

was attached to the Directorate-General for Economy and Energy in the post of assistant to the Director-General;

2. Orders the defendant to pay the costs.

Delvaux

Trabucchi

Lecourt

Delivered in open court in Luxembourg on 15 December 1965.

A. Van Houtte

L. Delvaux

Registrar

President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL GAND
DELIVERED ON 17 NOVEMBER 1965¹

*Mr President,
Members of the Court,*

Mr Werner Klaer held an important post in the administration of the German National Railways when in 1952 he entered the service of the High Authority as Director of the Transport Division. He left this post in 1960 following a reorganization of the departments, as a result of which this Division became a Directorate responsible to the Directorate-General for Economy and Energy; he was then appointed Adviser (Grade 1) a position which under the new Staff Regulations corresponds to that of Unclassified Adviser. Three years passed before it was possible to define the duties which were conferred on him.

A decision of the High Authority of 12 March 1963, which had been drawn up with his agreement, gave him a three-fold authority: authority to act as Adviser to the Directorate-General for Economy and Energy to ensure coordination in questions of transport with the other departments of the High Authority—authority to undertake certain

studies concerning transport within the ECSC—authority to represent the High Authority at various organizations dealing with problems of transport outside the framework of the Common Market. The High Authority subsequently considered that this definition of Mr Klaer's duties did not permit full use of his abilities and it took advantage of a reorganization in the structure of the Directorate-General for Economy and Energy to modify and extend his duties. On 18 December 1964, the President of the High Authority notified to Mr Klaer a decision taken by that Institution at its meeting on the preceding 2 December, the precise terms of which it is necessary to recall:

'Article 1:

Mr Werner Klaer, Unclassified Adviser, responsible for questions concerning transport (post No 10 in the detailed list of posts of Unclassified Advisers) shall be attached, with immediate effect, to the Directorate-General for Economy and Energy (post No 3 in the detailed list of posts of that Directorate-General).

¹ — Translated from the French.

Article 2:

Apart from the duties resulting from the authority conferred on him on 12 March 1963, in the performance of which he is directly responsible to the High Authority, Mr Klaer shall in future perform the duties of Assistant to the Director-General for Economy and Energy in conjunction with Mr Cros.

Article 3:

The powers and duties of Mr Klaer are set out in the Schedule to this decision.'

The Schedule gives the following details: there is no modification in Mr Klaer's duties in his capacity as adviser to the High Authority on questions of transport. On the other hand, in his capacity as assistant to the Director-General for Economy and Energy he is responsible, in conjunction with Mr Cros, for representing the Director-General both within and outside this administrative unit and for presiding at internal meetings when this senior official is prevented from doing so; when the Director-General is absent from external meetings he is to express the point of view of the Directorate-General; he is to work with the Director-General in coordinating the activities of the various Directorates within the Directorate-General and to act with him to ensure coordination with the other Directorates-General; he is to share with the Director-General in the distribution of the current tasks between the Directorates and follow up their performance. In specific matters the Director-General may delegate full powers to act. Finally, it is stated that in the absence of the Director-General Mr Klaer is to deputize for him.

It is this decision which, after receiving no reply to his complaint through official channels, Mr Klaer is referring to you on the grounds that it is vitiated by irregularities of form or substance,

that is, a failure to give reasons for the decision in infringement of Article 25 of the Staff Regulations of Officials, infringement of Articles 5 (4) and 7(1) of the Staff Regulations and Annex I thereof in that the duties entrusted to him by the contested decision do not correspond to his position in Grade A1, and infringement of Article 7 of the High Authority's General Rules on Organization determining the conditions of recruitment of senior officials of the Institution.

I — You are aware that the defendant maintains that the application is inadmissible on the ground that it is directed against an act which in reality does not adversely affect the applicant. It puts forward the following argument: the contested decision causes Mr Klaer no material loss and involves no reduction in grade or diminution of his rank in comparison with the Director-General with whom he is required to cooperate. As an official in Grade A1 who from March 1963 performed the duties of Adviser at the Directorate-General for Economy and Energy he is merely required to assist the Director-General concerned as effectively as possible. Moreover the decision of 2 December 1964 forms one measure with the authority of 12 March 1963; it details and extends the duties of a very highly-qualified official engaged in top-level studies; it constitutes a fresh definition of his duties by the administrative authority which does not adversely affect his status. For this reason Mr Klaer cannot validly complain that it gives him responsibility for fresh tasks which are outside those deriving from the authority given on 12 March 1963. On this point the High Authority refers to French administrative case-law, according to which an official is not entitled to contest the decision of a superior which modifies his duties without adversely affecting his status.

