THE COURT (Second Chamber)

hereby:

1. **Dismisses the application;**

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

Mackenzie Stuart Kutscher Sørensen

Delivered in open court in Luxembourg on 19 March 1975.

A. Van Houtte
Registrar

A. J. Mackenzie Stuart
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 25 FEBRUARY 1975 [1]

Mr President,
Members of the Court,

Mr Fabrizio Gillet, who was engaged by the High Authority of the Coal and Steel Community in 1962, had a brilliant although relatively short career. He commenced his duties on 15 January 1962 as a probationer at a senior level, as he belonged to Category A and held Grade 4, Step 2. He was established on the following 15 July, and finally reached Grade A1 with the duties of a director in the Commission.

On the eve of the accession of the three new Member States of the Communities on 1 January 1973, the Council decided by Regulation No 2530 of 4 December 1972 that 'special measures . . . should be adopted on a temporary basis' to encourage the recruitment of nationals of those States to Community institutions. Correspondingly it took the necessary measures for reducing numbers in the higher grades in order to free certain posts.

Thus Article 2 of the regulation provides that:

'Until 30 June 1973, the Institutions . . . are authorized, in the interests of the service and in order to meet requirements resulting from the accession to the . . . Communities of new Member States, to adopt for their officials in Grades A1 to A5 inclusive measures terminating the service of officials, as provided for in Article 47 of the Staff Regulations . . .'.

1 — Translated from the French.

Article 3 (1) of the same regulation lays down the conditions on which an official subject to a measure terminating his service shall be entitled:

— for a period of a year, to a monthly allowance equal to his last remuneration, and

— for a period fixed in accordance with his age and length of service to a decreasing allowance fixed as a percentage of his basic salary.

That allowance ceases to be paid when the official concerned reaches the age of 65.

According to paragraph 3 of the same article, the allowance for termination of service or compulsory retirement is weighted, in accordance with Article 82 (1) of the Staff Regulations, for the territory of the Member State in which the recipient provides proof of residence.

That allowance is expressed in Belgian francs and is paid in the currency of the State of residence. But it is calculated on the basis of the parities laid down in the third paragraph of Article 63 of the Staff Regulations, that is to say, of the parities accepted by the International Monetary Fund which were in force on 1 January 1965.

Mr Gillet requested the benefit of these provisions. His application for retirement was accepted by the Commission. But it is in respect of the fixing of the amount of the allowance which is due to him that the applicant finds himself in disagreement with the Directorate-General of Personnel which applied to him the methods of calculation fixed by Articles 2 and 3 of the regulation.

Article 5 of the same regulation institutes a special scheme for the benefit of former officials of the Coal and Steel Community. The most favourable conditions are, under the second paragraph of this article, reserved for officials who before 1 January 1962 held Grade A1 or A2 posts. Their pecuniary rights are determined on the basis of the provisions of Article 42 of the former Staff Regulations of the ECSC of 1956.

As to those who, although occupying a post in the service of the High Authority, did not hold one of those grades before 1 January 1962, their pecuniary rights are fixed on the basis of Article 34 of the former Staff Regulations and of Article 50 of the Rules and Regulations of the ECSC. But in both cases the payment of allowances in a currency other than the Belgian franc remains subject to the rule laid down by Article 63 of the Staff Regulations which I have already mentioned.

Disputing the method of calculation of the retirement allowance which was paid to him, Mr Gillet claimed, as a former official of the Coal and Steel Community, the benefit of the most favourable scheme by reference to Article 42 of the former Staff Regulations.

In the alternative he asked at least that Article 34 of those Regulations be applied to him.

In the second place, he disputed the application of Article 63 of the Staff Regulations currently in force; in his opinion, the allowance for termination of service ought to be paid to him in Italian lire on the basis of the real rate of exchange at the dates of payment and not under the old monetary parity of 1965.

By a memorandum of 7 February 1974 the Commission partially accepted the first of these requests, as it agreed to the application of Article 34 of the former Staff Regulations for fixing the amount of the allowance. But the applicant was not satisfied by that sollution. By the application which he has made to the Court he seeks the annulment of the decision contained in the Commission's memorandum. He sets out two heads of conclusions.

