

EIGHTY-THIRD SESSION

***In re* Bousquet (No. 2), Gourier
and Vollering (No. 11)**

Judgment 1663

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Karl Bousquet, the complaint filed by Mr. Philippe André Gourier and the eleventh complaint filed by Mr. Johannes Petrus Geertruda Vollering against the European Patent Organisation (EPO) on 28 June 1996, the EPO's single reply of 30 October 1996, the complainants' joint rejoinder of 17 February 1997 and the Organisation's surrejoinder of 21 April 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Considering the applications filed to intervene in Mr. Bousquet's complaint by:

**M.J.J.B. Beitner
M. Ludi
J.-B. Ousset**

Considering the applications filed to intervene in Mr. Gourier's and Mr. Vollering's complaints by:

**F. Blondel
C. Brénéol
F.J. Chambonnet
B. Cohen
G.I.L.C. Cousins-Van Steen
J.P.N. De Can
H.S.A. Dockhorn.
C. Fournier
C. Ginoux
R.E. Goovaerts
B.D. Granger
S. Grewel
I.M. Kagermeier
G.H.J. Mollet
D.F. Salvador
J.M. Skelly
C.H.S. Wolf**

Considering the EPO's observations of 15 May 1997 on those applications;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The European Patent Office, the EPO's secretariat, has for several years had the status of "observer" in the system⁽¹⁾ of the "coordinated" European organisations. The EPO's Administrative Council used to adjust the pay of staff, in accordance with Article 64(6) of the Service Regulations, on recommendations from the Co-ordinating Committee of Government Budget Experts of the coordinated organisations.

By a decision of 8 December 1988, CA/D 20/88, the Council approved a procedure for adjustment that was

"adapted from that of the 159th and 212th reports of the Co-ordinating Committee of Government Budget Experts". As amended by the Council Article 64(6) now reads:

"The remuneration of the permanent employees shall be subject to periodic review. It shall be adjusted by the Administrative Council in accordance with a procedure adopted by that body, account being taken, so far as applicable to that procedure, of recommendations by the Co-ordinating Committee of Government Budget Experts."

The procedure of adjustment is based on two notions. One of them, dubbed "parallelism", is that pay at the EPO should keep in line with pay in the main government departments of the seven member States that are taken for the sake of comparison. The other notion is the need to ensure equality of purchasing power in staff pay. Parallelism requires the use of an international index⁽²⁾ of prices in each country and a "specific indicator".⁽³⁾ Parity of purchasing power means that, once the scales of pay at the duty station taken as "the basis" for the system have been set, the scales in each of the other member countries have to be reckoned so as to ensure that staff in like professional and family circumstances have the same purchasing power, whatever the country where they are serving or have retired. The coefficients of purchasing power which are used to work out the scales, and the international price index for Germany, come from a unit known as the Inter-Organisations Study Section on Salaries and Prices (IOS). The coordinated organisations set up that unit and it is affiliated to the Organization for Economic Cooperation and Development. The city taken as the point of comparison for the whole system -- the so-called "reference city" -- is Brussels.

The Co-ordinating Committee of Government Budget Experts adopted its 212th report on 14 November 1985. The report says in paragraph 16 that: "While they are only calculated in principle once every four years, purchasing power parities are updated at each 1st July". In a report of 12 February 1993 the Co-ordinating Committee on Remuneration recommended setting new parities as from 1 July 1992. The adjustment meant rises of 4.1 per cent for Germany and of 7.3 per cent for the Netherlands.

On 11 June 1993 the Administrative Council of the EPO adopted proposals that the President of the Office had put to it in CA/29/93. That paper said:

"... there is no parity for Munich -- this city being at the centre of our remuneration system -- and, for that reason, the Munich pay scales are not changed. Consequently, in order to maintain equality of purchasing power between Munich and the countries where parities will have to be corrected, the figures for Brussels, used by the coordinated organisations must be reduced by the adjustment (4.1 per cent), established for Munich."

The upshot was that there was no adjustment for Munich but, by application of the specific indicator -- which was -0.1 per cent -- one of 3.1 per cent for The Hague as from 1 July 1992.

