# OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 9 MARCH 1961[1]

*Mr President,*
*Members of the Court,*

The present proceedings were brought by a servant of the Court who was appointed under the Staff Regulations of the ECSC; his legal position is still determined by those regulations. The Court has thus jurisdiction under Article 58 of the Staff Regulations of the ECSC.

I will not go into the complete previous history to the action from the appointment of the applicant, his establishment, the granting of the separation allowance in accordance with Article 47 of the Staff Regulations and Article 9 of the Staff Rules up to the taking of the contested decision. I shall mention them in so far as is necessary in a legal assessment of the facts.

On 8 July 1960 the applicant was informed by the Registrar of the Court that the Committee of the four Presidents had resolved that the distance of 25 km provided for in the Staff Regulations as a condition precedent to the granting of the separation allowance was to be taken as the crow flies; the Committee had further decided that servants of the Court affected should continue to enjoy the separation allowance *pro tempore*. The allowance would, however, gradually be withdrawn, expressed thus: 'à condition de résorber celle-ci progressivement au fur et à mesure des échéances d'échelon et des promotions éventuelles'.

The applicant made an administrative complaint against this notice to the President of the Court in accordance with Article 1 (c) of Annex I to the Staff Regulations. On this the contested decision of the President was taken on 21 September 1960. It is worded *inter alia* as follows:

> '. . . vous demandez de revenir sur la décision prise par la Commission des présidents relative à l'application . . . du critère de 25 km . . . La Commission des présidents a . . . pris la décision la plus favorable pour vous . . . Je ne puis donc que confirmer cette décision qui doit être considérée maintenant comme définitive.
> . . . L'indemnité de séparation vous a été accordée en tenant compte de l'interprétation donnée à la Cour au critère de la distance. C'est . . . cette décision qui a donné lieu aux remarques du commissaire aux comptes et à la décision actuelle de la Commission des présidents.
> Sans que vous puissiez vous prétendre lésé, le paiement de cette indemnité aurait pu être arrêté immédiatement par la décision de la Commission des présidents. Celle-ci aurait même pu demander le remboursement de sommes indûment payées.
> Enfin vous soulevez la question de la "légalité statutaire douteuse" de la décision prise par la Commission des présidents. J'ai tenu à repondre sur ce point dans ma lettre au comité du personnel.
> Dans cette décision, l'importance de la dépense budgétaire n'a pas joué de rôle; il s'agit d'une décision de principe à laquelle la Cour ne peut se soustraire . . . .'

Consideration of the lawfulness of this decision raises certain questions which, departing from their order in the application, I shall consider in their logical sequence.

1. Is the decision defective in form in the widest sense of the word, in particular defective as regards procedure and competence?

(a) First, it is to be observed that the decision of the President of 21 September 1960 does not involve an amendment of the Staff Regulations, that is, it is not a legislative measure but simply an *application* of the unchanged wording of the regulations diverging from the previous practice of the Court. Article 1 (b) and (c) of Annex I to the Staff Regulations makes the President competent in this case where it is a question of servants in Categories B and C, which is the case here.

1 — Translated from the German.

(b) What relationship has the contested decision to the decisions of the Committee of Presidents? Were the Registrar and President obliged to implement these decisions?

The decisions of the Committee resulted from criticism by the auditor. The latter had said in a letter dated 10 July 1958 to the Court that the granting of the separation allowance to staff whose place of origin was Arlon gave rise to objections since Arlon was less than 25 km from Luxembourg. The Registrar of the Court answered this on 17 July 1958 with the observation:

> 'Il est facile de vérifier que cette ville est à plus de 25 km de Luxembourg, soit par la route, soit par le chemin de fer . . .
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> . . . Dans ces conditions, nous avions l'obligation morale de réviser notre position en ce qui concerne la qualité de non-résident de M. Simon. L'intéressé serait peut-être même en droit de nous réclamer l'arriéré, mais il y a renoncé bénévolement.'

