EUROPEAN CENTRE FOR MEDIUM-RANGE WEATHER FORECASTS

APPEALS BOARD

DECISION

15 March 2022

in Cases No 7 – 11

The Appeals Board of the European Centre for Medium-Range Weather Forecasts

comprising

Michael Groepper, Chair,
Kieran Bradley, Vice Chair,
Spyridon Flogaitis, Member,
Eva-Maria Gröniger-Voss, Member,
Michael Wood, Member,

Assisted by Susan Madry, Secretary of the Appeals Board,

Having heard in public session in Reading

The Claimants:

H. G. (Case No. 7),
E. K. (Case No. 8),
D. S. (Case No. 9),
K. S. (Case No. 10),
D. M. (Case No. 11),

Assisted by Giovanni Michele Palmieri (Dakar) and Laure Levi (Brussels),

And

The Defendant:

The European Centre for Medium-Range Weather Forecasts (hereinafter 'ECMWF' or 'the Centre'),

Represented by Gregor Wettberg and Jens Alfs,

Assisted by Bertrand Wägenbaur, Brussels,

Has reached the following decision:

A. Facts:

I. The Claimants

1 The Claimants are pensioners who were previously active staff members of the Centre. Their appeal is directed against the application to them by the Director-General of the amendment to Article 36 of the Co-ordinated Pension Scheme Rules which provides that pensions are no longer adjusted in line with salaries but with inflation.

II. General Outline

2 1. ECMWF is, together with the North Atlantic Treaty Organization (NATO), the Council of Europe (CoE), the Organisation for Economic Co-operation and Development (OECD), the European Space Agency (ESA) and the European Organisation for the Exploitation of Meteorological Satellites (EUMETSAT), one of the six so-called “Co-ordinated Organisations”. The aim of the Co-ordination system is to provide recommendations on staff matters which have a high degree of technical complexity, such as salaries and allowances, as well as pensions, to the Governing bodies of the Co-ordinated Organisations. In accordance with Art. 1(a)(ii) of the Regulations concerning the Co-ordination system (which was adopted in 1991, and amended by the 154th CCR Report of 5 January 2004), one of the objects of the Co-ordination system is to provide recommendations concerning the Pension Scheme Rules.

3 These issues are discussed within three “colleges”, namely the Co-ordinating Committee on Remuneration (uniting the representatives of the Member States of the Co-ordinated Organisations – CCR), the Committee of Representatives of the Secretaries/Directors General of the Co-ordinated Organisations (CRSG) and the ‘Comité des représentants du personnel‘ (the Committee uniting the Representatives of the Staff Associations of the Co-ordinated Organisations and the Associations of their dependants or ‘CRP’). The three Committees meet separately, as well as in bilateral and tripartite meetings. Article 6(a) of the Regulations concerning the Co-ordination system describes the roles of the different colleges:

> “Recommendations, in the form of reports, shall be made by the CCR by consensus and, to the extent possible, in conjunction with the CRSG. The CRP shall be consulted on the draft reports with a view to considering its position.”

4 After consulting the other colleges, the CCR issues its reports which are transmitted to the Governing bodies of the Organisations. The Governing bodies take the corresponding decisions which are binding upon the executive organ of the respective Organisations.

5 The Co-ordinated Organisations receive technical support from the International Service for Remuneration and Pensions (ISRP) based in Paris at the OECD. ISRP is responsible for the management and review of all matters pertaining to the remuneration of staff and the pension scheme common to the Co-ordinated Organisations including through actuarial evaluations.

6 2. ECMWF has two pension schemes to which staff members are affiliated according to the date when they took up their duties: the Budgetised Pension Scheme (BPS[1]) created in 1974 for staff who entered into service before 1 January 2003, and the Defined Benefits Funded Pension Scheme (FPS) created in 2003 for staff who entered into service on or after that date. The Claimants are affiliated to the Budgetised Pension Scheme.

7 3. The ECMWF Pension Schemes are not 'funded schemes' in a strict legal sense. Article 40 of the BPS Rules and FPS Rules respectively establish their budgetary basis and the legal obligation of Member States to meet pension payments.

8 4. The ECMWF Pension Special Account was established by the ECMWF Council to create a "buffer fund" towards meeting future pension liabilities. In the event that the funds set aside are insufficient to pay future pensions, Member States jointly guarantee the payment of the benefits in accordance with Article 40 of the BPS and FPS Rules.

III. The Pension Adjustment Issue

9 1. In view of changes in the Organisations' staff policies, ever-growing pension expenditure, the general trend towards higher life expectancy, and major changes in the world's political and economic situation, the CCR recommended in its 105th Report of 20 October 1999 options for a reform of the Co-ordinated Pension Scheme to "*ease the long-term pension burden by proposing mechanisms for restoring financial equilibrium to the system*". However, the recommendations were rejected by the Governing bodies of all the Co-ordinated Organisations. Instead, the Organisations gradually introduced new pension schemes specific to each Organisation (ECMWF in 2003), thus closing the Co-ordinated Pension Scheme CPS (BPS for ECMWF) to new entrants after 1 January 2003.

10 2. In 2011, the CCR started examining the CPS (BPS) and, in 2017, decided to initiate an overall ("holistic") review of the scheme "*to bring the CPS more in line with best practice in other pension systems, both in international organisations and more widely, and to improve the financial stability of a system whose costs have been rising significantly*". The CCR announced that various measures were under consideration to reform the BPS, in particular:

- Abolition/reduction of the tax adjustment;
- Reduction of the pension accrual rate (which is at 2% p.a. today);
- Calculation of pension benefits on career salary (instead of final salary);

[1] In all other Co-ordinated Organizations except ECMWF, this scheme is referred to as CPS, the 'Co-ordinated Pension Scheme'.

- Introduction of a special levy on pensions for pensioners to participate in savings;
- Increase in the retirement age from 60 to 63.

11 The reform of the BPS (CPS) was subsequently included on the agenda of a large number of meetings between the various Co-ordination committees, which took place between February 2017 and September 2019. During a bilateral meeting between the CCR and the CRS in December 2018, *inter alia* the possibility of adjusting pensions in line with inflation was discussed.

12 On the basis of these suggestions, the CCR requested concrete reform proposals from the Organisations. After lengthy and difficult discussions within the CRSG, the final proposal dated 27 February 2019 made by the CRSG to the CCR on behalf of five of the six Co-ordinated Organisations (OECD being opposed to the reform) "in order to contain the costs" of the BPS was to:

- Adjust pensions in line with inflation instead of following the Remuneration Adjustment Method (RAM), and
- Restrict the conditions of entitlement to education allowance for future pensioners.

13 During those meetings, the CRP consistently expressed its disagreement with the various proposals and reiterated "its unanimous opposition to any amendments to the (B)PS, a scheme which has been closed for many years in all the Co-ordinated Organisations", arguing that only the contribution rate could be reviewed.

14 3. During the trilateral CCR-CSRP-CRP meeting of 26 September 2019, the CCR agreed to recommend the two measures previously proposed by the CRSG and to end the discussion on increasing the normal retirement age. In addition, the CCR consented to remove the reform of the BPS from its programme of work. These recommendations included in the 263rd CCR Report of 26 September 2019 were adopted by the ECMWF Council on 10 – 11 December 2019. The Rules governing the BPS were amended accordingly (they are now included in the Pension Staff Rules Annex VI-A).

15 4. The Remuneration Adjustment Method (RAM) is composed of three elements: a reference index, a national Harmonised Index of Consumer Prices (HICP) and the Purchasing Power Parity (PPP). The figure resulting from this method is determined on a yearly basis. This method is applied to salaries and other elements of remuneration paid to staff and was applied to pensions paid under the BPS until 1 January 2020. The HICP is compiled by EUROSTAT and the national statistical institutes for almost every country for which the Co-ordinated Organisations establish salary scales. This is the reference used when available, while the national consumer price index NCPI is normally not taken into account. The HICP applied to pensioners is that of the country of the scale used to calculate their pensions. The figures resulting from this method are applied automatically.

IV. The Pre-Litigation Procedure and Appeals

16 On 27 January 2020, the Director-General informed all staff and pensioners including the five Claimants of her decision to implement the changes to the pension schemes. On 21 February 2020, all the Claimants lodged a request for review under Article 39 and Article 1.1 of Annex VII of the Staff Regulations against their respective pension slip for the month of January 2020. The requests for review were not answered, and were therefore tacitly rejected. On 10 June 2020, the Claimants lodged their appeals against the Director-General's decision implementing the changes to the pension adjustment method. The Appeals Board decided to consider the five Appeals jointly.

