



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Ninth Chamber)

14 June 2018*

(Civil service — Officials — Death of a spouse who was an official — Persons entitled under the deceased official — Survivor's pension — Orphan's pension — Change of post of the official, surviving spouse — Adaptation of salary — Method of calculation of survivor's and orphan's pensions — Article 81a of the Staff Regulations — Notice of modification of pension entitlements — An act affecting a person adversely within the meaning of Article 91 of the Staff Regulations — Article 85 of the Staff Regulations — Recovery of undue payments — Conditions — Claim for compensation for material and non-material damage)

In Joined Cases T-568/16 and T-599/16,

Alberto Spagnoli, residing in Parma (Italy),

Francesco Spagnoli, residing in Parma,

Maria Alice Spagnoli, residing in Parma,

Bianca Maria Elena Spagnoli, residing in Parma,

represented by C. Cortese and B. Cortese, lawyers,

applicants,

v

European Commission, represented by G. Gattinara and F. Simonetti, acting as Agents,

defendant,

APPLICATION pursuant to Article 270 TFEU for, in Case T-568/16, annulment of Notice of modification No 3 PMO/04/LM/2015/ARES of the Commission's Office for the Administration and Payment of individual entitlements (PMO) of 6 February 2015 containing the statement of the new amounts of the survivor's and orphan's pensions granted to the applicants and, in Case T-599/16, firstly, annulment of Decision PMO/04/LM/2015/ARES/3406787 of the PMO of 17 August 2015 for recovery of amounts paid unduly to the applicants by way of survivor's and orphan's pensions and, secondly, for compensation for the losses allegedly suffered by the applicants,

THE GENERAL COURT (Ninth Chamber),

composed of S. Gervasoni, President, L. Madise (Rapporteur) and R. da Silva Passos, Judges,

Registrar: X. Lopez Bancalari, Administrator,

* Language of the case: Italian.

having regard to the written part of the procedure and further to the hearing on 9 November 2017,
gives the following

Judgment

Legal framework

- 1 The first paragraph of Article 79 of the Staff Regulations of Officials of the European Union ('the Staff Regulations'), in the version applicable to the present dispute, provides:

'The surviving spouse of an official or of a former official shall be entitled, in the manner provided for in Chapter 4 of Annex VIII, to a survivor's pension equal to 60% of the retirement pension or invalidity allowance which was paid to the deceased, or which, irrespective of length of service or of age, would have been payable to him if he had qualified for it at the time of death.'

- 2 The second paragraph of Article 79 of the Staff Regulations provides:

'The amount of the survivor's pension payable to the surviving spouse of an official who has died while in one of the administrative statuses specified in Article 35, shall be neither less than the minimum subsistence figure nor less than 35% of the last basic salary received by the official.'

- 3 The first paragraph of Article 80 of the Staff Regulations is worded as follows:

'Where an official or person entitled to a retirement pension or invalidity allowance dies leaving no spouse entitled to a survivor's pension, the children dependent on the deceased within the meaning of Article 2 of Annex VII at the time of his death shall be entitled to orphans' pension in accordance with Article 21 of Annex VIII.'

- 4 The third paragraph of Article 80 of the Staff Regulations provides:

'Where an official or person entitled to a retirement pension or invalidity allowance dies but the conditions set out in the first paragraph are not satisfied, the dependent children within the meaning of Article 2 of Annex VII shall be entitled to orphan's pension in accordance with Article 21 of Annex VIII; the pension shall, however, be equal to half the pension calculated in accordance with that Article.'

- 5 The first paragraph of Article 81 of the Staff Regulations provides:

'A person entitled to a retirement pension or to an invalidity allowance, or to a survivor's pension shall be entitled, under the conditions laid down in Annex VII, to the family allowances specified in Article 67; the household allowance shall be calculated by reference to the pension or the allowance of the recipient. These allowances shall be paid to recipients of a survivor's pension only in respect of the children dependent on the deceased official or former official at the time of death.'

- 6 The second paragraph of Article 81 of the Staff Regulations is worded as follows:

'The amount of the dependent child allowance payable to the person entitled to a survivor's pension shall, however, be twice the amount of the allowance provided for in Article 67(1)(b).'

7 Article 81a(1)(a) of the Staff Regulations provides:

‘1. Notwithstanding any other provisions, notably those concerning the minimum amounts payable to persons entitled to a survivor’s pension, the total amount payable by way of survivor’s pension plus family allowances less tax and other compulsory deductions to the widow and other entitled persons may not exceed the following:

(a) in the event of the death of an official having one of the administrative statuses set out in Article 35, the amount of the remuneration which the official would have received in the same grade and step if he had still been in the service, plus any family allowances received by him in that case and less tax and other compulsory deductions ...’

8 Article 2(1) of Annex VII to the Staff Regulations is worded as follows:

‘An official who has one or more dependent children shall, in accordance with paragraphs 2 and 3 below, receive an allowance of EUR 372.61 per month for each dependent child.’

9 The first subparagraph of Article 2(2) of Annex VII to the Staff Regulations provides:

‘2. “Dependent child” means the legitimate, natural or adopted child of an official, or of his spouse, who is actually being maintained by the official.’

10 Article 21 of Annex VIII to the Staff Regulations provides:

‘1. The orphan’s pension provided for in Article 80, first, second and third paragraphs of the Staff Regulations shall for the first orphan be equal to eight tenths of the survivor’s pension to which the surviving spouse of an official or former official in receipt of a retirement pension or invalidity allowance would have been entitled, the reductions set out in Article 25 [of Annex VIII to the Staff Regulations] being disregarded.

It shall not be less than the minimum subsistence figure, subject to the provisions of Article 22 [of that annex to the Staff Regulations].

2. The pension shall be increased, for each dependent child after the first, by an amount equal to twice the dependent child allowance.

...

3. The total amount of pension and allowance calculated in this way shall be divided equally among the orphans entitled.’

11 Article 82(1) of the Staff Regulations provides:

‘1. The pensions provided for above shall be calculated by reference to salary scales in force on the first day of the month in which entitlement commences.

No correction coefficient shall be applicable to pensions.

Pensions expressed in euro shall be paid in one of the currencies referred to in Article 45 of Annex VIII to the Staff Regulations.’

12 Article 41 of Annex VIII to the Staff Regulations provides:

‘The amount of pension may at any time be calculated afresh if there has been error or omission of any kind.

They shall be liable to modification or withdrawal if the award was contrary to the provisions of the Staff Regulations or of this Annex.’

13 The first paragraph of Article 85 of the Staff Regulations reads as follows:

‘Any sum overpaid shall be recovered if the recipient was aware that there was no due reason for the payment or if the fact of the overpayment was patently such that he could not have been unaware of it.’

14 Article 3(1) of Regulation (EEC, Euratom, ECSC) No 260/68 of the Council of 29 February 1968, laying down the conditions and procedure for applying the tax for the benefit of the European Communities (O), English Special Edition 1968 (I), p. 37) reads as follows.

‘The tax shall be payable each month on salaries, wages and emoluments paid by the Communities to each person liable.’

Background to the dispute

15 Francesco Spagnolli, Maria Alice Spagnolli and Bianca Maria Elena Spagnolli, three of the applicants, born on 10 May 1997, 23 March 1999 and 3 December 2001 respectively, are the children of Mr Alberto Spagnolli, also an applicant, and his spouse, Ms Elisa Simonazzi.

16 Ms Simonazzi was employed as an official of the European Union in grade AD 6, step 3, with the European Commission from 16 July 2005 to 22 April 2011, the date of her death, in Parma (Italy).

17 At the time of his wife’s death, Mr Alberto Spagnolli held a post as an official in grade AD 12, step 1, with the Directorate-General (DG) for Maritime Affairs and Fisheries of the Commission.

18 On 29 July 2011, the PMO.4 Pensions Unit (‘the PMO.4 unit’) of the Office for the Administration and Payment of individual entitlements (PMO) of the Commission communicated to Mr Alberto Spagnolli the decision, taken pursuant to inter alia Articles 79 and 80 of the Staff Regulations, to grant him entitlement to a survivor’s pension and to grant his three children entitlement to an orphan’s pension with effect from 1 August 2011. On the same day, the details of the amounts of those pensions was specified by the notice of determination of entitlements to survivor’s and orphan’s pensions PMO/04/MAG/2011/ARES, to which was attached, as an annex, the details of the calculations of those pensions (‘Notice No 1’).

19 On 10 October 2011, the Director-General of the DG Maritime Affairs and Fisheries adopted a decision by which it authorised, at the request of Mr Alberto Spagnolli, his secondment to the European Food Safety Authority (EFSA) in Parma, with effect from 16 October 2011 and for an initial period of five years. The temporary agent contract concluded by Mr Alberto Spagnolli with the EFSA provided that he would be classified in grade AD 9, step 2.

20 On 17 April 2012, the PMO.4 unit communicated to Mr Alberto Spagnolli, by Notice of modification No 2 (PMO/04/MAG/2012/ARES) and the annex thereto containing the details of the calculations made (‘Notice No 2’), an update of the amount of the survivor’s and orphan’s pensions as from 1 November 2011. That update was made necessary by Mr Alberto Spagnolli’s change of post and salary and served to rectify an error of calculation contained in Notice No 1.

- 21 On the same day, the PMO.4 unit sent Mr Alberto Spagnolli a document replacing the calculations of entitlements to the survivor's and orphan's pensions contained in Notice No 1 ('Notice No 1a').
- 22 In October 2013, Mr Alberto Spagnolli, classified in grade AD 9, step 2, was promoted to step 3. That rise in step led to an increase in his basic monthly salary with the EFSA.
- 23 On 6 February 2015, Mr Alberto Spagnolli received a telephone call from the PMO.4 unit informing him of a new revision of the calculation of the overall amounts of the survivor's pension and orphan's pensions as a result of the progressive index applicable to his new salary and an error in calculation contained in Notice No 2. On that same date, Mr Alberto Spagnolli received an email from that unit informing him that his pension entitlements would have to be recalculated due to his change in step and an error contained in Notice No 2. By that email, the PMO.4 unit also informed Mr Alberto Spagnolli of the need to recover the amount of approximately EUR 40 000 unduly paid by way of survivor's and orphan's pensions. Attached to that email was a Notice of modification No 3 (PMO/04/LM/2015/ARES) and annexes ('Notice No 3'), in which new calculations were given of the entitlements to survivor's and orphan's pensions as from 1 July 2012 and 1 October 2013, rectifying the error contained in Notice No 2 and integrating the applicable progressive index.
- 24 On 5 May 2015, Mr Alberto Spagnolli lodged a complaint pursuant to Article 90(2) of the Staff Regulations against Notice No 3 and against the demand, contained in the email of 6 February 2015, for repayment of the amount of approximately EUR 40 000 allegedly paid to him unduly by way of survivor's and orphan's pensions between 2012 and 2015.
- 25 By decision HR.D.2/ON/ac/Ares(2015) of 3 August 2015 ('the decision rejecting the complaint of 3 August 2015'), the appointing authority declared the complaint admissible but dismissed it on the merits with regards to both the new calculations of the amounts of entitlements to survivor's and orphan's pension and the claim for repayment of the amount of approximately EUR 40 000.
- 26 On 17 August 2015, the head of the PMO.4 unit adopted the decision to deduct amounts from pension PMO/04/LM/ARES/2015/3406787 ('the decision to recover undue payments') informing Mr Alberto Spagnolli that, further to Notice No 3, he owed the Commission the amount of EUR 22 368.19 and, for each of his children, the amount of EUR 5 922.72. By that decision, the PMO.4 unit further informed Mr Alberto Spagnolli that those amounts would be recovered through monthly deductions on the survivor's and orphan's pensions.
- 27 On 16 November 2015, Mr Alberto Spagnolli, acting on his own behalf and on behalf of his two minor daughters, and Mr Francesco Spagnolli, having reached the age of majority, each lodged a complaint pursuant to Article 90(2) of the Staff Regulations against the decision to recover undue payments.
- 28 On 4 March 2016, the appointing authority adopted decision HR.E.2/RO/ac/Ares(2016) rejecting the complaint ('the decision rejecting the complaint of 4 March 2016').