In his report on the sixth financial year the auditor referred to the different way in which the criterion of distance in Article 47 had been applied by the Court, on the one hand, and the three other institutions of the ECSC, on the other. He asked the Committee of the four Presidents to 'mettre fin à cette situation anormale en adoptant de façon définitive un critère commun . . .'.

After hearing the Committee of Common Interests the Committee of Presidents followed this proposal on 31 March 1960 and decided that in future the criterion of 'as the crow flies' would be applied by all institutions of the ECSC. On 9 May 1960 the Committee resolved to adopt the solution proposed by the Committee of Common Interests in respect of staff of the Court, that is, the arrangement which was later contained in the Notice from the Registrar of 8 July 1960.

On page 11 of the statement of defence it is stated with regard to the relationship between the Commissaire aux comptes (auditor) and the Committee of the four Presidents:

> 'La Commission des présidents a toutefois déduit du fait que le commissaire aux comptes doit lui adresser son rapport qu'elle a l'obligation de prendre les décisions qui en résultent et de les soumettre aux institutions comme ayant un caractère définitif'.

This view in my opinion finds no support in the Treaty. The task of the Commissaire aux comptes is according to Article 78 of the Treaty to examine the accounting and financial management and to draw up a report stating whether it has been effected in a regular manner. Article 78 is, however, in no way authority for the proposition that where there is diverse interpretation of a provision by the institutions of the Community the legal view of the auditor is binding. It cannot therefore *bind* the Committee of Presidents to take particular decisions. If the Committee recognizes that the criticism of the auditor is justified, it will, just like the institutions of the Community, take the necessary measures. The relevant obligation, however, derives directly from the Treaty.

The Treaty also sets the limits to the powers of the Committee. These limits cannot be exceeded solely by the desire to achieve as uniform an application of the provisions of the Treaty as possible, especially not the provisions of the Staff Regulations by the institutions of the Community. To this extent statements which ascribe to the decisions of the Committee of Presidents a 'caractère définitif' are wrong. At least such an argument cannot be derived from the case-law of the Court and the opinion of the Advocate-General in Joined Cases 7/56 and 3 to 7/57 which related to Parliament. According to Article 78 of the Treaty it is the task of the Committee to fix the size of the staff, their salary scales and allowances and exceptional expenses and to make the general budgetary proposal. In the ECSC sphere it is Article 16 of the Statute of the Court which applies in respect of staff of the Court: its position is determined by the Court itself. It would be incompatible with this provision to accord the Committee of Presidents extensive powers with regard to

staff regulations. It may therefore be a matter for the Committee of Presidents to stimulate uniformity in the Staff Regulations in the Community both with regard to their enactment and application, but nevertheless, apart from the questions dealt with in Article 78 it is for the Court to accept or reject the proposals of the Committee of Presidents.

The decisions of the Committee must be regarded in the light of these basic observations. They contain two factors which must be assessed separately: on the one hand, *general* observations on the interpretation of Article 47 of the Staff Regulations and, on the other, the application of this rule to the special case of the applicant.

The general observations could mean an amendment to the regulations. Assuming for the purposes of the inquiry that the wording of the Staff Regulations is ambiguous, that is, that it includes the interpretation which in the view of the Committee is undesirable, then the 'authentic' restrictive interpretation of the Committee would mean a limitation of the scope previously recognised, that is to say, an amendment to the regulations. It appeared in the proceedings that this objective was not in fact pursued. Such an amendment to the Staff Regulations would be ineffective due to non-observance of the procedure of Article 62. The general decision of the Committee can therefore be seen to be only an indication of the right interpretation of the Regulations. The Committee, however, has no binding powers in this sphere. Rather is it for the Court to determine the proper application and interpretation of the Regulations within the terms of its administrative powers. The said general decisions are accordingly not binding on the appointing authority of the Court.

Nor are they in the particular case of the applicant. The actual application of the provisions of the Staff Regulations is exclusively for the Court. The Treaty does not provide for binding directions by the Committee of Presidents.