The Office then made an administrative blunder. On 26 June 1993 it paid its staff at The Hague various allowances at rates that were 7.3 per cent higher. In July the Director of Staff Policy sent out a notice to staff at The Hague to say that the rise should have been only 3.1 per cent and that the sums overpaid would be docked from pay for July 1993.

Mr. Bousquet serves the Organisation at Berlin as an examiner of patents. Mr. Gourier and Mr. Vollering, who are also examiners, are at The Hague. On 6 September Mr. Gourier and Mr. Vollering each lodged two "complaints" with the President against the Council's decision of 11 June, as reflected in their pay slips for June 1993. In the first they asked him to apply to them as from 1 July 1991 scales that took account of the new parities. In the second they asked him more particularly to keep on paying as from 1 July 1993 the sums made over in allowances in June. On 23 September Mr. Bousquet too challenged the Council's decision of 11 June 1993 and asked to have his salary put up by 4.1 per cent as from 1 July 1991.

In report 22 of 28 May 1993 the Coordinating Committee on Remuneration had adopted a new procedure for adjusting pay as from 1 July 1993. Appendix 4 to the report said in point 1.2 that parities of purchasing power were in part to be revised each year and for the rest to be linked to indices of prices of the relevant consumer items.

The President put to the Council a report dated 30 November 1993 on the adjustment of pay as from 1 July 1993. It explained that for the coordinated organisations the international price index supplied by the IOS

had been replaced by a new index described as "implicit". The new one was worked out from the old international index, had a partial parity component and took Brussels as the "reference city". Brussels -- the report went on -- was obviously irrelevant to any adjustment of basic pay for EPO staff in Germany. For Germany it was Munich, and not Brussels, that mattered most; so the scales had no "parity" component.

On 18 November 1993 the IOS had let the Office have an index for Munich. The Office called it "pure", meaning thereby that the IOS had removed any reference to coefficients of purchasing power parity for Germany.

On 9 December the Council adopted the President's proposals in his report of 30 November for the scales to apply as from 1 July 1993. The "pure" international index that the EPO was using for Germany brought a rise of 4.3 per cent in pay, whereas the index used by the coordinated organisations yielded one of 6.7 per cent. The President said that for the Netherlands the outcome was a fall of 1.3 per cent.

On 14 February 1994 Mr. Bousquet again put a "complaint" to the President objecting that his pay slip for December 1993 showed a rise of only 4.3 per cent in line with the Council's decision of 9 December 1993, whereas the rise that applying the coordinated organisations' index would have brought was, by application of the specific indicator, 6.6 per cent. He asked the President for a 2.3 per cent rise as from 1 July 1993. He also said that the parity adjustment of 4.1 per cent should have applied as from 1 July 1992. On 3 March 1994 Mr. Vollering and on 8 March Mr. Gourier each lodged another three "complaints" with the President. They asked him to raise pay by 4.1 per cent as from 1 July 1992, to correct the amounts of allowances due as at 1 July 1993 and again to raise pay as from the same date by a percentage they did not state.

In a paper dated 22 April 1994 the President proposed to the Council what he saw as clearer arrangements for applying Article 10 of the procedure. His suggestion was to explain the statistical data to be used to ensure that the adjustments made by the Office continued, as Articles 6 and 10 of the procedure required, to abide by the provisions of the 212th report of the Co-ordinating Committee of Government Budget Experts, despite the changes made since 1992 by the coordinated organisations. On 8 June 1994 the Council approved as from 1 July 1994 the President's proposals for amending Article 10.

In a unanimous opinion of 6 July 1995 the Appeals Committee held that Brussels was still "the heart of the parity system". It recommended raising pay for staff at Munich by 4.1 per cent as from 1 July 1992. In another report, of 15 November 1995, it recommended a like rise in pay for staff at Berlin, The Hague and Vienna. On the same day it issued several other reports. In one it recommended raising pay at The Hague by 2.3 per cent and making corresponding rises in pay everywhere else but Germany as from 1 July 1993. In another report it recommended disallowing the claim to a 2.3 per cent rise for staff in Munich as from 1 July 1993. But it held that the administration had not properly followed the arrangements in the 22nd report of the Coordinating Committee on Remuneration for reckoning the international price index for Germany at that date. So it recommended taking a new decision in accordance with the 212th report of the Co-ordinating Committee of Government Budget Experts. In yet another report the Appeals Committee recommended allowing the appeals against recovery of sums overpaid.