Procedure

- 29 By application lodged with the Registry of the Civil Service Tribunal on 13 November 2015, Mr Alberto Spagnolli, acting in his name and on his own behalf and also, under his legal power of representation, in the name of and on behalf of his minor children Maria Alice Spagnolli and Bianca Maria Elena Spagnolli and, under a special mandate of representation, in the name of and on behalf of Mr Francesco Spagnolli, his adult child living in the same home, brought an action that was registered under number F-140/15 for annulment of Notice No 3.
- 30 On 3 February 2016, the Commission lodged a response with the Registry of the Civil Service Tribunal.

- 31 On 4 April 2016, within the time limit allowed, the applicants responded to the measures of organisation of procedure adopted by the Civil Service Tribunal within the meaning of Article 69 of its Rules of Procedure and submitted their written observations on the pleas of inadmissibility put forward by the Commission.
- 32 By application lodged with the Civil Service Tribunal on 14 June 2016 pursuant to Article 270 TFEU and Article 91 of the Staff Regulations, the applicants lodged an action registered under number F-29/16 for, inter alia, annulment of the decision to recover undue payments.
- 33 Pursuant to Article 3 of Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 6 July 2016 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants (OJ 2016 L 200, p. 137), Cases F-140/15 and F-29/16 were transferred to the General Court in the state in which they stood on 31 August 2016. Those cases were registered under number T-568/16 and number T-599/16 respectively and were assigned to the Ninth Chamber.
- 34 On 12 September 2016, the Commission lodged its response in Case T-599/16 with the Registry of the General Court.
- 35 On 9 December 2016, the applicants requested that a hearing be held in Case T-568/16, in response to a measure of organisation of procedure that had been adopted by the General Court on 7 November 2016.
- 36 On 20 December 2016, the applicants lodged a reply in Case T-599/16.
- 37 On 2 February 2017, the Commission lodged a rejoinder in Case T-599/16.
- 38 On 2 October 2017, the President of the Ninth Chamber decided to join the cases for the purposes of the oral procedure and the judgment.
- 39 On 25 October 2017, the Commission responded to the measures of organisation of procedure adopted by the Court on 3 October 2017.
- 40 At the hearing on 9 November 2017, the parties presented oral argument and replied to oral questions put by the Court.

Forms of order sought

- 41 In Case T-568/16, the applicants claim that the Court should:
- annul Notice No 3, as supplemented by the statement of reasons in the decision rejecting the complaint of 3 August 2015;
 - order the Commission to pay the costs.
- 42 In that case, the Commission contends that the Court should:
- dismiss the action as inadmissible or, in the alternative, as unfounded;
 - order Mr Alberto Spagnolli to pay the costs.

- 43 In Case T-599/16, the applicants claim that the Court should:
- annul the decision to recover undue payments;
 - annul, in so far as necessary, the decision rejecting the complaint of 4 March 2016;
 - annul, in so far as necessary, the implicit decision rejecting the complaint lodged by Mr Francesco Spagnolli;
 - order the Commission to compensate the material and non-material damage suffered by the applicants owing to the infringement of their right to good administration and of the Administration’s duty of care towards them, amounting, respectively, to:
 - the difference between the remuneration received by Mr Alberto Spagnolli as a temporary agent of the EFSA in grade AD 9, and the remuneration that he would receive as an official of the Commission in grade AD 12, for a period of one year;
 - the amount of the recovery sought from the applicants in the contested decision, increased by the difference between the pensions amount determined in Notice No 2 and the amount determined in Notice No 3, from the date on which Notice No 3 takes effect until such time as the family will be in a position to resettle in their earlier place of residence, that period being equitably estimated at one year from resolution of the present case;
 - order the Commission to pay the costs.
- 44 In that case, the Commission contends that the Court should:
- dismiss the action, in so far as it seeks annulment, as unfounded;
 - dismiss the action, in so far as it seeks monetary compensation, as inadmissible or, in the alternative, as unfounded;
 - order Mr Alberto Spagnolli to pay the costs.

Law

Case T-568/16

Admissibility

- 45 At the hearing, the Commission announced that it was withdrawing its first plea of inadmissibility, alleging that, in the absence of a mandatory prior complaint pursuant to Article 90(2) of the Staff Regulations lodged against Notice No 3 by Mr Alberto Spagnolli in the name of and on behalf of his minor children, the action was inadmissible as regards them. That withdrawal was noted in the minutes of the hearing.
- 46 In the present case, therefore, it is no longer disputed that the requirements of Article 90(2) of the Staff Regulations are met as regards Mr Alberto Spagnolli’s minor children.

- 47 However, the Commission maintains its second plea of inadmissibility, alleging that the action is directed at an act that does not adversely affect the applicants within the meaning of Article 91 of the Staff Regulations, but rather at an act, Notice No 3, that is a purely confirmatory act of a previous act, Notice No 1, that determined their pension entitlements.
- 48 The Commission submits in that regard that the applicants identified, incorrectly, Notice No 3 as an act affecting them adversely within the meaning of Article 91(1) of the Staff Regulations, on the ground that that notice is merely a purely confirmatory act of Notice No 1, as it merely applies the method of calculation determined by the latter act, consisting in including the orphan's pension in the amount of income subject to the maximum amount referred to in Article 81a of the Staff Regulations.
- 49 The applicants contest the plea of inadmissibility put forward by the Commission, arguing that the action directed against Notice No 3 is directed at an act which, in amending their pension entitlements, affects them adversely within the meaning of Article 91(1) of the Staff Regulations and is, therefore, not a purely confirmatory act.
- 50 As a preliminary point, it must be borne in mind that a plea of inadmissibility in an action lodged against a purely confirmatory decision may be put forward only to bar an action lodged out of time and may not be directed at the nature of the contested act (see, to that effect, judgment of 18 December 2007, *Weißenfels v Parliament*, C-135/06 P, EU:C:2007:812, paragraph 54), with the result that the Commission cannot question the adverse nature of Notice No 3 on the ground that that notice is purely confirmatory of Notice No 1.
- 51 In any event, according to settled case-law, an action for annulment brought against a decision which merely confirms an earlier decision which has not been challenged in good time is inadmissible. A decision is a mere confirmation of an earlier decision where it contains no new factors as compared with the earlier measure and is not preceded by any reexamination of the situation of the addressee of the earlier measure (see judgments of 29 September 1999, *Neumann and Neumann-Schölles v Commission*, T-68/97, EU:T:1999:238, paragraph 58 and the case-law cited; of 28 June 2006, *Grünheid v Commission*, F-101/05, EU:F:2006:58, paragraph 34 and the case-law cited; and of 14 September 2011, *A v Commission*, F-12/09, EU:F:2011:136, paragraph 119 and the case-law cited).
- 52 Moreover, it has been held that an administrative complaint and the subsequent appeal must both be directed against an act adversely affecting the applicant within the meaning of Article 90(2) and Article 91 of the Staff Regulations, since the act adversely affecting an official is one which produces legal effects which are binding on, and capable of affecting, directly and immediately, the interests of the applicant by bringing about a distinct change in his legal position (see judgment of 28 June 2006, *Grünheid v Commission*, F-101/05, EU:F:2006:58, paragraph 33 and the case-law cited).
- 53 In order to determine whether the Commission was correct in finding that Notice No 3 is a purely confirmatory act of Notice No 1, it must be considered whether Notice No 3 was not adopted on the basis of new factors and was not preceded by any reexamination of the applicants' situation.
- 54 It should be noted, in the first place, that the Commission reexamined Notice No 1 twice. An initial reexamination took place following the steps undertaken by Mr Alberto Spagnolli between November 2011 and March 2012. That reexamination led the Commission to rectify Notice No 1 by adopting, on 17 April 2012, Notice No 2 and Notice No 1a. According to the Commission's own statements, a second reexamination of the applicants' situation took place when Mr Alberto Spagnolli rose from grade AD 9, step 2, to grade AD 9, step 3. In that reexamination, the Commission discovered an alleged error of calculation contained in Notice No 2 and a resulting undue payment. This is why it adopted Notice No 3 containing the new calculations of the entitlements to the survivor's and orphan's pensions as from 1 July 2012 and from 1 October 2013.

- 55 In the second place, both the discovery of an error in Notice No 2 and Mr Alberto Spagnolli's change of step constitute new facts that are the reason for the new calculations of the applicants' pension entitlements contained in Notice No 3, that is to say, a change in the applicants' legal situation.
- 56 The foregoing considerations are not called into question by the mere fact that Notices Nos 1 and 3 apply the same method of calculation of pension entitlements in terms of the inclusion of the orphan's pensions in the amount of income subject to the maximum amount referred to in Article 81a of the Staff Regulations.
- 57 It follows that, since Notice No 3 was adopted following reexaminations of the applicants' legal situation and on the basis of new facts, it cannot be regarded as being a purely confirmatory act of Notice No 1, as contended by the Commission. On the contrary, Notice No 3 constitutes an act which, in acting as a substitute for the preceding acts, brings about a distinct change in the applicants' legal situation, affects their interests directly and immediately and therefore affects them adversely within the meaning of Article 90(2) and Article 91 of the Staff Regulations.
- 58 Therefore, the second plea of inadmissibility put forward by the Commission, alleging that Notice No 3 is not challengeable, must be rejected and the case must be examined on its merits.

Substance

- 59 It should be borne in mind at the outset that, according to settled case-law, claims for annulment formally directed against a decision rejecting a complaint have the effect, where that decision lacks any independent content, of bringing before the Court the act against which the complaint was submitted (judgments of 17 January 1989, *Vainker v Parliament*, 293/87, EU:C:1989:8, paragraph 8, and of 6 April 2006, *Camós Grau v Commission*, T-309/03, EU:T:2006:110, paragraph 43). Since the decision rejecting the complaint of 3 August 2015 in the present case lacks any independent content, it therefore merely confirms, in essence, the contested act, being Notice No 3, the action must be considered to be directed against that act.
- 60 In the application, the applicants put forward three pleas in law on the basis of which they argue that Notice No 3 is unlawful: (i) misapplication of the cap provided for in Article 81a of the Staff Regulations to orphan's pensions; (ii) unjustified exclusion of the family allowances from calculation of the cap on pensions provided for in Article 81a of the Staff Regulations; and (iii) an inadequate and contradictory statement of reasons in Notice No 3.
- 61 In response to a question put by the Court at the hearing, and as recorded in the minutes of the hearing, the applicants confirm that, in the light of the answers provided by the Commission on 25 October 2017 to the measures of organisation of procedure adopted by the Court on 3 October 2017, they withdraw the arguments aimed at contesting the accuracy of the facts, namely the amounts taken into account and the calculations made by the Commission in the different notices, in particular in Notice No 2, without thereby withdrawing their challenge to the lawfulness of the method of calculation of pension entitlements applied by the Commission in those notices. They accordingly withdraw their second plea in law in the present case.
- 62 It is appropriate to begin by examining the third plea.

– The third plea in law

- 63 By their third plea, the applicants submit that Notice No 3, as supplemented by the statement of reasons of the decision rejecting the complaint of 3 August 2015 is vitiated by an inadequate and contradictory statement of reasons.