B. The Claimants' position

The Claimants submit:

17 I. The arrangements for the adjustment of benefits are set out in Article 36 of the Pension Scheme Rules, which, before it was amended following the 263rd Report of the Co-ordinating Committee on Remuneration (CCR), read as follows:

> "Should the Council of the Organisation responsible for the payment of benefits decide on an adjustment of salaries in relation to the cost of living, it shall grant at the same time an identical adjustment of the pension currently being paid, and of pensions whose payment is deferred. Should salary adjustments be made in relation to the standard of living, the Council shall consider whether an appropriate adjustment of pensions should be made".

18 Following recommendations of a working group which favoured a straightforward linkage of pensions to the trend of salaries of serving employees at the same step in grade, the Council, on 21 and 22 November 1978, adopted a footnote worded as follows:

> "Article 36 of the Pension Scheme Rules, relating to the arrangements for the adjustment of benefits, shall be interpreted, in all circumstances and whatever the current salary adjustment procedure, as follows: whenever the salaries of staff serving the Co-ordinated Organisations are adjusted – whatever the basis for adjustment – an identical proportional adjustment will, as of the same date, be applied to both current and deferred pensions, by reference to the grades and steps and salaries scales taken into consideration in the calculation of these pensions".

19 After negotiations at the Co-ordination meeting held in April 1994 in Noordwijk, the three Co-ordination Committees (CCR, CRSG and CRP) came to an agreement on a "compromise" solution in Paris, 17 June 1999, whereby the CRSG and CRP agreed to the CCR's proposal that the rate of the staff contribution to the pension funding should be increased by 1%, taking it to 8% as

from 1 June 1994; the CCR agreed to recommend to Councils that the provisional contribution of 0.5%, collected since 1993, should be refunded to staff; at the insistence of the CSRG and the CRP, the CCR agreed to introduce an actuarial method into the Pension Scheme Rules, to be applied every five years "for all Organisations", in order to update the staff contribution rate; the CRP undertook to withdraw the appeals which had been lodged in three tribunals. This compromise was set out in the 34th Report of the CCR which was adopted by all Councils of the Co-ordinated Organisations. As a consequence, in line with the principle of "pacta sunt servanda" the only change that henceforth can be made to the CPS is the contribution rate.

20 II. The contested decision infringes the general legal principles protecting acquired rights, requiring legal certainty, and prohibiting non-retroactivity and unjust enrichment, as well as the Charter of Ethics of ECMWF; in addition, the decision is based on an insufficient statement of reasons.

1. Breach of acquired rights

21 The pension scheme is one of the key motivating factors in the recruitment of officials to work for an organisation. The mere existence of a pension is not the motivating factor here; rather an official will take into account the degree to which the future benefits of the pension scheme are guaranteed by the organisation and by law. The possibility that these benefits might subsequently be reduced arbitrarily and unilaterally is clearly a factor that could dissuade an official from joining an organisation.

22 A Working Group on Pensions established by the Governing Bodies of ECMWF and made up of representatives of the Member States reported to Council in December 2008 that pension rights are included in the individual staff contracts and are thus a contractual obligation for ECMWF; that by paying their part of the contribution and thus fulfilling their part of the obligation staff members have gained acquired rights to the benefits foreseen by the scheme; and that those Co-ordinated Organisations that wanted to make more substantial changes, such as ECMWF, had to put in place new pension schemes which would be applicable only to newly recruited staff members. The report was recognised and accepted by Council without question or comment.

2. No Impact Assessment

23 The amendment to Article 36 CPS agreed in December 2019 was not preceded by any impact assessment. The legislative body did not rely on any objective quantifiable need. Salary is the basic element in the calculation of pensions. If pensions follow the trend of salaries, equality of treatment among pensioners can also be maintained regardless of the point in time from which a pension started. The Working Group's proposal was in the interests of the staff, insofar as it not only ensured equality of treatment between pensioners but was also capable of promoting solidarity between the interests of serving staff and those of pensioners. These reasons were not even taken into account, still less discussed in the CCR when it was working on the proposals for the amendment of Article 36. As a result of the contested measure, fundamental elements

of the pension adjustment system have been abolished: the alignment of the adjustment between serving staff and pensioners, and the principle of parallelism between pension trends for retired staff of the Co-ordinated Organisations and salary trends for officials in eight "reference" civil services. Since 1976, the principle of parallelism between pay trends in the eight reference civil services and the trend of pay and pensions in the Co-ordinated Organisations has, over time, acquired the force of a customary rule.

3. Undermining the "spatial" adjustment

24 The amendment further undermines the principle of maintaining purchasing power parities (PPPs) which can be defined as a "spatial" adjustment. The abandonment of this concept is incompatible with the requirement of equal treatment for all pensioners regardless of their country of residence. It is only through the application of this system that a pensioner can be sure of being able to move their residence to another country without having to suffer negative consequences for their purchasing power. Discontinuing the system of economic parity deprives the new method, based on the national rate of inflation, of the elements of "stability and foreseeability".

25 Protection in terms of non-retroactivity means that rights already acquired have to be calculated on the basis of the old rules. Only rights yet to be acquired could be subject to the new arrangements without further ado. Staff are protected not only in terms of a ban on retroactive application of the new rules, but also against changes affecting the essential elements of their contracts. When the Claimants entered into the service of the Organisation, they took note not only of its remuneration system but also of the pension system that was open to them provided that they remained in the service of the Organisation for at least 10 years. One of the characteristics of the Co-ordinated Pension Scheme is that upon signing their contracts, staff members were given the assurance that after retirement they could return to their country of origin or settle in the (possibly different) country of their spouse, while retaining the same purchasing power as if they had remained in the country where they were employed. The contested amendment has abruptly put an end to that assurance. Removal of the spatial adjustment thus constitutes a breach of the general principle of law that obliges international organisations to abide by the principle of equal treatment.

4. Violation of the Charter of Ethics of ECMWF

26 According to the Charter of Ethics of ECMWF, "the Centre ensures that all information provided to member States and other Authorities, Organisations and Institutions is complete, accurate and timely". The document on the 263rd CCR Report provided by the Administration of the Centre to Council in December 2019 contained no information regarding the Report of the Working Group on Pensions adopted by Council in December 2008. The document for the Council was therefore neither complete nor accurate. The Charter of Ethics further states: "The Centre's management ensures that Staff are kept well informed of all

changes or issues that may affect them". Neither staff nor pensioners were informed of the Director-General's decision to recommend to Council the adoption of the 263rd Report.

5. Violation of Legitimate Expectation; Retroactivity; Unjust Enrichment; Loss Suffered

27 Along with all pensioners, the Claimants have a legitimate expectation of receiving the benefits provided by the scheme at the time at which the contributions were paid. Those who pay a given contribution are entitled to expect the benefits on the basis of which the contribution was calculated. Among these criteria are trends of pay, according to the parallelism method. The change in the adjustment of benefits has led directly to the denial of pensioners' rights and in turn to the unjust enrichment of the Organisation. The close link between the staff contribution and the expected benefits arises from the actual wording of Article 41 of the Pension Scheme Rules. In a scheme such as the Co-ordinated Pension Scheme, which is a budgetised defined benefit scheme, each staff member, by paying the set contributions, acquires the rights provided for by the scheme at the same time when the contributions are paid. The amendments to Article 36 deprive staff members of the full amount of the benefits for which they have contributed. It is the payment of contributions that entitles the pensioner to receive all the components of the pension and establishes the extent of the Organization's obligation with regards to pensioners.

28 At the time an official takes his pension rights, the fundamental principles of the pension scheme are a hard core that cannot be breached without retroactively changing the official's legal status. By breaching the reciprocal obligation, the Organisation has also breached the general principle of law prohibiting unjust enrichment: staff have paid more under an actuarial review method that takes account not of inflation-based adjustment but of the alignment of the adjustment with that used for serving officials.

29 As an ancillary point, the Claimants claim compensation for the loss suffered in the form of the contributions paid so that the pension adjustment could be on the same basis as the adjustment of pay.

