denmark, Germany, Greece, France, Ireland, Italy, the Netherlands and the United Kingdom to the remuneration and pensions of officials and other servants of the European Communities (OJ 1988 L 293, p. 1).

4 — Council Regulation of 26 November 1986 correcting the weightings applicable in Denmark, Germany, Greece, France, Ireland, Italy, the Netherlands and the United Kingdom to the remuneration and pensions of officials and other servants of the European Communities (OJ 1986 L 336, p. 1).

5 — Judgment in Case 7/87 *Commission v Council* [1988] ECR 3401.

6 — Paragraph 19 of the contested judgment.

3. The Commission contended that the application should be dismissed.

4. In their *claim for default interest* the officials had relied on the unjustified delay by the Commission in paying the arrears of remuneration owed to them. They alleged that the arrears were owed in 1981 and not for the first time in November 1988 (the date of payment).

5. The Court rejected that claim since before the adoption of Regulation No 3294/88 of 24 October 1988 there had been no entitlement to arrears of remuneration and therefore until then there could have been no delay in the payment of any debt due.⁷ After the adoption of that regulation the Commission diligently discharged its obligation to make payment.⁸

6. The Court of First Instance, however, *upheld the claim for compensation for damage resulting from loss of purchasing power.*

7. That claim was based on infringement of Articles 64 and 65 of the Staff Regulations. The officials argued before the Court that the Commission had infringed those articles in that it had simply paid the nominal value of

the arrears of remuneration. That, however, was not sufficient to secure the equivalent value of the salaries with regard to their purchasing power. In that respect they submitted statistical calculations of the loss of purchasing power of the Italian lira between January 1981 and November 1988.⁹

8. Secondly, the officials complained that the Commission had not properly complied with the judgment of the Court of Justice in Case 7/87 in that it had not compensated the said loss of purchasing power although the Court of Justice had stressed the need for a retroactive application of the new weightings (to the said effective date of 1 January 1981¹⁰).¹¹

9. The Court considered that the legislation contained in Regulation No 3294/88 could have been and therefore ought to have been adopted as early as 1 January 1984.¹² The fact that a valid regulation was adopted only in October 1988 infringed the general principle according to which decisions in that sphere should be adopted without unjustifiable delay¹³ and must therefore be regarded as constituting a fault.¹⁴ The Council possessed already in 1986 all the information needed to adopt a regulation in accordance

9 — See paragraphs 29-31 of the contested judgment.

10 — See paragraph 2 above.

11 — Paragraphs 32 and 33 of the contested judgment; the observation relates to paragraph 25 of the judgment in Case 7/87.

12 — Paragraph 39 of the contested judgment.

13 — Paragraph 36 of the contested judgment.

14 — Paragraph 39 of the contested judgment.

7 — Paragraphs 23 to 25 of the contested judgment.

8 — Paragraph 26 of the contested judgment.

with the requirements of the Staff Regulations.¹⁵ Even if the Council had adopted such a regulation by 1986, the procedure which led to the various Commission proposals to the Council had already been excessively long.¹⁶

10. As regards the damage suffered by the officials it is stated in the contested judgment (paragraph 40):

‘The Court regards it as established that, by virtue of that wrongful delay, the applicants suffered damage consisting in the loss of purchasing power of the arrears of remuneration which should have been calculated during the first quarter of 1984 and which were not calculated until several years later. In those circumstances, it must be observed that it would be impossible, except in particular circumstances, to establish how the applicants would have spent the arrears of remuneration which were due to them if the arrears had been paid to them in good time. However, in the present cases it is not a question of seeking evidence of individual losses, but of verifying whether facts exist which can be objectively proved on the basis of precise data which have been made public. By producing relevant statistics, which have not been contested by the defendant, the applicants have thus proved to the requisite legal standard the deterioration in purchasing

power which affected their arrears of remuneration during the period in question.’

11. The Court therefore, in an interlocutory judgment, *ordered* the Commission to pay compensation for the loss of purchasing power of the arrears of remuneration between 1 January 1984 and November 1988. According to the operative part of the judgment the amount of compensation is to be calculated on the basis of the official statistics of the Community concerning changes in purchasing power in the various Member States and then determined by agreement between the parties.

12. The Commission’s appeal is based on three grounds.

13. The Commission’s *first plea in law* is that the Court of First Instance wrongly interpreted Community law with regard to ‘default interest’ and ‘compensatory interest’ (awarded in the present case as compensation for depreciation). The *second plea in law* mainly criticizes the grounds in the judgment on the said issue which are insufficient and contradictory (first part). The grounds of the judgment were moreover open to objection because the Court had taken no account of the fact that the main claim could have been determined in 1986 (second part) and the Commission had been held liable for

15 — Paragraph 38 of the contested judgment; the Court’s observation is based on the fact that the Commission’s definitive proposal for the Council regulation had already been made in late 1985 and was also the basis of Regulation No 3916/86 and Regulation No 3294/88.

16 — Paragraph 39 of the contested judgment.

the conduct of another institution (the Council). On the latter issue the Court had wrongly applied Community law (third part). By its *third plea in law* the Commission objects to paragraph 40 (cited above) of the contested judgment and alleges that the Court 'wrongly interpreted and applied Community law on the requisite proof of damage for the payment of compensatory interest'.

(iii) award costs as provided for in law.

The *officials* contend that the Court should:

(i) principally

14. The *Commission claims* that the Court should:

(a) dismiss the Commission's appeal against the judgment of the Court of First Instance of 26 February 1992 in Joined Cases T-17/89, T-21/89 and T-25/89 as inadmissible;

(i) set aside the judgment of the Court of First Instance of the European Communities in Joined Cases T-17, T-21 and T-25/89 in so far as it orders the Commission 'to pay the applicants compensatory interest for the damage suffered by them, when their arrears of remuneration were calculated, as a result of the loss of the purchasing power thereof between 1 January 1984 and November 1988';

(b) order the Commission to pay the costs;

(ii) alternatively, should the Court of Justice give judgment on part or the whole of the substance of the appeal:

(ii) grant the orders sought at first instance by the Commission and dismiss the applicants' claim;

(a) dismiss the appeal, as pleaded by the Commission, as unfounded;

- (b) set aside the judgment of the Court of First Instance and uphold the applicants' claims in full as originally formulated;

B — Analysis

The Commission's appeal

- (c) order the Commission to pay the costs of both proceedings.

15. In view of Article 49 of the Statute of the Court of Justice of the EEC the Commission considers that the officials' cross-appeal (point b) is out of time and therefore inadmissible.

18. The grounds of the appeal set out above¹⁷ are based on two categories of objections. The first concerns the various kinds of interest contemplated by the Court of First Instance ('default interest' and 'compensatory interest') and the criteria for *determining the amount* of the recognized claim for interest. In the second category the Commission claims that it put forward its proposal already at the end of 1985 but that nevertheless the delay in the adoption of the legislation contained in Regulation No 3294/88 is attributed to it.

19. In the light of that it seems appropriate in the following observations to distinguish between the two categories of objection and to refer to them in separate sections.

16. The parties waived the oral procedure.

Section 1: *The objections relating to the Commission's liability for the period after 1986*

17. I shall refer to further particulars of the facts and legal position as well as the observations of the parties, as need be, in the following opinion. Furthermore, I refer to the Report for the Hearing.

20. *I.* Those objections are contained in the second part¹⁸ and third part¹⁹ of the second

¹⁷ — Paragraphs 12 et seq.

¹⁸ — P. 26 et seq., point 31 of the appeal.

¹⁹ — P. 27 et seq., points 33-35 of the appeal.

plea in law. The Commission relies there on the fact that its proposal, which was the basis of Regulation No 3294/88, was made already at the end of 1985 but that nevertheless it, and not the Council, is blamed for the further delay (until 1988). The Commission queries whether the officials ought not to have brought an independent action pursuant to Article 215 of the EEC Treaty on account of that delay against the Council as legislator instead of the Commission as employer. It considers that the statement of reasons is defective in that respect and furthermore that the Court of First Instance wrongly applied Community law.

judgments of the Court on legal issues²⁰ and cannot be based on grounds which concern the assessment of the facts by the Court as such.²¹ However, in the present case the facts on the basis of which the Court of First Instance determined the extent of the Commission's liability and which at the same time represent the basis of the present objections are not at issue. They arise clearly, and without there being any need for an 'assessment', from the time which elapsed between the happenings. The Commission challenges the content and grounds of the *legal conclusions* which the Court of First Instance drew from those facts. The officials' argument is therefore not pertinent.

