2. **Orders the Commission to bear its own costs and half the costs of the applicant.**

Pescatore Monaco Kutscher

Delivered in open court in Luxembourg on 30 May 1973.

A. Van Houtte
Registrar

P. Pescatore
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 13 DECEMBER 1972 [1]

Mr President,
Members of the Court,

I — The facts

After having worked for several years as a freelance proof-reader for the European Communities, Mr François Meganck was recruited as a temporary agent on 1 June 1970 at the Office for Official Publications of the Communities; he was established in the post of proof-reader on 1 December 1971.

Mr Meganck had a minor daughter dependent on him who in June 1970 was still proceeding with her studies. At the time of his recruitment he therefore benefited under the system of allowances in favour of heads of household laid down by Annex VII of the Staff Regulations.

This system comprises:

— the head of household allowance (Article 1 (1)) equal to 5 % of basic salary;

— the dependent child allowance and the education allowance which are fixed sums.

Finally, he received a daily subsistence allowance the benefit of which is accorded, by virtue of Article 10 (section 1) of Annex VII for a period of 12 months for officials who prove that they cannot continue to reside at home but who have not moved to the place of their allocation. The rate of this daily subsistence allowance varies according to the family situation. Mr Meganck benefited from the rate laid down for heads of household in accordance with his grade.

1 — Translated from the French.

However, since his daughter interrupted her studies at the end of the 1969-1970 school year in order to take up paid employment, Mr Meganck brought this fact to the knowledge of the Administration in the following October. By a memorandum of 25 November 1970 the Personnel Department informed him that the grant to him of the head of household allowance as well as the dependent child allowance and the education allowance had been cancelled as from 1 July 1970. As to the daily subsistence allowance, this was not mentioned in that memorandum. In fact Mr Meganck continued to be entitled thereto but at the lower rate laid down for unmarried officials.

Following this memorandum and in accordance with what he tells us was a verbal arrangement between him and a representative of the Personnel Department, Mr Meganck repaid a sum which he believed corresponded to the allowances incorrectly received in respect of the months of July to September 1970. Furthermore, he continued to receive his remuneration, apparently without verifying his salary slips. The fact remains that approximately 15 months later, at the beginning of February 1972, he was notified verbally that his financial position had not been correctly adjusted; that, although the dependent child allowance and the education allowance had in fact been cancelled, the Administration had continued to pay him in error the head of household allowance; and that, furthermore, the amount for the daily subsistence allowance had not been reduced to the rate laid down for unmarried officials.

By memorandum of 10 March 1972, the head of the Personnel Department confirmed these facts and decided to apply to Mr Meganck the provisions of Article 85 of the Staff Regulations, under the terms of which 'any sum overpaid shall be recovered if the recipient was aware that there was no due reason for the payment or if the fact of the overpayment was patently such that he could not have been unaware of it' and informed him that the amount overpaid, calculated at the total amount of 69 519 Belgian francs would be recovered by way of deduction from future salaries.

Mr Meganck did not even wait to receive this memorandum before approaching the President of the Commission on 23 February 1972, in accordance with Article 90 of the Staff Regulations, with a complaint that Article 85 should not be applied to him and that the sums paid in error should be retained by him.

As no reply was made to this complaint, save for a simple acknowledgement of receipt, an implied decision of rejection resulted from the silence for two months on the part of the Commission. By virtue of Article 91 of the Staff Regulations then in force, Mr Meganck had a period of two months to appeal to your Court. This he did by introducing an appeal on 22 June 1972 requesting that you should rule that the sums incorrectly received by him do not give rise to recovery as the conditions for the application of Article 85 are not satisfied in this case.

This appeal is admissible.

II — Question of competence of the author of the contested act

Members of the Court, it is necessary to deal with a question which was raised only at the hearing. Mr Meganck's representative, in fact, verbally invoked a ground based on lack of competence of the head of the Personnel Department at Luxembourg to take a decision for the recovery of the amount incorrectly received in pursuance of Article 85 of the Staff Regulations. He maintained that by virtue of a decision of the Commission relating to 'the exercise of the powers devolving upon the appointing authority', the Assistant Director-General of Administration was alone competent to take such a decision concerning officials of the Commission at Luxembourg.

In the first place, is the applicant entitled to invoke this ground during the course of the oral procedure when he did not do so in his application nor in his reply during the written phase of the proceedings?

By virtue of Article 38 of your Rules of Procedure, the application initiating the proceedings must contain, in particular, '(c) the subject matter of the dispute and a brief statement of the grounds on which the application is based'.