6. Inadequate Statement of Reasons

30 The Claimants further complain of an inadequate statement of reasons and the arbitrary nature of the measure adopted.

31 Any administrative act must be accompanied by sufficient reasons. The Summary Record of the 135th Joint Meeting notes that the amendments were proposed "in the interests of the CPS and current and future pensioners … to avoid a more severe deterioration of the CPS". However, it was never a question of a "deterioration of the CPS". No study has been carried out in that respect. The CRSG has not provided any data to the other Co-ordination Committees. The financing of the CPS is the individual responsibility of each Co-ordinated Organisation. Until 2007, ECMWF pensions were paid out of the budget of the Organisation and financed mainly with the staff contributions. Since

2003, ECMWF has taken measures to ensure the viability of the BPS and the payment of future benefits for staff and former staff members affiliated to the Scheme. As a first step ECMWF took the decision to close the BPS to new entrants as of 1 January 2003 and implemented a new fully funded defined benefits pension scheme for staff recruited on or after that date. In the light of these measures and in the absence of any study of the financial stability of ECMWF's CPS, it is untenable to argue that the CPS, as implemented at ECMWF, is in danger of "deterioration".

32 The CCR makes no comment on equal treatment between pensioners and thus on the application of a spatial adjustment. It refers purely to protecting pensioners against cost-of-living increases. Savings are presented merely as a probable consequence of changes rather than the main aim of the CCR. The inadequate reasoning in the text of the 263rd Report and its preparatory work breaches a general principle requiring reasons to be stated for administrative acts. Inadequate reasoning represents a violation of the principle according to which administrative decisions cannot be arbitrary. Reasons must be stated for any decision in order to allow the Judge to resolve on a reasoned basis disputes brought before him.

33 As a result, this amendment, which is based neither on figures nor studies and which is not sufficiently substantiated, is arbitrary.

C. The Defendant's position

I. As to the facts:

34 1. The Defendant underlines that the ECMWF Pension Special Account was established by Council to create a "buffer fund" towards meeting future pension liabilities but without changing the budgetary nature of the pension scheme. In the event that the funds set aside on the Pension Special Account are insufficient to pay future pensions, Member States jointly guarantee the payment of the benefits by virtue of Article 40 of the BPS and FPS Rules.

35 2. The Harmonised Index of Consumer Prices (HICP) is defined by EUROSTAT, the statistical office of the European Union. By contrast to the RAM, the figures resulting from this method are applied automatically, i.e. they do not require any decision by Council or the Director-General.

II. On Admissibility:

36 The Defendant contends that the present appeals are inadmissible as a whole since the Claimants challenge the legality of the legal provision on which the pension slips were based. Moreover, the Claimants have no cause of action since they failed to prove that the new adjustment method will cause financial injury. Regarding the orders sought, the Appeals Board has no jurisdiction to issue injunctions to the Defendant and to its legislature. The Appeals Board cannot order the Defendant to provide the Claimants with revised pension

slips. The Appeals Board, in any event, only has the authority to quash an individual decision, if held illegal, and to recommend the Defendant to replace it by a new decision which takes account of the Appeal Board's considerations.

III. On the substance:

37 1. None of the case law referred by the Claimants confirms that a given method of adjustment of salaries and pensions is an acquired right. The views certain bodies may have expressed in 2002, 2008, or 2019 in the context of what was clearly a debate on subject of pensions do not, as such, generate any acquired rights regarding the method of adjustment nor do they confirm the existence of the right at issue. While it is common ground that accrued pension rights are acquired rights, these benefits are not "reduced arbitrarily and unilaterally". Regardless of which adjustment method is applied – the HICP or the RAM – no such method touches upon the accrued pension rights as such. By paying their contribution to the pension fund the active staff members do not buy or otherwise acquire a given method of annual adjustments which happens to exist at the time of their recruitment once they retire. The concept of defined benefits does not comprise a right to a given adjustment method – in the present case the RAM. The Claimants do not show why a given adjustment method for salaries or pensions which applies at the time of recruitment would be an essential and fundamental element of the contract. It would be highly unlikely to the point of being mere speculation that the modalities of the annual adjustment method in force at the time of their recruitment, as opposed to the modalities of other methods of adjustment, would have influenced the decision of the Claimants to take up employment with ECMWF and to remain in its service.

38 2. The fact that the BPS is a closed scheme does not mean that it is a frozen scheme. The Member States explicitly mentioned that the BPS and the FPS should evolve in parallel, implying that they did not consider the BPS to be a system which cannot be reformed.

39 3. Regarding the Claimants' contention that the amendment to Article 36 was not preceded by any impact assessment and that the legislative body relied on no objective quantifiable need, the Defendant notes that neither the case law nor the legislation, nor any general principle of law, requires that the legislature carry out an impact assessment prior to a legislative change to the method of adjustment of salaries or pensions. The reasons for that legislative change were amply discussed with the CRP which is well aware that the BPS is chronically in deficit, forcing the Member States to inject substantial amounts to keep it financially viable. The reasons for changing the adjustment method are based on objective considerations.

40 4. The adjustment is based on the HICP for the country of residence of each of the Claimants and thus results in stable, foreseeable and transparent results. The Claimants fail to explain why the salary adjustment which takes into account several elements, in particular inflation and the evolution of salaries of

civil service salaries in eight reference countries provides more stable, foreseeable and clearly understood results than an adjustment which takes into account only one of these elements, namely the HICP.

41 5. The change in the adjustment method to an adjustment in line with inflation is very limited and does not deprive the Claimants of access to a comfortable income. It still guarantees that the pensions maintain the same value, thus protecting the pensioner's purchasing power over time. The difference between the two methods of adjustment is a matter of nuances, and the HICP is a mainstream adjustment method, the consumer price index being a common reference in many other international organisations.

42 6. Following the Claimants' argument that the RAM had been applied to both salaries and pensions "for more than 40 years" would mean that the RAM had become an acquired right merely because of the number of years it applied also to pensions. A written legislative rule does not become a customary norm, implying that it cannot be amended, simply by virtue of having existed for a number of years. Otherwise, a number of years after having adopted the piece of legislation the legislature could never amend it. The alignment of the adjustment between serving staff and pensioners is not a principle of law but a choice of the legislature. This choice does not become binding by virtue of its mere existence. The consistent application of the rules in force cannot qualify as a customary rule. There is no objective requirement that would demand equal treatment of pensioners residing in different countries. The new adjustment method applies to all pensioners equally. Pensioners are not in the same situation as active staff members. The former may freely choose the country where they retire, while the latter ordinarily must reside within a reasonable distance of their place of employment. Pensioners have the same possibility to return to their country of origin and opt for a new salary scale under Article 33 of the BPS Rules as they had before the reform.

43 7. When the adjustment of pensions in line with the evolution of salaries was introduced, this measure was very controversial; the CRSG was concerned that a strict linking to salaries might result in a loss of purchasing power for pensioners if salaries were to be reduced. To adjust pensions in line with the cost of living was considered to better protect pensioners – a position that was shared by the staff representatives.

44 8. As to the alleged breach of the Charter of Ethics of ECMWF, the Defendant points out that this is a policy document enacted by the Director-General with respect to the staff of ECMWF. Therefore, Council is by definition neither entitled to the benefit of, nor obliged to respect, the Charter of Ethics. Moreover, the Pensioners' Association cannot claim any right under the Charter of Ethics because pensioners are not covered by it. There is a detailed process of consultation in Co-ordination which involves both the Staff Committee and pensioner representatives. Numerous discussions took place at the Centre with the Staff Committee and the Pensioners' Association.

45 9. The Defendant shares the Claimants' view that they have a legitimate expectation of receiving the benefits provided for under the scheme. But this is

not based on the notion that the pension contributions of the Claimants would be calculated on the basis of the parallelism method as expressed by the RAM, i.e. the adjustment method which formerly applied to both the salary of active staff members and to pensions. The pensioners, including the Claimants, may of course legitimately rely on being paid the amount of pension resulting from the defined benefit scheme they have contributed to according to the number of accrued pension years which is an acquired right. But ECMWF has never given staff any precise, unconditional and concordant assurance that the method for the annual adaptation of pensions which hitherto applied, i.e., the RAM, would never be replaced by a different method.

46 10. Regarding the principle of *pacta sunt servanda* invoked by the Claimants in relation to the so-called “Noordwijk Agreement” of 1994 – an agreement that allegedly was based on the guarantee that the scheme's benefits would remain unchanged and provided that the contribution rate would represent 1/3 of the long-term cost of the BPS –, such an agreement between the different committees would not be binding upon the Co-ordinated Organisations ever after. Council remains sovereign to decide if, when, and how to amend existing legislation, meaning that no other instance may validly engage in any agreement or other measure which would impact on or otherwise limit Council’s sovereignty. The “Noordwijk Agreement” is not a binding agreement by which the legislature committed itself to always apply the same adjustment method to both salaries and pensions. The participants to the agreement did not have the power to validly commit the legislatures of the Organisations even if they had wanted to do so.