First, he claims that the refusal to allow him the benefit of Article 42 of the former Staff Regulations of the ECSC is illegal. Secondly, he persists in disputing the payment of his allowance in Italian lire on the basis of the official parities in force on 1 January 1965.

He raises an objection of illegality in respect of Article 5 (1) and (2) of Regulation No 2530/72, on the ground that those provisions discriminate between the former officials of the Coal and Steel Community according to whether they were serving before or after 1 January 1962.

Lastly, he also calls in question the legality of Article 99 of the Staff Regulations of the ECSC adopted in 1962, which include transitional provisions applicable to certain members of its staff.

Drawing the inferences of that argument, he asks the Court to exercise its unlimited jurisdiction in proceedings concerning Community officials to determine the amount of the allowance on the bases insisted on by him and to do likewise in respect of the pension which he will be able subsequently to claim.

On the first point, I have no hesitation in suggesting that the Court should reject the conclusions of the application. Mr Gillet is in fact taking advantage first of the disparity of treatment which Article 5 of Regulation No 2530/72 has created between the former officials of the ECSC in relation to their date of entry into the service; in the second place, he raises an issue based on the contractual rights acquired by him by reason of his promotion after 1962 to Grade A1 which he held at the time of the termination of his service.

It is precisely on this ground that the applicant's argument appears to me to be unacceptable and is furthermore contradicted by the firmly established case-law of the Court based upon the nature of the legal relationship between officials and the Community institutions. As I have had occasion to mention in the *Reinarz* and *Becker* cases (Joined Cases 177/73 and 5/74, and Case 10/74 [1974] ECR 819 and 867), this relationship has no contractual basis. It is based purely upon the Staff Regulations.

The Community authority is therefore entitled at any time to amend the provisions of the Regulations in any way which it considers to be in accordance with the interest of the service, on condition that such amendments are adopted by the competent authority, namely the Council, that they do not have retroactive effect to the detriment of servants and, finally, that they are not vitiated by misuse of powers. As to the officials, they cannot take advantage of vested rights except where the event giving rise to such rights took place under the scheme of the Regulations before the amendment adopted by the competent authority.

In the present case, it is common ground that the applicant, who entered the service as a probationer in Grade A4 only on 15 January 1962 and was not, furthermore, established until 15 July 1962, cannot take advantage of the provisions of Article 42 of the former Staff Regulations of the ECSC of 1956, the benefit of which is expressly reserved under Article 5 of Regulation No 2530/72 for the officials who prior to 1 January 1962 already held Grade A1 or A2 posts. Neither can he take advantage of the transitional provisions laid down in Article 99 of the new Staff Regulations of 1962 which expressly refer to this requirement of grade held on 31 December 1961, in order to benefit from the pecuniary rights provided for by Article 42 of the former Staff Regulations.

Let me add that, from the entry into force of Regulation No 259/68 of the Council introducing a single set of Staff Regulations for officials of the European Communities in accordance with Article 24 of the so-called Meger Treaty of 8 April 1965, the applicant was excluded from the transitional provisions adopted in 1962 in favour of those officials to whom the Staff Regulations of 1956 had not been applied before 1 January of that year.

Under Article 2 of this regulation, the transitional provisions contained in Articles 93 to 105 of the Staff

Regulations of 1962 have ceased to be applicable to them.

The determination of Mr Gillet's entitlement to an allowance after the termination of his service cannot therefore, on the basis of Article 5 (1) of Regulation No 2530/72, be decided otherwise than in accordance with Article 34 of the former Staff Regulations, as moreover the Commission has accepted. That solution, in addition, finds support in a judgment given on 2 July 1969 in Case 1/68 — *Pasetti-Bombardella* v *Commission* (Rec. 1969, p. 235) by which the Court rejected the claim of an official in Grade A3, under the scheme of the former Regulations, to benefit from the pecuniary rights provided for in Article 42 of those Regulations. Furthermore, it is established in the present case that Mr Gillet did not reach Grade A2 until 1 August 1965. He could not have claimed the benefit of Article 42 unless he had attained that grade before 1 January 1962.