The decisions on pay brought a surge of protest from the staff. The Council held its 60th Session from 4 to 8 December 1995. It bade management start talks on 1 January 1996 with staff representatives to sort out the dispute over pay once and for all. In a communiqué, No. 2 of 1 February 1996, the President offered to make good half the loss of pay that applying the method in force since 1988 had entailed as from 1 July 1992 and thenceforth to take Brussels again as the "reference city" for the system. The upshot was that the President and the chairman of the headquarters staff committee put out a joint statement on 15 February 1996 and the Council endorsed the resulting draft decision on 8 March. A single lump-sum payment was to be made against past losses, the scales were to be adjusted as at 1 January 1996, and Brussels was again to become, as from 1 July 1996, the "reference city" for reckoning parities in purchasing power.

A circular of 2 April 1996 from the Vice-President of Directorate General 4 told the staff that the appeals had failed. That is the impugned decision.

B. The complainants have two pleas: breach of the procedure of adjustment and of Article 64(6) of the Service Regulations, and breach of the rule against retroactivity.

First, they submit that Brussels was still the "reference city", i.e. the duty station to be taken for the sake of comparison. In reckoning pay as at 1 July 1992 and as at 1 July 1993 the EPO ignored the index of the cost of living in Brussels. It thereby dropped the method it had itself adopted on 8 December 1988. The right course would have been to take the international index of consumer prices used by the coordinated organisations and the purchasing power coefficient worked out for Munich from the IOS's figures, which treated Brussels as the "reference city".

The complainant's second plea is that the decisions taken in June and December 1993 not to apply in full the adjustments due as from 1 July 1992 and as from 1 July 1993 were tantamount to retroactive amendment of the policy adopted in 1988. No such amendment should have come into force before 1 July 1994.

The complainants are asking the Tribunal to quash the decision of 2 April 1995 and order the EPO to pay them as from 1 July 1992 a 4.1 per cent rise in salary "attributable to the inclusion of the Brussels-Munich parity as determined for that date by the [IOS]". Mr. Bousquet wants the Organisation to pay him as from 1 July 1993 a 2.3 per cent rise "attributable to the inclusion in full of the international 'implicit' index for Germany as determined at that date by the IOS" and to pay him in full and retroactively from the dates of entry into force -- as from 1 July 1994 and as from 1 July 1995 -- such adjustments as are attributable to application of the implied" index determined yearly by the IOS for Germany. Mr. Gourier and Mr. Vollering seek further increases of 2.3 per cent "attributable to the inclusion in full of the cost-of-living index for the Netherlands" and such later adjustments as are attributable to application of the cost-of-living index determined yearly by the IOS for the Netherlands. Mr. Gourier and Mr. Vollering ask the Tribunal to declare that the EPO acted in breach of Article 88 of the Service Regulations on the recovery of undue payments. They claim payment of interest at the rate of 10 per cent a year on the amounts withheld, and costs.

C. In its reply the EPO asserts that according to several technical papers written in support of its case in the internal appeal proceedings Munich has since 1988 been the point of comparison for the pay of EPO staff. The compromise of March 1996 replaced Munich with Brussels as from 1996.

The defendant denies breaking the rule against retroactivity or departing from any of the rules. It submits that the Office was right to recover promptly the sums overpaid in allowances in June 1993.

D. In their rejoinder the complainants maintain that whereas Brussels serves the purpose of statistical comparison Munich matters just for the choice and presentation of pay scales. They observe that Article 6 of the procedure refers to what the Co-ordinating Committee of Government Budget Experts said in its 212th report about the reckoning of parity coefficients and price indices. They infer that the nub of the method consists in relating purchasing power parities to Brussels. The EPO chose to have the IOS supply the relevant statistics. They press their other pleas.

E. In its surrejoinder the Organisation submits that the distinction that the rejoinder draws between Brussels and Munich is a "mere fiction". Article 6 of the procedure makes an express derogation from the 212th report: it says that the coefficients are "re-calculated on the basis of Germany (Munich = 100)". Having the IOS supply data for the purpose of applying the procedure does not make Brussels the relevant point of comparison.