- 64 The applicants state in that regard that neither Notice No 3 nor the decision rejecting the complaint of 3 August 2015 explains the reasoning followed and the calculations actually made by the Commission. According to the applicants, although, like the earlier decisions, the statement of reasons of Notice No 3 indicates that, in order to determine the cap provided for in Article 81a(1)(a) of the Staff Regulations, account must be taken of an amount resulting from the sum of the net salary of the deceased and that of the surviving spouse at the time of the death, including the allowances for the three dependent children, to which the surviving spouse is entitled, given that the calculations in Notice No 3 show that the net salary of the surviving spouse takes into account only the household allowance and the dependent child allowances, the statement of reasons contained in Notice No 3 is in contradiction to the operative part of that notice.
- 65 The applicants further submit that nor does the decision rejecting the complaint of 3 August 2015 provide any clarification about the statement of reasons of Notice No 3. The appointing authority refers to the aggregate amount of income of the deceased official, had she been alive, and to the 'net income of the widower', without stating explicitly whether, in that case, it was the actual net salary of the widower, that is to say, the salary actually received following the death of Ms Simonazzi, or the widower's fictive salary, that is to say, the widower's salary calculated as if his wife had been alive. In the applicants' submission, 'the widower's net income' within the meaning of the decision rejecting the complaint of 3 August 2015 cannot correspond to either the actual salary, which is not taken into account in the determination of the maximum amount provided for in Article 81a of the Staff Regulations, or Mr Alberto Spagnolli's fictive salary, since the amount of the 'widower's net income' indicated in Notice No 3 does not include the family allowances to which he would have been entitled had his spouse been alive. They thus infer therefrom that the statement of reasons added by the appointing authority is, in any event, contrary to the content of Notice No 3.
- 66 As a preliminary point, it should be clarified that the Commission's cumulation of the emoluments for determining the maximum amount provided for in Article 81a of the Staff Regulations, in situations where it is dealing with two spouses, both of whom are EU officials, as is apparent from the different notices of determinations of pension entitlements, is not being challenged by the applicants in the present case. That cumulation of the emoluments of the officials concerned serves to determine the maximum amount to which is subject the income of the family of the surviving official, in order to avoid enrichment as a result of the death. The cap provided for in Article 81a of the Staff Regulations is therefore calculated by the Commission by adding the salary of the deceased spouse to the salary of the surviving spouse. This method is not expressly provided for in the wording of Article 81a of the Staff Regulations which, for the determination of that maximum amount not to be exceeded, refers only to the salary of the deceased spouse. However, as is apparent from the decision rejecting the complaint of 3 August 2015 and as was confirmed by the Commission at the hearing, that method was chosen by the Commission in order to maintain more income for the family from a taxation standpoint.
- 67 In the present case, the applicants dispute the amount of the income attributed to Mr Alberto Spagnolli which, in the different notices of pension entitlements, was added to the salary of his deceased spouse in the determination of the maximum amount provided for in Article 81a of the Staff Regulations. More specifically, they consider that, in that income, the Commission includes an incorrect amount of the dependent child allowances. The applicants also dispute the calculations of the pension entitlements, in which the Commission applies Article 81a of the Staff Regulations to the orphan's pensions and goes on to limit them. Accordingly, the issue of compliance with the obligation to provide a statement of reasons must be examined in the light of those challenges put forward by the applicants.
- 68 In that regard, it should be noted that the purpose of the requirement laid down in the second paragraph of Article 296 TFEU, and also contained in the second paragraph of Article 25 of the Staff Regulations, is to enable the EU Courts to review the legality of contested decisions and to provide the officials concerned with sufficient information to assess whether those decisions are well founded

or subject to a defect enabling their legality to be challenged. The statement of reasons must therefore in principle be notified to the person concerned at the same time as the decision adversely affecting him, for failure to state the reasons cannot be remedied by the fact that the person concerned learns the reasons for the act during the proceedings before the EU judicature (see judgment of 4 November 2008, *Marcuccio v Commission*, F-41/06, EU:F:2008:132, paragraph 61 and the case-law cited).

- 69 It has also been held that a possible lack of a statement of reasons may be remedied by appropriate reasoning provided at the stage of the response to the complaint, as the reasons for that decision are deemed to coincide with the reasons for the decision against which the complaint was made (see judgment of 4 November 2008, *Marcuccio v Commission*, F-41/06, EU:F:2008:132, paragraph 66 and the case-law cited).
- 70 It has also been held in the case-law that it is possible, first, to compensate for an inadequate — but not a totally absent — statement of reasons even in the course of the proceedings where, before bringing his application, the person concerned already had information constituting the initial elements of a statement of reasons, and, second, to regard a decision as having an adequate statement of reasons if it occurred in a context known to the official concerned, enabling him to understand its scope (see judgment of 15 February 2011, *Marcuccio v Commission*, F-81/09, EU:F:2011:13, paragraph 40 and the case-law cited).
- 71 In the first place, it should be noted that the arguments aimed at showing that the statement of reasons of Notice No 3, as supplemented by the decision rejecting the complaint of 3 August 2015, is inadequate on the ground that those two acts do not afford an understanding of the method of calculation applied by the Commission, relate to infringement of essential procedural requirements, the analysis of which must precede the examination of the merits of the grounds in question.
- 72 In that regard, firstly, it is apparent from Notice No 3, as supplemented by the statement of reasons of the decision rejecting the complaint of 3 August 2015, that it effected a new calculation of the applicants' entitlements to survivor's and orphan's pensions arising from, first, the presence of an error of calculation contained in the preceding notice, being Notice No 2, and, second, from Mr Alberto Spagnolli's change of step, from grade AD 9, step 2, to grade AD 9, step 3, in October 2013, including as regards the indices applicable to his salary on 1 July 2012 and on 1 October 2013.
- 73 Secondly, it is apparent from a reading of all the notices, in particular Notices Nos 2 and 3 taken together with the explanations provided in the decision rejecting the complaint of 3 August 2015, that the error contained in Notice No 2 results from the inclusion of six dependent child allowances, instead of three, in the amount of Mr Alberto Spagnolli's net salary used to determine his 'fictive income' ('amount A'), being the income calculated as if his spouse had been alive.
- 74 Thirdly, it should be noted that the applicants themselves observe that the method of calculation applied by the Commission consists in taking into account, first, an 'amount A' corresponding to the 'fictive income', comprising the sum of the net salary of the deceased had he been alive and the net salary of the surviving spouse at the time of the death, including the allowances for three dependent children and, second, an amount corresponding to the 'actual income' that the spouse would receive if the limitation in Article 81a was not applied and that is made up of the sum of the net income of the surviving spouse, the survivor's pension and the orphan's pensions ('amount B'). Moreover, both the calculations contained in Notice No 3 and those contained in the decision rejecting the complaint of 3 August 2015 show that the difference between amount A and amount B results in the amount to be deducted proportionally from the survivor's and orphan's pensions.
- 75 Fourthly, the decision rejecting the complaint of 3 August 2015 also explains that the cumulation of the net salary of Mr Alberto Spagnolli and that of his deceased wife is due to the need to take account of the application of EU income tax to the income, in accordance with Article 4 of Regulation

No 260/68, and that the method of calculation chosen by the Commission for the calculation of the entitlements to survivor's and orphan's pensions is the one that maintains more income for the family from a taxation standpoint.

- 76 Thus, the applicants cannot argue that the statement of reasons is inadequate on the ground that the decision rejecting the complaint of 3 August 2015, in referring to the cumulation of the 'net salary of the widower' with that of the deceased, does not enable them to understand whether it is the actual income, amount B, or the fictive income of the widower, amount A. In fact it is quite clear from the explanations provided in that decision that it is the fictive income, as it refers to the income which, when combined with the salary that the deceased would have received, is taken into account in order to determine the maximum amount not to be exceeded within the meaning of Article 81a of the Staff Regulations, being amount A.
- 77 In the light of the foregoing, the statement of reasons of Notice No 3, as supplemented by the decision rejecting the complaint of 3 August 2015, must be deemed to be adequate inasmuch as it enables the applicants to understand the method of calculation applied by the Commission, the objective pursued by it and the outcome of the determination of their pension entitlements.
- 78 Thus, the applicants' arguments to the effect that the statement of reasons given in Notice No 3, as supplemented by the decision rejecting the complaint of 3 August 2015, was inadequate on the ground that it did not enable them to understand the method of calculation applied by the Commission, must be rejected. It is, moreover, clear that the statement of reasons in question enabled the applicants to challenge the merits of that method before the Court.
- 79 In the second place, regarding the applicants' argument to the effect that there is a contradiction between the statement of reasons of Notice No 3 and the operative part thereof due to the calculations applied in Notice No 3 and the operative part thereof, as supplemented by the decision rejecting the complaint of 3 August 2015, not matching, it must be borne in mind that, as explained in paragraph 61 above, the applicants are no longer challenging the accuracy of the facts, being the details of the calculations made by the Commission in the different notices, including Notice No 3. At the hearing they stated that that argument, alleging a contradiction in reasons, had to be understood as alleging that there was an infringement of the obligation to provide a statement of reasons resulting from the lack of communication of the details of the calculations applied in Notice No 3, which made it impossible to understand the error made in the calculation of the pension entitlements.
- 80 In that regard, it should be underscored that the statement of reasons of a decision does not require all details of the calculations in that decision to be stated explicitly. It is sufficient that the parties concerned are able to understand the reasons that led to the adoption of the act pertaining to them, the objective pursued by it and the method applied by it to determine the amounts of their entitlements. The statement of all of the calculations of the amounts contained in Notice No 3, however useful and desirable it may be, is not essential to compliance with the duty to state reasons; in any event, the Commission cannot, by mechanical recourse to arithmetical formulas alone, divest itself of its own powers to make a correct assessment of the applicants' pension entitlements according to the circumstances of the case (see, to that effect, and by analogy, judgment of 2 October 2003, *Salzgitter v Commission*, C-182/99 P, EU:C:2003:526, paragraph 75 and the case-law cited).
- 81 The fact that it was possible to detect a number of errors in the calculation only once those figures had been provided is insufficient for a finding that the statement of reasons in the contested decision is inadequate since, when reviewing such a decision, the EU Court may order that all the evidence which it requires be submitted to it in order to enable it to carry out a detailed review of the method by which the fine was calculated (see, to that effect, and by analogy, judgment of 2 October 2003, *Corus UK v Commission*, C-199/99 P, EU:C:2003:531, paragraph 150).

82 As it is apparent from the analysis carried out in paragraphs 72 to 77 above that Notice No 3, as supplemented by the statement of reasons of the decision rejecting the complaint of 3 August 2015, enabled the applicants to understand the grounds that led to the adoption of the act pertaining to them, the objective pursued by it and the method applied by it to determine the amounts of their entitlements, the arguments put forward by them to establish that there has been an infringement of the obligation to provide a statement of reasons due to the lack of statement of the details of the calculations of their pension entitlements must be rejected.

83 The third plea in law must therefore be rejected.

– *The first plea in law*

84 By the first plea, the applicants allege that Notice No 3 is unlawful and must be annulled on the ground that, by including the orphan's pensions in the amount of the income subject to the limitation laid down in Article 81a of the Staff Regulations, it led to an unjustified reduction in the amount of the survivor's and orphan's pensions granted to them.

85 Firstly, the applicants submit that the expressions 'survivor's pensions' in the plural and 'the widow and other entitled persons', used by the legislature in Article 81a of the Staff Regulations, do not refer to orphan's pensions, but rather situations of coexistence between the surviving spouse and the divorced ex-spouse or between the surviving spouse and the children of a previous marriage, which situations are covered respectively by Articles 27 and 28 of Annex VIII to the Staff Regulations, on the one hand, and the first paragraph of Article 22 of Annex VIII to the Staff Regulations, on the other.

86 Secondly, the applicants state that, when the legislature refers to one type of pension or another, this will be clear from the wording of the provisions of the Staff Regulations, such as inter alia Article 80(3) and (4) of the Staff Regulations, Article 21(1) and (2) and Article 24 of Annex VIII to the Staff Regulations.

87 Thirdly, the applicants highlight the fact that the survivor's and orphan's pensions pursue different objectives. The survivor's pension is intended to guarantee the surviving spouse a supplement to the family income, so as to make up for the loss of income from the deceased spouse, whereas the orphan's pension is a separate kind of support payment aimed at ensuring autonomy for orphan children. That kind of difference in objective of the two types of pensions is confirmed by the Staff Regulations providing, first, that upon reaching the age of majority orphans may request to have their pension paid into a separate account from that of the parent entitled to the survivor's pension and, second, that the loss of the survivor's pension does not entail loss of the orphan's pension but, on the contrary, a doubling of the amount. That different objective of the two types of pensions justifies a difference in the treatment of the income deriving from the survivor's pension as compared to the income from the orphan's pension and, therefore, the inapplicability of Article 81a of the Staff Regulations to the latter.

88 In the applicants' submission, the unlawful inclusion of the orphan's pension in the amount of their income subject to the limitation in Article 81a of the Staff Regulations led to a reduction in the amount of their survivor's and orphan's pensions, both for the period from 1 July 2012 to 30 September 2013 and for the period subsequent to 1 October 2013. The reductions in those amounts was imposed due to the cap laid down in Article 81a of the Staff Regulations being exceeded by an amount of EUR 1 629.27 for the first period and EUR 1 576.92 for the second period. The inclusion of the amount of EUR 2 088.90 in orphan's pension in the determination of the income subject to that cap was decisive for the application of reductions in the amounts of the pensions paid to the applicants.