47 11. As to the alleged unjust enrichment, the Claimants argue that there is a close link between the staff contribution and expected benefit. The amendment to Article 36 of the BPS Rules deprives staff members of the full amount of the benefits for which they have contributed. Staff have paid more under an actuarial review method that took account, not of inflation-based adjustment, but of the alignment of the adjustment with that used for serving officials. The Defendant objects to the Claimants’ view that by paying their pension contributions in the past they have acquired the right to have their future pensions adjusted according to the method – the RAM – which applied at the time to both salaries and pensions. The Claimants paid their pension contributions on a legal basis and on the basis of the principle of solidarity. The pension received by an official is not the exact equivalent of his contributions to the scheme. Pension contributions were not calculated on the basis of the RAM applicable at the time.

48 12. As to the principle of non-retroactivity, the new adjustment method was applied for the first time in January 2020. It is not retroactive, since it only affects the adjustment of pensions for the future as from 1 January 2020, not the pension adjustments that were implemented before that date.

49 13. As to an alleged loss, there is no reasonable presumption that the decision will cause injury. The RAM is, inter alia, determined by the annual adjustments to the remuneration of the national civil servants of the reference Member States. These adjustments are also the result of a political decision. By contrast, the National Consumer Price Index is the result of a mathematical process.

Thus, it cannot be excluded that the adjustment of the national civil service remuneration remain below the consumer price index. The calculation made by the Claimants seems to rely on an actuarial assumption of a long-term evaluation of salaries (0.24% above inflation). However, an actuarial study performed over the last 15 years on the basis of the number of pensioners in each country only serves to predict the costs of the BPS, but may not be used to calculate individual damage.

50 14. With regard to the allegedly "inadequate statement of reasons and arbitrary nature of the measures adopted", the Defendant submits that the decision of ECMWF of 27 January 2020 contains ample reasons and reference to the 263rd Report of the CCR. The Claimants do not question the existence of reasons given, but disagree with their contents while criticising the absence of further reasons. However, it is perfectly legitimate for the legislature to take into account the future liability of pension funds and that reforms may be necessary to ensure the long-term sustainability of a pension system. Pension costs are rising, notably because of a continuing increase in life expectancy together with the deterioration in the situation of the global financial markets and the resulting fall in the discount rate. The contested measure was not taken overnight but is the result of lengthy discussions among the three Co-ordinated Committees which included extensive studies and analysis from actuarial and legal experts. There is nothing either arbitrary or unreasonable in taking account of the HICP and the various countries of residence of the Claimants or, if non-existent, the NCPI.

D. The Parties' requests

51 I. The Claimants request the Appeals Board

- Principally, to annul the decision of the Director-General of 27 January 2020 revealed in the January 2020 salary slip to implement the decision of Council relating to adoption of the 263rd CCR Report, and if need be, of the implicit rejection of the request to withdraw the impugned decision;

- in the alternative, to obtain compensation for the damage sustained in the form of the contributions paid to allow the adjustment of the pension on the same basis as the adjustment of salaries;

- to reimburse the legal costs in the amount of GBP 2000 for each case.

52 II. The Defendant requests the Appeals Board

- to reject the appeals,

- to order the Claimants to bear their own costs.

E. Considerations

I. On Admissibility

53 1. All the Claimants are pensioners and thus have standing to challenge individual decisions adversely affecting their pension rights and incidentally to contest the legality of a general rule on which the individual decision is based. They have shown that the new pension adjustment method has already reduced the amount by which their pension was adjusted compared to the previous method and is likely to cause a further decrease as pension adjustments could lag behind the adjustment of salaries. Although the Defendant is right in saying that it is not certain that the application of the new pension adjustment scheme will always be less favourable to pensioners, since an adjustment following inflation may even be more advantageous compared to an adjustment following RAM, the allegation that there may be a certain gap between the two adjustment methods is not a matter of mere speculation. The new adjustment method was, moreover, introduced with the clear purpose of reducing the costs of the pension scheme. Thus, the pensioners have a cause of action, even if they cannot prove that in every single year to come the adjustment of their pensions will lag behind the adjustment of salary. The Appeals Board is satisfied that there is a reasonable presumption that such a lag is likely to occur over the years which the Claimants will spend as pensioners.

54 2. All the Claimants have fulfilled the other prerequisites provided for in Article 1.1 of the Conditions of Appeal and Rules of Procedure for the Appeals Board. They have written to the Director-General and not received a positive answer. The condition in Article 1.1 providing that the Director-General has either rejected such request or failed to reply to the Claimant within 20 days gives the Director-General's failure to reply the same effect as the rejection of the request. The Claimants are right in assuming that the time period of 60 days to lodge an appeal started on the last day of the time period of 20 days within which the Director-General was expected to answer. The Claimants have respected that deadline provided for in Article 1.5 (60 days).

55 3. Therefore, the Appeals Board accepts all the appeals as admissible.

II. On the Merits

1. The Legal Framework

56 In the version in force prior to 31 December 2019, Article 36 of the BPC (CPS) Rules – 'Adjustment of benefits' read as follows:

> 1. Should the Council of the Organisation responsible for the payment of benefits decide on an adjustment of salaries in relation to the cost of living, it shall grant at the same time an identical adjustment of the pensions currently being paid, and of pensions whose payment is deferred. Should salary adjustments be made in relation to the standard of living, the Council shall consider whether an appropriate adjustment of pensions should be made*.
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> *Footnote:

"Article 36 of the Pension Scheme Rules, relating to the arrangements for the adjustment of benefits, shall be interpreted, in all circumstances and whatever the current salary adjustment procedure, as follows: Whenever the salaries of staff serving in the Co-ordinated Organisations are adjusted – whatever the basis for adjustment – an identical proportional adjustment will, as of the same date, be applied to both current and deferred pensions, by reference to the grades and steps and salary scales taken into consideration in the calculation of these pensions."

57 Paragraphs 1 and 2 of Article 36 as amended with effect from 1 January 2020 read:

> 1. Pensions shall be adjusted annually in accordance with the revaluation coefficients based on the consumer price index for the country of the scale used to calculate each pension.
>
> Pensions shall also be adjusted in the course of the year, for any given country, when prices in that country show an increase of at least 6%.
>
> 2. At regular intervals, the Secretary General shall establish a comparison of the difference between increases in salary and increases in pensions, and may, where appropriate, propose to the Committee of Ministers measures to reduce it.

58 Thus, through the amendment of Article 36 the former parallelism between adjustment of salaries and pensions has been abandoned. Under the new system, pensions will be automatically adjusted annually in line with the consumer price index – in other words: following inflation – regardless of whether or not, and in what amount, salaries are adjusted.

2. The Competence of Co-ordination

59 Annex 1 to the Regulations concerning Co-ordination provides that "the object of the co-ordination system is to provide recommendations to the Governing bodies … concerning (i) basic salary scales, and the method of their adjustment, for all categories of staff and for all countries where there are active staff or recipients of a pension; (ii) Pension Scheme Rules". The Appeals Board considers that it cannot be inferred from this Rule that Co-ordination may only recommend methods of adjustment of salaries, but not that of pensions. The quoted Rule shows that both salaries and pensions are a matter of Co-ordination. It is true that the words "the method of their adjustment" are linked to "basic salary scales" only, while with respect to "Pension Scheme Rules", mentioned in (ii), there is no explicit mention of such a competence. But since Pension Scheme Rules necessarily need to include rules for pension adjustment, the competence of Co-ordination to provide recommendations concerning Pension Scheme Rules extends to the competence to recommend the adjustment method, even if this is not expressly mentioned in (ii).

3. The wording of the former version Article 36 CPSR

60 a) The Claimants submit that the wording of the former version of Article 36 CPSR created a solid link between the adjustment of salaries and the adjustment of pensions, so that this connection cannot be altered within the limits of the given system. Thus, the parallelism between the adjustment of salaries and the adjustment of pensions should be considered as an acquired right.

