OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 1 JULY 1965[1]

Mr President,
Members of the Court,

Today I have to give my opinion on the admissibility of five appeals which were joined last month by an order dated 17 June and which were brought by officials who have all belonged to the Translation Department of the General Secretariat of the Councils for a long time, some longer than others. One of them, Mr Noack, even holds the position of Head of this Department.

Messrs Battin and Noack were previously established under the ECSC Staff Regulations of 1956, but Messrs Loebisch, Valerio and Van Royen had held their positions under the conditions of employment known as the 'Brussels contract'. When the 1962 Staff Regulations came into force the situation of the applicants was dealt with by various individual decisions, and the ones taken last, on 28 March 1963, promoted the first four persons mentioned above to Grade L/A 4, and Mr Noack to Grade L/A 3. These same decisions, which took effect from 1 January 1962, also fixed the step of each servant in the grade which was attributed to him.

Before these measures were taken the persons concerned did not fail to take an interest in what was going to happen to them, about which they had already been told at least unofficially. In October 1962 they had, without submitting a formal complaint, either expressed their 'anxiety' concerning the grading contemplated for them, or given an indication as to what grading seemed to them to be in line with their interpretation of the Staff Regulations, and more precisely of the provisions dealing specially with the Translation Department. But at that time the applicants did not submit to the competent authority any complaint against the decisions of 28 March 1963 concerning them, nor did they file any appeal with the Court.

Everything changed when your judgment of 7 July 1964 in Case 70/63, the *Collotti* case, which dealt with the position of the Head of the Language Department at the Court, was delivered. Complaints were then submitted to the Secretary-General of the Council. They expressly mentioned this judgment and they requested that the parties concerned be regraded retroactively as from 1 January 1962 on the basis of the principles established by you in that case. The rejections—express or implied depending on the case— of these complaints have given rise to the appeals before you under numbers 50, 51, 53, 54 and 57/64, which are drafted in practically identical terms.

You are called upon to give a decision on the admissibility of the appeals, without going into their substance, since the defendant argues that they are not admissible in view of the conditions laid down in Article 91 of the Rules of Procedure. Thus I shall limit my observations to this question alone, and they will lead me to advise you to allow the objection raised by the Secretariat General of the Councils.

The applicants fully expected that the objection of admissibility would be raised, so much so that the most important arguments are devoted to establishing that their applications are admissible. They are set out successively under three heads.

1. In the first place Article 90 of the Staff Regulations, which gives officials the right to submit a complaint to the appointing authority, does not subject this right to any time-limit. Furthermore, by virtue of Article 91, the fact

1 — Translated from the French.

that no decision is given in reply to a complaint constitutes a decision rejecting it against which an appeal to the Court may be made.

In this case complaints were submitted to the competent authority on various dates, of which the earliest is 22 July 1964. These complaints were made against the grading given to the persons concerned, and the appeals were lodged within the time-limit land down in Article 91 after these complaints had been rejected expressly or by implication. Therefore they are said to be admissible.

But, as appears from what the applicants themselves say, their complaints of 1964 were directed against a grading *given on 28 March 1963,* and at that time they did not oppose it in any way either by administrative procedures or by way of an appeal to the Court. Furthermore the defendant is right to point out that compliance with the time-limit laid down in Article 91 is not enough to make the appeal admissible. The implied or express decision taken when the complaint was made only confirmed the previous decision, even if it was taken after a new appraisal of the situation, and it cannot be accepted that Article 90 and 91 may be used as a vehicle for calling in issue again decisions which have long since become definitive. It is the decision of 28 March 1963 which should have been contested within the period laid down in respect of it.

2. There is a second argument, presented as a secondary point in the application, although during the oral proceedings you were told that it was the main argument in support of the admissibility of the appeals: it is said that your judgment in Case 70/63 constitutes a new factor requiring the defendant to reconsider its position on the meaning of various articles of the Staff Regulations. The refusal of the defendant to agree with the complaints submitted after this judgment took place is said to constitute a new decision which can be contested. And in support of this argument reference is made to your judgment in Joined Cases 42 and 49/59, SNUPAT (Rec. 1961, p. 98).

Thus the question which emerges is what significance is to be attached to your judgment in the appeal brought by Mr Colotti. Can other officials, who claim to be in the same legal or factual situation as Mr Collotti was, reopen the issue, submit new complaints and benefits from new time-limits in order to contest decisions taken concerning them at an earlier stage?

This question seems to me to have already been decided by your judgment of 17 June last in Case 43/64, the one brought by Richard Müller. In that judgment you said that apart from the parties the only persons concerned by the legal effects of a judgment of the Court annulling a measure are 'the persons directly affected by the measure which is annulled'. It is only as regards these persons that it can constitute a 'new factor'. As has been said, it is one thing to be directly affected by the measure annulled, and it is another to have an interest in the rule of law, the disregard of which has lead to the annulment of the disputed measure. It is only for the former, who are also the less numerous, that the judgment of the Court constitutes a new factor.