21. II. Two of the officials' arguments concerning inadmissibility relate to those objections.

22. 1. The officials consider that the Commission is challenging parts of the judgment in which the Court assessed the extent of the delay attributable to the Commission. They consider that the observations on that issue are therefore inadmissible because they concern the assessment by the Court of the facts.

23. That argument must be rejected. It is admittedly true that appeals are confined to

24. 2. The officials are furthermore of the view that the Commission's said observations seek a new form of order which was not sought before the Court of First Instance and is accordingly inadmissible pursuant to Article 113 of the Rules of Procedure of the Court of Justice.

25. That argument is also invalid. The forms of order which the Commission seeks at the end of its appeal correspond precisely to Article 113. The Commission's objections which are in question here directly concern the justification of those forms of order. Should they be upheld, it would lead to the setting aside of the contested judgment at

20 — See Article 168a of the EEC Treaty and Article 51 of the Statute of the Court of Justice of the EEC and the similar provisions concerning the two other communities.

21 — See the judgment in Case C-238/90 P *Vidraný v Commission* [1991] ECR I-4339, paragraph 12).

least in part and/or to the partial success of the form of order sought by the Commission before the Court of First Instance (dismissal of the application). Thus neither expressly nor by implication has the Commission sought forms of order other than those which were sought at first instance.

26. 3. The result is that there can be no doubt about the admissibility of the Commission's contested objections.

27. *III.* As I have said, the Commission objects both to the grounds and to the content of the conclusions at which the Court of First Instance arrived in respect of the period from 1986.

28. 1. In that respect I consider it appropriate first to consider the question whether the Court of First Instance's grounds meet the applicable requirements.

29. From the point of view of principle the Court of Justice has already referred in the *Vidranyi* judgment²² to the rule that every court must give grounds for its decision.

30. In the present case the Commission considers that rule to be infringed because there is a *complete absence* of grounds. There is therefore a 'grave defect' in the contested judgment.²³

31. On considering that objection it is apparent that in fact the Court of First Instance has not stated how the delay after 1986 could make the Commission liable. In principle there is a need for such explanation, however, in order to understand the Court's argument.

32. At paragraph 35 of the judgment the Court of First Instance is concerned with deciding the officials' financial claims which pursuant to Article 179 of the EEC Treaty are the responsibility of the institution to which they belong. The party to any proceedings (and if necessary the ultimate debtor) in such a case is the institution *itself* in its capacity as *appointing authority*.²⁴

33. Furthermore, it follows from that paragraph of the judgment that the Court of First Instance considers the basis of the claim which it upheld to be in the general rules on compensation — rightly so, for even in the event of belated adoption of retroactive measures of adjustment the Staff Regulations provide for no increase in the nominal

²³ — Point 35, p. 28 of the appeal.

²⁴ — See the judgment in *Case 28/64 Müller v Council of the EEC and the Council of the EAEC* [1965] ECR 237, 247 and the judgment in *Case 307/85 Gavanis v ESC and Council* [1987] ECR 2435, paragraph 7.

²² — Previous footnote, paragraph 29 of the judgment.

amount.²⁵ Where there is doubt, however, claims for compensation must be made against the person responsible for the conduct causing damage.²⁶

34. In connection with the 'delay in establishing the rules', which the Court of First Instance regarded as the basis of the conduct giving rise to liability,²⁷ it is stated at paragraph 38 of the contested judgment:

'In the present case ... the legal basis for the five-yearly adjustment should have been established by 1986 at the latest, having regard to the fact that at that time the Council possessed all the information needed to adopt a regulation in accordance with the requirements of the Staff Regulations.'

35. From that it is apparent that the Court of First Instance held the Council responsible for the delay which occurred after 1986. That is, moreover, consistent with the fact that both Regulation No 3294/88 and

Regulation No 3619/86 were based on the same Commission proposal and that the Court of Justice declared the latter regulation void precisely on account of the provisions which departed from the Commission's proposal.²⁸

36. The fact that the Commission, like the Council, is an institution of the communities is no reason why in such circumstances it should be held responsible for any damage occurring after 1986. As I explained, the claim is made against it in the present case precisely in its capacity as an institution. The claim is not brought against the Communities as such or any of them.

37. Finally, claims alleging liability on account of the conduct of a Community institution (here the Council) which is not liable in its capacity as appointing authority are to be brought against the relevant Community, which is then represented before the Community judicature by the institution concerned.²⁹ In that case the applicable procedure is to be found in the general provisions of the Treaties and the statutes. Article 179 of the EEC Treaty (Article 152 of the EAEC Treaty) is just as relevant as Articles 90 and 91 of the Staff Regulations.³⁰

25 — See the judgment in Case 264/83 *Delhez v Commission* [1986] ECR 2749, paragraph 16.

26 — In its case-law on Article 178 and the second paragraph of Article 215 of the EEC Treaty, the Court of Justice goes so far as to declare *inadmissible* actions against the Community if the damage alleged is due to the conduct of the national authorities: see for example the judgment in Joined Cases 89 and 91/86 *L'Étoile Commerciale and CNTA v Commission* [1987] ECR 3005, paragraphs 17-21.

27 — Paragraphs 36 and 37 of the contested judgment.

28 — See the judgment cited in footnote 5 at paragraphs 11-13, 15-22 and 23-27.

29 — See the judgment in Joined Cases 63-69/72 *Werhahn v Council* [1973] ECR 1229, paragraph 7.

30 — See the judgment in Case 9/75 *Meyer-Burckhardt v Commission* [1975] ECR 1171.

38. An explanation for what, as has been shown, does not appear, *prima facie*, to be a logical attitude on the part of the Court of First Instance, cannot be found in the judgment of the Court of Justice in the *Meyer-Burckhardt* case,³¹ to which reference is made in the contested judgment at paragraph 35. It is true that pursuant to the *Meyer-Burckhardt* judgment a dispute between an official and his institution concerning compensation for damage is pursued, where it originates in the relationship of employment between the person concerned and the institution, under Article 179 of the Treaty and Articles 90 and 91 of the Staff Regulations.³² It is also true that the Court of Justice applied a broad criterion in relation to the question whether it 'originates in the relationship of employment'.³³ There is on the other hand nothing in that judgment to support the proposition that the appointing authority in a situation such as the present is responsible for the conduct of another institution.

39. It is thus apparent that the grounds of the contested judgment do not in themselves

provide the requisite explanation on the issue.

40. Nor is it possible to say on the basis of earlier case-law in similar cases that the deficiencies I have indicated do not amount to a failure to state reasons and thus a ground for setting aside the contested judgment.

41. From that point of view the Court of First Instance could have dispensed with explanation of the issue only if the legal position had been clearly in accordance with long-standing practice of the Court of Justice. We are however far from such a position.

42. In the *Roumengous Carpentier* judgment of 15 January 1985³⁴ the Court of Justice allowed a claim for interest by the applicant employed at Ispra against the Commission as appointing authority as compensation for the belated adjustment of the weighting for her place of employment.

31 — See the previous footnote.

32 — Paragraph 7 of the judgment.

33 — The applicant, a former national civil servant and former official of the Commission, had claimed compensation from the Commission for not complying with his request to take action against the Member State under Article 169 of the EEC Treaty. Rules which were disadvantageous to the applicant's claims for Community retirement pension applied in that Member State. The Court of Justice considered the application to fall under Articles 90 and 91 of the Staff Regulations because the applicant himself relied on them and claimed an infringement of Article 24 of the Staff Regulations on the protection due by institutions to officials (paragraph 8 of *Meyer-Burckhardt*). In the present case too the Court of First Instance has proceeded from a wide interpretation of Article 179 of the EEC Treaty. Consideration of the Commission's proposal, which led to the delay found in paragraph 39 of the contested judgment, is part of the legislative procedure pursuant to Article 64 of the Staff Regulations. It is to be borne in mind that generally the Commission as an institution with power to make proposals is also subject to the general rules on compensation (see the *Werhahn* judgment [footnote 29], paragraph 8). It is however not necessary to discuss the question whether the present case is sufficiently concerned with an employment relationship of officials, since none of the parties to the appeal has raised the question.