From this point of view the letter from the Registrar dated 8 July 1960 gives rise to objections, for it refers solely to the decision of the Committee of Presidents, that is, it simply implements this. The decision of the President dated 21 September 1960 which alone is binding is not completely clear, as the sentences quoted at the beginning show. The impression may be obtained that in reaching it the decision of the Committee was taken as legally binding. Since, on the other hand, it is expressly stated that the decision of the Committee is 'confirmed' ('confirmer'), and moreover the decision justifies itself not only on the basis of the decision of the Committee but sets out its own reasons, in my opinion the decision should not be annulled on the basis of a mistake in law in assuming the binding effect of the decision of the Committee.

2. Is the content of the contested decision lawful?

By decision of the Registrar dated 11 March 1958 with effect from 15 March 1958 taken with the approval of the President of the Court the applicant, before he took up his duties, was recognised to have his permanent address in Arlon, a town 26 km from Luxembourg by road and 29 km by railway. At the same time the applicant was recognized to be entitled to the separation allowance under Article 47 of the Staff Regulations and Article 9 of the General Regulations. In administrative law the recognition in 1958 represents a sovereign act in favour of the applicant ('begünstigender Verwaltungsakt') intended to settle a legal situation. Although the contested decision of 21 September 1960 leaves the applicant's claim *pro tempore* intact, it is intended progressively to abate on the periodic advancement in the salary scale (Articles 38 and 39 of the Staff Regulations). An advantage is thus being withdrawn from the claimant, albeit not with immediate effect or retroactively but as from a certain time in the future. This however, means the same as a partial revocation of the original advantageous administrative act according to which the applicant was to be entitled to the separation allowance as long as he was in

the service of the Court and in so far as there was no change in the Regulations. Since, as I have already mentioned, there can be no question of a change in the Regulations here which might possibly provide justification, we must consider under what conditions the revocation of an advantageous administrative act is permitted.

The Court had to consider this question in Joined Cases 7/56 and 3 to 7/57. It was then found that according to the law of the six Member States an administrative act which gave personal rights to the person concerned could on principle not be revoked in so far as it was lawful (Rec. 1957, p. 81 at p. 115):

> 'Where the personal right is vested, the necessity to ensure confidence in the permanence of the situation thus created prevails over the interest of the administration seeking to reverse its decision . . . If, on the other hand, the administrative act is unlawful, the law of all the Member States recognizes the possibility of revocation.'

Agreeing with the opinion of the Advocate-General the Court adopted the view outlined. It approved the possibility of revoking an advantageous administrative act provided that the act was unlawful and that the revocation took place within a reasonable time.

In my opinion this principle should be applied in the present case. It must therefore be considered whether the decision of 1958 giving the applicant the separation allowance involved a mistake of law. Since there are no defects of form and none has been alleged, all that remains is the question whether there was a substantively correct application of the Staff Regulations.

According to Article 47 of the Staff Regulations in conjunction with Article 9 of the General Regulations, staff who before they took up their duties had their permanent address for longer than six months in a place more than 25 km from the seat of the institution were entitled to a separation allowance. It is not disputed that the locality from which the applicant came is more than 25 km from Luxembourg by road or rail. The applicant takes the view that the criterion applied is lawful for in other provisions of the Staff Regulations (Articles 13, 16 and 17) distance is measured by road or rail. Further, in support of the correctness of this conclusion is the fact that in the Staff Regulations as opposed to the Provisional Staff Regulations which previously applied the term 'radius' no longer appears. Against this it is said (rejoinder p. 6);

> '. . . que la disparition du mot "rayon" n'est pas la conséquence d'une décision formelle, mais de la seule simplification de la rédaction.'

Reference to other provisions on allowances is mistaken because they are concerned with the costs of transport over a particular distance, whereas the relevant ground for granting the separation allowance is a change in living conditions.