This argument corresponds to the necessary distinction between the organization

of the department, for which the administrative authority is alone responsible and which it must be able to fix and modify in the light of changing circumstances and needs, and the rights held by servants under the Staff Regulations which they are entitled to enforce before the Court. However, although this distinction is necessary, it is often difficult to draw; it depends on the view taken by the various legal systems of the position of an official and on the degree of precision with which the texts define that position. Mr Klaer is correct in stating that the admissibility of his application is closely connected to the reasons justifying it, in that it is only after considering the substance of the action and by comparing the content of the contested decision with the provisions of the Staff Regulations which have allegedly been infringed that it is possible to state whether or not it constitutes an act adversely affecting the applicant. Thus it is the scope of this decision which we must now consider.

II — Under the terms of Article 5 of the Staff Regulations posts are classified, according to the nature and importance of the duties to which they relate, in four categories, each comprising a certain number of grades divided into career brackets ordinarily containing two grades each. A table appearing in Annex I shows basic posts and corresponding career brackets and on the basis of this table, after consulting the Staff Regulations Committee, the institution is required to define the duties and powers attaching to each post. Secondly, by virtue of Article 7, the appointing authority is to assign each official by appointment or transfer to a post in his category or service which corresponds to his grade.

It is clear from this that a servant is entitled not only to remain in the same grade and to receive the corresponding remuneration, but also to be entrusted with duties and powers which are in

accordance with the post corresponding to the grade which he holds in the administration. However, a certain area of uncertainty must arise from the inevitable overlapping of posts and from the fact that the various terms employed in their definition do not always correspond to clearly-defined concepts. You have seen this in questions of integration when the servants involved maintained that the duties which they performed in fact corresponded to a post in a higher grade than that in which they had been established. Here the problem is reversed: the official is complaining that he is being made responsible for duties which are inferior to those required by his post and grade.

Mr Klaer holds Grade A1 which in itself constitutes a career bracket; the basic post in this grade is that of Director-General, which is defined by the table adopted by the High Authority on 18 December 1962 as an official who 'directs an administrative unit of the highest echelon'. The Unclassified Adviser, who is defined as 'a very highly-qualified official with the task of advising the institution or engaged in top-level studies' also holds Grade A1. This is the position held by Mr Klaer.

On the other hand, posts in Grade A2 are those of either a Director who 'directs an important administrative unit under the direct authority of a Director-General or, exceptionally, the Institution', or a Principal Adviser who is a 'highly-qualified official with the task of advising the Institution or a Directorate-General', or even a 'highly-qualified official engaged in specialized studies'. The applicant's argument is that the new duties assigned to him by the decision of 2 December 1964 are inferior to the level which can be assigned to an Unclassified Adviser and, therefore, to Grade A1. I shall pass over the fact that neither the Annex nor the definition of posts mentions the post of assistant to the Director-General (or of assistant of the Director-General, since

both terms have been employed). You have already considered that these two documents cannot be exhaustive. I shall also pass over the fact that the former Staff Regulations of Officials of the ECSC mentioned a post of Assistant Director-General in Grade A2; although this is evidence of a tendency it cannot be conclusive. The important factor is not the designation but the content of the duties performed.

The High Authority emphasizes on this point that it does not concern itself with defining the detailed activities of its Advisers; such activities are necessarily linked to those of a Directorate-General and take various forms depending on the internal organization of the work but implying the pre-eminence of the Director-General in the running of the department for which he alone is responsible. Such pre-eminence appears here in particular in so far as it is the Director-General who decides on the 'specific matters' for which he may give a 'complete delegation' of powers to the senior official who is his assistant; similarly, in the case of a difference of opinion between the latter and the Director-General over practical details of coordinating the departments and distributing and performing the tasks involved, it is normal for the final decision to be taken by the Director-General. Thus, Mr Klaer was not subordinate to the Director-General in the administration but rather in the performance of their functions the latter took precedence over him.

Is this not rather a play on words? The precedence taken by the Director-General over the applicant cannot be justified by superiority of grade—a Director-General and an Unclassified Adviser are both in Grade A1—but it is justified by his position as Head of an administrative unit and this involves a certain subordination of his assistant. The framework of his action will be laid down for him and he will receive instructions on the direction which his

activities shall take and the procedures to be employed. For example, although it is stated in the Schedule to the contested decision that Mr Klaer shall, at external meetings, express the point of view of the Directorate-General in the absence of the Director-General, this point of view will not be drawn up on the basis of the applicant's opinion but on that of the Director-General. We have seen also that the Director-General alone has the power to decide on the matters for which he believes it necessary to delegate full powers to the assistant.