The applicants note that the judgment in Case 70/63 gave rise to numerous appeals made by officials of the various institutions. They further note that the institutions, which had consulted together in order to apply identical conditions when the Staff Regulations were published, did so again as soon as your judgment was known. All that is true and is to be explained by an elementary concern for good administration. It shows that the interpretation of paragraphs (1) and (4) of Article 102 of the Staff Regulations of the EEC and of the sole Article of Annex 10 to the Staff Regulations of the ECSC presented a problem which was common to the

Communities as a whole. However, this certainly does not mean that the officials of these Communities, to whom the disputed Article applies, are directly concerned by the individual measure grading Mr Collotti in a way which you have judged illegal. This fact is enough to prevent your judgment from opening a new time-limit for bringing appeals.

This solution is in accordance with principles which apply more or less absolutely in the legal systems of the various Member States. As the Secretariat-General of the Councils reminded you, in French law a judgment annulling a measure only affects the measure which is itself annulled, but not similar measures which the persons concerned have not contested in due time. Thus, for example, the annulling of steps taken to establish officials in one ministry does not require the administration to recommence such procedures taken in the same circumstances in other ministries and not contested within the limitation period. Italian law seems to apply analogous solutions. As for German law, while perhaps it is not yet definitively fixed, it at least tends to follow the same direction.

Moreover, the case-law from the judgment in the *Richard Müller* case does not seem to me to be irreconcilable in any way with the judgment in Joined Cases 42 and 49/59 (*SNUPAT* v *High Authority*) referred to by the applicants. In the latter judgment you decided that the grounds of your earlier judgment in which you refused to allow the undertaking concerned the exemption which it claimed should have led the High Authority to re-examine and to withdraw the exemptions which had been given to other undertakings whose circumstances were analogous. These cases were about the financial aspects of the equalization scheme, which was organized in such a way that an alteration to the contribution made by one of the participating undertakings had an automatic repercussion on the position of all the others. Quite apart from the fact that the parties were identical, it is the very nature of the equalization scheme which seems to me to justify the solution which you adopted then. And it is perfectly clear that this kind of close association is not to be found in the public service.

Finally, during the oral procedure the applicants have emphasized that it is your function, to an even greater extent than in the case of the highest courts in national legal systems, to contribute to forming a system of law which at Community level is still in its initial stages. It has been said that you deliver judgments of principle which create the law, and from this it has been deduced that these judgments constitute new factors for applicants and for the institutions alike.

Far be it from me, Members of the Court, to dream of belittling the importance of your rôle in the evolution of a system of law which has still to be worked out on many points. You have to give an interpretation of texts in order to apply them to the cases which are submitted to you. And once you have given an interpretation of a point it will normally be applied by the Communities in the future, when they are faced with a problem which is analogous to the one on which you have ruled. In this sense, and even though you are never bound by your prior decisions, it is indeed correct to say that your case-law has a creative effect, and that it helps to establish the law. However it establishes it for the future. In other words it does not allow any review of situations which have been finally settled by reason of the expiry of the period for bringing actions.

3. Finally the applicants appeal to the principle of national justice and to administrative practice.

The interpretation of the provisions of the Staff Regulations which led to the decisions of 28 March 1963 was given and accepted in good faith at the time

by the parties in question. Your judgment in Case 70/63 revealed that this interpretation was erroneous. The principle that relationships within an administration should be governed by good faith leads to an acceptance of the proposition that because of this there should be a new examination of the matters concerned, and that at the end of such examination fresh proceedings may perhaps be instituted. This is what the administration itself seems to accept in the cases where it has replied to the complaints submitted.

Moreover the practice both in national administrations and in those of the Community is said to give the benefit of a judicial decision, taken on a question of interpretation of Staff Regulations in favour of one servant, to those who are in the same position.

My reply to the above arguments is that here again we must revert to the principle that legal actions are kept in bounds by periods of limitation. The interpretation which the administration gives to legal provisions and on which it bases its decisions are only valid subject to the decision of the courts, but it is for the official who disputes this interpretation to come to the courts within the prescribed periods, failing which the decision becomes definitive. And I do not see why respect for good faith which should govern the relationships between the parties should frustrate expressly established procedural rules.

I will add that, contrary to the impression given by the applicants, when the administration replied to the complaints submitted to it in 1964 it expressly reserved the question of the admissibility of those complaints.

Finally, the argument which relies on a supposed administrative practice cannot succeed for two reasons: a practice cannot have the status of a rule of law with which compliance is obligatory and which can be pleaded before the courts. Furthermore the allegations of the applicants on this point do not seem corroborated by what I have been able to discover concerning the administrative case-law of the Member States.

I am therefore of the opinion that:

— the appeals in Cases 50/64, 51/64, 53/64, 54/64 and 57/64 should be dismissed as inadmissible;

— and that the parties should bear their own costs in accordance with the provisions laid down by Article 70 of the Rules of Procedure.