61 b) The pension adjustment rule in force when the Claimants joined ECMWF was (Article 36):

> Should the Council of the Organisation responsible for the payment of benefits decide on an adjustment of salaries in relation to the cost of living, it shall grant at the same time an identical adjustment of the pensions currently being paid, and of pensions whose payment is deferred. Should salary adjustments be made in relation to the standard of living, the Council shall consider whether an appropriate adjustment of pensions should be made. (emphasis added)

62 This provision shows that the Scheme clearly differentiated from its very inception between adjustments in relation to the cost of living and in relation to the standard of living. It also shows that the provision itself envisaged that, for the adjustment of pensions there was an automatic alignment with salary adjustments only in relation to the cost of living (= inflation), but such alignment was not, in principle, automatic in relation to adjustments in respect of the standard of living. In this case, it was up to the Council to consider whether it was appropriate to apply the same adjustment to pensions. It is true that the footnote added to that provision extended automatic alignments to adjustments in relation to the standard of living. But the footnote did not eliminate the differentiation between adjustments in relation to the cost of living and those in relation to the standard of living ("*whatever the basis for adjustment")*. If the legislature had intended to dispense with the difference between these two types of adjustment, it would have made more sense to delete the words "in relation to ..", thus ensuring that any adjustment of salary would automatically apply to pensions as well. This was never done. The Appeals Board does not concur with the Claimant's view that the former version of Article 36 established an obligatory link and interdependence between the adjustment of salaries and pensions.

4. The "Noordwijk Agreement" Argument

63 a) The Claimants complain of a violation of the "Noordwijk Agreement", of the principles of *pacta sunt servanda* and of their legitimate expectations. They contend that, by adopting the 34th Report, the Councils of the Co-ordinated Organisations *ipso facto* approved the "Agreement" which means that henceforth the only change which could be made to the CPS is the contribution rate. As the letter of the CRP Chairman of 9 May 1994 does not mention that the compromise would be limited in time, the purported time limit of five years – contained in the 34th Report – must therefore be treated as a material error without basis in fact or law.

64 b) The argument regarding the so-called “Noordwijk Agreement” is based on the 34th CCR-Report of 29 April 1994 and the letter dated 9 May 1994 which the President of the CRP (Mr Giovanni Palmieri) addressed to the President of the CCR (Mr Bernhard Schaefer).

65 While it is not excluded that official documents such as the 34th CCR-Report may contain information of legal importance, the Appeals Board considers that in the present case the CCR Report of 29 April 1994 contains a record of the facts and of the considerations which finally led the CCR to present to the Councils of the six Co-ordinated Organisations the recommendations which were later adopted by them; they concern the new wording of Article 41 of the Pension Scheme Rules, the rate of staff contribution to the Pension Scheme and the guarantee by Member States concerning the payment of pensions. The Report’s main function, thus, is to explain the motives underlying the recommendations.

66 The Report provides a rather comprehensive narrative of the discussions which had taken place since 1 July 1974 when the CPS came into effect. To a considerable extent, the Report is devoted to the actuarial studies which had been carried out during 1990, 1991 and 1992. Moreover, the Report clearly reflects the different positions of the CCR, the CRSG and the CRP. The pertinent reflections are set out in more detail in the “Compromise Proposal by the Chairman of the CCR to determine the level of staff contributions to the Pension Scheme” attached as Annex 3 to the Report and mentioned in its paragraphs 2.3, 3.8 and 4. It is, thus, an official document which established that the procedure provided for in the “Regulations concerning the Co-ordination System” (laid down in the 154th CCR Report of 5th January 2004) had been duly followed. Article 6 provides, inter alia, that “recommendations, in the form of reports, shall be made by the CCR by consensus and, to the extent possible, in conjunction with the CRSG. The CRP shall be consulted on the draft reports with a view to considering its position”. By including the position of the CRP, the Report establishes that the CRP was correctly consulted, and that its position was duly considered. Within this framework, a Report relates divergencies of opinion as well as a common understanding of the participants. However, as the participants of Co-ordination (CCR, CSRG, and CRP) have no competence to conclude legally binding agreements, the CCR Report can neither create, nor attest to the existence of, legally binding obligations between the participants, still less between the participants and the Councils of the Co-ordinated Organisations.

67 In his letter of 9 May 1994 addressed to the President of the CCR, the President of the CRP says, inter alia:

> *Je tiens tout d'abord à vous remercier pour votre concours à la solution de compromis intervenue en matière de réforme du règlement des pensions et d'ajustement du taux de contribution des agents.*
>
> *Par la présente je souhaite surtout fournir des indications quant à l'interprétation de la position du CRP. Il s'agit notamment de tenir compte des deux circonstances suivantes :*

a. *le personnel demeure inquiet quant aux lacunes de la garantie juridique offerte par les États membres des Organisations en matière de paiement des pensions. Par ailleurs le CCR a demandé au CRP de lui soumettre une note faisant état desdites inquiétudes ;*
b. *l'intangibilité du régime des prestations est le présupposé sur la base duquel les discussions ont reposé et notre accord au compromis a été donné. Constituant un présupposé, cet élément n'apparaît nulle part dans le rapport. Il est à mon avis opportun de vous le signifier dans cette lettre.*

68 The 34th Report of 29 April 1994 (in its paragraph 4.3 – Position of the CRP) does not contain any reference to the "intangibilité du régime des prestations" as a "présupposé" of the compromise. But even if it were mentioned, this would not be more than an explanation of the motivation underlying the acceptance of the recommendations by the CRP. Moreover, it would not be clear what was meant by the term "régime des prestations", and it would not establish that the adjustment system for pensions – which was not discussed in the 1994 meetings – was an integral part of this "régime". It is much more likely that by "régime des prestations" the CRS President was referring to the system of the adjustment of staff contributions and the share of the total contribution to be borne by the staff, which had been the subject of the discussions.

69 Whatever the meaning of the letter, it was quoted and reconsidered in a trilateral Joint Meeting of the CCR, the CRSG, and the CRP held in Strasbourg on 23 and 24 June 1994. The result of the meeting is recorded in point 10.3.1.1 of the minutes as follows:

> The Joint meeting "*noted that the CRP had felt it useful to record in a letter to the Chairman that its acceptance of the recommendation in the 34th Report had been based on the presupposition that the system of benefits was inviolable for the five-year period until the next review of the level of the staff rate of contribution to the Scheme; …*" (emphasis added).

70 The Appeals Board notes that the minutes of the Strasbourg meeting of June 1994 mentions a "five-year period" during which the system of benefits should be "inviolable", while the letter of the CRP Chairman of 9 May 1994 does not mention such a period. The Appeals Board considers that the June 1994 minutes (which take up the wording of the CRP letter of 9 May 1994) must be deemed to relate the latest stage of discussions and prevail over the CRS letter of May 1994. It shows that the ideas and concerns set out in the CRP letter were taken up again and discussed in the tripartite meeting of June 1994 and assumed their final shape in the minutes of the June meeting. The Appeals Board finds it highly unlikely that the CCR and the CRSG would have accepted a proposal of the CRP that the whole CPS system should remain "inviolable" once and for all with the sole exception of the contribution rate. Mentioning the five-year period reflects the new wording of the rule (Article 41.5) providing for a five-year period before reviewing the staff contribution rate as an element of

stability meant to protect the interests of staff and pensioners. The Claimants' assumption that the wording of the June 1994 minutes reflects a "material error" has not been proven and is no more than speculation. The Appeals Board bases its assessment on the clear and unambiguous wording of the documents submitted by the parties, rather than on speculative suggestions. As the Defendant rightly submits, the minutes of meetings of Co-ordination meetings are reviewed by all three Committees before their final adoption. The Claimants have not provided any evidence that the content of the minutes was contested by the CRP at the time.

71 The Appeals Board thus considers that the so-called "Noordwijk Agreement" relates to discussions held between the three Co-ordination Committees in 1994 and the compromise proposals they agreed on: the staff contribution rate increase to 8%, in return for the inclusion of a complete actuarial method in an annex to the pension rules, a mandatory period of five years between two revisions of the contribution rate and the provision that the special contribution that had been paid by staff members since 1992 be reimbursed. It does not establish either that the CCR had no right to submit proposals concerning the method for adjusting pensions, or that the Council of ECMWF had no right to adopt them. The ECMWF Council was therefore not estopped by the "Noordwijk Agreement" from amending Article 36 of the CPS (BPS).

5. Acquired (Vested) Rights

72 a) The Claimants submit that the contested decision alters fundamental and essential terms of the Claimants' employment with ECMWF. Their entitlement to defined pension benefits includes the adjustment of their pensions in accordance with the RAM. While staff contributions may evolve, defined benefits may not. Organisations cannot unilaterally change rules in such a way as to alter a fundamental or essential term of employment. Staff members affiliated to a "defined benefits" pension scheme must be in a position to apprehend what they will receive as pensions payments once they have retired. It contrasts with "defined contributions" schemes where the benefits to be received upon retirement depend on an individual member's contributions and the performance of the pension fund over time. While the CCR has several times challenged, on political grounds, the annual adjustment results of the RAM, it was recommended by the CCR and decided year after year to keep the basic features of the RAM as they are, even if some small changes were made.

