

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 17 MARCH 1965¹

*Mr President,
Members of the Court,*

Mr Richard Müller was engaged on 31 August 1959 as a contractual official of the Secretariat of the Councils of the European Communities in Brussels. By a decision of 17 January 1963, he was integrated as from 1 January 1962 in Grade B 2. Following complaints on his part he was promoted to Grade B 1 as from 1 October 1962 by a decision of 28 March 1963, and the effect of this promotion was later back-dated to 1 January 1962 by a second decision of 21 June 1963.

Basing his position on the definitions of the duties and powers attaching to each post, adopted as far as concerns the Secretariat-General of the Councils by a decision of 7 October 1963 and brought to the knowledge of those concerned on the following 15 October, he sent the Secretary-General on 9 April 1964 a request to be classified as from 1 January 1962 in one of the grades of career bracket A 4-A 5. He pointed out that from a date prior to the entry into force of the Staff Regulations he had been entrusted with supervising commitments to incur expenditure with regard to both liabilities entered into and orders to pay under the conditions laid down in the Financial Regulation concerning the execution of the separate parts of the budgets of the Councils; that he was not under any instructions from immediate superiors in the exercise of his duties; and that the post he held was not one involving executive duties but one in which the duties were administrative and advisory, falling within Category A, and more exactly within career bracket A 4-A 5. As he received no reply, he

made an application to you, which was lodged on 2 July 1964, against the implied refusal of his request. That request was, furthermore, expressly rejected by a decision of the Secretary-General of the Councils of the same date.

In his reply Mr Müller modified his original conclusions. He asked principally to be classified in Grade A 3 as from 1 January 1962 or, alternatively, in Grade A 4-A 5 as shown in his application.

Three questions must be considered in turn:

- the identity of the defendant;
- the admissibility of the application, and possibly the modification of the original conclusions;
- the validity of Mr Müller's claims.

I

The application, which followed a complaint addressed to the Secretary-General of the Councils, being the appointing authority, was made against this same authority. The defendant raises the objection that, in deciding to establish the applicant, he acted on behalf of the Councils and that institutions alone can be defendant parties before the Court and not the departments which comprise them or the officials who direct those departments. Mr Müller should therefore have brought his application against the Councils of the EEC and of the EAEC.

The parties respectively relied in support of their arguments on your judgments in the Reynier and Erba cases (Joined Cases 79 and 82/63 of 9 June 1964, Rec. 1964, p. 511) and in the Huber case (Case 78/63 of 1 July

¹ - Translated from the French.

1964, Rec. 1964, p. 721). According to the latter judgment, which modifies the solution applied in those preceding it in order to adapt it to the case in question, when a decision terminating a contract is taken by the Committee of Chairman, which exercises within the Commission of the EEC the powers given to the appointing authority, the application must be brought against the Commission. Whatever the character of the organization which constitutes the Secretariat of the Councils—all that can be said of which is that it has not the character of a common institution within the meaning of the Treaty—the judgment in the Huber case appears to me to provide the solution. It is proper, correcting the statements in the application on this point, to regard it as brought against the Councils.

II

Although the defendant is willing to agree that this mistake as to capacity has no bearing on the regularity of the application, it maintains that the application is inadmissible. The original conclusions were out of time, from whatever standpoint one considers Mr Müllers position. The amending conclusions contained in the reply are contrary to Article 38 of the Rules of Procedure.

Let us reconsider these two assertions :

(1) The defendant recalls first that the position of the applicant was fixed in 1963 by several decisions: that of 17 January, integrating him under the Staff Regulations in Grade B 2, then, because he complained of not having been classified immediately in Grade B 1, decisions of 28 March and of 21 June 1963 rectifying his position to this effect. Against this last decision, which by implication denies him the right to Grade A 4 or A 5 and which necessarily affects him adversely in respect of his classification, Mr Müller did not appeal or make an administrative complaint. To which the applicant

replies with good reason that all this took place at a time when the definitions of the duties and powers attaching to each post were not yet known; the conformity of his classification to Article 5 of the Regulations and to Annex I was thus reserved, and it is not possible to raise against him the failure to complain against the decisions which entitled him to so much of his claims as he could put forward at that time.