This is all evidence of a subordinate position in relation to the Director-General, which is perfectly logical since to be subordinate is the essence of the position of an assistant.

What is at issue in this case is whether the contested decision, to the extent to which it produced these results, constitutes a decision adversely affecting the applicant and prejudicing the rights which he holds under the Staff Regulations. I believe that the answer to this question must be in the affirmative.

It follows, at least by implication, from the table of definitions of basic posts that servants in Grade A1 can only be responsible to the High Authority or its working groups. By definition this applies to a Director-General; it is expressly stated as regards an Unclassified Adviser with the task of 'advising the Institution'; the definition of duties in career bracket A2 confirms this result inasmuch as it specifies that a Director is 'under the direct authority of a Director-General or, exceptionally, the Institution', and that a Principal Adviser has the task of 'advising the Institution or a Directorate-General'. The same concept appears throughout the table and places the holder of a post under the authority of the official in the career bracket immediately superior: A Head of Division in Grade A3 is under the authority of a Director in Grade A2—a Principal Administrator in Grade A4

is the head of a sector of activity within a Division, or the Assistant to a Head of Division, and so on. It is possible that this system is too rigid but it must be accepted as it is and it does not appear to allow any official in Grade A1 to be placed under the authority—for the issue in this case is basically one of authority—of another official in the same grade.

It is true, of course, that certain duties arising under the 1963 document setting out Mr Klaer's authority, in the exercise of which, as is stated in the contested decision, Mr Klaer was directly responsible to the High Authority, were performed at the Directorate-General for Economy and Energy. The applicant was required to ensure coordination in questions on transport with the other departments of the High Authority; this entailed the existence of working relations between the applicant and this Directorate-General, without the applicant's being integrated into it and being in no way subordinate to its Director-General. This is quite different from his position under the decision of 2 December 1964, by which he is attached to the Directorate-General in question as assistant to the Director-General. It does not matter that in the performance of his duties assigned under the earlier authority Mr Klaer continues to be responsible only to the Institution, since the new duties assigned to him are too important to be, as the defendant Institution suggests, a mere accessory to or extension of his former duties in Grade A1 with which they have just been merged. They are, in fact, quite distinct and they must be assessed separately.

Let me make a final observation on this point. The duties of the post of assistant to the Director-General for Economy and Energy were entrusted both to the applicant and to Mr Cros at the same time; the Directorate in which the latter was employed had been abolished by departmental re-

organization and he holds Grade A2. Although Mr Klaer takes a certain precedence over the latter in that he alone is empowered to take the place of the Director-General in the absence of that official, one cannot but be surprised to see two servants in different grades jointly performing the same duties. The High Authority states that its intention was merely to give comparable prestige and 'functional' authority to the new duties of assistant to the Director-General especially created for these two officials, in order that they collaborate at the same level. This is possible, but in that case the level in question would be that of Grade A2.

Two conclusions are to be drawn from this. The decision of 2 December 1964 is not merely an internal measure for the organization of the department which exists within the context of the administrative authority; it concerns the individual position of the applicant and the rights which, in my opinion, he holds under the Staff Regulations, by assigning to him duties which do not correspond to the post and grade which he holds in the administration. This being so, it is admissible for Mr Klaer to contest this decision and, for the reason which I have just given, he is entitled to obtain its annulment.

III — I shall therefore devote less time to a consideration of the other submissions put forward in support of the application

1. First, contrary to Article 25 of the Staff Regulations, no reasons were given for the contested decision although it constitutes an act adversely affecting the applicant. It is a fact that, while stated to have been taken at the meeting of 2 December 1964, it merely refers, apart from the provisions concerning the powers of the President of the High Authority, to the decision of 24 September 1964 determining the distribution of the various areas of competence within the Directorate-General for Economy and

Energy. The confidential minutes of these meetings of the High Authority were communicated to you at your request. It is clear from these that at the first meeting the High Authority, having given up the idea of introducing a new order of seniority within the Directorate-General, intended to ensure that the head of this administrative unit enjoyed the cooperation of two assistants, namely Mr Klaer and Mr Cros; at the second meeting, the High Authority was informed that the applicant refused to accept the plan prepared by the Director-General but had accepted the general outlines set out in the President's decision to which I have referred. It is clear from the reply given to the question which you asked at the hearing that the applicant only became aware of the terms of the minutes of these meetings when they were placed in the file.