34 — Case 158/79 [1985] ECR 39. Likewise the parallel judgments of the same day in Joined Cases 532/79, 534/79, 567/79, 600/79, 618/79, 660/79 and 543/79 *Amesz v Commission* [1985] ECR 57; Case 737/79 *Battaglia v Commission* [1985] ECR 71.

43. The Court stated in that respect:

'Having regard to the circumstances of the case, in particular the excessive slowness of the Community institutions in discharging their duties ... the Court fixes the interest in respect of the delay in settling the applicant's pecuniary claims at 6% per annum.'

44. In that case however the conduct at issue was in fact that of the Commission. The applicant had claimed:

'That there was a serious wrongful omission on the part of the Commission in the performance of its functions, inasmuch as, although it was aware of the illegal situation to which the parties concerned had objected, it took no action to remedy that situation.'

45. Indeed, at a time of considerable price increases at the applicant's place of employment the Commission had provided for too little retroactivity in its proposal (for adjustment of the weighting), which therefore did not meet the requirements of Article 65(2) of the Staff Regulations, but which was adopted by the Council.^{36 37} Furthermore, contrary to the position in the present case, it had not proceeded against the Council when the latter had adopted the defective (also for other reasons) measure of adjustment. The latter

could therefore not be declared illegal until after the applicant had challenged the relevant salary slip.

46. It is thus apparent that the *Roumengous Carpentier* judgment is no justification for the failure to state reasons in the present case.

47. The same is true of the 1984³⁸ and 1985³⁹ decisions which the Court of Justice reached in the *Culmsee* case.⁴⁰ After adjustment of their salaries, forced through by the Commission by means of an action, the applicants in those cases claimed interest both from their appointing authorities and from the Council. The action claimed *inter alia* annulment of the relevant salary slip in so far as the arrears provided for did not include default interest for the period from the effective date of the retroactive adjust-

38 — Order of 26 September 1984 in Case 175/83 *Culmsee v ESC and Council* [1984] ECR 3321.

39 — Judgment in Case 175/83 *Culmsee v ESC* [1985] ECR 2149.

40 — These decisions are part of a number of similar cases: see the judgments in Case 174/83 *Ammann and Others v Council* [1985] ECR 2133; in Case 176/83 *Allo v Commission* [1985] ECR 2155; Case 233/83 *Agostini v Commission* [1985] ECR 2163; in Case 247/83 *Ambrosetti v Commission* [1985] ECR 2171 and in Case 264/83 *Delhez v Commission* [1985] ECR 2179.

In contrast to the applicants in the *Culmsee* case the applicants in these cases took action only against their appointing authorities.

35 — Paragraph 10 of the judgment.

36 — Regulation No 3087/78 (OJ 1978 L 369, p. 10).

37 — See the judgment in Case 158/79 *Roumengous Carpentier v Commission* [1982] ECR 4379, paragraphs 6 and 25-27.

ment. Furthermore, they claimed compensation in full for the loss of purchasing power.

that those applicants had claimed interest *from the date from which there was retroactive effect*. A claim so defined and based is logically directed against the appointing authority.

48. The Court considered the action against the appointing authority to be admissible (albeit without the claim in respect of loss of purchasing power since there was no mention of it in the preliminary procedure). On the other hand it dismissed the action against the Council for payment of interest as inadmissible since it concerned 'only the Economic and Social Committee'.

51. In the present case, however, the Court of First Instance did *not* regard the *retroactive effect* of the measure of adjustment (to 1 January 1981) as decisive, but the *delay* in the adoption of the measure. Consequently it ordered the payment of interest from the date from which an appropriate period for that adoption was exceeded.

49. That result seems *prime facie* to indicate that the Court considers actions for the payment of interest in cases of that nature as in principle coming within the employment relationship which again could mean that from the substantive point of view it considers the appointing authority to be the debtor.

52. I do not overlook the fact that the applicants in the *Culmsee* case also alleged a delay in the adoption of the salary increase,⁴² without however drawing the necessary conclusion regarding the commencement of the obligation to pay interest (*dies a quo*).

50. That conclusion is however clearly contradicted by the fact that those applicants had regarded the payments of interest primarily as a necessary part of a regular salary slip where arrears had been fixed on the basis of *retroactive* measures of adjustment.⁴¹ In that connection it must also be borne in mind

53. Those features lead to the conclusion in the present case that the decisions of the Court of Justice in the *Culmsee* case also provide no reliable precedent and in any event no sufficient authority to allow a statement of reasons on the issue to be *completely omitted*.

41 — See the applicants' observations referred to in paragraphs 12 and 13 of the judgment in Case 175/83 *Culmsee v ESC* [1986] ECR 2667.

42 — See paragraph 17 of the judgment (previous footnote).

54. The result is that the third part of the second plea in law is valid, for the contested judgment does not satisfy the requirements of a due statement of reasons.

55. 2. In my opinion that infringement is ground for setting aside the judgment of the Court of First Instance (to the extent defined by the plea in law in question).⁴³ It does not seem to me appropriate to go on to discuss the objection of infringement of Community law. Since there is a complete absence of a statement of reasons by the Court of First Instance on a basic issue, in conducting such a review the Court of Justice would be assuming the role of a *court of first instance* and weaken the duties of the Court of First Instance in that respect. It might perhaps be possible to disregard that objection if the solution to the issue and the considerations arising in relation thereto were obvious. There can, however, be no question of that in view of the complicated and difficult consequences arising from the unfortunate division of responsibilities between the appointing authority and the legislative institutions as far as concerns the legal remedies and the capacity to be sued.

Section 2: *The objections concerning the types of interest ('default interest' and 'compensatory interest') considered by the Court of*

First Instance and the criteria it adopted for calculating the amount of interest

56. Within the confines set for this section it seems to me expedient first to deal with the *third plea in law*. Thereafter it will be necessary to discuss the *first plea in law* and the relevant parts 1 and 2 of the *second plea in law*.

The third plea in law

57. 1. The Commission's plea in law essentially challenges the fact that the Court of First Instance awarded compensation to the extent of the loss of purchasing power shown in the statistics as a consequence of the delay in the adoption of Regulation No 3294/88. There are three parts to the plea in law — despite the somewhat laconic heading, which mentions only one.

58. In the first part⁴⁴ the Commission argues that the Court of First Instance misconceived the definition of damage as corresponding to the infringement of a subjective right. The considerations which the Court of First Instance sets out in paragraph 40 of the contested judgment infringe general legal principles and extend the definition of damage in an unacceptable manner.

⁴³ — See the judgment in Case C-68/91 P *Moritz v Commission* [1992] ECR I-6849, paragraphs 24-26.

⁴⁴ — Page 29, points 39 and 40 of the appeal.

59. In the second part ⁴⁵ the Commission argues that the Court of First Instance infringed general principles in relation to the requisite evidence whereby evidence must be adduced of alleged damage and proved. The Court of First Instance considered that it was obvious that the officials had suffered damage even though they had not even alleged it.

60. In the third part ⁴⁶ the Commission does not deny that indexing is technically feasible on the basis of the purchasing power of the currency. Many countries have in the past had recourse to that means. Indexing of the value of the currency can however be based only on a measure adopted by the Community legislature and there is none such here.

61. *II.* All three parts of this plea in law serve the same purpose: as regards the so-called compensatory interest the Commission seeks to have the contested judgment set aside and the form of order it sought at first instance upheld, namely that the application be dismissed. By means of the present plea it seeks to show that loss of purchasing power cannot be the subject of a claim for compensation.

62. *III.* It is apparent however from a comparison of these three parts of the plea in law in question that the first and second parts are

not capable of resolving the problems in the same manner as the third part.

