Having regard to the Treaty establishing the European Economic Community;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to the Staff Regulations of Officials of the European Communities;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT (First Chamber)

hereby:

1. **Dismisses the application as unfounded;**

2. **Orders both parties to bear their own costs.**

Mertens de Wilmars Donner Monaco

Delivered in open court in Luxembourg on 2 July 1969.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 18 JUNE 1969[1]

Mr President,
Members of the Court,

The matter on which you have today to give judgment relates to the extent of the financial rights available to Mr Pasetti following the decision to terminate his services on the conditions laid down by Article 4 of Regulation No 259/68 of the Council.

In January 1956 the applicant entered the Legal Department of the High Authority. In the same year the Staff Regulations of the ECSC became applicable to him and he was established in Grade A3. Because of this, as in the case of holders of posts in Grades A1 and A2, he could at any moment be retired in the interests of the service (Article 42 of the Staff Regulations); in that event he was entitled to a temporary allowance, then to a pension calculated under more advantageous conditions than those conferred by Article 34 on officials accorded non-active status following a reduction in personnel involving the abolition of posts.

This system was amended by Article 50

1 — Translated from the French.

of the Staff Regulations of Officials of the ECSC of 1962. Only those established in Grades A1 and A2 could in future be retired in the interests of the service and their pecuniary rights were approximated to those accorded by the new Staff Regulations to servants given non-active status whose position moreover appears less favourable than in 1956. Nevertheless, under Article 99 those officials in Grades A1 and A2 who were established before 1 January 1962 might in the case of their subsequent retirement opt for the benefit of provisions of Article 42 of the former Staff Regulations.

Following the merging of the administrations, Article 4 of Regulation No 259/68 of the Council authorized the Commission until 30 June 1968 to adopt measures terminating the service of officials *in all grades,* which I shall have to describe more precisely. Let me simply say that in general the financial scheme applied by Article 5 of the regulation to the servants thus dispensed with is not very different from that laid down by Article 50 of the Staff Regulations of 1962. But Article 7 makes a dual alteration to this system:

— paragraph (1) thereof gives the option of the provisions of Article 34 of the Staff Regulations of 1956 (the former financial system of non-active status) to the former officials of the ECSC except those who, before 1 January 1962, were established in Grades A1 and A2;

— those officials might, under paragraph (2), opt for the application of Article 42 of the Staff Regulations of 1956 (the former financial system of retirement).

On 14 March 1968 Mr Pasetti requested that a measure terminating his service 'in accordance with Article 4(1) of the regulation' should be adopted. This was effected by a decision of 21 May 1968, confirmed on 20 June, and by letter of 21 June he was asked to intimate his choice of the financial rights connected with the termination of his service.

This letter referred without further explanation to Article 7 of the regulation but it was sufficient to read that article to see that, apart from the application of Article 5 of the regulation, the sole possible option was that of Article 34 of the Staff Regulations of 1956 and not that of Article 42.

The applicant was not deceived; thus he asks you for the partial annulment of the decision of 21 May 1968, confirmed on 20 June, to the extent to which it prevents his pecuniary rights from being calculated on the basis of Article 42 of the Staff Regulations of 1956. No doubt this decision is only an implementation—and an exact implementation—of Article 7 of Regulation No 259/68, but the applicant considers this article to be illegal for two reasons: first, since it does not grant to the officials established in Grade A3 of the ECSC before 1 January 1962 the benefit of Article 42, it infringes their vested rights; secondly, by refusing them what is granted to the officials established in Grades A1 and A2 before the said date, it discriminates between them and violates the principle of impartial administration. If this argument is well founded, it necessarily entails the partial illegality of the individual decision concerning him.

The Commission and the Council, which is intervening to defend its regulation, regard Mr Pasetti's application as inadmissible or at all events unfounded.

But before broaching the subtle and full arguments expounded by the parties I think it would be helpful to take a closer look at Regulation No 259/68 and to compare the system which it sets up with those appearing in the Staff Regulations; this will perhaps allow us to return to the essential points of a discussion which has had a tendency to digress as the proceedings progressed.