But—and it is the second ground upon which the defendant relies—admitting that Mr Müller could not realize the adverse effect involved for him in the decision of 21 June 1963 until after the decision of the Councils adopting the definitions of duties and powers within the meaning of Article 5 (4) this last decision was brought to the knowledge of the staff on 15 October 1963 and the applicant does not dispute this date. The complaint which he submitted on 9 April 1964 was made after the expiration of the time-limit for appeals and the implied refusal with which he was met could not start time to run afresh (Case 34/59, *Elz*, 4 April 1960, Rec. 1960, first part, p. 215).

According to the judgment in the Maudet case (Joined Cases 20 and 21/63 of 19 March 1964, Rec. 1964, p. 213), integration comprises two phases: first establishment in the same grade and step which the person concerned had by implication obtained before the entry into force of the Staff Regulations, without its being necessary to take into account for this operation the possible differences between this grade and that which, according to Annex I and the definitions referred to in Article 5, should correspond to the post considering the duties belonging to it; then the regularization, according to the circumstances, of his position, in accordance with the principle of equivalence between duties and grade laid down in Annex I, when he is kept in a pre-existing post for which

the new Regulations lay down a higher grade.

Generally, integration is granted before the definitions of duties has been adopted, and even these definitions do not come into force until after the time-limit for appealing against the integration decision has expired. You agree that the publication of the table defining the duties amounts to a new fact which allows the officials to request the Commission to re-classify him in accordance with the new provisions thus brought into being (Joined Cases 109/63 and 13/64, *Charles Müller*, 16 December 1964, and by implication Case 10/64, *Jullien*, 24 February 1965).

But in these two cases, the person concerned had made a complaint through official channels less than three months after the publication of the table; here he waited six months; his complaint, says the defendant, is out of time.

Mr Müller raises a two-fold argument against this objection. He knew of course as from the publication of the table of definitions that his classification was not in accordance with the Staff Regulations, but that publication could not cause time to start to run in respect of the time-limit for appeal because there was not yet any act adversely affecting him within the meaning of Article 91. It is not possible to say this of the definitions of duties and the irregular nature of his classification came not from a decision taken by the Secretary-General but on the contrary from the absence of a decision leading to his reclassification. It was for the appointing authority to consider of its own motion which career bracket should be attributed to him in accordance with Annex I to the Staff Regulations and it was only because of the failure to act by that authority that on 9 April 1964 he submitted a complaint.

To say that the definitions of duties are not an act adversely affecting him

is somewhat of a play on words. If it amounts to a new fact—as you have decided—it allows the person concerned to ask for a revision of the position arising from the previous, and in principle unassailable, decision, but it constitutes at the same time the point of departure from which time begins to run in respect of an appeal, without its being necessary in principle to wait until the administrative authority has taken the initiative by making such a revision itself. Without wishing to confuse the administrative decision with the legal decision, there comes to mind by way of analogy the provision which restricts applications for revision of your judgments to a time-limit which runs from the date on which the applicant receives knowledge of the facts on which the application for revision is based.

Mr Müller maintains in the second place that no provision of the Staff Regulations restricts the possibility of making a complaint to a period of three months. The appointing authority, when required to pronounce on a complaint submitted under Article 90 of the Staff Regulations, can in no case reject it as being out of time. At the most it may refuse to consider a right demanded in respect of a period excluded by prescription; but in the present case no right is barred by prescription.

Prescription has nothing to do with this matter. And although a complaint can in fact be made at any time, it cannot extend the time-limit for an appeal to the Court unless it is itself made within the time-limit for such an appeal. That is what appears to me to follow from the judgment of 9 June 1964 in the *Marcillat (née Capitaine)* case (Case 69/63, Rec. 1964, p. 471). This restriction is wise, because without it an official could at any time revive the admissibility of an appeal by making new requests to the appointing authority. The liberality which you

have shown by stating that a new fact may allow a decision not open to attack to be re-opened has as its necessary counterpart that such possibility should be confined to a strict time-limit. I would certainly suggest that you should hold the complaint submitted on 9 March 1964 by Mr Richard Müller when the definitions of posts had been published on the previous 15 October was out of time and could not keep time running if the applicant were not able to take advantage of an action on the part of the administration to support the admissibility of his appeal.