In other words, the application must be defined, and the area of discussion of the dispute limited, by the submissions as well as the issues raised, as from the commencement of the written procedure. In fact, although Article 42 of the Rules of Procedure permits a party still to indicate further evidence in reply or rejoinder, it prohibits — paragraph 2 — a *fresh issue* from being raised in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the written procedure.

It is only in such a case that the President may, even after the expiry of the normal procedural time limits, allow the other party time to answer on the fresh issue.

Even more so is it impossible for such issues to be raised for the first time during the course of the oral procedure.

These provisions are justified by the fact that the admissibility of the application to the Court is subject to observance of a strict period and of considerations of public interest. To allow an applicant to invoke certain issues of law only in his reply, event at the hearing, would result in denying such a nature to the time limit for the application.

Finally, it is also not possible to allow that, when the written procedure is closed and the details of the hearing are established by the report at the hearing, these details be altered by the verbal enumeration of fresh issues. This would adversely affect the regular course of the procedure.

With this in mind, you decided that it was advisable to make a distinction between 'the introduction of fresh issues in the course of the procedure and the introduction of certain *fresh arguments* advanced in support of issues already contained in the application'. You ruled that there was no objection to the Court examining those arguments. (Judgment of 13 June 1958, Case 2/57, Rec. 1958, p. 146).

You also admitted that fresh grounds for complaint could be raised for the first time by the applicant in his reply provided that such grounds for complaint were raised solely in connection with an issue of misuse of power raised in the application. (Judgment of 10 May 1960, Case 19/58, Rec. 1960, p. 496).

On the other hand, you rejected an issue arising from the general principle governing the legality of the withdrawal of administrative acts on the ground that the reason for cancellation so stated had not been referred to either directly or impliedly in the initiating application and that it did not constitute an extension of an issue already stated, but an entirely fresh issue. (Judgment of 15 December 1961, Joined Cases 19 and 21/60, Rec. 1961, p. 589).

However, this case law cannot be applied to all issues capable of being invoked. There are those which, by their nature, are concerned with matters of public interest in the sense that they bring into question matters of such importance that the court 'would disregard the rule of law which it has the duty of seeing observed, if the decision which it gives does not take account thereof' (R. Odent, Cours de Contentieux administratif).

From this it follows that not only can an issue based on public policy be raised at any moment but also that it is incumbent on the court to raise it of its own motion, if it is not raised by the applicant.

Your case law offers examples of this concept. Thus, you judged that lack of

reasoning in a decision emanating from the High Authority can and must be raised by the Court of its own motion. (Judgment of 20 March 1959, Case 18/57, Rec. 1959, p. 114), and that the question whether the forms of substance imposed by the ECSC Treaty for the preparation of the decisions in question in the case were observed, *must be* examined by the Court (Judgment of 21 March 1955, Case 6/54, Rec. 1955, p. 220). You also decided, when the defendant asked you to rule as inadmissible an issue based on the fact that the opinion of a consultative body had not been obtained in accordance with the statutory provisions on the ground that thin issue did not appear in the application, to examine the same of your own motion (Judgment of 21 December 1951, Case 2/54, Rec. 1955, p. 99).

Now, there is no doubt that the issues relating to competence are a matter of public interest, whether it is the jurisdiction of a court or the competence of administrative authorities which is in question. Any court — and this is also the case in respect of your Court — must consider of its own motion whether it has jurisdiction to hear the actions brought before it (Judgment of 17 February 1970, Commission v Italy, Case 31/69, Rec. 1970, p. 33). As to the division between the administrative authorities of the power to take decisions which are directly enforceable and thereby to make use of a prerogative of public power, this essentially is a matter of public interest.

Accordingly, the applicant is permitted to introduce, even belatedly, an issue relating to lack of competence which, in any event, it is incumbent on you to consider of your own motion.

It is now appropriate to establish whether the head of the Personnel Department was or was not competent to institute in Mr Meganck's case proceedings for the recovery of the amount incorrectly received, in accordance with the terms of Article 85 of the Regulations.

In principle, decisions relating to the individual position of agents governed by those Regulations must issue from 'the appointing authority'. This is the rule arising from Articles 1 and 2 of the Regulations which is applied by many other provisions of those Regulations whether is it a question, to quote examples only, of the allocation of the official (Article 7), of the appointment of the selection boards for recruitment competitons (Article 13), secondment (Article 38), non-active status (Article 41), and decisions relating to termination of service (Articles 38 to 54).