63. In that respect it may be observed first of all that the present case relates to a quite specific situation, namely the belated adoption of a measure for the five-yearly adjustment of weighting in the realm of civil service law. The third part of the plea in law deals with just that special feature: the Commission relies on the fact that the Community rules applicable to the situation do not provide for compensation for loss of purchasing power and therefore it cannot as such be granted. The two other parts of the plea on the other hand are based on general rules of the law of compensation although the present case does not involve the problem of compensation for loss of purchasing power in the law on compensation in that general form.

64. Furthermore, it is scarcely possible to consider the question whether the fact that loss of purchasing power can on its own be regarded as 'damage' or 'proof of damage' without determining the *positive* requirements of such terms. According to the contested judgment, however, the officials in order to show their damage at first instance simply referred to the fact of depreciation and selected their evidence (statistic material) correspondingly. The definition of the positive requirements within the abovementioned meaning would therefore serve no useful purpose in the present case.

⁴⁵ — Pages 30-32, points 41-50 of the appeal.

⁴⁶ — Page 32, point 54 of the appeal.

65. For all those reasons I propose to start with the examination of the *third part of the third plea in law* and to consider the two other parts only if it is necessary in order to judge the object⁴⁷ which that plea seeks.

66. IV. Within the framework so defined I can deal quite briefly with the officials' objection to the admissibility of the third plea in law.

67. The argument that this plea concerns the assessment by the Court of First Instance of the evidence and therefore is not within the purview of the Court of Justice relates exclusively to the first two parts of the plea and is thus irrelevant to the third part. The same is true of the argument that the two conditions postulated by the Commission concerning the allegation and proof of damage are satisfied in the present case.

68. Finally, the officials' argument that the principles on which the Commission bases its third plea in law have never been recognized and in particular have no support in the case-law must also be rejected. That argument does not concern admissibility but the merits of the plea, which I shall consider in the next paragraph.

69. V. 1. Whether the plea in question is valid must be judged according to the rules which could provide the basis for compensation for loss of purchasing power. The Court of First Instance⁴⁸ rightly assumed that in that respect only the rules on non-contractual liability were relevant. Since Articles 64 and 65 of the Staff Regulations provide for no compensation for loss of purchasing power even in the case of belated adjustment, the Staff Regulations cannot be authority for the claim at issue.⁴⁹

70. 2. Written Community law does not define the principles which apply to the liability of the institutions vis-à-vis Community officials. The case-law of the Court of Justice shows however that similar principles apply here as in the context of the second paragraph of Article 215 of the EEC Treaty.⁵⁰

71. The principle which the Court has consistently laid down in civil service law, according to which liability presupposes maladministration, damage and a causal connection between the two factors,⁵¹ basic-

48 — See paragraph 35 of the contested judgment.

49 — Judgment in Case 264/83 *Delhez v Commission* [1986] ECR 2749, paragraph 16.

50 — See the express remarks to that effect in the Opinion of Advocate General Sir Gordon Slynn in Joined Cases 169/83 and 136/84 *Leussink v Commission* [1986] ECR 2812 and 2814.

51 — See for example the judgment in Joined Cases 19/69, 20/69, 25/69 and 30/69 *Richez-Parise v Commission* [1970] ECR 325.

47 — See paragraph 61 above.

ally⁵² corresponds to the wording used in Article 215 of the EEC Treaty. Furthermore, in the *Leussink* case⁵³ the Court of Justice described the claims for compensation of an official arising from the relationship of employment and those of his family pursuant to Article 215 of the EEC Treaty uniformly as claims 'based on general law'.⁵⁴ As regards the latter claims it then drew,⁵⁵ for the purposes of the system of non-contractual liability, conclusions from the 'laws of the Member States', to which the second paragraph of Article 215 of the EEC Treaty refers.

72. If non-contractual liability is based, as in the case of the second paragraph of Article 215 and the Staff Regulations, on unwritten principles, then, apart from the conclusions arising from the laws of the Member States,⁵⁶ regard must also be had to the con-

text in which the problem of liability in question arises.⁵⁷ The consequence of that is that in certain cases regarding the Community's legislative activity its liability has been made subject to restrictive conditions derived from the laws of the Member States.⁵⁸

73. It must be admitted that in the present case the question is not of the conditions of liability but the legal consequences (that is, the assessment of the compensation) which arise on fulfilment of those conditions.⁵⁹ I see however no ground in that respect for applying another criterion and to disregard the context within which the question of liability arises in assessing the compensation.⁶⁰ Furthermore, the terms of liability which the context requires may be sought not only in the laws of the Member States but also in the

52 — The relationship between the terms 'unlawfulness' and 'service-related fault' has not as yet been comprehensively defined. In many contributions by writers the view is taken that any 'unlawfulness' for the purpose of the phrasing used in Article 215 of the EEC Treaty implies at the same time a service-related fault (see the evidence in Huglo, *Juris Classeur*, Europe, part 370, No 21).

Cf. also the judgment in Case 111/86 *Delauchev Commission* [1987] ECR 5345, paragraph 30, where in the field of civil service law the Court laid down the condition of 'the illegality of the allegedly wrongful act committed by the institutions'. See further the judgment in Case 137/79 *Kohl v Commission* [1980] ECR 2601, paragraph 16, where (also in the field of civil service law) the Court refers to Article 215 of the EEC Treaty.

In the present connection I prefer the concept of maladministration, for the infringement found by the Court of First Instance concerns an unwritten rule which is to be applied according to the circumstances of the particular case: see paragraphs 36 and 37 of the contested judgment.

53 — Joined Cases 169/83 and 136/84 *Leussink v Commission* [1986] ECR 2801.

54 — See the heading above paragraph 10 and the text of paragraph 13 of the judgment.

55 — See paragraph 22 of the judgment.

56 — As is well known, Community law, as a partial legal system, requires supplementation by general legal principles to be derived from the laws of the Member States in other spheres: as regards basic rights see for example the judgment in Case 14/73 *Nold v Commission* [1974] ECR 491, paragraph 13.

57 — As regards the ECSC Treaty the criterion of context has been expressly recognized in two recent judgments: judgment in Joined Cases C-363/88 and C-364/88 *Finsider and Others v Commission* [1992] ECR I-359, paragraph 24 and in Case C-220/91 P *Commission v Stahlwerke Peine-Salzgitter* [1993] ECR I-2393, paragraph 29.

58 — See most recently the judgment in Joined Cases C-104/89 and C-37/90 *Mulder and Others v Council and Commission* [1992] ECR I-3061, paragraph 12.

Regarding the criterion applied by the Court see generally: Joliet, *Le Droit Institutionnel des Communautés Européennes*, Le Contentieux, Liège 1981, pp. 269-271; Rideau/Charrier, *Code de Procédures Européennes*, Paris 1990, p. 189.

59 — The Commission has not denied the fact that in view of the date its proposal was made there is a service-related fault which could make it liable.

60 — That is also apparently the basis of Advocate General Mancini's Opinion of 11 December 1984 in Case 158/79 *Roumengo Carpentier v Commission* [1985] ECR 39, 42; the Opinion of Judge Biancarelli, acting as Advocate General, of 30 January 1991 in Case T-120/89 *Stahlwerke Peine-Salzgitter v Commission* [1991] ECR II-279, 364.

content and object of the Community provisions in the relevant field.⁶¹

application of a later date more favourable to the officials.⁶⁴ They may be looked upon as the antithesis of the wide interpretation previously mentioned.

74. 3. It is therefore necessary to enquire whether in the light of the laws of Member States and the context in which the officials seek compensation for loss of purchasing power the claim appears unfounded.

75. (a) The Court of Justice has had so far no opportunity to consider the question so framed. Some of the judgments on the Staff Regulations relating to the adjustment of purchasing power are devoted to the interpretation of the mechanism pursuant to Articles 64 and 65 of the Staff Regulations.⁶² In general it may be observed that those provisions were given a wide interpretation in accordance with their objective.⁶³

77. (b) I think account must be taken of the last view also as regards compensation for damage resulting from belatedness. The rule for the application of which the belatedness in question arose depends, as just described, on the context of the claim put forward. It may be that adjustment by the Court of the amount to reflect the decrease in purchasing power would represent an alien element within the system.