He was notified on 8 October 1964 of a decision of the Secretary-General of the Councils dated 18 July 1964 classifying him, as well as other servants, in the post of Principal Assistant, Grade B 1, career bracket B 1, with the date of assignment as 1 January 1962. This is, according to him, the measure which finally ended the integration procedure, which fixed his administrative position and the notification of which he could have awaited in order to lodge an appeal. For the administration, on the contrary, this decision is limited to reproducing the previous position, as it emerged from the previous decisions, and is thus purely corroborative.

That does not appear to be quite correct. In fact, an undated letter, sent to the applicant on 26 June 1963, set out the calculation of his new salary—which did not amount in principle to a decision fixing his career bracket—in Grade B 2, Step 1, and mentioned in a note a subsequent communication relating to the 'new career bracket' which he would be recognized as having 'in accordance with the basic posts and corresponding career brackets'. Mr Müller was thus entailed to await this communication, which was made in the present case by the decision notified to him on 8 October 1964. This decision takes account, furthermore, of the decision of the Councils of 7 October 1963 adopting the definitions of duties.

I do not think that in these circumstances it is possible to raise the objection that Mr Müller's appeal is out of time.

(2) In his reply, the applicant amended his original conclusions asking principally to be classified in Grade A 3, a career bracket reserved to those 'engaged in specialized studies or supervisory work under the authority of a Director-General or a Director'. It was not in fact until after he had lodged his application that he learnt from a 'note to the staff' that he came directly under a Director-General who was both his immediate superior and his reporting officer.

The defendant raises against these new conclusions the provisions of Article 38 of the Rules of Procedure which require that conclusions should be included in the application, the right afforded by Article 42 of the same Rules, in certain conditions, to raise fresh issues in the course of proceedings being incapable of being extended to new conclusions. For my part I am inclined to consider that they are by implication contained in the application and that they are limited to extending the previous conclusions; what the person concerned asks in fact from the beginning is his reclassification under the provisions of the Staff Regulations.

I suggest therefore that you should regard both the conclusions in the application and those in the reply as admissible.

III

The validity of Mr Müller's claims raises quite a delicate question. By a decision of the Secretary-General of 1 November 1961, the applicant was entrusted with the supervision of expenditure with regard to both commitments to incur expenditure and orders to pay and then confirmed in that position after the entry into force on 1 January 1963 of the Financial Regulation concerning the drawing up and imple-

mentation of the separate parts of the budgets relating to the Councils of the European Communities; this Regulation is limited to making reference to the rules concerning the drawing up and implementation of the separate parts of the budgets relating to the common institutions. For the Secretariat-General of the Councils it is a matter of duties which must be classified in Grade B 1; the applicant considers on the contrary that they fall within Category A, and more exactly within career bracket A 3 or, failing that, A 4-A 5.

According to the Staff Regulations, classification must be made on the basis of Article 5, which defines Categories A and B in quite a general manner, of Annex I which establishes the basic posts and corresponding career brackets and lastly on the basis of the decision of the institution which adopts the definitions of the duties and powers attaching to each post. In fact, the application of this system comes up against two difficulties. However precise the definitions, they cannot avoid overlapping to a certain extent, so that the same duties or very similar duties may attach to posts graded on different levels. On the other hand, it is done in respect of the most common cases, which leads to some uncertainty when it is a matter of classifying more specialized duties, even those carried out by a single servant, which is the position of the financial comptroller in the Secretariat-General of the Councils.

The only method is thus to take into consideration, on the one hand, the definitions of duties adopted by the decision of the Councils and, on the other, the duties and powers of the financial comptroller such as are defined in the Financial Regulation, without pretending that the comparison will necessarily result in a complete solution.