73 b) The Appeals Board does not share the Claimants' view that the application of the amended pension adjustment method violates their acquired rights.

74 According to established international administrative jurisprudence, the principle of "acquired rights" protects officials of international organisations against unilateral amendments of employment conditions which are of a fundamental and essential nature. This principle concerns rights and conditions which are so substantial and important that they can be considered to have been decisive in influencing the staff member to accept the appointment and, later, inducing him to stay. An acquired right is "*one the staff member may expect to survive any amendments of the rules*" (see, e.g. the ESA Appeals Board's decisions

No. 24–27 of 8 July 1986; No. 78 of 18 July 2003; ILOAT decisions No. 832 of 5 June 1987, consideration 13; No. 4028 of 26 June 2018, consideration 13, and No. 4380 of 18 February 2021, consideration 10).

75 The right to receive the contractually agreed remuneration during service is a right which the staff member acquires by taking up service and which he retains as long as he remains in service. Likewise, being entitled to pension benefits on retirement is such an acquired right. It is also common cause between the parties that officials may claim an acquired right to a method providing for periodic adjustments of salaries and pensions to compensate the effect of inflation on their salaries and pensions. The right of pensioners of the Centre to an adjustment of their pension benefits which fully maintains their purchasing power has not been contested in the present proceedings, and the Board does not therefore take a position on this matter. The parties disagree on the issue of whether the concrete method for calculating the adjustment is an essential part of the pensioner's rights or not. If it is, then the method shares the nature of the pension right and is an acquired right as well. If it is not, then the method may be changed without infringing the acquired rights of pensioners, provided that the application of the method leads to a satisfactory result with regard to the purchasing power of the pensioner.

76 The test whether or not a right is of a fundamental and essential nature and so substantial and important that it was decisive for the the staff member to accept the appointment with ECMWF and, later, induced him to stay, requires an assessment which must be done in a generalised manner, i.e. from the objective perspective of persons concerned, on whom the right at issue is conferred. It is not possible to assume that a certain right created by a general legal provision constitutes an acquired right for some of the persons concerned, and not for others. A right must constitute an acquired right for all concerned, or for none of them. The view of an individual may be decisive only if it is an individual right which is expressly stipulated in an employment contract and thus conferred solely on that person (see ESA Administrative Tribunal, decision No. 132 of 26 July 2021, paragraph 85). Since the new adjustment method is incorporated in the Pension Rules and thus applies to all pensioners, the Appeals Board has to consider the matter from a general and objective point of view, taking account of the whole body of staff members employed in ECMWF.

77 Applying the test in this way leads to the conclusion that the adjustment method provided for in the old BPS (CPS) does not constitute an acquired right. The automatic alignment operated by the footnote to Article 36 cannot be considered to be of fundamental and essential importance such as to determine the staff member's decision to accept the appointment or to remain in the service of the Centre. While the amended adjustment method was only applied by ECMWF from 2020, it was applied to the pension schemes of all new recruits to a number of the other Co-ordinated Organisations much earlier (NATO from 2005, ESA and EUMETSAT from 2010). If the introduction of the new adjustment method in line with inflation in these Organisations had had the deterrent effect claimed by the Claimants, these Organisations would no longer have been able to recruit persons prepared to take employment with them.

There is no evidence before the Board to lead it to consider that these Organisations have encountered difficulties in attracting or retaining new staff despite the new pension adjustment method. Thus, it can be concluded that in the other Co-ordinated Organisations, the adjustment method is not – and never was – a point of decisive importance. There is no reason to assume, nor have the Claimants demonstrated, that staff members engaged in ECMWF had a generally different approach in this regard and took or remained in employment with the Centre on condition that their pension would be adjusted in line with staff salaries.

78 In addition, the Board notes that none of the international tribunals which have ruled on this question has considered the methods for adjusting pensions to be of such importance that they reach the level of unamendable acquired rights. Like the rate of staff contributions to the pension scheme which may be adapted according needs, and the retirement age, the method of adjustment belongs to the incidental matters lacking fundamental importance. In its decision of 15 April 2021 (Nos. 640/2020 et seq.) on Pension Cases, the Administrative Tribunal of the Council of Europe rejected the claim that the amendment to Article 36 of the BPS Rules had violated the acquired rights of the pensioners, holding that the acquired right to receive a pension does not include the requirement that adjustments are to be made according to the method applied in the past (see paragraphs 175 et seq. of the decision). Likewise, the Administrative Tribunal of NATO ruled in its decision of 1 June 2021 (affaire no. 2020/1303) that the introduction of a new adjustment method – designed to maintain the purchasing power of pensions – does not violate the acquired rights of pensioners (see paragraphs 74 et seq. of the decision). The Appeals Board of EUMETSAT, in its decision No. 9-14 of 19 October 2021, rejected the arguments of the claimants that the introduction of the new adjustment method was a breach of acquired rights. Earlier, in its decision No. 2089 of 30 January 2002 (consideration 16), the ILOAT addressed the same issue of principle holding:

79 > “The Tribunal does not have to decide whether the periodic adjustment of pensions should be viewed as an acquired right. Even assuming that it were, such a right would go no further than the maintenance of purchasing power of the pension paid at the time of entitlement […] To accept that pensions must always be adjusted to keep in line with post-retirement salary increases would be to expose pension funds to uncertain and unmeasurable future liability which might well in the end wipe out the funds themselves.”

80 On these grounds, the Appeals Board rejects the argument that the introduction of the new adjustment method constituted a breach of the Claimants’ acquired rights.

6. Other arguments invoked by the Claimants in support of their claims

81 1. The Claimants submit that the wording of the former Article 36 created a solid link between the adjustment of salaries and the adjustment of pensions,

so that the dependency of the latter on the former should be considered as preventing the Centre adopting the contested amendment to this provision. From the previous wording of Article 36 BPS Rules they deduce three arguments:

82 a) The link was meant to create solidarity between staff and pensioners;

b) The link was meant to establish parallelism between salary trends in the eight so- called “reference” national public services and salary and pension trends in the Co-ordinated Organizations. There was a customary rule not to deviate from this parallelism whenever an amendment was proposed. The Claimants complain that the new version of Article 36 violates this customary principle;

c) The amendment to Article 36 of the CPS undermines the principle of purchasing power parity. It calls into question the so-called “spatial” adjustment which ensures that a pensioner can move his residence to another country without suffering negative repercussions on his purchasing power.

83 The Appeals Board does not agree with these arguments.

84 The Appeals Board recalls that while the abolition of the principle of pension adjustments would amount to a breach of acquired rights, organizations are free to determine the modalities for the adjustment of pensions, and are not bound by any specific method. The choice of such method is a matter within the discretion of the Council and depends on complex and technical economic considerations which are by their very nature ever-changing and which the Council takes into account on the basis of recommendations made in this respect in the Co-ordination procedure. The method initially chosen for the adjustment of pensions was based on such economic considerations and consisted in aligning the adjustment of pensions with the adjustment of the salaries of serving staff. The Appeals Board notes the Claimants’ view that this alignment could be interpreted as an expression of solidarity between serving and retired staff, or as a specific expression of the principle of equality. However, it considers that these are merely factual consequences of the chosen adjustment method and not a justification for that method itself.

85 Likewise, parallelism in the evolution of salaries and pensions is a consequence of the previous pension adjustment method and not its justification. The application over a long period of time of a particular pension adjustment method does not confer an acquired right to have that method applied for all time to the person concerned, or prevent the Council from amending it, if it considers that such an amendment is appropriate for functional reasons.

86 As to “spatial” adjustment, the Appeals Board notes that Article 33 of the BPS Rules (providing that the pensioner who no longer resides in the country of his last posting may opt for the scale applicable in his country of residence) has not been amended. The right of pensioners to choose their place of residence and of having their purchasing power maintained with regard to the inflation prevailing in that country has not been affected by the new adjustment method

which continues to ensure that pensions do not lose their purchasing power. Article 33 requires the pensioner to make an 'irrevocable' choice of their country of residence; it does not in any way seek to facilitate the maintenance by the pensioner of economic ties with a number of countries or moving from one country to another at will, as the Claimaints argue. The indexation of pensions in line with consumer price indices is precisely intended to guarantee that there will be no financial loss in terms of purchasing power, wherever the pensioner takes up residence. Moreover, no longer adjusting pensions in relation to salaries but revaluing them in relation to inflation may even be favorable to pensioners in the event that salary adjustments are not approved.