In this case, that authority is the Commission.

However, it is quite clear that the Commission, as also the other institutions, cannot itself take all the individual measures relating to the management of staff, the strength of which is several thousand agents spread over several places of employment. It is essential that the power of decision be decentralized. This is why Article 2 of the Staff Regulations directs that: 'each institution shall determine who within it shall exercise the powers conferred by these Staff Regulations on the appointing authority'.

In accordance with this provision, the Commission allocated the powers of decision in respect of its officials by a Decision dated 26 February 1971.

This it did by way of exhaustive enumeration of the powers conferred by the Regulations, reserving to itself those which seemed to it to have particular importance. They appear in Article 2 of the Decision of 26 February 1971. It then granted certain powers to the member of the Commission entrusted with administrative matters (Article 3). Finally, it divided other powers of management, according to their nature, and in accordance with declining order of importance of the authorities concerned, between the Director-General of Personnel and General Administration (Article 4), the Assistant Director-General at Luxembourg for the officials engaged there, and either the Director of

Personnel or the Director of Finance in respect of the other officials (Articles 5 and 6); finally, the heads of the Directorate-General of Personnel and General Administration (Article 7).

But it also conferred powers of management on the Director of the Office for Official Publications of the European Communities in respect of officials allocated to that department. As you know from a previous case (19/70, Almini), that Office was set up by Article 8 of a Decision of the representatives of the governments of the Member States annexed to the Merger Treaty of 1965. The Office was organized by a Decision of 16 January 1969 which is, in reality, an agreement between the Presidents of the various Institutions. The Office is a technical service common to the Institutions; it has a certain automony in its functioning but its management is a matter for the Commission.

With regard to the power to decide upon the recovery of sums incorrectly received by officials, an examination of the legislative Decision of 26 February 1971, still in force, enables one to ascertain:

— on the one hand, that the heads of the Personnel Department are not empowered to exercise that power; the implementation of Article 85 of the Regulations does not appear in the exclusive enumeration of their powers in Article 7 of the Decision of 26 February 1971;

— on the other hand, that in principle it is the Assistant Director-General of Personnel at Luxembourg, who is competent to deal with officials allocated to that town;

— that, nevertheless, in the case of officials allocated to the Office for Official Publications of the Communities, it is the Director of that department who has the power to decide upon the recovery of sums incorrectly received.

Therefore, although the head of the Personnel Department who signed the disputed decision certainly lacked competence, the applicant is incorrect in asserting that the Assistant Director-General alone could apply Article 85 to him, but this error seems to us to have no bearing on the outcome of the dispute as, if you must find that in this case it was for the Director of the Office for Official Publications to exercise this power with regard to an official allocated to his department, the issue of the lack of competence of the author of the contested act is nevertheless well-founded and it appears that the disputed decision must be annulled.

However, are we not faced here with a dispute in which the Court has unlimited jurisdiction by virtue of Article 91 of the Regulations, and would it not be appropriate to examine the case as to the merits in order to give a decision on the applicant's submissions so that you may judge whether he is entitled to retain the sums in dispute?

We do not think so. In fact, in this area of the recovery of sums incorrectly paid, the Administration does not have binding competence. It is not under an obligation to require the return of sums received, even improperly. Article 5, at least in its wording at the time when the contested decision was taken, granted it an option and determined the conditions for the exercise thereof, it left the Administration with the power to forego the exercise of this option, even for reasons of pure expediency.

Therefore, annulment based on the lack of competence of the author of the act has the result of restoring the *status quo* and must lead the legally competent authority to undertake a fresh examination of the question and to take a fresh decision.

By giving a decision *here and now* as to the merits, that is by settling the question whether the implementation of Article 85 of the Regulations was in this case legally possible, you would be taking the place of the Administration itself.

Therefore, whatever doubts one might have on the applicant's arguments, it

seems to us to be essential that you restrict yourself to annulling the disputed decision.

We shall not express our opinion as to the merits for the same reason.

If the competent authority again decides to apply Article 85 of the Regulations to Mr Meganck, it will fall to him to contest this decision if necessary. Moreover, if he thought them well-founded he could do so by raising issues other than those which he has raised in the present appeal.

We are therefore of the opinion

— that the decision contained in the memorandum from the head of the Personnel Department dated 10 March 1972 should be annulled, and

— that the entire costs of the proceedings be borne by the Commission.