- 89 Lastly, they submit that, since the notices that preceded Notice No 3 are vitiated by the same error as Notice No 3, being misapplication of Article 81a of the Staff Regulations to orphan's pensions, the Commission is supposed to draw the inferences from the Court's judgment annulling Notice No 3 and therefore recalculate the applicants' survivor's and orphan's pensions, with retroactive effect, pursuant to Article 41 of Annex VIII to the Staff Regulations.
- 90 The Commission disputes the applicants' arguments and submits that Article 81a of the Staff Regulations refers to both the survivor's pension and the orphan's pension.
- 91 It is therefore necessary to answer the question whether Article 81a of the Staff Regulations must be interpreted as also referring to orphan's pensions.
- 92 As a preliminary point, firstly, it must be borne in mind that, as indicated in paragraph 7 above, Article 81a(1)(a) of the Staff Regulations is worded as follows:
- '1. Notwithstanding any other provisions, notably those concerning the minimum amounts payable to persons entitled to a survivor's pension, the total amount payable by way of survivor's pension plus family allowances less tax and other compulsory deductions to the widow and other entitled persons may not exceed the following:
- (a) in the event of the death of an official having one of the administrative statuses set out in Article 35, the amount of the remuneration which the official would have received in the same grade and step if he had still been in the service, plus any family allowances received by him in that case and less tax and other compulsory deductions ...'
- 93 Secondly, regarding the Commission's argument, reiterated at the hearing, to the effect that it is apparent from a judgment of the Civil Service Tribunal that, pursuant to Article 81a(1)(c) of the Staff Regulations, the orphan's pension was included in the overall amount of the net pensions paid to the persons entitled under the deceased official, that is to say, in the amount liable to be subject to the cap laid down in that article (judgment of 5 February 2016, *Bulté and Krempa v Commission*, F-96/14, EU:F:2016:10, paragraph 53), it must be observed that, in that case, the question of the lawfulness of the application of Article 81a of the Staff Regulations to orphan's pensions was not challenged by the parties in question and therefore could not be ruled on definitively by the Court.
- 94 It should be observed mainly that the orphan's pensions are provided for in Article 80 of the Staff Regulations, which is part of Title V, Chapter 3, of the Staff Regulations, entitled 'Pensions and invalidity allowance'. As is also apparent from the case-law, those pensions are genuine pensions and are subject as such to the pension scheme referred to in the Staff Regulations (see, to that effect, and by analogy, judgment of 23 March 1993, *Huet v Court of Auditors*, T-8/93, EU:T:1994:35, paragraph 30).
- 95 It should further be noted that the detailed rules for the calculation of orphan's pensions are laid down in Chapter 4, Article 21, of Annex VIII to the Staff Regulations, under the reference in Article 84 of the Staff Regulations, and that that chapter is entitled 'Survivor's pension'. This shows that the expression 'survivor's pension' is used by the legislature to identify not only the pension of the surviving spouse of the deceased official, in other words the survivor's pension in the strict sense of the term, but also provisions concerning the orphan's pensions. Thus, although it is true, as the applicants argue, that certain provisions refer explicitly to orphan's pensions, that does not mean that other provisions that do not refer to them explicitly may not be applied to them, as they are genuine pensions which are, by virtue of that fact, subject to the provisions of the Staff Regulations that are applicable generally to pensions.

- 96 Moreover, since Article 81a of the Staff Regulations is one of the final provisions of Title V, Chapter 3, of the Staff Regulations and is among the provisions applicable to pensions, of which the pensions provided for in Article 80 form a part, Article 81a cannot be interpreted as excluding orphan's pensions. As correctly observed by the Commission, that provision's use of the expression 'survivor's pensions' in the plural must be construed as referring to any type of 'pensions', the triggering factor for which is the death of an official, which is the case not only for the survivor's pension, but also for the orphan's pension. Moreover, as correctly pointed out by the Commission, under the first to third paragraphs of Article 80 of the Staff Regulations and Article 21 of Annex VIII to the Staff Regulations, the survivor's pension and the orphan's pension are linked, as the amount of the latter is contingent on the amount of the former.
- 97 The application of Article 81a of the Staff Regulations to orphan's pensions cannot be called into question by the applicants' arguments to the effect that the expressions 'survivor's pensions' and 'persons entitled' used in Article 81a of the Staff Regulations refer to situations of coexistence between the surviving spouse and one or more divorced ex-spouses or between several divorced spouses, which are situations governed by Articles 27 and 28 of Annex VIII to the Staff Regulations, on the one hand, and between the surviving spouse and orphans from a previous marriage of the deceased official, which situations are covered by the first paragraph of Article 22 of Annex VIII to the Staff Regulations, on the other.
- 98 Firstly, Article 28 of Annex VIII to the Staff Regulations, which is the relevant provision in the present case, provides that, in situations of coexistence between the surviving spouse and one or more divorced ex-spouses or between several divorced spouses, the same survivor's pension is allocated proportionally between the different persons entitled. Thus, as it is one and the same pension, the situations referred to above cannot be covered by the expression 'survivor's pensions' in the plural as found in Article 81a(1) of the Staff Regulations.
- 99 Secondly, if by the use of the expressions 'pensions' and 'persons entitled', Article 81a(1) of the Staff Regulations was intended to cover situations of coexistence between the surviving spouse and orphans from a previous marriage of the deceased official, to the exclusion of the children from the union of the deceased official and the surviving spouse, then, as correctly pointed out by the Commission, that would give rise to an unjustified disparity in treatment as between the different children of the deceased official. Whereas the children of the union of the deceased official and the surviving spouse would not have their orphan's pensions limited due to the inapplicability of Article 81a(1) of the Staff Regulations to them, the pensions of orphans from a previous marriage would be liable to be limited under that provision. Such a difference in treatment, which is unjustified and contrary to the principle of equal treatment, cannot be accepted.
- 100 Lastly, even if the applicants' argument to the effect that the survivor's pension and the orphan's pension pursue partly different objectives were true, in the light of all the foregoing that is not sufficient for a finding that Article 81a(1)(a) of the Staff Regulations does not apply to orphan's pensions.
- 101 Similarly, the applicants' arguments to the effect that the partly different objective underlying the survivor's and orphan's pensions is confirmed by the fact that, first, upon reaching the age of majority orphans may request to have their pension paid into a separate account from that of the parent entitled to the survivor's pension and, second, that the loss of the survivor's pension does not entail loss of the orphan's pension but, on the contrary, a doubling of the amount, do not call into question the application of Article 81a of the Staff Regulations to orphan's pensions. In fact, those two types of pensions together form part of the emoluments received by the Spagnolli family as a result of the death of one of the spouses, the total amount of which, in accordance with the method of calculation applied by the Commission, is included in order to comply with the principle aimed at preventing enrichment of the family as a result of the death.

- 102 It should further be noted that the case-law has accepted that the objective pursued by the orphan's pension, as provided for in the fourth paragraph of Article 80 of the Staff Regulations, that is to say, the pension paid to persons treated as dependent children, is to compensate for the costs incurred by the official for the maintenance of the child (judgment of 30 January 2003, *C v Commission*, T-307/00, EU:T:2003:21, paragraph 53), and there must be a similar finding in respect of the orphan's pensions referred to *inter alia* in the third paragraph of Article 80 of the Staff Regulations, which is at issue in the present case, for the pension to be granted to the children of Mr Alberto Spagnolli.
- 103 The underlying purpose of the orphan's pension, which is to compensate for the costs incurred by the surviving official for the maintenance of dependent children, contributes towards achieving the objective of fostering financial autonomy for those children. To the extent that the orphan's pension enables the costs of maintaining the children to be offset, it is part of the family income and does not escape the rule proscribing enrichment as a result of the death of a parent who is also an official, compliance with which rule is ensured by the application of the cap provided for in Article 81a of the Staff Regulations.
- 104 In the light of the foregoing, Article 81a of the Staff Regulations must be deemed to cover both the survivor's pension and the orphan's pension. Thus, the method of calculation of pension entitlements applied by the Commission, by which the orphan's pensions in the actual income subject to the cap provided for in Article 81a are included, complies with that provision.
- 105 Therefore, the first plea in law must be rejected.
- 106 In the light of the foregoing, the action in Case T-568/16 must be dismissed in its entirety.

Case T-599/16

- 107 In Case T-599/16, the applicants challenge the decision to recover undue payments, which was adopted by the Commission in order to recover the amounts of the survivor's and orphan's pensions paid unduly to the applicants due, in its view, to an error in Notice No 2, which was rectified by the new calculations of their pension entitlements contained in Notice No 3.
- 108 As in Case T-568/16 (see paragraph 61 above), and as recorded in the minutes of the hearing, at the hearing in the present case the applicants withdrew their arguments challenging the accuracy of the facts, being the Commission's sums and calculations in the different notices and, *inter alia*, in Notice No 2, without thereby withdrawing its challenge to the lawfulness of the method of calculation of the pension entitlements applied by the Commission in those notices.
- 109 At the hearing, moreover, the applicants withdrew their challenge to the Commission's use of a document attached to the statement in defence, consisting in a screen shot of the outcome of the calculation of the net salary of an official in grade AD 9, step 2, using an IT instrument called a 'calculette' (automatic calculator).
- 110 In the application, the applicants put forward, in essence, three pleas in law.
- 111 The first and the second pleas in law allege infringement of Article 85 of the Staff Regulations. In that connection, the applicants submit that the conditions provided for in Article 85 of the Staff Regulations, being, first, the existence of an undue payment received and, second, the knowledge or evidence of an undue payment made, arising from an error contained in Notice No 2, are not present in this case.

- 112 The third plea in law alleges infringement of the principle of sound administration and of the duty to have regard for the welfare of staff. In that regard, the applicants also put forward a claim for compensation for material and non-material damage allegedly suffered due to the infringement of the principle of sound administration and of the duty to have regard for the welfare of staff.
- 113 The Commission puts forward a plea of inadmissibility in relation to the claim for compensation, which it considers to be in any event unfounded. It also disputes the other pleas and arguments put forward by the applicants in support of its claim for annulment and submits that they must be rejected as completely unfounded.

Consideration of the claim for annulment

– The first plea in law

- 114 It must be borne in mind as a preliminary point that, as in Case T-568/16 (see paragraph 59 above), the decision rejecting the complaint of 4 March 2016 in the present case lacks autonomous content and therefore merely confirms, in essence, the decision to recover undue payments. The action must therefore be regarded as being directed at that latter decision (see, to that effect, judgments of 17 January 1989, *Vainker v Parliament*, 293/87, EU:C:1989:8, paragraph 8, and of 6 April 2006, *Camós Grau v Commission*, T-309/03, EU:T:2006:110, paragraph 43).
- 115 By their first plea, the applicants allege infringement of Article 85 of the Staff Regulations resulting from there being no undue payment in the present case. This plea comprises three parts. Firstly, they submit that there was no undue payment because there was no error relating to the amount of the dependent child allowances in Notice No 2. Secondly, they consider that there was no undue payment on the ground that Notice No 3 was unlawful as a result of the inclusion therein of the orphan's pensions in the calculation of the amount subject to the cap referred to by Article 81a of the Staff Regulations. Thirdly, they submit that there was no undue payment on the ground that that same notice did not include the family allowances in the amount of Mr Alberto Spagnolli's fictive income (amount A).
- 116 The Commission replies that the three parts of the first plea are completely unfounded and must be rejected. It adds, in the rejoinder, that the second part is inadmissible on the ground that it was put forward out of time.
- 117 Given that, by the first part of the first plea in law, the applicants reiterate the arguments put forward in Case T-568/16 to dispute the fact that the amount of the fictive income (amount A) of Mr Alberto Spagnolli had twice taken account of the amount of the family allowances and given that, as observed in paragraph 108 above, at the hearing the applicants withdrew their challenge to the accuracy of the facts, being the Commission's calculations in the different notices, the applicants must also be deemed to have withdrawn that part of the first plea in law.
- 118 It should be pointed out in any event that, with the responses provided by the Commission to the measures of organisation of procedure, on 25 October 2017 it was established that the amount of Mr Alberto Spagnolli's fictive income (amount A), EUR 8 937.32, which appears in Notice No 2, included, as observed by the Commission, six dependent child allowances instead of three. Thus, the applicants' arguments aimed at establishing that the amount of EUR 8 937.37 included individual dependent child allowances were in any event unfounded.