87 2. To support their argument that the amendment to Article 36 of the BPS Rules violated their statutory rights, the Claimants further submit that the BPS is a closed pension scheme and that after closing the BPS, only the contribution rate of the BPS was open to later amendments. This they deduce from Article 41 of the BPS Rules. A closed pension scheme is no longer open to other amendments except those provided for in Article 41.

88 The Appeals Board does not agree with this argument.

89 The fact that a pension scheme is closed means that from a certain date on no active staff joining the Centre are admitted as new members. In the following years, the number of pensioners may grow, but it will always be limited by the number of active staff members who were admitted as members at the closing time and thus became aspirants to a pension.

90 That a pension scheme is closed in no way means that its legal structure is frozen and has to remain unchanged. Within any given system, changes are possible and common. One of the most common changes in practice is the increase in contribution rates, since every pension system has a natural tendency to become more and more expensive, as pensioners become more numerous and enjoy an increasing life expectancy, while the number of active staff contributing to its funding is constantly decreasing, tending to zero. The existence of Article 41 BPSR shows that contribution rates may be adjusted and that active staff members affiliated to the BPS cannot claim that their contribution rate – limited to 1/3 of the benefits provided – remains fixed as a percentage of their salary. This Article only applies to active staff members, not to pensioners. Therefore, nothing can be deduced from this provision with regard to pensioners. On the contrary, the provision regarding pensioners is Article 36 BPSR, which explicitly provides that pensions may be adjusted. Article 41 BPSR does not limit the power of the Council to amend Article 36 by introducing a new method for calculating the adjustment.

91 3. The Claimants refer to the BPS as a fully funded pension scheme and draw the following arguments from this concept: Since the BPS is a fully funded pension scheme and the contributions of the Member States and the active staff members are calculated and verified by an actuary, the contributions made by the staff members fully cover what they are entitled to receive as a pension after retirement. The amendment to the Pension Scheme means a cut in their pension benefits, and this means that the Centre is taking away money which

the pensioners are entitled to consider as belonging to them as their own property.

92 The Appeals Board notes that the notion of fully funded pension scheme used for the ECMWF BPS scheme only implies that the scheme is funded to 100% by contributions made by the active staff members and by the Member States, and that no funds from the regular ECMWF budget are needed to pay the running pensions. “Fully funded” is therefore just a description to explain that there is a fund from which pensions are paid, and that the fund is not replenished by a recurring levy on the Member States but is solely funded by contributions which are calculated according to standard rules. Article 41 BPS Rules provides that the contributions to the Pension Scheme must “represent” the cost, in the long term, of the benefits provided by the Scheme, whereby the rate of the contribution is 1/3 for the staff members and 2/3 for the member States. Thus, the term “fully funded” does not create any individual right for the staff member or for the future or present pensioner. It just explains how, in general, the money is collected and how contributions are calculated.

93 The concept of a “fully funded pension scheme” does not mean that by paying contributions the individual staff member is building up something like a money stock as he would do by regularly paying into a savings account or into a capitalized pension account. The BPS is a system based on solidarity (the active staff members pay for the pensioners; pensions are paid from the contributions of active staff); it is not a defined contribution system where every staff member builds up his own capital stock. While the amount of a savings account is directly linked to payments made by the bank client, the right to a pension does not depend on the total amount in monetary terms of a staff member’s contributions but on the staff rules which provide that a staff member, upon retiring is entitled to a life-long pension. Likewise, the amount of the pension does not depend on the exact amount of the contributions made by the staff member, but on the number of reckonable years, the accrual rate of 2 percent per reckonable year, and on the salary corresponding to the last grade held by the staff member. Some of these coefficients are foreseeable years before the beginning of retirement, some are not (for instance, the date of retirement in case of early retirement due to invalidity; promotion or downgrading; and final salary). During the time of active service, the staff member does not accumulate a stock within the Pension Fund which personally belongs to him as his property and whose amount defines his “acquired right”, as would be the case with a savings account in a bank whose actual value may at any time be assessed to the last penny. Instead, the active staff member has a permanent and legitimate expectation that he will receive the pension benefits calculated according to the applicable rules. However, if the active staff member dies just before reaching the pension age, his claim to a pension is extinguished and does not form a part of his estate (as a savings account would).

94 No staff member or pensioner has a claim that the regulations which define his conditions of employment and pension arrangements remain unchanged after his taking up his duties. There is no principle that the formula for pension adjustments must stand for ever. The Appeals Board does not consider that the Staff Rules establish an indissoluble link between salaries and pensions so that

the legislature would be prohibited from establishing new rules providing that salaries and pensions may develop at a different pace.

95 The Appeals Board further notes that the Centre was not prohibited from adopting the measures recommended in the 263rd CCR Report because its Pension Buffer Fund was "flourishing", as the Claimants submitted in the oral pleadings. Every pension system has to monitor the evolution of its expenditure which results from the payment of pension benefits made and to ensure that future pension payment are covered by contributions from active staff members and Member States. However, the introduction of the new adjustment method had a different objective, that is, to contain future pension expenditure and thereby ensure the viability of the system as such. Since a closed pension scheme has a natural tendency that the number of active staff members as contributors decreases (tending to zero) while the number of pension receivers increases, it is inevitable that at a certain time the funds stored in a buffer fund or raised by the contributions of active staff member will no longer cover the payments made to pensioners. The Centre, therefore, was entitled to envisage such evolution and anticipate the future situation, whatever the current state of its Pension Buffer Fund. Moreover, the Centre, being a member of the six Co-ordinated Organisations, was allowed to exercise its discretion to follow the CCR recommendation, even if there was no imminent liquidity problem (see judgment in case No. 94 of the Administrative Tribunal of the OECD of 30 June 2021, paragraph 65).

96 4. The Appeals Board concludes that the amendment to Article 36 BPFR did not infringe the Claimants' statutory rights.

7. Reasons for the Reform and Assessment of its Consequences

97 a) The Claimants further submit that the amendment introduced to the Pension adjustment Rules was based on invalid reasons and was therefore arbitrary.

98 In the first instance, the Claimants argue that the need to amend the Pension Scheme arose from the fact that the Member States failed to pay their due contributions to the Pension Fund from the inception of the scheme in 1974 until 1991. They submit that it is unfair to remedy the situation at the expense of the Claimants who paid their contributions. Moreover, the Claimants complain that the reasons given by the CCR and adopted by the Centre do not appear to be in the interest of the service and are inadmissible insofar as they do not serve the purpose of the BPS.

99 In the second instance, the Claimants submit that the reform was not properly reasoned. They complain that no impact study had been performed by the Defendant in order to assess and to quantify the needs of the scheme in the long-term and to determine the best measures to address these needs, as would be required by the general principle of good administration.

100 b) The Appeals Board does not agree with these arguments.

101 If it were correct that in the past the Member States did not pay the employer contribution into a dedicated fund, this would not imply that the Claimants cannot be asked to participate in the effort to ensure the future viability of the scheme through a revised method for the adjustment of pensions (see above paragraph [95]). The means by which the stability of a pension system is maintained is a policy question, and it is not for the Appeals Board to consider whether policy decisions are reasonable as long as they are not patently arbitrary and thus illegal. Regular adjustments to the pension scheme are inherent in every pension system. In principle, amendments may be made by raising the contribution rates, or by adapting other pension parameters within applicable legal limits.

102 A system like the BPS, which relies on contributions from active staff members and the member States which are not stocked in individual saving accounts attributed to an individual staff member but are directly spent to pay the running pensions, would require a constant increase of the contribution rate to cover growing expenses. Although this has, indeed, occurred (the Defendant has demonstrated that there have been numerous increases of the staff contribution rate, starting at 7 % and being currently fixed at 11.8 %), it is rational to take measures limiting expenditure as well. One such measure is to reduce the cost of pension adjustments, without putting at risk the acquired right to receive a pension which maintains its purchasing value through an adjustment in line with inflation.

103 The reasons which induced the CCR to recommend the reform to the Councils of the Co-ordinated Organizations are clearly set out in the 263rd CCR Report, which refers to other documents containing more details. The Appeals Board does not consider it to be its task to assess the correctness of the assumptions and reflections on which the recommendations were based; suffice it to say that these reasons are not obviously based on incorrect assumptions or abusive considerations, and there is nothing to indicate that they are not the true reasons behind the amendment of Article 36 CPS. That the Claimants do not accept these reasons does not change the fact that the contested amendment of the pension adjustment method was well reasoned by its authors and that these reasons cannot be considered to be arbitrary.