78. That is the position in the present case.

76. Other judgments concerned with the loss of purchasing power of claims the amount of which was fixed in precise provisions as regards the relevant date refused the

79. In that respect the object of Articles 64 and 65 must first be borne in mind. Those provisions govern from the point of view of time and place the adjustment of salaries in the light of the economic trend and in particular the trend in purchasing power. In the case of Article 65 the accent lies on the tem-

61 — See the judgment in Case 9/69 *Sayag v Leduc* [1969] ECR 329, paragraphs 5-11 and the Opinion of Mr Advocate General Gand of 1 July 1969 in that case, *ibid.* 338, 341.

62 — Judgments in Case 59/81 *Commission v Council* [1982] ECR 3329; in Case 158/79 *Roumengoux Carpentier v Commission* [1982] ECR 4379; in Case 7/87 *Commission v Council* [1988] ECR 3401 and in Case 301/90 *Commission v Council* [1992] ECR I-221.

63 — To that effect see the judgment in Case 156/78 *Newth v Commission* [1979] ECR 1941 and the judgment in Case 256/78 *Misenta v Commission* [1980] ECR 219.

64 — See for example the judgment in Case 156/80 *Morbelli v Commission* [1981] ECR 1357, paragraph 34. See also the judgment in Case T-8/90 *Colmant v Commission* [1992] ECR II-469.

poral aspect, because it governs the annual adjustment of 'remunerations'. Article 64 on the other hand primarily concerns the aspect of place, since it is intended to ensure that officials receive a salary equal in value irrespective of the particular place of employment within the Community.

80. Both provisions are aimed at the adoption of roles relating to remuneration leading to the payment of particular *nominal* amounts. Should those amounts lose purchasing power during the validity of the rules adjustment may be made only by new measures under Articles 64 and 65 supplementing or replacing the earlier measures.

81. In that connection it must also be borne in mind that the adjustment machinery under the two provisions is based on a subsequent review: the adjustment always takes place on the basis of a trend which has already *taken place* and not one which is expected. There is however no provision that the adjustment should take account of the period which has expired since the effective date of the adjustment. That is so even where Article 65 provides a date (paragraph 1) or a period (paragraph 2) for the Council's intervention. Even in the case of a 'delay' in the adoption of the measure of adjustment the Staff Regulations provide for no corresponding increase in the nominal amounts. As I have already said, according to the case-law of the Court of Justice that machinery is of an exhaustive nature.

82. Secondly, it must be borne in mind that the Staff Regulations have placed adjustment of salaries in the hands of the Commission and the Council. As is apparent from the documents, staff representatives take part in the procedure leading to the Commission's proposal.

83. In the light of that I cannot agree that the Community judicature should award compensation for loss of purchasing power where there is belated adjustment. Such a result would contrast with the exhaustive nature of the rules, the Commission's and Council's powers and the significance of the staff participation in the proposal stage.

84. Those reservations might perhaps have to be overridden if the neglect by the institutions were so great that it infringed the essential nature of the duty to have regard for the welfare of staff. There is however no evidence of that in the present case (apart from the fact that there are hints in the case-law how the officials could in such an extreme situation take counter measures, for example by challenging the salary slips).⁶⁵

65 — See the judgment in *Roumengous Carpentier* (footnote 37).

85. The conclusion thus emerging from the context of the question of liability which has been raised is unaffected by the criteria on which the *Dumortier* judgment of 19 May 1982 ⁶⁶ is based, which arose in another context.

86. The judgment followed a 1979 interim judgment ⁶⁷ in which the Community was held liable for the abolition of refunds for maize gritz. As the basis for the calculation of the compensation the Court of Justice at the time had considered the amount of the refunds which the applicants would have received but for the unlawful abolition of the rules. In the final judgment in 1982 the Court then found that the payments which the Community owed the applicants on that basis should be converted from ECU into the particular national currency at the rate prevailing on the date of the interlocutory judgment.

87. In my opinion there is no sufficient parallel between that case and the present which might appear to justify the decision of the Court of First Instance to order compensation for loss of purchasing power.

88. First, it was not then a question of the increase in the nominal amount of the unpaid refunds (by application of a rate of interest) but the conversion of the unaltered nominal amounts into national currency. The

solution thus adopted by the Court takes account of the fact that the unpaid amounts were comparable to a debt in a foreign currency. The Court of Justice had not, for example, on the basis of conversion rates applicable on past dates when payments had fallen due, ordered compensation for loss of the purchasing power of the amount so calculated.

89. Secondly, the Court of Justice had recourse to a conversion rate which was part of the Community refund procedure instead of undertaking an independent adjustment to the purchasing power of the various currencies.

90. Thirdly, it is apparent that the Court of Justice was concerned to ensure equality of treatment among those to whom refunds were due, a factor which is not in question in the present case.

91. The solution I propose causes no problems from the point of view of the laws of the Member States, which in addition to the criterion of context which has been so far dealt with are relevant to the applicable system of liability.

92. First, it may be observed that the present case is concerned with the belated satisfaction of financial claims. It is true that the

⁶⁶ — Joined Cases 64/76 and 113/76, 167/78 and 239/78, 27/79, 28/79 and 45/79 *Dumortier and Others v Council* [1982] ECR 1733.

⁶⁷ — Case number and parties as above, [1979] ECR 3091.

delay did not arise in the payment of an ascertained or ascertainable amount but in the procedure which led to the determination of that amount. However the consequences for the creditor were the same in both cases.

tional cases (for example in the United Kingdom, France and Germany).

93. In contrast, the Court of First Instance, apparently having regard to the laws of certain Member States (for example Belgium and Italy), made a distinction between those two cases and linked a claim for 'compensatory interest' equal to the loss of purchasing power to the belated determination of the amounts owed, while, in the view of the Court, 'default interest' was reserved for the period after such determination. However that definition of 'compensatory interest' as specific compensation for the loss of purchasing power is primarily conceived for cases in which the Court has to calculate the compensation for *continuing* damage and thus takes into account the period elapsing between the damage and the (final) judgment.⁶⁸

95. The result is that there are no objections to the solution I propose from the point of view of national laws.

96. The third plea in law should therefore be upheld.

The first plea in law

94. Finally, it is to be stressed that the award of interest claimed for the lapse of time and based solely on loss of purchasing power determined statistically is rejected in certain Member States or granted only in excep-

97. *I.* The essence of the Commission's argument in that respect is that the case-law of the Court of Justice does not distinguish (or no longer distinguishes) sharply between default and compensatory interest. Traditionally the award of *default interest* depended on the fact that the relevant debt was certain, ascertained or ascertainable and due. On the other hand, according to the traditional definition, *compensatory interest* was awarded to a creditor who could show continuing damage. A condition is that there should be an intentional or negligent act, a damaging event and a causal link between the act and event. The case-law has now replaced that dual concept with an independent and uniform concept based on the definition of default interest but which goes further than the traditional definition of default interest. Interest for the purpose of that concept represented simply compensation for

⁶⁸ — See the Opinion of Mr Advocate General Van Gerven of 26 January 1993 in Case C-271/91 *Marshall* judgment of 2 August 1993 [1993] ECR I-4367, I-4381, point 23, and the Opinion of Mr Advocate General Tesaro of 16 September 1993 in Case 308/87 *Grifoni v EAEC* judgment of 3 February 1994 [1994] ECR I-341, I-343, points 22 and 24.

damage on the basis of the delay with which the institution had paid the amounts owing under the Staff Regulations. Award of that interest presupposed maladministration on the part of the appointing authority and a warning or demand. Such interest corresponded to the legal rate of interest provided for by the laws of the Member States and thus, apart from the natural productivity of money, involved a factor relating to depreciation.

The Commission observes that the Court of First Instance wrongly interpreted Community law as regards default interest on the belated payment of an official's salary.⁷² When it declared the claim for default interest to be unfounded the Court of First Instance relied on a definition of the term 'default interest' which has since been superseded by the Court of Justice in its case-law.⁷³

98. *II.* The object which the Commission pursues on that basis with the first plea in law pursues is not readily apparent. On the one hand the Commission challenges the part of the judgment awarding 'compensatory interest' to the officials: it claims that neither in relation to the Staff Regulations nor in any other field has the Court of Justice accepted an independent claim for adjustment of a belatedly paid amount to take account of loss of purchasing power.⁶⁹ Contrary to the grounds given in the judgment of the Court of First Instance,⁷⁰ the Commission alleges that there is no case-law on the adjustment of arrears of salary in accordance with the trend in the cost of living.⁷¹

99. However, it also criticizes the part of the judgment dealing with the claim for payment of 'default interest'; as is known, the Court of First Instance rejected that claim in accordance with the Commission's contention.