- 119 As regards the second part of the first plea in law, it is clear that the applicants reiterate the arguments, put forward in Case T-568/16, relating to the textual, structural and purposive interpretation of Article 81a of the Staff Regulations leading to the conclusion that the Commission's method of calculation, consisting in applying that provision to the orphan's pensions in Notice No 3, makes it unlawful and therefore unsuitable for proving that there was an undue payment.
- 120 Those arguments have already been dismissed as unfounded in Case T-568/16 (see paragraphs 92 to 104 above). Nor, incidentally, can they be upheld in the present case, as sought by the applicants. The second part must therefore be rejected as unfounded, without it being necessary to rule on the plea of inadmissibility put forward in that regard by the Commission (see paragraph 116 above).
- 121 By the third part of the first plea in law, the applicants submit that there was no undue payment due to the errors of calculation contained in Notice No 3, thereby reiterating the arguments put forward previously in support of their second plea in law in Case T-568/16.
- 122 In that regard, it must be borne in mind that, further to the responses provided by the Commission to the measures of organisation of procedure, on 25 October 2017, the applicants withdrew their challenge to the accuracy of the facts, being the detail of the calculations made by the Commission in the different notices. Inter alia they withdrew their second plea in law, put forward in Case T-568/16, by which they were putting forward the same arguments as those set out in the third part of the first plea in law of the present case, being arguments aimed at establishing that the calculation in Notice No 3 showed errors relating to the inclusion of the dependent child allowances (see paragraph 115 above). Thus, the applicants must also be deemed to have withdrawn the arguments referred to in paragraphs 115 and 121 above.
- 123 For all practical purposes, it should be borne in mind that Notice No 3 does not contain any errors in terms of the application of Article 81a of the Staff Regulations (see paragraph 104 above) or errors of calculation in terms of the inclusion of the dependent child allowances. Article 81a of the Staff Regulations must be interpreted as applying to orphan's pensions. Moreover, the calculations contained in Notice No 3, inasmuch as they include three dependent child allowances in the amount of Mr Alberto Spagnolli's fictive income (amount A), as indicated in the responses provided by the Commission to the measures of organisation of procedure on 25 October 2017, are not vitiated by the errors referred to by the applicants. Their arguments, aimed at showing that there was no undue payment due to errors of calculation in Notice No 3, are in any event unfounded.
- 124 In the reply, firstly, the applicants add that, even if the 'calcuette' method referred to in paragraph 109 above is used, there has been no undue payment. They affirm in that regard that the inclusion of Mr Alberto Spagnolli's fictive income, amount A, and actual income, amount B, does not comply with Article 81a of the Staff Regulations and that, contrary to the Commission's contentions, that inclusion is not necessary for cumulative taxation of income. They take the view that if the Commission was able to calculate EU income tax by cumulating the salary received by Mr Alberto Spagnolli and the amount of the survivor's pension, then it was incorrect to take account of that cumulation for the purposes of applying Article 81a of the Staff Regulations. In the applicants' submission, the cumulation of the income of both spouses is decisive, as it leads to account being taken of the amount plus the dependent child allowances received by Mr Alberto Spagnolli in the calculation of the actual income (amount B), whereas he was already receiving those amounts before the death of his spouse, pursuant to Article 67 of the Staff Regulations. The applicants argue that that cumulation is incorrect.
- 125 Secondly, the applicants affirm that the cap provided for in Article 81a must be understood as a comparison between, on the one hand, the solidarity contributions referred to in that provision, attributed solely pursuant to that article and, on the other hand, the income of the deceased official, determined fictively as if that official was still alive. They accordingly consider that the method to be applied should be different, depending on whether or not the surviving spouse is himself or herself an official who was already receiving the household allowance and the individual dependent child

allowances before the death. They take the view that, if the surviving spouse is himself or herself an official, the income attributed to him or her due to the death of his or her spouse (also an official) comprises the sum of the amounts of the survivor's pension and the individual dependent child allowances and they infer therefrom that, in the present case, the actual income (amount B) should include only those two amounts.

- 126 In that regard, it must be held that the arguments referred to in paragraphs 124 and 125 above are aimed at putting forward new pleas alleging that Notice No 3 is illegal. As restated in paragraph 124 above, those pleas of illegality of Notice No 3 were put forward for the first time in the reply lodged in Case T-599/16, which seeks, inter alia, annulment of the decision to recover undue payments. As discussed in paragraph 66 above, they were not set out in the application initiating Case T-568/16, which seeks annulment of Notice No 3, or in the application lodged in Case T-599/16.
- 127 In Case T-599/16, the applicants cannot be permitted to put forward a plea of illegality within the meaning of Article 277 TFEU in order to challenge the legality of Notice No 3, even if that was their intention. It was for them, if they believed there were grounds to do so, to put forward those new pleas in Case T-568/16 relating to that notice. Moreover, the question of assessing the conditions of admissibility of those pleas in the light of Article 84 of the Rules of Procedure of the General Court is relevant only in that context.
- 128 In any event, inasmuch as, at the hearing, the applicants stated that they were not withdrawing the arguments in question and stated that their belatedness was justified on the ground that they had been late in receiving the information about the calculations applied by the Commission for the determination of their pension entitlements, and therefore had been late in understanding the method of calculation applied by the Commission, it should be noted that, contrary to what the applicants stated at the hearing, there are no new factors of law or fact concerning Notice No 3 justifying an extension being granted on the time limit for bringing an action for annulment of that notice.
- 129 Firstly, it is apparent from the action brought in Case T-568/16 that the applicants understood that the Commission was proceeding to cumulate the emoluments received by the surviving spouse and the deceased spouse (see paragraph 74 above). The applicants themselves explain in Case T-568/16 that the Commission was proceeding to take account, on the one hand, of the fictive income (amount A), composed of the sum of the net salary of the deceased had she been alive and of the net salary of the surviving spouse at the time of the death, including the allowances for three dependent children and, on the other, of the amount corresponding to the actual income (amount B) that the spouse would receive if the cap provided for in Article 81a was not applied and which is composed of the sum of the net income of the surviving spouse, the survivor's pension and the orphan's pensions.
- 130 Secondly, it was indicated previously in the decision rejecting the complaint of 3 August 2015 that since the ratio legis of Article 81a of the Staff Regulations is to prevent enrichment of the family by reason of the death of an official, the method of calculation applied by the Commission was to calculate the difference between the actual income (amount B) and the fictive income (amount A), in order to deduct it proportionally from the survivor's and orphan's pensions.
- 131 Thirdly, although the composition of the two amounts corresponding to Mr Alberto Spagnolli's 'net salaries' is part of the fictive incomes (amount A) indicated in Notice No 3, being the amount equal to EUR 7 722.61 and the amount equal to EUR 8 084.74, does not appear in Notice No 3, the decision rejecting the complaint of 4 March 2016 or in the Commission's statement in defence, such an omission, in both Notice No 3 and the other notices, did not prevent the applicants from understanding and therefore challenging, within the time limit, that is to say, in the action for annulment of Notice No 3 in Case T-568/16, the method of calculation applied by the Commission, consisting of cumulating the salary of the surviving spouse and that of the deceased spouse. Both the adoption of the decision to recover undue payments and the communication of the details of the calculations of the fictive salaries indicated in the different notices cannot be held to be new facts

allowing the applicants, who omitted to avail themselves in due time of the remedies available to them to challenge an act adversely affecting them, to put forward new grounds of annulment of Notice No 3, thereby circumventing the time limit for bringing an action against that notice.

132 It follows that the arguments referred to in paragraphs 124 and 125 above, put forward for the first time in the reply in Case T-599/16, are in any event put forward belatedly, contrary to Article 84 of the Rules of Procedure, and must be rejected as inadmissible (see, by analogy, judgments of 6 July 2000, *AICS v Parliament*, T-139/99, EU:T:2000:182, paragraphs 59 and 62 and the case-law cited, and of 8 March 2007, *France Télécom v Commission*, T-340/04, EU:T:2007:81, paragraph 164 and the case-law cited).

133 In the light of all the foregoing, the first plea in law cannot succeed.

– *The second plea in law*

134 By their second plea in law, the applicants submit that the requirement under Article 85 of the Staff Regulations that the overpayment of survivor's and orphan's pensions must be 'patently such' for there to be a basis for a decision to recover undue payments is not met in the present case.

135 In that regard, firstly, the applicants submit that the judgments referred to in the decision rejecting the complaint of 4 March 2016 are not relevant in the present case. Those judgments concern situations that are different from the applicants', being that of the official, the recipient of undue payments, who made incorrect statements to the relevant administration, or of the official who, having been credited an undue amount, does not flag up the error or express any doubts as to the existence of the error in question to the administration in order to enable the latter to make the necessary checks. Unlike the situations mentioned in the judgments referred to in the decision rejecting the complaint of 4 March 2016, in the present case a number of steps were undertaken with the administration in compliance with the duty of diligence required of the official. Those steps were intended, inter alia, to show that the survivor's and orphan's pensions had been underestimated. In the applicants' submission, it is precisely because of those steps that the administration adopted Notice No 2 and provided for an increase in the pension entitlements.

136 Secondly, it is unreasonable of the Commission to require that the applicants, having obtained an adjustment of the limit on the pension entitlements they believed to be owing to them, persist in intervening with the administration in order to make sure that it did not make a mistake in the calculation of the amount of their pension entitlements. Moreover, although Notice No 2 contains an error in favour of the applicants, the Commission cannot maintain that Mr Alberto Spagnolli failed in his duty of diligence in discussing the amounts received with the administration or that he ought to have recognised in some way or another that an error in his favour had been made.

137 Thirdly, the applicants' situation is linked to the resolution of complex legal questions, such as whether or not the dependent child allowances should be included in the calculation of the limitation provided for in Article 81a of the Staff Regulations. That complexity does not make an error by the administration — if indeed there was one — 'patently such that he could not have been unaware of it'.

138 Fourthly, the administration cannot argue that a doubt as to the existence of an error having led to an undue payment ought to have arisen from a reading of Notice No 2, given that, in the right-hand column of the central part of that annex, entitled 'new net of Mr B. Spagnolli', six dependent child allowances were included. That column referred to the calculation of the actual income (amount B) in which six dependent child allowances were correctly included.

- 139 Fifthly, the lack of knowledge of the error committed in Notice No 2 is readily apparent from the complaint filed against Notice No 3. That complaint shows that the increase provided for in Notice No 2 had been understood by the applicants as being linked to the reduction of Mr Alberto Spagnolli's salary following his secondment and the correction of an earlier error of calculation to his detriment, contained in Notice No 1. The applicants did not associate that increase with an alleged error by the administration in favour of Mr Alberto Spagnolli in the calculation of the dependent child allowances in his fictive income (amount A).
- 140 Sixthly, given that, at the time of the death of his spouse, Mr Alberto Spagnolli was an AD 12 official, whereas at the time of the adoption of Notice No 2 he was an AD 9 official, the terms used by the administration both in Notice No 2 and in Notice No 3, namely 'net salary of Mr Spagnolli at the time of the death', do not give any grounds for considering it strange that the net salary at the time of the death was higher than his usual salary at the time.
- 141 In the first place, the Commission submits that, given that Mr Alberto Spagnolli was associated with the definition of a calculation that was different from the cap of the survivor's and orphan's pensions, which led to a much higher net amount of those pensions in Notice No 2, he knew that the different calculation of the dependent child allowances in the definition of the fictive income (amount A) was behind the adjustment of the amount of those pensions in that notice. In other words, since the difference between the incorrect sums referred to in Notice No 2 and the correct ones referred to in Notice No 3 arises solely from the inclusion of those dependent child allowances in the fictive income — in which those allowances were incorrectly calculated twice — and since Mr Alberto Spagnolli's contribution to the rectification done by the Commission in Notice No 2 was decisive, the requirement of knowledge of the irregularity of the applicants' pension payments is met in the present case.
- 142 In the second place, the Commission submits that the error contained in Notice No 2 was, in any event, so obvious that Mr Alberto Spagnolli could not be unaware of it. A mere reading of the amount of the fictive income and the amount of the actual income shows that the latter, whilst including twice the amount of dependent child allowances, was lower than the former. That ought to have alerted any diligent official and prompted him to contact the administration in order to flag up the error. Moreover, a simple reading of Article 66 of the Staff Regulations would have easily shown that the basic salary of the surviving spouse in grade AD 9 was hardly compatible with the amount indicated in Notice No 2, as confirmed, moreover, by the printed version of the calculation done using the 'calcullette', referred to in paragraph 109 above, a copy of which was attached to the statement in defence.
- 143 Moreover, in the Commission's submission, it was perfectly reasonable to require a duty of care from Mr Alberto Spagnolli, given the high grade he had reached as an official, grade AD 12, before being seconded to Parma.
- 144 Moreover, since any official is supposed to be familiar with the rules of the Staff Regulations relating, in the present case, to the amount of the salary of an official in grade AD 9 (Article 66 of the Staff Regulations) and that of the dependent child allowances (Article 2(1) of Annex VII to the Staff Regulations, Article 67 and the second paragraph of Article 81 of the Staff Regulations), Mr Alberto Spagnolli cannot validly argue that the error of calculation relating to the determination of the maximum amount of the survivor's pensions of which he was the recipient with his children was not 'patently such' within the meaning of the first paragraph of Article 85 of the Staff Regulations. In the Commission's submission, as that requirement has not been met, the decision to recover undue payments was adopted correctly and the action should be dismissed as unfounded.
- 145 In the present case, it must be determined whether the Commission is entitled to demand repayment of the amounts received unduly by the applicants in the light of Article 85 of the Staff Regulations. That article provides that 'any sum overpaid shall be recovered if the recipient was aware that there