104 The Claimants' arguments related to the need that an impact study be carried out prior to amending the adjustment method raise the question of whether an Appeals Board has the power – and if so the duty – to investigate the details of the law-making process within the governing body of the ECMWF, which, according to the Claimants, was badly informed and acted without sufficient information and diligence when it decided on the new BPS.

105 The Appeals Board notes that a body charged with legislative powers has a very broad discretion in assessing and determining the appropriateness and the modalities of general rules. No Administrative Tribunal has the right to substitute its discretion for that of the legislature. Generally speaking, the Appeals Board is not bound to look into the law-making process itself at the suit of individual Claimants. On the other hand, the Appeals Board has the power to control whether the result of the law-making process is in accordance with higher

ranking law and generally accepted legal principles. Within these margins the Appeals Board may conclude that a legal provision was based on assumptions that were manifestly false or on factual elements that were manifestly wrong. In such a case, the Appeals Board has no power to declare the rule void, but it may hold that such rule must not be applied as a legal basis for individual decisions (compare the German notion of “Inzidentkontrolle” and the French notion of “exception d’illegalité”.)

106 As to the obligation of the body entrusted with adopting legislation to base its decision on correct facts and assumptions, it is, in the first instance, the duty of its members to ask for sufficient and reliable information. Unless it can be proven that they had no information at all at their disposal, and that the body acted in complete ignorance of the facts, it is not up to the Appeals Board to establish what information was needed, what information was actually to hand, and whether the members of the body drew the right conclusions from this information.

107 Regarding the Claimants’ allegation that, breaching the Charter of Ethics of ECMWF, the documents on the 263rd CCR Report provided by the Administration to the Council contained no information on the Report of the Working Group adopted by Council in December 2008, the Appeals Board notes that the Centre’s duty, fixed in the Charter, to ensure “that all information provided to member States and other Authorities, Organisations and Institutions is complete, accurate and timely” can hardly comprise an obligation to provide the Council in 2019 with information which is more that 10 years old and which, moreover, was contained in a report which had been adopted by the Council and was therefore already in its possession.

108 In any case, the documentary evidence shows that the matter of the BPS had been discussed for years at the level of Co-ordination as well as at the level of the Councils of the six Co-ordinated Organisations. There is no evidence that any of the points mentioned by the Claimants was overlooked or not taken into account. In these circumstances, the Claimants cannot reasonably claim that CCR was not sufficiently well informed on the issues, even without a specific impact study. It is true that the conclusions were different from those which the Claimants find appropriate. But it is not necessary that measures taken by law garner the approbation of those who are subject to them.

109 In its decision Nos. 640/2020 et seq. of 15 April 2021 (on the identical Pension issue), the Administrative Tribunal of the Council of Europe points out that (127) “the statement of reasons for a decision of a technical nature such as the adjustment of the calculation method in line with the consumer price indices, does not require all the details to be explicitly set out in the contest decision. Indeed, an analytical description of the specific technical considerations relating to the adoption of an act, however useful and desirable it may be, is not in itself indispensable in order to consider that the obligation to state reasons has been met. It is sufficient that the persons concerned are able to understand the reasons for the adoption of the act which concerns them, the objective which is pursues and the method applied to establish the amounts to which they are entitled. (128) This is precisely the case here. The Tribunal observes that the 263rd report of the CCR … contains elements of reasoning …; … (130) The

fact that, in the claimants' view, … there are no grounds justifying the need for the amendment is a matter of the internal lawfulness of the contested measures and not of the reasoning behind them. … (134) As regards the argument that there were no specific and technical studies to justify and explain the change made, the Tribunal notes that there is evidence … which clearly shows that certain studies were indeed carried out. Even if the appellants dispute the validity of the studies in question and argue that the organizations need to carry out other studies, all of this leads to the logical conclusion that the appellants were aware of the context in which the amendments was made … . (135) It follows from the foregoing that the arguments put forward by the appellants to establish the existence of a breach of the obligation to provide reasons on account of the lack of specific and detailed or technical information justifying the pension adjustment method adopted must be rejected".

110 The Appeals Board agrees with this reasoning.

8. Violation of the Principle of Equal Treatment

111 a) The Claimants submit that the previous pension adjustment system was intended to ensure equal treatment of active staff and of pensioners. This principle is violated by applying different adjustment methods to the salary of active staff and to the pensions of the pensioners.

112 b) The Appeals Board does not agree with this view. There is a fundamental difference between active staff and pensioners. Active staff continue to serve the Centre with their knowledge, intelligence and constant endeavours in order to promote the Centre's strategic and technical aims. The Centre may, thus, have a vital interest in keeping active staff in their service and offer them conditions – especially salaries – designed to render offers of employment from competitors less attractive. This is why the Centre offers staff members a salary level which takes account of and adapts to the – usually rising – standard of living. Towards pensioners, on the other hand, the Centre has the obligation to pay them the pension benefits which they have accrued during their service, and thereby, in accordance with Article 36, maintain the purchasing power of their pension rights as determined at their retirement through an appropriate adjustment method. Thus, staff members and pensioners are in a different position and may be treated differently. The Centre is under no obligation to continue to increase the pensions according to a rising standard of living – or to reduce them in case of a downward adjustment of salaries.

9. Retroactive effect

113 a) The Claimants further submit that the amendment to the Pension Scheme constitutes a retroactive, and therefore illegal, change of their pension conditions. In legislating for years already past, both in effect and reality, the new rule is retrospective. The right to receive a pension included in past years the right to have the pension adjusted at the same pace as salaries, i.e. following the cost of living. This right was derogated by the new pension scheme which only allows for an adjustment following inflation.

114 b) The Appeals Board does not accept this argument. The amendment does not have any retroactive effect, as it applies to future pension payments only. There would have been such retroactive effect if the Centre had introduced the amendment to cover pensions already paid in the past (from the day of retirement until December 2019) which had been adjusted at the same pace as salaries and required that such pensions now be recalculated on the basis that adjustment should only be in line with inflation, thus creating an overpayment which the Centre would be entitled to claim back from the Claimants. This is not the case. The new pension Scheme came into force on 1 January 2020 and did not apply to pension payments which the Claimants had already received up to that date. It did not change the rules applicable to the Claimants in the past, but only with effect for the future.

10. Breach of the Duty of Care, Unjust Enrichment and Prejudice

115 a) The Claimants question how a reform which is aimed at making savings due to expected lower pension increases in the future, and therefore lower pension payments, would guarantee the pensioners' purchasing power. Therefore, the Claimants maintain that the Defendant violated its duty of care.

116 b) They further submit that, by reducing the level of pension benefits through an amendment to the adjustment method after contributions were paid and without reimbursing the excess contribution, the new method retroactively affects situations and rights which have become definitive and unjustly enriches the Centre to the Claimants' detriment.

117 c) The Claimants calculate their financial loss by comparing past adjustments following salaries with adjustments based on inflation. They calculate the annual loss for the expected life span. The result varies for each Claimant; however, it amounts to sums as specified by each Claimant. They admit that the calculation of their financial loss is necessarily a complex and difficult exercise since they are not actuaries. It is nevertheless meant to be a close estimate based on objective criteria.

118 d) The Appeals Board does not agree with the Claimants' position.

119 The new adjustment method is meant to safeguard the pensioners' purchasing power. Savings which might arise from the new system will be limited and are meant to provide the BPS with sufficient funds to adjust pensions in line with inflation. The Claimants have not shown that the Centre violated its duty of care.

120 Nor does the new adjustment method lead to an unjustified enrichment of the Centre. At the time when they were paid in, the staff contributions were calculated in line with the applicable rules and thus were due payments which the fund of the BPS was entitled to receive. As explained above in paragraph [93], the Claimants are mistaken when they assume that by paying their due contributions, they acquired the right to a specific and unchangeable pension adjustment method. The new adjustment method does not reduce the Claimants' pension benefits as such and thus does not lead to any enrichment of the Centre. As the Centre is right in pointing out, staff members have no entitlement to

a pension which represents the exact monetary equivalent of the contributions paid for. A change in the adjustment method does not render past contributions "improperly deduced".

121 On the basis of these findings, the Appeals Board sees no reason to attribute the Claimants the compensation claimed for their alleged losses. The pensions which they will receive in the future will be calculated on the basis of the applicable parameters and adjusted according to the rise in the cost of living, leaving therefore no loss which the Centre would be liable to compensate.

F. Conclusion:

122 For these reasons, the Appeals Board decides:

1. The appeals of the Claimants are dismissed.

2. The Claimants shall bear their own legal costs.

3. The Centre shall reimburse the travel and subsistence expenses incurred by the Claimants.

Michael Groepper Chairman	Susan Madry Secretary