100. Although at first glance that argument is surprising in view of the Commission's interest, nevertheless it becomes apparent (with some effort) what is ultimately behind it. In that respect I refer to the Commission's answer to an objection of the officials to the effect that the first plea in law was inadmissible since the Commission had no interest in pursuing it, for the Commission had not been unsuccessful in relation to *default interest* (cf. second paragraph of Article 49 of the Statute of the Court of Justice of the EEC). In its answer thereto the Commission alleged that it was interested in 'a return to a, in its view, pertinent interpretation of Community law in relation to *compensatory interest*'.⁷⁴ The first plea in law has thus the same object as the third plea, namely that the contested judgment should be set aside in so far as the Court of First Instance awarded compensation for the belatedness found based solely on statistical trends in purchasing power.

69 — Page 18 under point 7 of the appeal.

70 — See paragraph 35.

71 — P. 17 under points 4-6 and p. 22 under point 18 of the appeal.

72 — P. 16 under point 2 of the appeal.

73 — P. 18 under point 10 of the appeal.

74 — P. 2 of the reply; my emphasis.

101. Certainly the impression cannot be denied that the Commission in connection with this case is attempting to persuade the Court of Justice generally (also in relation to default interest) of its view of the matter. The formal object of the contested plea in law is however confined to the setting aside of the contested judgment to the aforementioned extent.⁷⁵

102. *III.* Against that background I do not consider it appropriate to discuss the first plea in law separately. As we have seen, the Commission's purpose is achieved already with the third plea in law. Furthermore, I shall be able to deal with the alternative (according to which in a case such as the present no compensation is awarded for loss of purchasing power evidenced by statistics but only 'default interest' at 'a rate laid down by law') proposed in the first plea in law vis-à-vis the Court of First Instance's solution when I consider the cross-appeal.

The first and second part of the second plea in law

103. *I.* As with the first plea in law these objections relate to both parts of the judgment (default interest and compensatory interest). On the basis of a view which it considers in that respect correct,⁷⁶ the Commission criticizes the Court of First Instance

for failing to state sufficient grounds for its judgment.

104. Since that is criticism concerning the formal correctness of the judgment it cannot be regarded as dealt with in view of the result I have proposed in respect of the third plea in law.

105. *II. 1.* First of all the Commission alleges that the grounds of the contested judgment are contradictory in two respects. First, the result which the Court of First Instance reached does not accord with the alleged (traditional) distinction between default interest and compensatory interest. Secondly the Court of First Instance did not achieve a cogent application of the Community concept.

106. The officials repeat in that respect their view that the Commission could not make those objections because it had not been adversely affected, having been successful in relation to default interest. It is sufficient in that respect to observe that the Commission's objections are based on the view that there is a failure to state reasons which permeates the whole of the judgment and thus covers the part relating to compensatory interest in respect of which the Commission was unsuccessful. The officials' argument must therefore be rejected.

⁷⁵ — Above, paragraph 100.

⁷⁶ — Above, paragraph 97.

107. Nevertheless, I consider the Commission's observations in the matter to be unfounded. The Court of First Instance has explained sufficiently how in respect of the present case it perceives the criterion for distinguishing between default interest and compensatory interest, namely the ascertained or ascertainable nature of the main claim.⁷⁷ The definition of the two terms in question on which the Commission relies,⁷⁸ on the other hand, are not contained in the judgment. The result is that the contradiction alleged by the Commission is not between the various parts of the grounds of the contested judgment but between the Commission's view of the law and that of the Court of First Instance.

108. The same must be said of the Commission's criticism that the Court of First Instance did not logically apply the Community concept (which the Commission advocated). As the Commission itself recognizes in its first plea in law, the Court of First Instance did not base itself on that concept. In that respect also I cannot see that there is any failure to state reasons in the contested judgment.

109. 2. The Commission sees a further breach of the duty to state due reasons for the judgment in connection with the fact that the Commission had put forward its proposal for rules corresponding to those of Regulation No 3294/88 by the end of 1985. The Commission bases itself on the conclusion which the Court of First Instance drew

in paragraph 38 of the contested judgment⁷⁹ from that fact and considers that the Court of First Instance itself assumed that the main claim was ascertainable in 1986. On that assumption, in the Commission's view, the Court of First Instance ought to have awarded default interest (and not compensatory interest) from that date.

110. That argument likewise does not convince me. As is apparent from paragraphs 23 and 24 of the contested judgment, the Court of First Instance recognized that the Council had a discretion for the purposes of the five-yearly adjustment of the weighting in question and considered that the main claim was ascertainable therefore only from 24 October 1988 when the Council adopted Regulation No 3294/88. In view of that, paragraph 38 of the contested judgment to which the Commission refers can be interpreted only as meaning that the Council at the beginning of 1986 had at its disposal all the factors necessary for the exercise of that discretion.

111. The *conclusion* which I draw from my consideration of the *Commission's plea in*

77 — Paragraphs 23-25 of the contested judgment.

78 — Above paragraph 97.

79 — 'In the present case ... the legal basis for the five-yearly adjustment should have been established by 1986 at the latest, having regard to the fact that at that time the Council possessed all the information needed to adopt a regulation in accordance with the requirements of the Staff Regulations.'

law is that its criticism is well founded in so far as:

be fulfilled. I shall therefore consider the officials' cross-appeal below.

- there lack sufficient grounds for the claim for interest from 1986 (second and in particular third part of the second plea in law);

Respect of the time-limit under the first paragraph of Article 49 of the EEC Statute of the Court of Justice

- the Court of First Instance infringed Community law by recognizing a claim for compensation for the statistical loss of purchasing power by reason of the delay which was found (third plea in law).

113. The Commission is of the opinion that the cross-appeal (as a whole) is inadmissible since the period of two months laid down in the said provision has not been observed. The Rules of Procedure do not provide that the opportunity created by the due lodging of an appeal may be used to question in the response parts of the judgment unaffected by the appeal.

The officials' cross-appeal

114. That objection must be rejected. Article 116(1) of the Rules of Procedure provides as follows:

112. With their answer the officials cross-appealed in case the Court of Justice should decide in whole or in part the merits of the appeal. If the Court were to follow my view that the officials' objections to the admissibility of the Commission's complaints are substantially ⁸⁰ invalid, that condition would

'A response may seek:

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

⁸⁰ — I do not consider it necessary to answer the question of the admissibility of the first plea in law, which the officials also raised, because the case did not depend on that: see above, paragraph 102.

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

The conflict between the grounds of the judgment and the operative part of the judgment and infringement of the prohibition of discrimination

115. That provision shows clearly that the other party is indeed given an opportunity for an independent counter-attack. The present case, in which the Court of First Instance upheld one of the claims made by the officials at first instance while rejecting the other, shows, moreover, that for reasons of equality of opportunity for the parties that is a legitimate objective. As regards the time-limit for the cross-appeal it follows from those considerations that the respondent to the appeal is not bound by the first paragraph of Article 49 of the EEC Statute of the Court of Justice but must simply respect the time-limit for the response.

116. Thus it is not surprising that in a recent judgment the Court of Justice seems by implication to have assumed the admissibility of a cross-appeal made in a response.⁸¹

117. The Commission’s argument of inadmissibility must therefore be rejected and I shall now consider the officials’ objections.

118. I. The officials’ arguments on this issue relate mainly to the fact that the Court of First Instance determined the commencement of the obligation to pay interest (*dies a quo*) as 1 January 1984. The officials complain that the Court of First Instance awarded no compensation for the period prior to that. That is incompatible with the assumption which the Court of First Instance rightly made that any inexcusable delay in establishing the rules must be regarded as constituting a fault⁸² and that the Commission had already in January 1982 the corresponding documents of the SOEC available.⁸³ It is said that the judgment therefore reveals an obvious contradiction between its grounds and its operative part and infringes the principle of equal treatment.