was no due reason for the payment or if the fact of the overpayment was patently such that he could not have been unaware of it'. It follows from that wording that, in order for an amount unduly paid to be recovered, it is necessary to adduce proof that the recipient actually was aware that there was no due reason for the payment or that the overpayment was patently such that he could not have been unaware of it (judgments of 11 October 1979, *Berghmans v Commission*, 142/78, EU:C:1979:233, paragraph 9; of 9 September 2008, *Ritto v Commission*, F-18/08, EU:F:2008:110, paragraph 29; and of 21 November 2013, *Roulet v Commission*, F-72/12 and F-10/13, EU:F:2013:184, paragraph 46).

146 Article 85 of the Staff Regulations thus provides for the administration to be able to recover any amount unduly received in two situations: where the recipient was aware that there was no due reason for the payment and where the irregularity of the payment was patently such that he could not have been unaware of it.

147 As regards the first of those scenarios, and even if the Commission did intend to opt for this scenario in the decision rejecting the complaint of 4 March 2016, it is for the administration to prove that the recipient actually was aware that there was no due reason for the payment (judgment of 26 June 2013, *Achab v EESC*, F-21/12, EU:F:2013:95, paragraph 44).

148 As regards the second scenario, account must be taken in each case of the ability of the official concerned in each case to make the necessary checks (see judgment of 26 June 2013, *Achab v EESC*, F-21/12, EU:F:2013:95, paragraph 45 and the case-law cited).

149 In the present case, as regards the first scenario, in order to consider that proof has been made out of Mr Alberto Spagnolli's actual awareness of the irregularity of the payment, the Commission must demonstrate that he knew, firstly, that the fictive income (amount A) stated in Notice No 2 included double the amount of the dependent child allowances; secondly, that that inclusion was incorrect; and, thirdly, that it was that inclusion that had given rise to the irregularity of the payments of the survivor's and orphan's pensions made on the basis of Notice No 2.

150 Yet the Commission's statements, to the effect that Mr Alberto Spagnolli was aware of the inclusion of double the amount of the dependent child allowances in the fictive income stated in Notice No 2 as a result of the contacts undertaken by him with the administration in order to obtain modifications of the calculations of his entitlements to survivor's and orphan's pensions contained in Notice No 1 do not establish that the requirement of awareness of the irregularity of the payment was met in the present case, in other words, that the three conditions referred to in paragraph 149 above were satisfied. To begin with, those affirmations are based on a mere presumption. Secondly, the exchanges between the applicants and the administration concerned the errors of calculation contained in Notice No 1 and not the method of calculation applied in Notice No 2. Thirdly, given, firstly, the ambiguity, recognised by the appointing authority itself in the decision rejecting the complaint of 3 August 2015, in the expression 'net salary of Mr Spagnolli at the time of the death' used in Notice No 2 to refer to the fictive income (amount A) and, secondly, the lack of detailed explanation of the amounts included in that income, the Commission cannot argue that Mr Alberto Spagnolli knew that that income included six dependent child allowances nor, a fortiori, that he knew that that inclusion was incorrect and that he further knew that it had given rise to undue payments.

151 Thus, given that the Commission has failed to establish awareness of the error within the meaning of Article 85 of the Staff Regulations, it must be determined whether, in the present case, the Commission was correct in finding that the irregularity of the payment was patently such that Mr Alberto Spagnolli could not be unaware of it, that is to say, to ascertain whether the applicants' situation is that envisaged in the second scenario referred to in paragraph 146 above.

152 In that regard, it should be borne in mind that, according to the case-law, the party concerned, far from being relieved of all duties of reflection and verification, is, on the contrary, required to repay any amounts paid by error which a normally diligent official who is supposed to be familiar with the

rules governing his remuneration ought to have detected (judgments of 11 July 1979, *Broe v Commission*, 252/78, EU:C:1979:186, paragraph 13, and of 17 January 1989, *Stempels v Commission*, 310/87, EU:C:1989:9, paragraph 10).

- 153 Moreover, it is apparent from the case-law that the factors taken into account by the EU judicature in determining whether the error by the administration was ‘patently such’ include the level of responsibility of the official linked to his grade and seniority, and also the degree of clarity of the applicable Staff Regulations provisions setting out the conditions for granting the emoluments owing to the party concerned and the significance of the changes in his personal or family circumstances where payment of the sum at issue is linked to an assessment of such circumstances by the administration (see, to that effect, judgments of 27 February 2015, *EESC v Achab*, T-430/13 P, EU:T:2015:122, paragraph 31 and the case-law cited, and of 27 January 2016, *DF v Commission*, T-782/14 P, EU:T:2016:29, paragraphs 25 and 27).
- 154 An examination of that case-law shows that it cannot be inferred therefrom that the criterion of seniority carries more weight than the other criteria. On the contrary, that case-law makes it clear that all factors must be considered together, as the circumstances of each one may justify greater weight being attached to certain criteria over others (judgment of 27 February 2015, *EESC v Achab*, T-430/13 P, EU:T:2015:122, paragraph 43).
- 155 Moreover, according to settled case-law, it is not necessary for the official concerned, in the exercise of his duty of diligence, to be able to determine the precise extent of the error made by the administration. The fact that he has doubts about the validity of the payments in question is sufficient for him to be obliged to contact the administration so that it can carry out the necessary checks (see judgment of 21 November 2013, *Roulet v Commission*, F-72/12 and F-10/13, EU:F:2013:184, paragraph 50 and the case-law cited).
- 156 As a preliminary point, firstly, unlike the assessment of compliance with the obligation to provide a statement of reasons in the notice of adjustment of those entitlements, the assessment of whether an irregularity on the part of the administration in the determination of pension entitlements was ‘patently such’ must be carried out on the basis of the material available to the party concerned at the time of the irregularity which, in the present case, was the time of adoption of Notice No 2 and included his abilities and skills linked to his grade, the duty of diligence which could reasonably be expected of him and the clarity of the provisions governing his entitlements.
- 157 Secondly, it should be noted that, in the present case, the assessment of a ‘presumed awareness’ of the irregularity of the payments received by the applicants is closely linked to the understanding of the calculations of the pension entitlements applied by the administration itself, which affords, inter alia, an insight into which amount of dependent child allowances should be included in the fictive income (amount A) and, moreover, presupposes access to the details of the calculation underlying the determination of Mr Alberto Spagnolli’s net salary taken into account in the fictive income (amount A).
- 158 In the first place, it should be noted that the calculation of the pension entitlements applied by the Commission is not readily apparent from the wording of the provisions applicable in the present case.
- 159 Article 81a of the Staff Regulations does not provide expressly for the cumulation of the emoluments of the surviving spouse and of the deceased spouse. According to the explanations given in the decision rejecting the complaint of 3 August 2015, which were confirmed by the Commission at the hearing, that cumulation was done in the interest of the applicants (see paragraph 66 above). As that article does not refer to Mr Alberto Spagnolli’s income for the calculation of the cap not to be exceeded in order to avoid enrichment as a result of the death, nor does it contain any information about the amounts to be include in that income inter alia in terms of the dependent child allowances.

- 160 The second paragraph of Article 81 of the Staff Regulations, which states that ‘the amount of the dependent child allowance payable to the person entitled to a survivor’s pension shall ... be twice the amount of the allowance provided for in Article 67(1)(b) of the Staff Regulations’, was also likely to mislead the applicants. In fact, it was perfectly possible for them to consider that, due to the death of Mr Alberto Spagnolli’s spouse, considerations of the effectiveness of the provision required the Commission to take into account twice the amount of the dependent child allowances not only for the determination of the actual income (amount B) but also for the determination of the fictive income (amount A) of the surviving spouse. Moreover, the wording used in the different notices to identify the latter amount, being the ‘net salary of Mr Spagnolli at the time of the death with three dependent children’, tends to make it more difficult to understand the composition of Mr Alberto Spagnolli’s fictive income (amount A). That wording in fact is liable to be understood as meaning that the fictive income (amount A) must be calculated ‘at the time of the death’ and, therefore, taking into account the death — which means that twice the amount of the dependent child allowances should be included, in accordance with the second paragraph of Article 81 of the Staff Regulations, rather than not taking it into account — which would lead to the opposite result, with a single amount of the dependent child allowances being included.
- 161 It is also worth emphasising that, as confirmed by the Commission at the hearing, there are no general implementing provisions or memoranda explaining how Article 81a of the Staff Regulations is to be applied in practice in cases where, as in the present case, both the surviving spouse and the deceased spouse are EU officials. The explanations of the calculations done by the Commission in Notice No 2 were given only at the stage of the decision rejecting the complaint lodged against Notice No 3, namely on 3 August 2015. It was only at that stage that the appointing authority explained that, for the determination of the maximum amount provided for in Article 81a of the Staff Regulations, the inclusion of Mr Alberto Spagnolli’s income in the calculation of the cap provided for in Article 81a of the Staff Regulations (amount A) takes account of Mr Alberto Spagnolli’s income calculated ‘dynamically’, that is to say, according to his grade at the time of the calculation, on the basis of a fiction, that is to say, as if the death of his spouse had not occurred and that, consequently, a single amount of the dependent child allowances is included in that income.
- 162 In the second place, it must be borne in mind that no details are given in Notice No 1, Notice No 1a or Notice No 2 of the details of the composition of the amounts of Mr Alberto Spagnolli’s fictive income (amount A). Thus, it cannot be argued that the applicants had sufficient material in order to be able to identify, or at the very least suspect, firstly, that, in Notice No 2, the Commission had included twice the amount of the dependent child allowances in Mr Alberto Spagnolli’s fictive income (amount A); secondly, that that inclusion was incorrect; and, thirdly, that that inclusion had given rise to an undue payment.
- 163 Moreover, as Notice No 1 contained incorrect calculations and was subsequently corrected by Notice No 1a, adopted the same day as Notice No 2, it was not a suitable basis for Mr Alberto Spagnolli to use to understand the details of the calculations contained in Notice No 2. Similarly, nor does Notice No 1a, which took into account a different salary and was adopted following steps undertaken by Mr Alberto Spagnolli due to the underestimation of his pension entitlements, constitute an act establishing that he could not be unaware of an error of calculation contained in Notice No 2 which gave rise to an undue payment or to consider that he had contributed to the occurrence of that error of calculation and thereby to the applicants receiving an undue payment.
- 164 Moreover, the reconstruction of the calculations contained in Notice No 2, which was made possible by virtue of the documents produced by the Commission on 25 October 2017 in response to the measures of organisation of procedure, shows that the inclusion of twice the dependent child allowances (six dependent child allowances instead of three) in the fictive income (amount A) also affected the determination of the income tax applicable to that income. It follows that the difference between the amount incorrectly received by the applicants on the basis of Notice No 2 and what they ought to have received is not merely a matter of taking away three dependent child allowances.

Although the Commission seeks to simplify the error contained in Notice No 2 by deducting the inclusion of six dependent child allowances instead of three, that does not correspond to the reality and, especially, in the absence of details of the calculation that served to determine the fictive income (amount A), such an error was anything but ‘patent’.