One notices first of all that although, as opposed to Category B which cor-

responds to 'executive duties', Category A covers 'administrative and advisory duties', Article 5 does not mention supervisory duties, which may consequently apply, according to the circumstances, to either category. The criterion of the Staff Regulations is essentially that of the educational level or professional experience required for the exercise of the duties: university level or secondary level, according to whether it is a matter of Category A or B.

The definitions of duties adopted by the Councils includes for career bracket B 1 and the post of Principal Administrative Assistant the following two expressions: 'in charge of an administrative unit' and 'engaged in carrying out or supervising a body of operations, involving where appropriate the interpretation of Regulations and general instructions'.

As to careers in Category A, they involve either the direction of administrative units which vary according to their importance and the rank of the official who has authority over the heads of those units, or the carrying out of administrative or advisory duties. The concept of control re-appears there in various forms:

- for career bracket A 6-A 7 of Administrator 'engaged in planning, advisory and supervisory duties on the basis of general Directives';
- for career bracket A 4-A 5 of Principal Administrator 'carrying out planning, advisory or supervisory duties under the authority of a Director or a Head of Division';
- for career bracket A 3 of Head of Division 'engaged in specialized studies or supervisory work under the authority of a Director-General or a Director'.

I apologize for the dry nature of this table which is intended only to show the subtlety, if not the arbitrariness, of the distinctions which it lays down; the difficulty of extracting from it a result

which is not open to criticism is even more apparent upon a consideration of the powers granted to the applicant by the Financial Regulation.

Article 25 of the Financial Regulation provides that the Secretary-General of the Councils shall appoint a servant with the duty of supervising commitments to incur expenditure and orders to pay. In order to ensure the independence of this official, all the measures concerning his appointment, his promotion and his career in general are the subject of reasoned decisions which are sent to the Councils for their information.

In accordance with the general rules followed in the Member States, his supervision is exercised by his prior approval of commitments to incur expenditure and orders to pay issuing from the officials acting as authorizing officers.

In the first case the purpose of his approval is to certify the correctness of the budgetary heading, the availability of credits, the regularity and conformity of the expenditure with regard to the applicable provisions, and particularly of the budgets and regulations, as well as all acts done in execution of the Treaties and Regulations. If he refuses his approval, the last word belongs to the higher authority of the institution which can over-ride him by a reasoned decision, except when the availability of credits is in question.

The same rules apply *mutatis mutandis* to authorization of expenses.

Let us at once set aside certain arguments relied upon by Mr Müller to establish that the duties defined above belong to Category A. The independence which he enjoys and which ensures that he receives instructions from no superior in the exercise of his duties appears to me, in itself, to have no importance with regard to his classification. The same obtains in respect of the fact that the supervision is carried out by him over the acts of author-

izing officers who belong themselves to Category A.

On the other hand, although the applicant makes great efforts to make his duties correspond to the definition of one of those applicable to the basic posts, his analysis is never absolutely convincing because of the very special nature of his work; it is thus that he is led in turn to emphasize that he is not subject to any superior in carrying out his work, since he is put under the direct authority of a Director-General. It is no doubt necessary to take the problem a little higher.

The defendant, noting the silence of Article 5 on the point, emphasizes that supervisory duties may, according to the circumstances, fall within Category A or B, and that the definitions adopted by the Councils does not allow an *a priori* classification of the posts corresponding to activities of this nature in a fixed category. One may nevertheless ask oneself—without going into the discussion raised by the applicant on the relationship in German between the terms used in the French version of the definitions—whether the expression ‘supervising’ has the same meaning according to whether it is used in those definitions concerning Category A or B. For career bracket B 1, the phrase ‘engaged in carrying out or supervising a body of operations, involving where appropriate the interpretation of Regulations and general instructions’ may be compared to that employed for career bracket B 4-B 5: ‘(an official who) carries out general office work under supervision’. The comparison may give the impression that it is more a matter of detailed supervision of the proper execution of the tasks than real supervision of a legal nature. I think ultimately, however, that it is impossible to give a very different meaning to the same expression in the two parts of the table; it has thus to be admitted that the difference is more one of degree than of kind in cases where this

expression is employed in relation to Category A or B. A supervisory post is classified in one or the other category in accordance with the greater or lesser difficulty of the operations or their importance or the abilities required.