119. Furthermore there was no excuse for the belated activity of the institutions. In that connection they discuss in a general way the institutions’ possibilities for expeditious action.

81 — Case C-346/90 P *Fv Commission* [1992] ECR I-2691.

82 — Paragraph 36 of the contested judgment.

83 — Paragraph 29 of the contested judgment.

120. Those observations must be rejected because they challenge in effect the assessment of the facts by the Court of First Instance. From 'an examination of the circumstances surrounding the adoption of the legislation' the Court of First Instance inferred 'that the said legislation could, in fact, — and therefore should — have been adopted from 1 January 1984'. In doing so it took account not only of the availability of the SOEC data but also the regularity of the preparatory meetings. The officials have adduced nothing to show that the Court of First Instance based that assessment on criteria which could be challenged on *legal* grounds. In particular they have not challenged the need to have preparatory meetings after production of the SOEC data.

Breach of the general principles of compensation

122. The most important part of the cross-appeal concerns the Court of First Instance's decision in relation to the claim for 'default interest'. As is known, the Court of First Instance rejected it on the authority of the *Ammann* judgment,⁸⁵ for in the absence of a certain or ascertainable claim on the basis of objective factors for the period before Regulation No 3294/88 was adopted there could be no delay in the payment of a due debt.

123. *I.* Before I discuss the officials' criticism of those observations I should like to refer to two, in my opinion important, points.

121. *II.* The officials' argument that, for the purposes of compensation for loss of purchasing power, the Court of First Instance ought also to have taken account of the depreciation in the compensation itself (for the period from 1988 to the effective payment) can likewise not be accepted. Apart from the fact that there is no compensation for loss of purchasing power,⁸⁴ the officials raised the claim in question for the first time on appeal. Pursuant to the second subparagraph of Article 116(1) (at the end) and Article 116(2) of the Rules of Procedure it can therefore not be taken into account.

124. The first point concerns the term 'default interest'. According to the definition laid down by the Court of Justice in the *Campolongo* case⁸⁶ that constitutes a legal evaluation and determination of the loss suffered by reason of the delay in complying with an obligation. According to that early judgment default interest is therefore awarded on a flat-rate basis without it being necessary to prove specific damage. As regards the *rate of interest* it is a question of

⁸⁵ — Case 174/83 *Ammann and Others v Council* [1986] ECR 2647.

⁸⁶ — Judgment in Joined Case 27/59 and 39/59 *Campolongo v High Authority* [1960] ECR 391.

⁸⁴ — See paragraphs 57-96 above.

the statutory interest which obtains in many Member States (see for example the Belgian, French, Italian and German law). The Court of Justice also later adopted that interpretation of default interest as interest at a flat-rate.⁸⁷ On the other hand, as early as 1964⁸⁸ it abandoned the view (still propounded in the *Campolongo* judgment) that default interest could not be awarded in the absence of any 'legal provision' in Community law. Since then the Court of Justice itself determines the flat-rate which in recent judgments has generally been 8% p. a.⁸⁹ In the following I shall therefore assume that the parties and the Court of First Instance interpreted the term in question in that way.

ation'.⁹¹ For that criticism the officials in justification of their claim refer to the same facts which the Court of First Instance considered, albeit for the purposes of compensation to the extent of the statistical loss of purchasing power, as giving rise to liability.

126. *II.* In the light of those considerations the question raised by the officials' present complaint is whether the delay occurring in the adoption of the adjustment measure, which, as we have seen, does not give entitlement to compensation for the statistical loss of purchasing power, attracts default interest at a flat rate.

125. The second point with which I shall deal as a preliminary concerns the evidence on which the officials relied at first instance for their claim for the payment of default interest. According to the contested judgment that claim is based on the 'Commission's delay in paying them the arrears of remuneration due to them'.⁹⁰ The officials' criticism is to that extent directed against 'the delay in paying their arrears of remuner-

127. In the officials' view the present case is to be distinguished from the *Ammann* case in that the delay then was only one year and ten months whereas in the present case it was more than eight years before the arrears owing were paid. Transposition of the criteria established in the said judgment to the present case reveals a lacuna in the system of legal remedies or signifies a grave infringement of the general principle whereby compensation is owed for the belated fulfilment of financial obligations. If there were no default interest or adjustment for depreciation the officials would have no means of

87 — See for example the judgment in Case 115/76 *Leonardini v Commission* [1978] ECR 735 and the judgment in Case 185/80 *Garganese v Commission* [1981] ECR 1785, paragraphs 19-21.

88 — See the judgment in Case 11/63 *Lepape v High Authority* [1964] ECR 61, in particular pp. 156 and 162.

89 — See on the Staff Regulations for example the judgment in Case 21/86 *Samara v Commission* [1987] ECR 795; on general liability see the judgment in the *Mulder* case (footnote 58 above).

90 — Paragraph 20 of the contested judgment.

91 — Paragraph 21 of the contested judgment.

redress if the institutions for some reason delayed the adoption of a legal measure beyond a reasonable time.

128. The argument that an ascertainable claim arose only on the adoption of the Council regulation should be no obstacle to compensation in the form of default interest or in some other form if unusual delay occurred in the procedure for the adoption of the measure. In cases of this kind the award of default interest could represent a just solution, if a period justified by the requirements of the procedure were allowed.

129. I consider that argument essentially well founded.

130. The Court of First Instance's assumption that the main debt (representing the arrears for the five-yearly adjustment) became certain⁹² only after the adoption of Regulation No 3294/88 is correct and undisputed.

131. On the other hand that fact as such does not prevent the award of default interest if there is delay in the procedure.

132. There was in the *Campolongo*⁹³ judgment still a suggestion that default interest was *independent of the existence of maladministration* and in the nature of an automatic penalty if a debt *which had fallen due* was not promptly paid.

133. Although that view may be correct in particular cases,⁹⁴ it has proved inappropriate under the Staff Regulations. In the latter case the need very soon became apparent for default interest to be awarded as compensation if the belated payment of sums which had fallen due was caused by maladministration. Such belatedness is often due in practice to a dispute about the interpretation of the Staff Regulations. The Court of Justice has therefore regarded a flat-rate 'default interest' procedure as appropriate also in such cases.⁹⁵ The claim to such interest is based in such a situation not on the single non-recognition that the amount is due but has its true origin in a misinterpretation of the

⁹³ — See footnote 86.

⁹⁴ — See for example the default interest which the Court of Justice fixed in the *Berti* case for the period after the delivery of a final judgment determining the quantum of the applicant's damage (Case 131/81 *Berti v Commission* [1985] ECR 645). Such interest is comparable with the interest which the Court of Justice laid down in the proceedings for a declaration of liability in the field of the common agricultural policy: first in the so-called *Quellmehl* and *Maize Gritz* judgments of 4 October 1979 (see footnote 67 and the similar judgments of the same day) and most recently in the *Mulder* case (footnote 58).

⁹⁵ — See for example the judgments in Case 114/77 *Jacquemart v Commission* [1978] ECR 1697; in Joined Cases 63 and 64/79 *Boizard v Commission* [1980] ECR 2975; in Case 40/79 *Pv Commission* [1981] ECR 361; and in Case 103/81 *Chaumont-Barthel v Parliament* [1982] ECR 1003.

⁹² — See also as regards Article 65 the *Ammann* judgment and the similar judgments of the same day (footnote 85).

Staff Regulations⁹⁶ and thus in maladministration even if it amounts only to the said mistaken interpretation.⁹⁷

134. Against that background it is worth remembering that for a creditor of a pecuniary debt it makes economically no difference whether the debtor delayed payment after the sum became certain or ascertainable or whether his delay is due to maladministration at an earlier stage, namely in determining the sum owed (or the criteria for its determination).⁹⁸

135. I also see no difference between the two cases from the debtor's point of view. If in a case such as the present the main debt is not ascertainable before adoption of the rule, that means that the competent institution has a *discretion*. That point of view however is not decisive, for such discretion is not affected by the award of default interest (for delay in the procedure). In general it cannot be maintained that the discretion would have been exercised differently if the procedure

had been carried out more expeditiously. Thus in relation to the present case it is not apparent how the content of the Commission's proposals could have been influenced if its consultations had been carried out more expeditiously. Likewise the Council's attitude to the proposals would not have changed had they been submitted to it earlier.