The new system is peculiar to the Commission and is temporary; while it applies, that is until 30 June 1968, the authorities of that institution are pre-

cluded from taking decisions regarding non-active status or retirement on the conditions laid down by the Staff Regulations.

The termination of service which it institutes may effect officials in all grades, but the conditions under which it occurs differ according to whether it concerns officials in Grades A1 and A2 or others. With regard to the former, the Commission has a discretion which it must nevertheless exercise objectively (*Reinarz* v *Commission,* Case 17/68, 6 May 1968 [1969] E.C.R.), and this therefore resembles the system of retirement laid down by the Staff Regulations.

On the other hand, the system applied to officials in other grades, including those in Grade A3, includes a series of factors which previously characterized the non-active status procedure: the obligation to reduce the number of posts available in the detailed list of posts, the intervention of the Joint Committee and the establishment of criteria of assessment in the selection of servants to whom the measure applies. Moreover those servants are entitled to opt between termination of service and non-active status which leaves open the possibility of a return to the service.

It will be noted that, as in the system of non-active status provided for by the Staff Regulations, account may be taken, if the interests of the service allow, of officials' requests for a measure terminating their services. But it is not certain, on the basis of the provision (for this is perhaps not how it has been applied), that the volunteer may opt for non-active status. From all these factors it seems to me clear that Regulation No 259/68 sets up a system which taken as a whole cannot quite be expressed in terms of any of the methods of leaving the service provided for in the Staff Regulations and which may be explained by the temporary and exceptional requirements which had to be met. It had to rationalize its departments and reduce the number of posts; an attempt was made to construct a system giving both the Commission and its servants very varied oportunities according to the varying situations. From the point of view of the choice of the servants leaving the service, this system combines a discretion, unilateral but regulated selection and voluntary departure. From the point of view of the financial system provided for those servants it also affords a range of facilities wide enough to differ according to the age or seniority in service. This system forms an entity and must be evaluated as a whole.

II

In the light of those general observations I shall first of all consider the pleas of inadmissibility put forward by the Commission and the Council with regard to Mr Pasetti's application.

1. The Commission maintains first of all that the application is inadmissible because the contested measure cannot adversely affect the applicant. The applicant himself asked for his services to be terminated 'in accordance with Article 4(1) of Regulation No 259/68 of the Council' and that provision lays down that the measures in question to be adopted 'in manner provided hereinafter', which is clarified in the succeeding articles, in particular with regard to their financial effects. Mr Pasetti therefore requested the application of all the provisions of the regulation and did not qualify his request with any reservation; the entire decision taken was what he wanted and the Commission invokes the maxim '*volenti non fit injuria*'.

Mr Pasetti replies to this argument by relying on the conditions under which he made his request on a standard form given him before he was able to acquaint himself with the provisions of the regulation; this seems to me of little importance in the present case. He alleges that his request may not be interpreted as a renunciation in advance of the right to make an application against a decision

yet to be taken, which seems to me more serious. But what prevents me above all from accepting the plea of inadmissibility put forward by the Commission is that the maxim *'volenti non fit injuria'* appears to me to have no place in the relationship between the Community and its servants, above all since this relationship, to which I shall shortly return, is governed by the Staff Regulations and not by contract. The administration is bound to observe the law. If the decision taken by it contains a defect such as to render it illegal, which only consideration of the substance can reveal, it must be possible to make an application against it even if the decision was taken at the request of the official concerned.

2. Nor am I favourably inclined towards two other pleas of inadmissibility put forward by the Commission. One is based on the fact that, since the system made available to the applicant by Regulation No 259/68 is more favourable than the previous system, Mr Pasetti has no interest in contesting it. The other is that the measure set up by the regulation is distinct from the retirement provided for in the Staff Regulations and which alone conferred on the official the right to benefit from Article 42 of the Regulations of 1956. As the Commission itself admits, this line of argument is strictly related to the substance of the case. In fact a general and abstract appraisal cannot be made of the financial rights which the official derives from the application of a particular system; according to his age and seniority or other factors, a servant could indeed benefit from a particular system and it does not seem possible for this largely subjective factor to influence the admissibility of the application. On the other hand, the difference must be shown between the 'retirement' of the Staff Regulations and the 'termination of service' of Regulation No 259/68 in order to establish that Article 42 of the Staff Regulations of 1956 applies to the first of those measures and not to the second; whatever the view I have taken above, this is not evident at first sight.