CONSIDERATIONS

1. Until 30 June 1988 the scales of staff pay for the EPO were the same as for the system of "coordinated" organisations. The Organisation had the status of an observer and was applying for full membership. The system takes Brussels as the point of comparison. The scales of pay for staff in Brussels serve as the basis for working out the scales in other countries, coefficients being applied to give pay the same purchasing power whatever the duty station.

In an edition dated January 1982 Article 64(6) of the Service Regulations read:

"The remuneration of the permanent employees shall be subject to periodic review and shall be adjusted by the Administrative Council taking account of the recommendations of the Co-ordinating Committee of Government budget experts of the Co-ordinated Organisations."

In 1988 the EPO adapted the system of the coordinated organisations to its own needs: it would bring pay into line with its own career system, adjust pay for all grades so as to have a rational structure allowing a smooth shift from one grade to another, and fit in a new grade, A4(2).

Its Administrative Council then amended Article 64(6) to read:

"The remuneration of the permanent employees shall be subject to periodic review. It shall be adjusted by the Administrative Council in accordance with a procedure adopted by that body, account being taken, so far as applicable to that procedure, of recommendations by the Co-ordinating Committee of Government Budget Experts."

On 8 December 1988 the Council approved the text of a procedure for the adjustment of salary. The title was: "Procedure, adapted from that of the 159th and 212th reports of the Co-ordinating Committee of Government Budget Experts, for adjusting the remuneration of permanent employees of the European Patent Office". The text reads in part:

"CHAPTER II - REVIEW OF BASIC SALARIES

Article 3

1. With effect from 1 July of each year and on the basis of comparable grades, the basic salaries of permanent employees working in Germany will be adjusted by an amount equal to the percentage change over the past 12 months in the international price index as calculated in that country, corrected upwards or downwards by the applicable weighted average of the real percentage changes in net remuneration levels in the central government services of the reference countries over the same period.

2. This percentage adjustment applies to basic salaries in force in Germany at 1 July of the previous year.

3. Remuneration levels of civil servants in central government services and the national cost of living indices are supplied by the relevant Member States' civil services; the international price indices and coefficients of purchasing power are supplied by the Inter-Organisations Study Section.

...

Article 5

To obtain the basic salaries applicable on 1 July in countries other than Germany, the new basic salaries applicable to the staff working in Germany are multiplied by the coefficients of purchasing power parity which ensure that all employees in the same grade and step have the same change of purchasing power.

Article 6

The coefficients of purchasing power parity and consumer price evolutions are calculated in accordance with the procedure laid down in the 212th report of the Co-ordinating Committee of Government Budget Experts and re-calculated on the basis of Germany (Munich = 100).

...

CHAPTER V - CONSUMER PRICE INDICES AND COEFFICIENTS

OF PURCHASING POWER PARITY

Article 10

The change in the cost of living referred to in articles 3, 6, 7 and 9 and the application of the coefficients of purchasing power parity referred to in Articles 3, 5 and 6 are determined on the basis of the international price indices and coefficients of purchasing power parity drawn up in the Member States in accordance with the recommendations of the 212th Report of the Co-ordinating Committee of Government Budget Experts."

Annex II of the 212th report sets out the statistical methods used by the Inter-Organisations Study Section on Salaries and Prices (IOS), a body set up by the coordinated organisations. It says:

"III. Purchasing Power Parities

8. The Committee could support the recommendation of the Working Party that Brussels should remain the reference town [sic] and

that the Fisher method should be used for the calculations.

9. In order to establish purchasing power parities between Brussels and the various duty stations involved, it is necessary to:

- (i) collect representative commodity prices in Brussels and each of the duty stations,
- (ii) weight these prices in accordance with the consumption pattern of the population concerned ...,
- (iii) subsequently update these parities.

...

IV. Co-operation between the European Communities and the

Coordinated Organisations

16. The international index for Belgium ... is calculated by the SOEC [Statistical Office of the European Communities] and approved by the Belgian Ministry of Economic Affairs ... It is used by the European Communities and the Co-ordinated Organisations. The international index for France is calculated by the INSEE [National Institute for Statistics and Economic Research] and used by the European Communities, Co-ordinated Organisations and the United Nations. The international indices for Germany, Italy, the Netherlands, Norway and the United Kingdom are calculated by the Inter-Organisations Section on the basis of data provided by national statistical offices ..."