- 165 It is also noteworthy that, in the decision rejecting the complaint of 3 August 2015, the appointing authority itself states explicitly that a chronological examination of the different notices of determination of pension entitlements leads to the acknowledgement that the method applied by the Commission ‘was not readily comprehensible’.
- 166 Moreover, it should be noted that the Commission officials, more specifically the officials of the PMO.4 unit, who are presumed to know and apply the method of calculation of entitlements to survivor’s and orphan’s pensions in their work, made errors of calculation of the applicants’ entitlements on a number of occasions, as shown by the various successive notices. Notice No 1 of 29 July 2011 was rectified by Notice No 1a of 17 April 2012 and by Notice No 2 of the same day. That notice was in turn corrected and replaced by Notice No 3 of 6 February 2015. Therefore, even if it was accepted that Mr Alberto Spagnolli could use the calculette referred to in paragraph 109 above, that does not by itself show that the presence of an error was patently such that Mr Alberto Spagnolli could not be unaware of it. Moreover, the possibility of using the calculette presupposes knowledge of the details of the calculations made by the Commission, as it involves putting in manually the different amounts taken into account for the determination of the pension entitlements.
- 167 Lastly, the diligence required of an official in the grade corresponding to Mr Alberto Spagnolli’s cannot mean that, when a number of relevant pieces of material in the notices of determination of the entitlements at issue in the present case are missing, when there is a lack of clarity in the provisions of the Staff Regulations and when a number of errors were made at the time by the administration itself, the official in question, who has already undertaken several steps, must persist in questioning the administration in order to obtain a subsequent check of the calculations applied by it, once he is satisfied by the result, inter alia following steps he has himself undertaken. In a situation such as that of the present case, it is reasonable to expect that the Commission, following the numerous steps undertaken by Mr Alberto Spagnolli with it, assessed his situation correctly and did not make irregular payments. To require him to persist in his inquiries with the administration, even when he can reasonably expect to have obtained a correct assessment of his entitlements to the survivor’s and orphan’s pensions when it has corrected the errors contained in the first notice of determination of pension entitlements, inter alia following the steps taken by him, would run counter to what can be reasonably expected from him as part of his duty of diligence.
- 168 It is apparent from the foregoing that the Commission’s arguments to the effect that a mere reading of a higher amount of the fictive income stated in Notice No 2 as compared to the actual income set out therein sufficed to raise doubts as to the presence of an irregularity cannot succeed. Given the difficulties involved in understanding the method of calculation applied by the Commission, the lack of general implementing provisions or memoranda that could have clarified the scope and application in practice of Article 81a of the Staff Regulations, the difficulties of interpretation relating to that provision (see paragraphs 92 to 104 above), the lack of certain details relating to the calculations made by the Commission in the different notices, the use of the expression ‘net salary of Mr Spagnolli at the time of the death’, recognised by the appointing authority itself as being ambiguous in the first decision rejecting the complaint of 3 August 2015, and the various errors made, the Commission cannot argue that the irregularity of the payments received by the applicants on the basis of Notice No 2 was patently such that the official in question, given his grade, could not be unaware of it (see, a contrario, judgment of 9 September 2008, *Ritto v Commission*, F-18/08, EU:F:2008:110, paragraph 34, where the applicant was not able to rely on any ambiguity whatsoever in the text of the relevant provisions).

- 169 In other words, it cannot be argued that the skills and knowledge associated with Mr Alberto Spagnolli's grade could enable him, on the basis of a mere reading of Notice No 2, to overcome the difficulties of legal interpretation of the provisions of the Staff Regulations in question in the present case, to identify the calculations done by the Commission and to understand that Notice No 2 was vitiated by an error that gave rise to an irregular payment.
- 170 As the requirement that the irregularity of the payment be patently such is not met in the present case, the Commission was not entitled to claim for recovery of undue payments from the applicants.
- 171 The decision to recover undue payments must therefore be annulled, without it being necessary to rule on the third ground of annulment.

The claim for monetary compensation

- 172 The applicants put forward arguments in support of their contention that the administration is legally liable towards them and claim that they should be compensated for their material and non-material damage.
- 173 In the first place, the applicants argue that the illegality of the Commission's conduct has been proven, first, by explaining the reasons why both Notice No 3 and the decision to recover undue payments were illegal and, second, by showing, under the third plea, that a delay of over one year for the re-examination of the decision of determination of pension entitlements and the adoption of the decision to recover undue payments constituted, in the present case, a particularly serious fault on the part of the Commission and an infringement of the duty to have regard for the welfare of staff.
- 174 As regards, in particular, the infringement of the principle of sound administration, the applicants submit that, as Notice No 2 had been adopted following a formal procedure conducted specifically on request, Mr Alberto Spagnolli was justified in relying on the accuracy of that notice to make important life decisions, inter alia the decision to continue his secondment in Parma. Thus, the Commission could not wait three years to check its calculations and even less demand retroactively that an allegedly unduly paid sum be repaid, without infringing the principle of sound administration and its duty to have regard for the welfare of staff in respect of Mr Alberto Spagnolli.
- 175 As regards, in particular, the infringement of the duty to have regard for the welfare of staff, the administration ought to have closed all internal audit procedures and adopted any corrective measures and acts requiring repayment of unduly paid amounts within at most one year following the adoption of Notice No 2. Moreover, at the time of adoption of a decision modifying the applicants' pension entitlements, the administration ought to have taken account of the particular circumstances of the case, including the presence of minor children, the family move to Parma and the difficulties involved in reversing the decision to continue the secondment with the EFSA after a certain lapse of time. The administration cannot maintain that it was not aware of those circumstances, given the numerous contacts initiated by Mr Alberto Spagnolli and documented by an exchange of emails between November 2011 and April 2012, produced by the applicants. Nor can the administration maintain that it was not aware of the rules and principles which, even under EU law, govern the situation of minors who move from one Member State to another. Those rules and principles follow in particular from Article 12 of the 1980 Hague Convention on the Civil Aspects of International Child Abduction, concluded at the Hague on 25 October 1980, and from Article 10 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2003 L 338, p. 1), under which a minor may, in principle, be considered integrated into the social environment of the State on whose territory he is present, one year after the move, and which require that his situation and entitlements be defined rapidly, within a period not normally exceeding one year. Lastly, the applicants add that the reduction of the fictive income

(amount A) following the inclusion of Mr Alberto Spagnolli's income in the calculation of the fictive and actual incomes (amounts A and B) constitutes an infringement of the duty to have regard for the welfare of staff since, contrary to the Commission's contentions, it results from a discretionary choice by the administration and not from the exercise of circumscribed powers.

- 176 In the second place, as regards the material and non-material damage, the applicants submit first of all that the adoption of the decision to recover undue payments caused them non-material damage arising from the disruption and destabilisation of their emotional and social attachments due to changes of place of residence that had taken place or would take place if Mr Alberto Spagnolli was obliged by the new financial situation to return to his post as an AD 12 grade official with the Commission in Brussels (Belgium). That loss corresponds to the difference between the remuneration received by Mr Alberto Spagnolli as an AD 9 grade official and what he would have received had he remained as an AD 12 grade official for one year, on the ground that one year is a reasonable time in which to take and implement the decision to change one's place of work and residence.
- 177 The applicants further argue that the Commission's conduct caused them material damage by bringing about a significant change in their financial situation, retroactively and in an unreasonably tardy manner. The applicants take the view that that damage consists of the amount the Commission claims must be repaid and of the difference between the amount of the pensions established in Notice No 2 and the amount established in Notice No 3 as from the date on which the latter notice became effective until the time the family is in a position to move back to their former place of residence. That time is estimated to be one year from the time the present proceedings are concluded.
- 178 The applicants add that the first part of the material damage will become a moot point should the decision to recover undue payments be annulled, as will the second part of the material damage if the claim for annulment of Notice No 3 put forward in Case T-568/16 is successful.
- 179 In the third place, the applicants state that the causal link between the Commission's unlawful conduct and the damage in respect of which they are seeking compensation is clearly established since, although the decision to move to Parma was made by Mr Alberto Spagnolli and cannot be attributed to the administration, the aforementioned damage was caused by the negligent delay in the adoption of Notice No 3 and of the decision to recover undue payments.
- 180 The Commission disputes both the admissibility and the merits of the claim for monetary compensation.

– *Admissibility*

- 181 The Commission begins by submitting that the applicants cannot successfully argue in support of their claim for compensation for non-material damage that the administration is at fault when it conducted itself in a non-decision-making capacity, as they failed to submit a request pursuant to Article 90(1) of the Staff Regulations, then a complaint pursuant to Article 90(2) of the Staff Regulations, against the explicit or implicit rejection of that request. In the Commission's submission, it is only once that complaint has been rejected explicitly or implicitly that an action for damages may be brought before the General Court (see judgment of 12 July 2011, *Commission v Q*, T-80/09 P, EU:T:2011:347, paragraph 61 and the case-law cited).
- 182 The Commission goes on to argue that the applicants may not bring a claim for compensation for material damage the amount of which reflects what the applicants are required to repay the administration should their action for annulment of the decision to recover undue payments be unsuccessful (see judgment of 24 January 1991, *Latham v Commission*, T-27/90, EU:T:1991:5, paragraph 38 and the case-law cited). It therefore disputes the admissibility of the claim for compensation in respect of the first part of the material damage (see paragraphs 177 and 178 above).

- 183 The applicants begin by replying that the claim for compensation for non-material damage is admissible inasmuch as it is based on the direct consequences of the acts the annulment of which they seek. It was inter alia the administration's delay in settling their entitlements and adopting the decision to recover undue payments that led to the damage arising from the disruption to the applicants' family situation, in respect of which they seek compensation. The loss arising from the disruption and destabilisation of their emotional and social attachments due to changes of place of residence that had taken place or would take place if Mr Alberto Spagnolli was obliged by the new financial situation to return to his post as an AD 12 grade official with the Commission in Brussels (Belgium). That loss corresponds to the difference between the remuneration received by Mr Alberto Spagnolli as an AD 9 grade official and what he would have received had he remained as an AD 12 grade official for one year, on the ground that one year is a reasonable time in which to take and implement the decision to change one's place of work and residence.
- 184 Next, in regards to that part of the material damage corresponding to the amount of the decision to recover undue payments, the applicants submit that, in the case-law cited by the Commission, the applicant is not challenging an act adversely affecting him and then seeking damages to compensate for the loss resulting from that act, which is not the situation in the present case, since the acts adversely affecting the applicants, being Notice No 3 and the decision to recover undue payments, have been the subject matter of an action for annulment.
- 185 In the first place, regarding the plea of inadmissibility of the claim for compensation for non-material damage, it must be remembered that, according to settled case-law, under the system of remedies established by Articles 90 and 91 of the Staff Regulations, an action for damages, which constitutes an autonomous remedy, separate from the action for annulment, is admissible only if it has been preceded by a pre-litigation procedure in accordance with the provisions of the Staff Regulations. That procedure differs according to whether the damage for which compensation is sought results from an act having adverse effects within the meaning of Article 90(2) of the Staff Regulations or from conduct on the part of the administration which contains nothing in the nature of a decision. In the first case, it is for the person concerned to submit to the appointing authority, within the prescribed time limits, a complaint directed against the act in question. In the second case, on the other hand, the administrative procedure must commence with the submission of a request, within the meaning of Article 90(1) of the Staff Regulations, for compensation. It is only the express or implied rejection of such a request that constitutes a decision adversely affecting the person concerned and against which he may submit a complaint, and it is only after the express or implied rejection of that complaint that an action seeking compensation may be brought before the Tribunal (see, to that effect, judgment of 12 July 2012, *Commission v Nanopoulos*, T-308/10 P, EU:T:2012:370, paragraph 33; see, also, judgment of 11 May 2010, *Nanopoulos v Commission*, F-30/08, EU:F:2010:43, paragraph 83 and the case-law cited).
- 186 The non-material damage in respect of which the applicants are seeking compensation relate to the Commission's alleged delays in ruling on their entitlements and to notify them of the decision to recover undue payments, that is to say, as rightly pointed out by the Commission, non-decision-making conduct by the administration that does not relate directly to the content of the decisions annulment of which is sought by the applicants. It is, moreover, apparent from the case-law that a delay does not, in principle, constitute an act adversely affecting an official (see, to that effect, judgment of 11 May 2010, *Nanopoulos v Commission*, F-30/08, EU:F:2010:43, paragraph 99 and the case-law cited).
- 187 Consequently, the applicants had to follow the pre-litigation procedure referred to in paragraph 185 above in two stages, that is to say, by lodging a request for compensation within the meaning of Article 90(1) of the Staff Regulations, then by lodging a complaint against any decision rejecting the request for compensation.