To this argument the following is to be said: it is clear that the wording of Article 47 is not so clear as the previous Staff Rules of the Court of 1953. In Article 16 of the Provisional Staff Rules it is stated:

> 'Compte tenue de la situation actuelle du siège de la Cour, sont considérés comme non-résidents lors de leur engagement, au sens du présent règlement, les agents qui, au cours des trois mois précédant leur entrée en fonctions, ne résidaient pas de façon habituelle à Luxembourg ou dans un rayon de 25 km de cette ville ou n'y exerçaient pas leur activité professionelle.'

In this provision the word 'rayon' means 'as the crow flies', even if the points to which and from which the measurement is to be made are not completely clear. On the other hand, according to normal usage the version 'locality more than 25 km' can be understood both in the sense of 'as the crow flies' and also by road or rail. The term used in the Staff Regulations is thus ambiguous. Ambiguity for the purposes of legal application is removed if the background to the use of the term justifies a restrictive interpretation or the objective of the provision cogently excludes a multiple meaning.

According to generally recognized principles of interpretation, obviously the greatest

reservation is called for in considering unpublished material. The extracts of the minutes produced show that the original incomplete drafts of the Staff Regulations likewise use the term 'rayon'. When an essentially new complete draft was produced the present version appeared:

> 'L'indemnité de séparation (est) accordée aux agents qui avant leur entrée en fonctions habitaient dans une localité située à une distance supérieure à . . . km du siège.'

It was adopted in the final version without, as far as we know, an express resolution on a material change of criterion. It does not seem justified to conclude from this change of wording that the new wording was meant and intended to convey the same meaning as the expression previously used. It must be observed that this alleged intention of the authors has not found objective record in the wording of the regulation. Whereas the first term 'rayon' has only one meaning the second expression 'distance supérieure à 25 km' has several concepts of distance. The inference of the defendant does not therefore accord with logic.

It must, however, be doubted whether there was any such uniform intent on the part of the authors, for the then President of the Court was a Member of the Committee of Presidents and he had in 1958 approved that the criterion should be used in the sense of distance by road or rail. No convincing argument in favour of the defendant's view can be derived from the drafting history of the provisions.

Does the objective of the rule justify a restrictive interpretation? The separation allowance, as was pertinently pointed out, is intended to compensate for the inconvenience associated with moving away from accustomed surroundings. It cannot be inferred from this fact that only the distance as the crow flies is an appropriate means of determining the relevant distance from the original address. There is no reason why the basis in a legal rule is not the distance by road or rail. This latter criterion is justified by the fact that the degree in the variety of the geographical areas, apart from frontiers which are irrelevant here, depends on the normal possibilities of communication by road or rail. Thus, on the contrary, it is obvious to think first of this criterion of distance where the conditions for the separation allowance are to be fixed or their scope to be determined by interpretation. The objective of the rule therefore requires no restrictive interpretation in either sense. It is thus clear that the current wording of Article 47 covers and allows as valid the interpretation both 'as the crow flies' and by road or rail.

The Registrar's decision of 1958 approved by the President is therefore not unlawful. It follows from this that its revocation is ruled out so long as the wording of the Regulations is not changed. The means adopted in the present case cannot lead to the desired uniformity in the application of the Staff Regulations. This objective can be attained only by an amendment of the wording of the Regulations which must be approved by the Court as an institution (Article 16 of the State of the Court). To this extent I agree with the view of the auditor in the audit for the sixth financial year:

> 'Dans une telle hypothèse, le rôle de l'administration est, selon nous, d'attirer l'attention des instances compétentes sur l'insuffisance d'une disposition du règlement et de proposer, le cas échéant, qu'une modification soit apportée à cette disposition suivant la procédure régulière.'

## 3. Summary and opinion

We are not called upon here, in an individual case in which there are conflicting decisions of the appointing authority applying the same Staff Regulations of 1958 and 1960, to make a decision applicable generally to all institutions. The Court has only to consider the legality of the particular decision brought before it.

I propose that the application should be acceded to and that the decision of the President of 21 September 1960 should be annulled, since the conditions for a revocation of the decision of 11 March 1958 are not fulfilled.

The Court must bear the costs of the proceedings.