The gist of the method adopted in 1988 was that the IOS was to supply information on international price indices and coefficients of purchasing power for Brussels. The EPO used that information to recalculate the scales for Munich and therefrom to work out the scales for the other EPO duty stations.

2. The EPO says that it followed the new procedure until 1992, when it introduced a method of its own. It explains that that method consisted in using statistics that came, not from the IOS for the purpose of recalculating the Munich scales, but from the statistics offices of the state of Bavaria or of Germany as a whole. The Organisation found the new method more reliable than taking the new "implicit" international price index which the coordinated organisations were using instead of the old one. The method made for savings, too, on rises attributable to inflation in the cost of living.

The President put a paper -- CA/29/93 -- to the Administrative Council at its session of June 1993 about the adjustment of pay as from 1 July 1992. The paper proposed using new coefficients of purchasing power parity which the Coordinating Committee on Remuneration had approved. It said:

"In accordance with Articles 5 and 6 of the procedure ... these coefficients, using Germany as a reference, apply to the Office."

It observed that the coordinated organisations had made the following adjustments as from 1 July 1992, taking Brussels as the basic point of comparison:

Country: Germany
Reference city: Munich
New parity: 0.0515
Old parity: 0.04948
Change: + 4.1%

...

Country: Netherlands
Reference city: The Hague
New parity: 0.05500
Old parity: 0.05127
Change: + 7.3%

The paper commented that in accordance with Articles 5, 6 and 10 of the procedure the new parities needed to be taken into account as they reflected local trends and to be brought into line with the EPO's own reference city, which was Munich. The paper explained that since the EPO was taking Munich as the reference city only the figure for Munich should serve in working out the rates of adjustment for the other

duty stations. The rate of adjustment for The Hague would be 3.1 per cent. The Munich figures were adapted regularly and needed no further amendment: should any slight adjustment prove necessary, the President would make proposals in the light of the Office's financial situation.

On 11 June 1993 the Administrative Council approved the President's proposals and decided:

"Article 1

Note has been taken of the report of the President of the European Patent Office on the implementation of the new purchasing power parity coefficients, the proposals for which have been approved.

Article 2

Basic monthly salary scales in tables 3 and 4 of Annex III to the Service Regulations are replaced by the corresponding scales contained in the tables appended to this decision.

Article 5

Should the adjustment arising from this decision result in a scale or an amount for indemnity or allowance lower than that in force in July 1992, such negative adjustment shall be reflected in adjustments after 1 July 1992.

Article 6

This decision ... shall apply as from 1 July 1992."

Application of the new method resulted in no increase at all for Germany and one of 3.1 per cent for the Netherlands. Several documents observed that the method made for cuts in costs.

3. Many staff at Munich, Berlin and The Hague were put out to hear that they would not be getting the same adjustments as the staff of the coordinated organisations.

In June 1993 the EPO paid staff at The Hague allowances at a rate that was 7.3 per cent higher. Shortly afterwards, however, it told them that it had mistakenly paid them too much and would be recovering the sums overpaid. The staff objected on the grounds that the conditions for recovery under Article 88 of the Staff Regulations were not met.

Many staff members appealed against the Council's decision of 11 June 1993 on adjustment as it was reflected in their pay slips.

4. On 9 December 1993 the Council adopted a decision on the President's proposal on the adjustment of staff pay as from 1 July 1993. The adjustment was worked out from the figures for June 1993. To make for parity in purchasing power the EPO got from the IOS what it calls a "pure" international price index, a corrected version of the "implicit" one used by the coordinated organisations.

Staff lodged further internal appeals against the pay slips they got as a result of that decision.

On 8 June 1994 the Council made amendments to Articles 6 and 10 of the procedure adopted in 1988. The amended text reads:

"Article 6

The coefficients of purchasing power parity and consumer price evolutions are calculated in accordance with the procedure laid down in the 212th report of the Coordinating Committee of Government Budget Experts and the interpretation thereof in Chapter V of the procedure and re-calculated on the basis of Germany (Munich = 100)."

