JUDGMENT OF THE COURT (FIRST CHAMBER)
10 DECEMBER 1969[1]

Theodorus Mulders
v Commission of the European Communities

Case 8/69

Summary

1. Officials — Accounting officer — Independence of duties — Concept
(Financial Regulation, Article 22, decision of the Commission of 30 July 1968, Article 2)

2. Officials — Financial controller and accounting officer — Equivalence of duties — None
(Financial Regulation, Article 24)

1. The independence of the accounting officer, as regards the performance of his duties, from those whose authorizations of expenditure he has to verify, does not necessarily mean that there can be no difference in rank within the service between him and them, but merely that he is not subordinate to any superior in the actual performance of his duties.

2. No equivalence exists between the duties of a financial controller and those of an accounting officer such as to justify their being given an equal grading.

In Case 8/69

THEODORUS MULDERS, an official of the Commission of the European Communities, residing in Uccle, 2 avenue Maréchal-Ney, represented by Marcel Slusny, Advocate at the Cour d'Appel, Brussels, with an address for service in Luxembourg at the Chambers of André Elvinger, 84 Grand'Rue,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Louis de la Fontaine, acting as Agent, with an address for service in Luxembourg at the offices of Émile Reuter, 4 boulevard Royal,

defendant,

Application for the annulment of the implied decision of rejection taken by the Commission with regard to the request by Mr Theodorus Mulders to have the decision appointing him accounting officer of the Commission supplemented by promoting him to a higher grade,

1 — Language of the Case: French.

THE COURT (First Chamber)

composed of: R. Monaco, President of Chamber, A. M. Donner (Rapporteur) and J. Mertens de Wilmars, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Summary of the facts

The facts on which the present proceedings are based may be summarized as follows:

The applicant entered the service of the European Atomic Energy Community on 8 October 1958 as Head of Financial Services, and was appointed on 21 May 1961 by the Euratom Commission accounting officer for the Operational Budget, and on 19 December 1961 Accounting Officer for the Research Budget.

On 6 March 1963 he was established in Grade A3 pursuant to Article 102 of the Staff Regulations, and was given the title of Head of Division. In this post he was placed, as was the financial controller for the Commission, under the authority of the Director-General for Finance, although in his capacity as accounting officer he was answerable directly to the Euratom Commission.

In a letter of 7 September 1966 the applicant submitted a request to the Commission on the basis of Article 90 of the Staff Regulations that he be appointed to Grade A2 with retroactive effect to 31 May 1961. By a letter of 12 December 1966 the Director-General for Administration of the EAEC informed the applicant that the Commission had reached the conclusion that the classification of the applicant's duties was in accordance with the provisions of the Staff Regulations.

On 28 May 1968 the applicant was informed by a letter from the President of the Commission that the latter, as part of its re-organization of its departments, had decided on 21 May to employ him in the post of Head of the Division of Finance, Treasury and Accounts, being part of the Directorate for the Operational Budget and Finance, itself part of the Directorate-General for the Budget. He was kept in Grade A3, his superiors in the administrative hierarchy being classified respectively in Grades A2 and A1. At the same time a Directorate-General for Financial Control was created, and the official placed at the head of this was later designated financial controller.

On 30 July 1968 the Commission decided by written procedure, a decision confirmed during its meeting of 2 to 6 December 1968, to appoint Mr Mulders accounting officer of the Commission, stating that in the performance of his duties he was to be directly responsible to the Commission.

Without waiting for official notificatian of this decision the applicant submitted a complaint by letter of 14 October 1968 to the Commission requesting it to amend the said decision by altering his

grading to correspond to the responsibilities given him under the Financial Regulation, and with the primary aim that the applicant should not be made subordinate by reason of unequal grading in a manner contrary to the autonomy required by the Financial Regulation. Since no reply was received to his complaint by 14 December 1968, the applicant (interpreting the silence as an implied decision of rejection under Article 91 of the Staff Regulations) submitted an application to the Court of Justice, dated 7 February 1969 and lodged at the Court Registry on 10 February 1969.