To put such a question is to admit by implication that the contested decision need not necessarily have contained a statement of the reasons on which it was based, but could merely have referred to earlier decisions justifying it, provided that the person concerned was aware of such decisions in good time. In fact, according to your case-law the requirement that reasons must be given for a decision is not a mere matter of form; the object of a statement of reasons is to enable those persons concerned by the measure to ascertain the grounds on which it is based and to allow the Court to review its legality.

This being so, the question arises whether, in this case, the requirements of your case-law were fulfilled even though Mr Klaer was not at that moment aware of the wording of the minutes of the two meetings on 24 September and 2 December 1964. It is clear from a document produced by the applicant (Schedule No 4 to his application), which is an account of his interview on 20 November 1964 with the Vice-President of the High

Authority, the President of the Administrative Committee, that he was then informed of the solution 'envisaged by the High Authority', that is, his appointment in conjunction with Mr Cros as Assistant to the Director-General of the Directorate-General for Economy and Energy. During this interview he was asked for his agreement to the proposal which, after reflection, he refused. In my opinion, however, this document cannot constitute evidence of an adequate knowledge of the earlier decisions, since it only represents an indirect knowledge and there is no evidence that it covered all the contested provisions. It appears, therefore, that the decision of 2 December 1964 is irregular as regards procedure.

2. There remains a series of criticisms to which I shall rapidly refer. They arise mainly from the ambiguous drafting of the first Article of the decision in question: the applicant, an Unclassified Adviser responsible for questions concerning transport (post No 10 in the detailed list of the posts of Unclassified Advisers), is to be attached to the Directorate-General for Economy and Energy (post No 3 in the detailed list of posts of this Directorate-General).

The applicant concludes from this that, while maintaining his former post No 10 in the detailed list of posts of the departments adopted on 5 September 1963, the High Authority transferred him to post No 3, that of Unclassified Adviser to the Directorate-General, which became vacant in June 1964 on the departure of its former occupant. This procedure is inadmissible for two reasons, first, because it leads to one official's simultaneously holding two different posts in the detailed list of posts and, secondly, because the second of these posts, previously occupied by an official who only held Grade A1 on a personal basis, had become a post in Grade A2 on the departure of its former occupant.

One might maintain, as does the defendant Institution, that the contested decision only referred to post No 10 on the ground that when the decision was taken this post was held by the applicant; the intention was not to keep him in this post, but to transfer him to post No 3. I find it, in fact, more difficult to understand the High Authority's argument that Mr Klaer 'was transferred from one post in the detailed list of posts to another, but that this post was, first, abolished and, secondly, recreated with the same powers'. Thus, the former post No 3 had been abolished in June 1964 on the departure of its former occupant and the post held at present by the applicant had only been created as a post in Grade A1 in December 1964, on the abolition of this post No 10, by using the corresponding budgetary post; as a result, the new post No 3 had nothing in common with the former post No 3. This modification had been achieved according to the detailed list of posts adopted with retroactive effect on 31 May 1965 and valid for the financial year from 1 July 1964 to 30 June 1965.

These observations post almost as many questions as they claim to resolve. What is the value of the detailed list of posts, not only as a list of posts provided for in Article 6 of the Staff Regulations, but as a description of the organization of the various departments? From the latter point of view, to what extent can

it retroactively sanction modifications already made to the structure of the departments? If, as the defendant claims, a new post has been created, could the applicant be assigned to it without the use of any other procedure, or was it necessary to apply the provisions of Article 7 of the General Rules on Organization? This rather subtle argument has not simplified these many questions: I believe, however, that if you accept my opinion you need make no reply to them.

In order for you to annul this decision, it is sufficient to state that it concerns the personal situation of the applicant, defines the duties entrusted to him in a manner which contravenes the Staff Regulations and does not state the reasons on which it is based.

The solution which I unhesitatingly propose on the basis of the Regulations may however appear unsatisfactory. At the hearing the High Authority told you that it had tried to 'reconcile the requirements of the department with those of the staff' and I accept this. It is clear, however, that the means chosen cannot be accepted; it was incumbent upon the High Authority to adopt another method and, if the required reconciliation could not be achieved, to consider whether it was necessary to apply provisions such as those of Article 50, which would provide a final solution to a problem which had been present for too long.

I am therefore of the opinion that

- Mr Klaer's application should be declared admissible;
- the decision of the High Authority of 2 December 1964 should be annulled;
- the costs of the action should be borne by that Institution.