Article 10 comes under Chapter V, which is headed "Consumer price indices and coefficients of purchasing power parity". It says in (1) that the change in the cost of living referred to in Articles 3, 6, 7 and 9 and the application of the coefficients of purchasing power parity referred to in Articles 3, 5 and 6 are determined on the basis of the international price indices and coefficients of purchasing power parity drawn up in the Member States in accordance with the recommendations of the 212th Report of the Co-ordinating Committee of Government Budget Experts. Article 10(2) says that only rents actually paid by EPO staff will

count in evaluating changes in rent used to calculate international price indices. Article 10(3) provides that the purchasing power parities shall be updated each year as at 1 July by multiplying the purchasing power parity by the percentage change in the international or the relevant national consumer price index and dividing the result by the percentage change in the international price index for Germany. Article 10(4) states that parities for Austria and the Netherlands will be updated on the strength of the international index and that for other countries where pensioners are resident the national index will be used. Lastly, 10(5) says that for Austria the parity resulting from the recalculation as at 1 July 1994 and communicated by the IOS shall be regarded as the purchasing power parity existing at that date.

In December 1994 the Council adopted, on the strength of the procedure as amended in June, an adjustment to pay for the period from 1 July 1994 to 30 June 1995.

Again appeals came from the staff.

5. The appeals went to the Appeals Committee. In reports of 6 July and 15 November 1995 it unanimously recommended that the President allow them.

To have done with the disputes the President and the staff representatives found a compromise. A proposal that the Council approved on 8 March 1996 was put to each member of the staff, and most of them accepted it. The gist of it was that Brussels was to serve as the reference city for the purpose of adjustment and pay was to go up as from 1 January 1996 by 3.9 per cent for Berlin and Munich and by 6.3 for The Hague. Lump sums would also be paid that were equivalent to half the amounts that would be due if the Appeals Committee's recommendations as to the reference city were followed. That meant letting staff at Munich, Berlin and The Hague have retroactive payment of 2 per cent of net pay as from 1 July 1992. Staff at The Hague would also get another rise of 2.1 per cent in net pay as from 1 July 1993. The compromise did not apply to anyone who declined it.

The Vice-President of Directorate General 4 informed the staff by a circular of 2 April 1996 that the President had rejected the internal appeals.

6. Three permanent employees, each acting for himself, have lodged these complaints impugning the President's decision. They are challenging the change made in June 1993 that consisted in dropping the method which had been adapted from that of the coordinated organisations and which had taken Brussels as the starting point of comparison. The impugned decision and their claims are about the adjustment of pay for the periods from 1 July 1992 to 30 June 1993 and from 1 July 1993 to 30 June 1994. Pay since 30 June 1994 is not at issue.

The Organisation has put in a single reply and the complainants a single rejoinder. The cases may be joined since they arise from the same facts and raise the same issues.

The nub of the complainants' case is that the change of method offended against Article 64(6) of the Service Regulations and against the rule that no administrative decision that may cause injury should be retroactive. They cite precedent. Mr. Gourier and Mr. Vollerling, who are stationed at The Hague, have a subsidiary plea: if the new method were upheld recovery of the sums overpaid in allowances would be in breach of Article 88 of the Service Regulations.

In the Organisation's submission there is only one material issue: should the reference city for the relevant periods have been Brussels or Munich? Its answer is that, quite obviously, in 1988 it replaced Brussels with Munich, where its headquarters are, for the purpose of adjusting pay at its other duty stations. It denies breach of the rule against retroactivity on the grounds that there were no new rules: the President was just applying rules already in force. In answer to the subsidiary plea of the complainants stationed at The Hague the defendant says that recovery of the sums overpaid in allowances is not in breach of Article 88. To anyone who got those sums the mistake was glaring: everyone had been told that the rise would be 3.1 per cent and the sums paid were plainly higher.

7. Adjustment serves two purposes: one is to make for equality of purchasing power by reference to trends in consumer prices; the other is to have "parallelism" in pay between the EPO and national civil services by applying a weighting factor known as the "specific indicator" so as to adjust upwards or downwards.

The only point at stake is whether parity of purchasing power was observed. What, in other words, was the proper basis for adjusting the complainants' pay to the cost of living from 1 July 1992 to 30 June 1993 and from 1 July 1993 to 30 June 1994?