II—Conclusions of the parties

The *applicant* claims that the Court should:

— declare that the applicant, an accounting officer with the Communities who exercises no other duties for them, must, in the same way as the financial controller, be placed under the direct and exclusive authority of the Commission and be, like him, on the same level as Directors-General having the powers of an authorizing officer;
— declare that the decision of the Commission of 30 July 1968 appointing the applicant accounting officer in the Communities must be understood to amend accordingly the decision of 21 May whereby he was appointed Head of Division forming part of a Directorate itself part of a Directorate-General;
— accordingly, declare that the applicant should be classified in Grade A1 with effect from 30 July 1968;
— further to the last point, declare that the Commission must within two months from the date of the judgment to be delivered adjust the applicant's grade to correspond to his duties as accounting officer and annul the implied decision whereby on 14 December 1968 it rejected the complaint on this subject made to it by the applicant.

The *defendant* contends that the Court should:

— declare the application unfounded;
— order the applicant to pay the costs in accordance with the relevant provisions.

III—Submissions and arguments of the parties

The submissions and arguments of the parties may be summarized as follows:

A — *Admissibility*

In its statement of defence, the *defendant* considers that the application is only admissible as regards the decision 30 July 1968 naming the applicant accounting officer of the Commission. An application against the decision of 21 May 1968 appointing him to a post in Grade A3 is inadmissible because it is out of time.

The *applicant* states in his reply that the subject-matter of the application is neither the decision of 21 May nor that of 30 July, but the implied rejection by the Commission of the appeal through official channels of 14 October 1968 seeking a revision of the decision of 21 May on the basis of that of 30 July, the latter introducing a new element of substance with regard to the first.

In the rejoinder, the *defendant* asserts that in the context of the present proceedings the Court has jurisdiction only to examine the question whether the appointment of the applicant as accounting officer of the Commission amounts to conferring on him new duties giving him a right to be re-classified in Grade A1.

B — *The substance of the case*

After setting out the respective duties of the accounting officer, the authorizing officer and the financial controller with-

in the Communities' Administration, the *applicant* relies on various provisions in the Financial Regulation (Articles 22, 43, 49 and 51) in support of his claim that the officials must be independent of one another and that, in particular, the accounting officer must be directly answerable to the Commission without the interposition of superiors in the administration. In this respect he refers to the report of the Audit Board for the financial year 1963 and the reply from the EAEC Commission to the report.

Despite the fact that at the time of the decision of 30 July 1968 it was expressly acknowledged that the applicant was directly under the authority of the Commission in the exercise of his duties, no alteration was made either to the decision of 21 May 1968 which placed him under the authority of a Director himself subject to a Director-General, or to the Grade A3 classificaton previously given to him. In the case of the financial controller, on the other hand, the need to make him independent of those Directors-General who were authorizing officers was taken into account, namely by making his grade equal to theirs.

In its statement of defence, the *defendant* Commission remarks that it would be difficult to ensure equality of grade for the authorizing officers, the financial controller and the accounting officer because it is itself the chief authorizing officer. The powers of an authorizing officer accorded to certain officials, in particular Directors-General, are only derivative and are based on a delegation of powers on the part of the Commission. The grade in which an accounting officer is placed must be determined by the nature of his duties.

As to the comparison between the position of the accounting officer and that of the financial controller, it is difficult to compare their duties and responsibilities, as will be seen by an examination of Articles 30 and 43 of the Financial Regulation. This difference is confirmed by the grades given by the High Authority and the EEC and EAEC Commissions to their respective accounting officers and financial controllers.

The case-law of the Court (Case 28/64), moreover, reveals the weakness of the applicant's claims.

As for the accounting officer's financial liability, to which the applicant refers, the defendant replies that this very liability was the reason behind the classification of accounting officers in Grade A3, the accounting officers in other institutions being classified in Grade B1.

In a more general way the defendant contends that its powers and responsibilities in relation to the organization of its departments are not subject to any particular restrictions as regards the Financial Control Services and accounts, and concludes from this that its decisions on those matters can only be challenged on the ground of misuse of powers.

Should the Court judge, however, that the appointment of an official to the post of accounting officer of the Commission gives him a right to a Grade A1 post, this conclusion would mean that the applicant's appointment was illegal because it was contrary to the appropriate procedures in the Staff Regulations (Articles 29 and 45).