- 188 In the present case, it is clear, as correctly pointed out by the Commission, that the two-stage pre-litigation procedure provided for in Article 90(1) and (2) of the Staff Regulations has not been completed.
- 189 The applicants' claim for compensation for non-material damage must accordingly be rejected as inadmissible.
- 190 In the second place, as regards the plea of inadmissibility of the claim for compensation for the material damage having the same amount as what the applicants are required to repay to the administration should the claim seeking annulment of the decision to recover undue payments not be successful, it is no longer necessary to rule on the admissibility of that claim. Not only was the decision to recover undue payments in the present case annulled, the applicants themselves state explicitly in the action that 'that part of the material damage' no longer has any purpose should the decision to recover undue payments be annulled (see paragraph 178 above). The claim for compensation of the first part of material damage must therefore be considered as being put forward in the alternative in the light of the form of order seeking annulment of the decision to recover undue payments.

– *Substance*

- 191 For the same reasons as those set out in paragraph 190 above, nor is it necessary to rule on the merits of the applicants' claim for compensation for the first part of the material damage.
- 192 As regards the claim for compensation for the second part of the material damage, the applicants put forward arguments to the effect that the administration has incurred liability (see paragraphs 172 to 179 above) and seek compensation, inter alia, for the second part of the material damage (see paragraph 177 above), corresponding to the difference between the amount of the pensions established in Notice No 2 and the amount established in Notice No 3 as from the time it takes effect until the time when the family is in a position to move back to their previous residence, which they estimate at one year from the conclusion of the present proceedings.
- 193 The Commission replies that the applicants have not proven that the conditions for incurring non-contractual liability for the administration were satisfied in the present case. In the first place, it submits, in regards to the unlawful conduct arising from the infringement of the principles and duties referred to by the applicants, that it was in a situation of 'circumscribed powers' requiring it to adopt a decision to recover undue payments, as the time limit of five years had been observed and the conditions laid down in Article 85 of the Staff Regulations were satisfied. Individual circumstances such as diligent conduct on the part of the party concerned or the effects that the incorrectly-calculated pensions might have indirectly had on his life choices cannot preclude the adoption thereof. Moreover, the decision to request secondment to Parma, with a much lower salary package than that of the original posting in Brussels, was solely the result of Mr Alberto Spagnolli's decision. Furthermore, Mr Alberto Spagnolli was able to put forward his views a number of times to the administration which, in keeping with the principle of sound administration, always followed up on his requests promptly, as evidenced by the correspondence between them. Moreover, the alleged infringement of the duty to have regard for the welfare of staff has not been substantiated and cannot lead to the contested decision being held to be illegal since, according to the case-law, that duty cannot in any event depart from the principle of legality (judgment of 23 October 2012, *Eklund v Commission*, F-57/11, EU:F:2012:145, paragraph 83). Moreover, an alleged legitimate expectation as to the intangibility of the calculations of the pension entitlements could not have arisen had there not been specific assurances from the Commission and where the notices containing the calculations of the pension entitlements always contain a statement to the effect that, under Article 41 of Annex VIII to the Staff Regulations, the appointing authority reserves the right to make any checks and, where necessary, to revise its decision, potentially with retroactive effect, on the basis the evidence available to

it. Lastly, as the conditions laid down in Article 85 of the Staff Regulations for the adoption of the decision to recover undue payments were observed, the applicants cannot argue that that decision is illegal.

- ¹⁹⁴ In the second place, there is no causal link between, on the one hand, the decision to recover undue payments and the implementation thereof and, on the other, the applicants' life choices that may cause them the losses they allege. Mr Alberto Spagnolli chose freely to move to Parma and, inasmuch as his secondment was planned for a limited period of five years, his return to Brussels and the allegedly detrimental consequences thereof for the children in terms of their social and emotional attachments were foreseeable. The detrimental effects alleged cannot therefore be attributed to illegal conduct on the part of the Commission. Moreover, inasmuch as the recovery of undue payments is done by instalments, the applicants cannot argue that the repayment was so arduous as to force Mr Alberto Spagnolli to end his secondment to Parma.
- ¹⁹⁵ According to settled case-law, an action for compensation brought pursuant to Article 270 TFEU may succeed on its merits only if a number of factors are proven: the illegality of the allegedly wrongful act committed by the institutions; actual harm suffered; and the existence of a causal link between the act and the damage alleged to have been suffered (judgments of 1 June 1994, *Commission v Brazzelli Lualdi and Others*, C-136/92 P, EU:C:1994:211, paragraph 42, and of 21 February 2008, *Commission v Girardot*, C-348/06 P, EU:C:2008:107, paragraph 52). Those three criteria are cumulative. Failure to prove any one of them is sufficient for an action for damages to be dismissed.
- ¹⁹⁶ Moreover, where it is put in issue under the provisions of Article 270 TFEU, the non-contractual liability of the institutions may be incurred on the ground solely of the illegality of an act adversely affecting an official (or of non-decision-making conduct), without there being any need to consider whether it is a sufficiently serious breach of a rule of law intended to confer rights on individuals (see judgments of 16 December 2010, *Commission v Petrilli*, T-143/09 P, EU:T:2010:531, paragraph 46 and the case-law cited, and of 11 May 2010, *Nanopoulos v Commission*, F-30/08, EU:F:2010:43, paragraph 131 and the case-law cited).
- ¹⁹⁷ Moreover, according to settled case-law, the damage for which compensation is sought in an action claiming non-contractual liability of the Union must be actual and certain, which it is for the applicant to prove (see judgment of 9 November 2006, *Agraz and Others v Commission*, C-243/05 P, EU:C:2006:708, paragraph 27 and the case-law cited). The applicant must adduce conclusive proof as to the existence or extent of the damage he alleges (see judgment of 16 September 1997, *Blackspur DIY and Others v Council and Commission*, C-362/95 P, EU:C:1997:401, paragraph 31 and the case-law cited).
- ¹⁹⁸ In the present case, the applicants argue that it was the unreasonable delay and retroactive effect of Notice No 3 and the decision to recover undue payments that brought about a significant change in the financial situation, in the light of which the Spagnolli family took and maintained its decision to reside in Parma.
- ¹⁹⁹ As the decision to recover undue payments has been annulled, Notice No 3 will not produce any retroactive effects. Thus, the applicants cannot argue that they have suffered losses resulting from the change in their financial situation for the period between the adoption of Notice No 2 and the adoption of Notice No 3. Moreover, as regards the period subsequent to the adoption of Notice No 3, should the claim for compensation for damage corresponding to the difference between the amount of the pensions established in Notice No 2 and that established in Notice No 3 for one year (see paragraph 192 above) be successful, that would have the effect of partly circumventing the dismissal of the action for annulment brought against the latter notice. That dismissal implies that, as from the date of adoption of Notice No 3, the applicants' pension entitlements will be calculated on the basis of the latter. This claim for damages is therefore inadmissible.

- 200 In any event, as will be demonstrated below, inasmuch as the loss alleged by the applicants results directly from their life choices and not from any unlawful conduct on the part of the administration, the existence of a causal link between that conduct and the loss is not sufficiently direct for the Commission to incur non-contractual liability.
- 201 Firstly, as correctly pointed out by the Commission, Mr Alberto Spagnolli was seconded to Parma at his request, for a fixed period limited to five years. Moreover, the decision to second Mr Alberto Spagnolli was adopted on 10 October 2011 (see paragraph 19 above), that is to say, after the adoption of Notice No 1 on 29 July 2011 (see paragraph 18 above), which had determined the applicants' pension entitlements incorrectly, as stated by the applicants themselves and as evidenced by the adoption, on 17 April 2012, of both Notice No 1a and Notice No 2. It follows that the choice to move to Parma, to expose the children to a temporary move in accordance with the conditions provided for in the secondment contract and to accept the living and salary conditions different from those in place before the secondment was made independently of any assessment or revision of the applicants' pension entitlements. Moreover, the possibility of revising at any time the applicants' entitlements under Article 41 of Annex VIII to the Staff Regulations was expressly stated in all the notices adopted by the administration, which refutes the applicants' arguments to the effect that they were entitled to rely on their financial situation remaining stable.
- 202 Secondly, the choice to remain in Parma, which allegedly turned out to be detrimental for the applicants' financial situation, was made, according to their statements, on the basis of Notice No 2, adopted on 17 April 2012 (see paragraph 20 above). The applicants further submit that the unlawful delay by the administration commenced one year after the adoption of that notice, as is apparent from their arguments, to the effect that a reasonable time period for an internal audit procedure to be completed with the adoption of a rectification act and an act for the recovery of undue payments should not exceed one year.
- 203 However, the applicants cannot argue that the administration's unlawful delay is behind their 'detrimental' choice to remain in Parma and gave rise to losses they estimate are equal to the difference between what they would have received on the basis of Notice No 2 and what they should receive on the basis of Notice No 3. It is clear that, had the contested acts been adopted within the allegedly 'reasonable time period' of one year from the time of adoption of Notice No 2, that would have brought forward the change in the unfavourable financial situation for the applicants, who would have been unable to receive 'undue' benefits resulting from the application of Notice No 2 for about three years. It follows that, even if Notice No 3 and the decision to recover undue payments were adopted belatedly, that delay did not cause the applicants the loss they allege.
- 204 As there is no causal link between the administration's conduct and the alleged loss, the Commission cannot be held to have incurred liability and the claim for compensation for the second part of the material damage is rejected.
- 205 In the light of the foregoing, in Case T-599/16 the decision to recover undue payments must be annulled and the action dismissed as to the remainder.
- 206 As the decision to recover undue payments has been annulled, the Commission is required to draw the inferences from the judgment annulling that decision as regards, inter alia, the amounts that have been withheld on Mr Alberto Spagnolli's salary statement. On the other hand, since the action for annulment of Notice No 3 has been dismissed, the applicants' pension entitlements will remain fixed for the future by that notice, as from the date of its adoption until any new decision revising their entitlements adopted by the Commission pursuant to Article 41 of Annex VIII to the Staff Regulations.

Costs

- 207 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Article 134(3) of those rules states, however, that, where each party succeeds on some and fails on other heads, the parties are to bear their own costs.
- 208 In the present case, given the close connection between the cases which justified their being joined, and given that the applicants were unsuccessful in Case T-568/16, whereas in Case T-599/16 the Commission was unsuccessful on the merits of the action for annulment the Court considers it fair in the circumstances of the case to order each party to bear its own costs in each case (see, to that effect, and by analogy, judgment of 23 November 2011, *Jones and Others v Commission*, T-320/07, not published, EU:T:2011:686, paragraph 158).

On those grounds,

THE GENERAL COURT (Ninth Chamber)

hereby:

- 1. Dismisses the action in Case T-568/16;**
- 2. In Case T-599/16, annuls Decision PMO/04/LM/2015/ARES/3406787 of the Office for the Administration and Payment of individual entitlements (PMO) of the Commission of 17 August 2015 ordering recovery of the amounts paid unduly to the applicants by way of survivor's and orphan's pensions and dismisses the action as to the remainder;**
- 3. Orders each party to bear its own costs in each case.**

Gervasoni

Madise

da Silva Passos

Delivered in open court in Luxembourg on 14 June 2018.

[Signatures]

Table of contents

| | |
|--|----|
| Legal framework | 2 |
| Background to the dispute | 4 |
| Procedure | 5 |
| Forms of order sought | 6 |
| Law | 7 |
| Case T-568/16 | 7 |
| Admissibility | 7 |
| Substance | 9 |
| – The third plea in law | 9 |
| – The first plea in law | 13 |
| Case T-599/16 | 16 |
| Consideration of the claim for annulment | 17 |
| – The first plea in law | 17 |
| – The second plea in law | 20 |
| The claim for monetary compensation | 26 |
| – Admissibility | 27 |
| – Substance | 29 |
| Costs | 32 |