3. The Council in intervening adopts another position in order to cast doubts on the admissibility of Mr Pasetti's application.

The applicant requests that Article 7 of the regulation be declared inapplicable to his case; but has he an interest in so doing?

In fact if the two paragraphs of Article 7 are declared inapplicable to him he loses the benefit of the provisions relating to non-active status in force before 1962, without obtaining the benefit which he claims from the provisions relating to retirement in force before that date.

I think that Mr Pasetti's application should be interpreted as relying on the illegality of Article 7(2), and therefore on its inapplicability to his case, *to the extent to which it does not cover the officials established in Grade A3 before 1962.* If this illegality is proved, and this still concerns the substance of the case, the decision taken by the Commission should be annulled and the execution of your judgment would entail an obligation on the Commission to take a new decision taking into account the rights recognized to Mr Pasetti by the Court. This implies that the applicant certainly has an interest, under the conditions and within the limits which I have just indicated, in disputing the legality of Article 7 of the regulation and consequently of the individual decision concerning him. His application thus seems to me admissible.

III

But is it well founded?

I should like to say from the outset that in my view the reply is in the negative.

1. The first ground of complaint is based on the infringement of the applicant's vested rights on the basis of Article 42 of the Staff Regulations of 1956. It

has been presented in two slightly differing forms in the course of the proceedings.

(a) In order to support it, the application is based solely on the fact that Article 7 of Regulation No 259/68 only indirectly recognizes the existence of this right as it expressly reserves the vested rights of officials in Grades A1 and A2 under Article 42; it is wrong in failing to take into account the fact that the same right has vested in officials in Grades A3 on the basis of the same article, since that article applied to both groups.

The Commission counters the argument thus put forward with the rule that a right to maintain advantages recognized by staff regulations only occurs if all the facts establishing the right occurred whilst those regulations were in force. More precisely, the right to pecuniary benefits on retirement only crystallize at the moment of retirement. When Mr Pasetti's services were terminated, Article 42 of the Staff Regulations of 1956 had long since ceased to be in force.

This view which, as the defendant recalls by means of a number of quotations, is that the public administrative law of the Member States is the logical consequence of the view that the official's relationship is one governed not by contract but by regulations, since the Staff Regulations are in fact a body of rules which may always be amended by the competent authority. This view was defended by Mr Advocate-General Roemer in his opinion in connexion with the case of *Boursin v High Authority* (1 December 1964, Case 102/63 [1964] E.C.R. 691).

This, however, appears archaic to the applicant who considers that it is only conceivable 'according to the outmoded view that the legislature is all-powerful' and wishes to set against it, in a sphere which appears to him closer to that which you are considering, the solutions adopted by the administrative tribunal of the United Nations Organization to determine a whole series of inviolable rights for international civil servants. This claim is however irrelevant for two reasons. First, as Mr Advocate-General Roemer pointed out in his abovementioned opinion, international administrative law is above all a system created by convention with contracts of employment the duration of which is generally strictly limited whilst the officials of the Communities come under a system of staff regulations. It is therefore normal in this case to keep to principles analogous to those adopted in national public administrations. It certainly seems that the case-law of international administrative tribunals tends more and more to recognize an extensive power to the institution to alter the legal position of its contractual servants. Even in those organizations there is a body of rules or staff regulations the provisions of which are repeated in individual contracts and only certain of those provisions may really be considered as contractual and thus incapable of being altered. In its intervention the Council cited as an example Judgment No 61, *Lindsey,* of 4 September 1962, of the Administrative Tribunal of the International Labour Organization which made this distinction very clearly.

(b) Leaving the abstract sphere and the sphere of principles, the applicant in his reply and more so in the oral procedure endeavours to discover a connexion or even an identical nature between Regulation No 259/68 and the previous provision which would justify the application of that provision. This is thus a little different from vested rights.