The *applicant* replies, referring to Articles 31 and 44 of the Financial Regulation, that the duties of the financial controller and the accounting officer are exercisable in the same way as those of the authorizing officer, by virtue of the delegation of powers by the Commission.

In laying down the principle of the separation of authorizing officers and accounting officers from each other Article 22 of the Financial Regulation could only have meant the separation of Directors-General with the powers of authorizing officers from the accounting officer in office. The decision of the Commission appointing the applicant accounting officer without making him independent of the Directorate-General to

which he belonged must therefore be annulled on the ground of excess or misuse of powers.

As far as the comparison with the position of the financial controller is concerned the applicant claims in particular:

1. That whilst Article 47 of the Financial Regulation makes financial controllers liable only to disciplinary action, accounting officers are liable both to disciplinary action and to payment of compensation under Article 49 of the same regulation;

2. That the argument based on the respective grades given to accounting officers and financial controllers in the High Authority and the EEC and the EAEC Commissions misses the point because the duties exercised in the three administrations by the accounting officer and by the financial controller are very different; but the duties of the respective accounting officers were in any case far less important than the duties of the accounting officer in the single Commission.

The judgment of the Court in Case 28/64 is, on the other hand, not relevant to the present case since the duties of a financial controller in the Council are not comparable to those of an accounting officer in the Commission.

According to the *defendant* the principle of the separation of authorizing officers and the accounting officer has been maintained in the present organization, since the applicant is not subject to any directions from his superiors in the performance of his duties as accounting officer. The judgment in Case 28/64 is in any case perfectly relevant, because the provisions in the Financial Regulation concerning financial controllers and accounting officers are applicable as much to the budget of the Commission as to that of the Council.

In addition the defendant refers again to Article 24 of the Financial Regulation to demonstrate the fundamental difference which exists between the liability of financial controllers and that of accounting officers.

Lastly, it is not true to say that the duties of the accounting officer and of the financial controller were very different in the three Communities. In fact after 1965 the provisions in the Financial Regulations concerning accounting officers and financial controllers in the three executives were identical.

During the oral proceedings the defendant also contested the claim that the decision of 30 July 1968 constituted a new element of substance, since this decision did not alter the nature of the duties exercised by the applicant.

On the other hand, it stated that should the Court decide that an appointment as accounting officer carries with it a right to be classified in Grade A1, this would not be sufficient to place the applicant in that grade: on the contrary, the Commission would be bound to initiate the procedure laid down in Article 29 of the Staff Regulations.

This was contested by the *applicant*, who claims that it is a well established principle of administrative law that the benefit of any re-assessment must be passed on to the person holding that post.

IV — Procedure

The written procedure followed the normal course.

After hearing the report of the Judge-Rapporteur and the views of the Advocate-General the First Chamber of the Court decided to commence the oral proceedings without any preparatory inquiry.

The oral submissions of the parties were presented at the hearing 30 October 1969.

The Advocate-General delivered his opinion at the hearing on 12 November 1969.

Grounds of judgment

1 The application, lodged at the Registry on 10 February 1969, seeks the annulment of the decision of rejection implied according to Article 91 of the Staff Regulations of Officials by the failure of the Commission to reply within two months to the complaint submitted to it by the applicant on 14 October 1968.

2 In the said complaint the applicant requested the Commission to supplement its decision of 30 July 1968 appointing him accounting officer of the Commission by re-classifying him in Grade A1, thereby adapting his grading to his responsibilities and avoiding the interposition of superiors in the administration contrary to the independence essential to his post.

Admissibility of the application

3 The defendant has contended that the application cannot call in issue the decision of 21 May 1968 appointing the applicant to a post in Grade A3 because no complaint or application to the Court was made against that decision within the prescribed period of three months.

4 The applicant has stated that the subject-matter of his application is neither the decision of 21 May nor that of 30 July 1968 but the implied rejection of his request for re-classification.

5 The point at issue is whether the decision of 30 July 1968 gave the applicant the right to be re-classified in Grade A1.

6 Since the time for an appeal against the decision of 30 July had not expired at the time when he lodged his complaint, the applicant is entitled to request a review of the legality of that decision in his application directed against the implied rejection of the said complaint.