As to the submission based upon the disparity of treatment between officials according to whether they were appointed or promoted to one or other of the highest grades in Category A on a particular date, this is without foundation. For the benefits reserved by Article 5 of Regulation No 2530/72 to those who held one of those grades before 1 January 1962, as opposed to those who obtained them only later, are the normal and legal consequence of the transitional provisions which had no other purpose than to preserve vested rights. No rule of law higher than the Staff Regulations requires the Community legislature to obtain the same advantages for officials appointed or promoted after 1 January 1962. If these servants are thus treated differently there is no illegal discrimination.

Thus, the first head of the conclusions of the application can only be rejected.

On the second head, which concerns the payment of the allowance in Italian lire at the rate prevailing on the free money market in force at the date of transmission of the sum due, it is appropriate to mention that despite the great vicissitudes of the rates of exchange which have occurred since 1965 the Community institutions continue to apply for payment to their officials the rates of exchange resulting from the parities accepted by the International Monetary Fund, which were in force on 1 January 1965. This is still so, even after 21 December 1971, the date on which there came into force the 'central rates' adopted in Washington and used by central banks in the framework of the narrowing of the margins of exchange rates, and although the European Monetary Agreement, in which the unit of account was equivalent to the unit of account used in the ECSC provisions, had ceased to have effect as from 31 December 1972.

Thus, for the applicant who has made his residence in Italy, the transitional allowance for termination of service, expressed in Belgian francs, is subject to the weighting applicable to officials working in Italy. That allowance is paid to him in lire at the rate of exchange in force on 1 January 1965, namely lire 12·50 to the Belgian franc. It is undeniable that the real parity, in June 1974 for example, was appreciably higher (17·10 lire to the Belgian franc). In these circumstances, the applicant's interest in conversion at the real rate on the day of payment may be seen.

The Commission's argument consists in maintaining that the weighting takes into account not only the cost of living in the place of employment or residence but also the loss due to devaluation of the Italian currency. That argument is hardly convincing since the weightings were created and are calculated in relation solely to the cost of living in accordance with place of employment, as follows from the very wording of Article 65.

The applicant points out, not without reason, that the Council's decision of 14 May 1973, the latest at the time,

provides, in respect of the fixing of the weightings, that the increase granted was intended to compensate for 'the noticeable increase in the cost of living' recorded in the Member States since 31 December 1972. That date is prior to the decision to let the Italian currency 'float'. It was certainly not intended to compensate for the consequences of that new currency measure.

Nevertheless, I do not think that Article 65 is illegal to the extent to which its practical application involves reference to official fixed parities. I cannot see that any general principle of law can compel the Community institutions to refer, independently of the application of weightings, to the real rates of exchange for the payment of the amounts paid to their officials or former officials.

However, it appears to me necessary to express certain reservations on the system employed by these institutions. If one accepts, for the sake of argument, that the weighting takes into account, to a certain extent, the devaluation of the currencies of certain of the Member States, the rules in force concerning not only the transitional allowance but pensions appear to me to amount to privileged treatment for pensioners. In fact, Article 45 of Annex VIII to the Staff Regulations allows them to choose for the payment of their pension a currency different from that of the country in which they reside. For example, a pensioner residing in Italy may have his pension weighted for Italy whilst having it paid in Belgian francs. This provision re-enacts that of the Rules and Regulations of the Staff of the ECSC in force before 1962, at a time when pensioners were not offered a choice of weighting.

In the example which I have chosen, the recipient of the pension thus obtains a benefit from the exchange rate and escapes the stabilization of his income in accordance with the level of prices in the country in which he resides, whilst benefiting from increases in the weighting applicable to that country, to repeat the words of the Audit Board which has never ceased to complain of this state of affairs since 1969.