The defendant is right to recall on this subject that what differentiates categories, if not the career brackets and grades, is essentially the university or secondary educational level required, and to say that it is necessary to consider the particular characteristics of the post of financial comptroller from this point of view. It appears that the duties of the latter include for the greater part of the time purely formal supervision (concerning the correctness of the budgetary heading and the availability of credits for example) which belong to pure financial *technique*. This servant has no doubt to check the regularity and the conformity of the expenditure with regard to the provisions applicable to it, but the certification of regularity does not in principle require knowledge of a university level; as to the conformity of the expenditure with the rules governing it, checking is carried out in a *clearly defined* sphere, both in respect of the operations concerned and the rules to be applied. That does not necessitate having a general ability to form judgments which goes with a university education. Furthermore a financial comptroller, as distinct from the Audit Board, does not have to consider good financial management or the advisability of the expenditure.

This last point, despite what is maintained by the applicant, appears certain to me. Although Article 2 of the Financial Regulation lays down the principle that budget appropriations can be used only in accordance with principles of economy and good financial management, this entails a desire, and the financial comptroller is not in a position to ensure that it is observed; he cannot for example absolutely refuse

to allow the allocation of expenditure which he regards as useless or undesirable, if the credits are available.

On the other hand, the applicant is not entirely wrong when he gives a less restricted view than the Secretariat-General of the Councils of the extent and variety of the rules which a financial comptroller has to apply, particularly within the framework of decisions which concern the staff. It is the whole application of the Staff Regulations which comes into play, and if it is too much to say with him that the sphere of a financial comptroller has nothing in common with finance except the name, it is nevertheless true that it is a legal supervision which is exercised in financial matters.

What consequences should be deduced from this? We are dealing with one of those cases, unfortunately numerous in respect of classification, where no solution is really obvious, where two different decisions of the administration may be equally justified. It appears to me impossible to say that the duties of a financial comptroller at the Secretariat-General of the Councils *necessarily require* a university education, but it would be otherwise, in a larger institution where there might be an actual *department* of financial supervision, for one or more of those who would be at the head of that department. The margin of uncertainty which always exists in this sphere makes it impossible to state that in classifying the applicant in Category B, in the only career bracket which makes provision for supervisory duties, the administration has misunderstood the Staff Regulations. If you consider it so, you do not necessarily have to reply to the argument by which the applicant claims to show that he must be classified in career bracket A 3, or possibly in career bracket A 4-A 5.

If you consider on the other hand that the supervisory post falls within Category A, it would be very difficult to

say at what level in that category Mr Müller's post should be placed. He asks for Grade A 3 because he is put directly under the authority of a Director-General who is also his reporting officer and his immediate superior; but that does not appear to me to be decisive since the characteristic of a financial comptroller is not to be subject to instructions in the exercise of the duties entrusted to him by the rules; he is thus placed directly under the Director-General for the sake of order, and the classification cannot depend only upon a criterion of this nature. As to career brackets A 4-A 5 and A 6-A 7, they differ in that, in the first case, it is a matter of carrying out *some* supervision under the authority of a Director and, in the second, of carrying out *supervisory*

duties on the basis of general directives, without there being mention of the authority of the superior. It is this last career bracket which appears to me to correspond best to the duties of the applicant, the 'supervisory duties' appearing to me equivalent to the permanent, general and sedentary nature of his involvement, as opposed to 'supervision' which belongs more to missions of inspection in connexion with particular cases; but this is purely a matter of impression because, once more, it is practically impossible to find a rule which fits the applicant's position.

However that may be, it does not appear to me that by putting him in Grade B 1 the Secretariat of the Councils has misconstrued the Staff Regulations.

I am of the opinion that:

— Mr Richard Müller's application should be dismissed,

— and that the costs should be borne by both parties in accordance with Article 70 of the Rules of Procedure.