7 The application is admissible.

The substance of the case

8 The applicant claims that the Financial Regulation of 30 July 1968 concerning the drawing up and implementation of the Budget of the European Communities and the responsibilities of authorizing officers and accounting officers, in particular Article 22 which provides that the execution of the Budget shall be carried out in accordance with the principle of the separation

of authorizing officers and accounting officers, requires that authorizing officers, the accounting officer and the financial controller be independent of each other and that the accounting officer be directly responsible to the Commission without the interposition of superiors in the administration.

[9] Since, according to the applicant, the duties of the authorizing officers, the accounting officer and the financial controller are of equivalent importance, it follows that these persons should all have the same rank in the hierarchy and should not be subject to the instructions of other officials.

[10] To ensure their complete independence from other officials the authorizing officers and the financial controller-general have been placed in Grade A1; consequently the accounting officer, too, should according to the applicant be given the same grade.

[11] Article 2 of the decision of 30 July 1968 provides that 'in the performance of their duties the accounting officer and the assistant accounting officers shall be responsible directly to the Commission'.

[12] The applicant has not contested the legality of this provision.

[13] The purpose of the provision is to ensure the independence of the accounting officer and make him directly answerable to the Commission in the performance of his duties.

[14] Whilst it is true that according to the detailed list of posts the Finance, Treasury and Accounts Division of which the applicant is Head comes under the Directorate for the Operational Budget and Finance and the Directorate-General for the Budget, the applicant has provided no evidence calculated to show that this situation could jeopardize the independence required by the Financial Regulation and prescribed by the decision of 30 July 1968.

[15] The independence of the accounting officer, as regards the performance of his duties, from those whose authorizations of expenditure he has to verify, does not necessarily mean that there can be no difference in rank within the service between him and them, but merely that he is not subordinate to any superior in the actual performance of his duties.

[16] The reference to the grades held by the authorizing officers and by the financial controller-general has no relevance.

17 In the first place the Commission normally delegates its powers of authorizing expenditure only to officials in the highest grades, so that the recipients of these delegated powers of authorization are not placed in Grade 1 as a result of this delegation: on the contrary, it is because they are Heads of Directorates-General or of Directorates that the power of authorization has been delegated to them.

18 Secondly, a comparison of Articles 29 to 31, 39 and 40 with Articles 42 to 45 of the Financial Regulation proves that the duties and responsibilities of the financial controller and those of the accounting officer differ considerably.

19 Article 24 of the regulation, moreover, in providing that the rules of the administrative provisions applicable to financial controllers shall be determined in such a way as to guarantee the independence of their duties and that the measures taken in respect of their appointment and promotion, disciplinary action or transfers, and various methods of interruption or termination of appointment shall be subject to reasoned decisions to be forwarded, for information, to the Council, has hedged the position of financial controllers around with guarantees even more precise than those provided for the position of accounting officer.

20 The applicant is therefore wrong to claim that between the duties of financial controller and the duties of an accounting officer there exists an equivalence such as to justify these officers' being given an equal grading.

21 Furthermore the appointment of the applicant as accounting officer does not constitute an important new fact in relation to his assignment to the post of Head of the Finance, Treasury and Accounts Division.

22 In fact the duties in this division coincide with the work of an accounting officer to such an extent that it is impossible to separate or distinguish the two sets of duties.

23 That is, moreover, confirmed by the applicant's own statement that he has no duties or responsibilities other than those of accounting officer.

24 It follows from the foregoing that the application directed against the implied rejection of the applicant's complaint of 14 October 1968 must be dismissed as unfounded.

Costs

25 The applicant has failed in his action.

26 Under Article 69(2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.

27 However, under Article 70 of the Rules in actions by officials of the Communities institutions shall bear their own costs.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Communities;
Having regard to the Protocols on the Statute of the Court of Justice;
Having regard to the Staff Regulations of Officials of the European Communities;
Having regard to the Financial Regulation on the constitution and implementation of the Budget of the European Communities and the responsibilities of authorizing officers and accounting officers, in particular Articles 22, 24, 29 to 31, 39 to 41 and 42 to 45;
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;**

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

Delivered in open court in Luxembourg on 10 December 1969.

Monaco Donner Mertens de Wilmars

A. Van Houtte
Registrar

R. Monaco
President of the First Chamber