Certainly, that situation results in treating recipients of pensions resident in the same country differently, since according to the particular case the pension is paid in the currency chosen by the person concerned and a weighting may be applied different from that in force in countries of the provisional seats of the Communities. Lastly, where appropriate, this pension is converted into Belgian currency.

In certain respects it is not possible to see why this same option is not open to the applicant since moreover the weighting of the transitional allowance is fixed in accordance with Article 82 (1) of the Staff Regulations, which provision is found in the chapter on pensions.

Mr Gillet asked in the alternative to benefit from it in his claim of 1 October 1963, failing payment in accordance with the real rate of exchange. In any case, he will be able to claim that advantage when he claims his right to a retirement pension.

But it appears to me that to extend the existing situation concerning the pension to the decreasing allowance paid under Article 3 of Regulation No 2530 would actually introduce a disparity of treatment between recipients of these allowances residing in the same country. It is the scheme of payment of pensions which should be revised so that every pension which is weighted ought compulsorily to be paid in the currency of the country in respect of which the weighting is calculated.

One may point out another anomaly in the system of payment of transitional allowances. It certainly appears that the parities referred to in Article 63 of the Staff Regulations, which are used to calculate the remuneration paid in a currency other than the Belgian franc, differ from the rates which are used for the purpose of equalization of accounts for the preparation of the budget. The

Commission, on the basis of parities adopted in 1969, reconverts into Belgian francs the sum converted into Belgian francs at the 1965 rate. Thus, for two operations conducted in one currency different rates may be employed: the remuneration or the transitional allowance is entered in the accounts as an expenditure for an amount different from that which is actually paid out. That is the case particularly for officials posted to France, the United Kingdom and the Federal Republic of Germany.

In truth, the Commission appears to admit, in reply to the observations of the Audit Board, that Article 63 'no longer corresponds entirely in this period of monetary instability to the objective sought in 1962 which was effectively to guarantee the same purchasing power for the remuneration of all officials, whatever their place of assignment or residence'.

Lastly, the Council of Ministers appears also to have accepted, in a reply of 26 April 1972 to a written question from a member of the European Parliament, 'that it is not impossible that financial measures taken during the last few years have affected the equality of the purchasing power of salaries'. On that occasion, it stated that it would consider carefully any proposal which the Commission considered it appropriate to submit to it with a view, on the basis of the provisions of the Regulations, to eliminating any loss suffered by officials in one or other of the countries to which they are posted by reason of financial changes.

The Council replied to a fresh question on the same subject on 5 July 1973 that, not having received a proposal from the Commission on this subject, it could not say anything. That is, to say the least, curious, for the Commission had on 28 March 1969 proposed that the date of 1 January 1969 should be substituted, in respect of exchange parities, for that of 1 concerning the accounts for the 1970 January 1965. Furthermore, in its reply to the criticisms of the Audit Board financial year, it states that 'that proposal has since been under discussion'.

Replying again on 9 March 1970 to another written question, the Commission informed a member of Parliament that 'the discussions on the revision of the Staff Regulations actually in progress at the Council provide for the examination of the proposal of the Commission to replace the date of 1 January 1965 by that of 1 January 1970, so as to neutralize the effects of changes in monetary parity which have taken place . . .'.

In any case, the Council could, under Article 152 of the Treaty establishing the European Economic Community, request the Commission to submit any appropriate proposal to it. But these considerations come within the sphere of 'lege ferenda'.

In the present state of the law, Article 63 does not appear to me to be vitiated by any illegality, even if it leads to consequences which are obviously hardly equitable. The application of them which is made to the applicant appears to me to be perfectly proper from the legal point of view. I can only therefore, although with regret, suggest that you also set aside the second head of conclusions of the application. But I would take the liberty of suggesting that the Community institutions quickly bring into force the means of arriving at a new definition of the unit of account used in Article 63, so that it accords as closely as possible with economic reality.

To sum up, I am of the opinion that the application should be dismissed and that in accordance with Article 70 of the Rules of Procedure the costs incurred by the Commission should be borne by it.