Both sides rightly acknowledge that to work out pay for other duty stations the Organisation has since 1988 been taking Munich as the reference city ("Munich = 100") and reckoning the scales according to differences in purchasing power between Munich and the host countries, the purpose being to preserve parity. The complainants are not challenging the rates of adjustment applied to the Munich scales for the other duty stations. What they do challenge is the method of setting the Munich scales, precisely because of the effect on pay at the other duty stations. In their submission the material issue is whether Brussels was what they call the "statistical reference city" for the EPO, as it was for the coordinated organisations, and they maintain that it was. The Organisation reports that Munich has been the only reference city since 1988. In 1989-92 it used to take the international price indices which it got from the IOS and which the coordinated organisations were also using. In 1992-93 it switched to its own method of reckoning trends in purchasing power at Munich and accordingly granted no increases. In 1993-94 it went back to a "pure" international price index which it got from the IOS but which the coordinated organisations had stopped using. Is the method it followed in 1992-93 and in 1993-94 in line with the one it had approved in 1988 and so with the new text of Article 64 of the Service Regulations and the procedure then adopted?

8. The Organisation's first plea is that Munich has been the only "reference city" since the change of method in 1988. In its submission the upshot is that it was free to set the Munich scales on its own and to disregard the IOS's figures for Brussels. Articles 3, 5 and 6 of the procedure are -- it argues -- conclusive, and they derogate from the *renvoi* to the 212th report, which took Brussels as the reference city.

The plea fails. According to the 1988 version of Article 64(6) of the Service Regulations adjustments are to be made "in accordance with a procedure adopted" by the Council, "account being taken, so far as applicable to that procedure, of recommendations by the Co-ordinating Committee of Government Budget Experts". The plain meaning is that, "so far as applicable" and in keeping with the EPO's own needs, the Organisation is to follow those recommendations. There is no intent of derogation from the system in any other respect.

Article 3(1) of the procedure stipulates that pay in Germany "will be adjusted by an amount equal to the percentage change over the past 12 months in the international price index as calculated in that country"; article 3(3) says, among other things, that "international price indices and coefficients of purchasing power are supplied" by the IOS; and Article 6 that "The coefficients of purchasing power parity and consumer price evolutions are calculated in accordance with the procedure laid down in the 212th report of the Co-ordinating Committee of Government Budget Experts and re-calculated on the basis of Germany (Munich = 100)". Article 10 too is relevant. The heading of the text is "Procedure, adapted from that of the 159th and 212th reports of the Co-ordinating Committee of Government Budget Experts, for adjusting the remuneration of permanent employees of the European Patent Office." Applying the 212th report means that Brussels is the statistical reference city. Indeed it is such not just for the coordinated organisations but for the European Union and United Nations bodies as well. If, as the defendant says, Articles 3, 5 and 6 of the procedure amounted to derogation, then the procedure would at the very least have had to explain how otherwise to adjust the pay of staff in Munich in line with the two cardinal notions of parity and parallelism. It does not.

The President put to the Council a paper -- CA/29/93 -- about pay as from 1 July 1992. Though the paper acknowledged that the IOS's new parity figures reflected cost-of-living trends, it still proposed adjustment to bring them into line with the EPO's own "basic reference point". It did not explain how that was to be done; it merely gave to understand that the proposal was linked to the Organisation's finances. Nor was any satisfactory explanation later forthcoming on the subject for either of the two periods, 1992-93 and 1993-94. Even though the EPO took Munich as the point of comparison for the other duty stations, it was still perfectly able to work out the Munich scales from the IOS's figures for Brussels (taking Munich as "=100"). One factor of relevance in construing a rule is the way it has been understood and applied in good faith over a long period. From 1988 until the adjustment made as from 1 July 1992 the EPO took the IOS's figures. Indeed it stood to gain in two ways from doing so. For one thing, the unit of the coordinated organisations was offering a reliable service and full documentation, which the EPO did not have and which it says it was too small to secure for itself. The other advantage was that in adjusting pay it was keeping in the

mainstream of international organisations, subject only to a few exceptions to answer its own needs.

The conclusion is that the rules that the EPO made in 1988 did not allow it to depart from the method of adjusting pay on the strength of the IOS's cost-of-living figures.