The Commission maintains that the Staff Regulations of 1962 ended both the right of the administration compulsorily to retire officials in Grade A3 and at the same time the right of those officials to benefit from Article 42 of the Staff Regulations of 1956, and although Regulation No 259/68 temporarily applies to those officials as to those in all grades a system of termination of service, this

system, as I have shown, differs from the preceding one.

In order to rebut this argument the applicant first of all points out that Article 4 of the regulation justifies the measures adopted as being in 'the interests of the service' which forms the basis for retirement; it is therefore to this alone that reference is made since non-active status only constitutes an option. He adds that this article speaks of measures terminating the service of officials '*provided for in Article 47 of the Staff Regulations*'. If reference is made to this latter article which, moreover, appears in a chapter entitled 'Termination of Service', there is a whole series of possibilities unrelated to the present situation, such as resignation, dismissal for incompetence and also at (c) retirement in the interests of the service which is clarified in Article 50. The chain is thus complete: by referring to Article 47 the regulation simply refers to Article 50 which thus becomes applicable to officials in Grade A3 excluded from the preceding system and there are no grounds for excluding those of them who were established under the ECSC system before 1961 from the benefit of Article 42 of the Staff Regulations of 1956 for the same reasons as the officials in Grades A1 and A2 in the same situation.

This seems to me a very artificial interpretation. In the first place, Article 4 also justifies the measures adopted as meeting 'requirements resulting from a reduction in the number of posts', which is the standard reason for non-active status. It might also be wondered why the regulation did not refer directly to Article 50 instead of making a detour by way of Article 47 and I think that, if it did not do so, it was precisely to exclude the applicant's pretended assimilation. Furthermore, amongst the examples of termination of service listed in Article 47 there is one which the applicant has forgotten: compulsory resignation; this is the measure which severs the link with the service when the period of non-active status has expired without reinstatement (Article 41(4)). There may thus be seen in the general reference employed by Regulation No 259/68 an indication that it envisages various forms of termination of service. More precisely, as I have already said, the regulation creates an autonomous system which bears the stamp of several previous types of measure and which cannot be entirely reduced to any of them. It therefore seems to me that we must reject the applicant's attempt to justify his vested rights by a sort of assimilation between the provision of 1968 and that of 1962.

2. The second ground of complaint is based on the difference in treatment accorded to the officials of the ECSC in Grade A3 established before 1962 in comparison with their fellows in Grades A1 and A2 satisfying the same conditions; this disparity violates the basic principle of impartial administration. As one can see, this ground of complaint is not very different from the preceding one and seems to me no better founded. I shall thus be very brief in this connexion.

It may be noted in the first place, as the Council's Agent does in his pleadings, that the provisions of 1968 are restricted to maintaining the respective financial positions of the various categories of officials in the event of their leaving the service. Since the servants of the ECSC who were established in Grades A1 and A2 before 1962 had until 1968 a more favourable system, the Council considered it expedient, to maintain this system without extending it to others, but in so doing it did not recognize real vested rights and created no discrimination since the position at the date when the regulation entered into force was not the same for the various categories of servants. It is from the Staff Regulations of 1962 that the respective positions of officials in Grades A1 and A2 on the one hand and those in Grade A3 on the other have differed, but for reasons which I have indicated at the outset and which have

no influence on the legality of the solution adopted by Regulation No 259/68. Secondly, it is precisely by following the applicant's reasoning that discrimination operating in favour of the category of servants in question would be caused. Discrimination in relation to the officials in Grades A1 and A2 who, having the same financial treatment, would have much reduced procedural guarantees. Discrimination in relation to the other officials of the ECSC in service before 1962 but having a grade lower than A3 who would have a less advantageous financial system without increased guarantees. Those remarks seem to me sufficient to reject this ground of complaint.

I am of the opinion that:

— Mr Pasetti's application should be dismissed as unfounded; and

— that a ruling should be given as to costs pursuant to Article 70 of the Rules of Procedure.