136. In such cases of delay it may therefore be assumed that if the institutions had acted with due expedition *the discretion would have been exercised in the same way as if it had been exercised at an earlier date.*⁹⁹

137. Before I discuss the *Ammann* judgment let me emphasize that that view is the basis of an important number of judgments of the Court of Justice.

138. The *Roumengous Carpentier* judgment which has already been discussed¹⁰⁰ and in

96 — See the judgment in Case 106/76 *Gelders-Deboeck v Commission* [1977] ECR 1623, paragraphs 25-30.

97 — See the judgment in Case 271/87 *Fedeli v Parliament* [1989] ECR 993 (summary publication; see paragraphs 15 and 16 of the full judgment). No later than that judgment the Court of Justice seems to have abandoned the requirement of a 'grave' mistake of interpretation within the meaning of the *Gelders* judgment (previous footnote).

98 — See paragraph 92 above.

99 — As to the delay for which the Council was responsible see above, paragraphs 28-54, and below at paragraph 144.

100 — Above at paragraphs 42 and 43.

which the Court of Justice ¹⁰¹ referred to the 'excessive slowness of the Community institutions in discharging their duties' is the leading case. Although the present case, in which the Commission carried out the procedure too slowly, is not quite comparable with that case, in which the Commission by causing and tolerating the continuance of an unlawful situation delayed the fixing of the officials' claims, ¹⁰² nevertheless that judgment shows that even events which have delayed the fixing of claims may be regarded as a basis for default interest.

139. The view which I advocate here is to be encountered, moreover, in a set of judgments concerning the fixing of the degree of invalidity, which is undoubtedly a matter of discretion. ¹⁰³ Thus the Court of Justice found in the *Leonardini* case 'that the Commission's conduct does not satisfy the said requirements of Article 73 and that it delayed settlement of the case in question'. ¹⁰⁴ The Court thereupon awarded 'default interest' (at 8%) from the date on which the matter ought to have been concluded. The case of *B v Commission* ¹⁰⁵ is particularly significant in that connection. From the clear wording of that judgment it

is apparent that the Court equated the delay in the determination of the degree of invalidity with the belated payment after that determination. ¹⁰⁶

140. The Court of Justice approached the *Williams* case ¹⁰⁷ in the same manner. The appointing authority failed to classify the applicant in that case in accordance with certain criteria which it had itself laid down (after his appointment). The Court of Justice ordered the appointing authority not only to classify the applicant with retroactive effect 'and to observe the criteria laid down' ¹⁰⁸ but also 'to pay the difference in salary resulting from the correction, increased by interest at the rate of 6% as from the date on which each payment fell due'. ¹⁰⁹

141. I now come to the *Ammann* judgment.

142. There the Court of Justice replied to the officials' argument that there had been

101 — Footnote 34; also the parallel judgments of the same day, *ibid.*

102 — See paragraph 45 above.

103 — Judgments in Case 101/74 *Kurrer v Council* [1976] ECR 259; in Case 115/76 *Leonardini v Commission* [1978] ECR 735; in Case 152/77 *B v Commission* [1979] ECR 2819; in Case 156/80 *Morbelli v Commission* [1981] ECR 1357 and in Case 186/80 *Suss v Commission* [1981] ECR 2041.

104 — *Leonardini* judgment, previous footnote, paragraph 12.

105 — Footnote 103.

106 — Paragraphs 20 and 21 of the judgment.

107 — Judgment in Case 9/81 *Williams v Court of Auditors* [1982] ECR 3301.

108 — Paragraph 1 of the operative part.

109 — Paragraph 2 of the operative part; my italics.

‘an excessive and abnormal delay’¹¹⁰ in the adoption of the measure of adjustment under Article 65 of the Staff Regulations to the effect that ‘an obligation to pay default interest can arise only where the amount of the principal sum owed is certain or can at least be ascertained on the basis of established objective factors’.¹¹¹

143. It is apparent however from paragraph 22 of the judgment that the Court of Justice did not consider that rule to be absolute. In that paragraph the Court dealt with the situation after delivery of the judgment declaring void an earlier unlawful measure of adjustment:

‘A further question which could arise is whether an obligation to pay default interest should be recognized where there was an unjustified delay in actually determining the amount of remuneration owed. However, in this case, the Council adopted Regulation No 3139/82 with all due diligence ... in compliance with the Court’s judgment ...’.

144. However, the Court did not explain why the belatedness did not have to be considered earlier, in relation to the stage before the judgment of annulment was delivered. That delay was caused almost exclusively by the fact that although the measure of adjustment was adopted expeditiously it had at

first an unlawful content. The Court may have considered there was a problem of liability for legislative measures,¹¹² which no longer arises after the judgment of annulment. Those factors, however, are to be found in the present case only in respect of the stage after adoption of the unlawful Regulation No 3619/86; to that extent the contested judgment should already be set aside in any case on account of the insufficient statement of reasons.¹¹³ For the period from the beginning of 1984 to the end of 1985 it is clearly a question of delay for which the defendant Commission has to answer, and ‘excessive slowness’, as the Court of Justice expressed it in the *Roumengous Carpentier* judgment.

145. I cannot agree with the officials in so far as they seek to explain the *Ammann* judgment by the fact that in that case there was only a relatively short period between the *effective date of the adjustment* and the *adoption of the measure* (or payment of the contested amounts). Whether on principle interest is owed depends on whether there is *unjustified delay* in the adoption of the adjustment measure. Such ‘delay’ begins in any case at a date after the effective date. On the other hand, the *length* of the unjustified delay is only a reference criterion for the *amount* of the claim for interest and not for the *principle* thereof.

110 — Paragraph 17 of the judgment.

111 — Paragraph 19 of the judgment.

112 — See paragraph 72 above.

113 — Above, paragraphs 28-54.

146. The result is that I am in any event of the opinion that the *Ammann* judgment is no obstacle to such a solution.

147. Even the considerations which led to a refusal of a claim for compensation for the statistical loss of purchasing power,¹¹⁴ are no obstacle to the recognition of default interest.

149. *III.* From all that it follows that, contrary to the contested judgment, the officials have a claim for default interest covering in any event the period from 1 January 1984 to 31 December 1985 for the delay which occurred in the adoption of Regulation No 3294/88.

Final observation

148. The instrument of default interest represents a form of compensation which, in contrast to compensation for loss of purchasing power, does not amount to intervention by the Community judicature in the powers and procedure of the Council and the Commission. After initial hesitation,¹¹⁵ it has developed in the case-law as a standard judicial instrument. The rate of interest applied expresses no systematic adjustment to purchasing power (which is reserved to the said institutions), but the principle of a flat-rate compensation which does not relate specifically to any particular kind of damage (in particular loss of purchasing power or loss of the possibility of investment). Furthermore, interest of that kind in Community law contains an element of penalty:¹¹⁶ on the one hand the creditor does not need to prove damage and on the other the extent of the delay can influence the rate.¹¹⁷

150. The contested judgment should be set aside on account of the valid objections raised in the appeal and cross-appeal.

151. In view of the second and third part of the second plea in law,¹¹⁸ the Court of First Instance must reconsider the question of liability for the period from 1986. Furthermore, in so far as the officials should be awarded default interest in respect of their cross-appeal it is necessary to fix an appropriate rate of interest. The Court of First Instance should determine it. Pursuant to

114 — See above, paragraphs 77-94.

115 — See paragraph 124 above.

116 — Opinion of Mr Advocate General Mancini of 31 January 1985 in the *Ammann* case [1986] ECR 2131, 2140.

117 — See the *Leonardini* judgment (footnote 103), paragraph 37.

118 — Paragraphs 20-55 above.

Article 54 of the EEC Statute of the Court of Justice the case should be referred back to the Court of First Instance.

152. In that case the costs should be reserved in accordance with Article 122 of the Rules of Procedure.

C — Conclusion

153. For all those reasons I propose that the Court should:

- set aside the contested judgment in Joined Cases T-17/89, T-21/89 and T-25/89;
- refer the case back to the Court of First Instance for judgment;
- reserve the costs.