9. The Organisation further pleads that in 1992 it had to stop using the IOS's index and start reckoning its own cost-of-living figures. The reason was that the coordinated organisations had given up that index in favour of a weighted one, described as "composite" or "implicit", which was not at all the international index provided for in the EPO's procedure. It had to make good the loss of the old index and itself get hold of other statistics of price movements so as to work out the rates of adjustment. It says they came from German or Bavarian statistical services.

The coordinated organisations fine-tune adjustments every few years on the strength of the findings of detailed surveys of the cost of living for civil servants. For the years in between, adjustments used to hinge on general cost-of-living indices; but to make for greater accuracy the organisations decided to carry out smaller surveys and use the findings to work out a fraction of the full rate of adjustment. Hence the implicit index.

The President put a paper on the subject to the Council at its meeting in November 1992. Like the EPO's advisory group on pay, he said that that system had been working well. He proposed making no change in the IOS's practice of converting the international to the implicit index. The Council agreed. In 1993, however, President and Council changed tack on the grounds of drawbacks over using the implicit index. One was the risk of letting through too big increases which would have been hard to correct *ex post facto*.

(a) Did it really run counter to the procedure for the EPO to use the IOS's implicit index?

There is no need to answer that question. The procedure left the Organisation discretion in the matter, and it did not actually decide whether it wanted to keep to the old sort of international index insofar as it never invoked the choice in support of its refusal of an increase in pay.

(b) Yet the Organisation does fail to show that it could not have got from the IOS an international price index established as in 1988.

It says that for the 1993-94 exercise it got from the IOS a "pure" international index, which was worked out easily enough. So presumably it would have been able, however belatedly, to get a pure index for 1992-93 as well.

The conclusion is that there were no proper grounds for departing from the 1988 procedure.

10. The Organisation says that there was no appreciable change in the cost of living in Munich to warrant adjustment. That seems implausible. Indeed the paper that the President put to the Council does not bear it out. The reasons that the paper offers relate mainly to pay policy, and it says that there may be a correction later if the Organisation's finances so allow. The rates of increase approved by the coordinated organisations and by the European Union for 1993-94 suggest that according to the relevant indices the cost of living in Munich did then go up. So do the terms of the compromise later concluded by the Organisation with most of its staff. Applying a "pure" index for 1992-93 too would probably have yielded a different result.

11. By failing to apply the 1988 procedure in 1992-93 the Organisation infringed the staff's right to the adjustment due thereunder. And its decision affected the one about pay in 1993-94 because it set the figures that afforded the basis for subsequent adjustment.

12. Applying the wrong method put the staff at serious risk of not getting the adjustment they were entitled to.

In that respect they are in much the same position as the staff of the European Southern Observatory as to the failure to adjust pay for 1992-93: see Judgments 1419 (*in re Meylan and others*) and 1420 (*in re Dekker and von der Lüche*), which apply by analogy.

The impugned decision must therefore be set aside. Since the Organisation has not yet worked out the

consequences of properly applying the 1988 procedure as from 1 July 1992 in accordance with Article 64(6) of the Service Regulations, the cases must be sent back for new decisions to be taken in the light of this judgment. Interest will be payable on any sums due as from the due dates.

13. Since the complainants' main plea about the rate of adjustment is upheld, there is no need to take up their subsidiary plea about the recovery of sums overpaid.

14. Having largely succeeded, the complainants are awarded costs.

15. Insofar as the interveners are in the same position in fact and in law as the complainants they shall have the same rights as the complainants, save as to costs.

DECISION

For the above reasons,

1. The impugned decision of 2 April 1996 is set aside.

2. The cases are sent back to the Organisation so that it may take new decisions accordingly, in the complainants' and interveners' favour, as from 1 July 1992.

3. The Organisation shall pay the complainants a total of 10,000 German marks in costs.

4. All the other claims of the complainants and the interveners are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

William Douglas
E. Razafindralambo
Egli
A.B. Gardner

1. The system includes the North Atlantic Treaty Organization (NATO), the Organization for Economic Cooperation and Development (OECD), the Council of Europe, the European Space Agency (ESA), the Western European Union (WEU) and the European Centre for Medium-Range Weather Forecasts (ECMWF).

2. This index gauges the rate of inflation in the country by reference to a "basket" of consumer items commonly bought by international civil servants.

3. The indicator represents the weighted average of real pay in the countries taken for the sake of comparison.