# OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 26 MAY 1976 [1]

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

Since Regulation (Euratom, ECSC, EEC) No 1473/72 (OJ English Special Edition 1972 (III), p. 703) entered into force the system of appeals provided for by the Staff Regulations contains in the second indent of Article 91 (3) thereof a provision whereby, where a complaint is rejected by *express* decision within the 3 months which an official has for bringing an action against the implied rejection deemed to have taken effect on the expiration of 4 months from the date of making his complaint, the period for lodging an appeal to the Court of Justice which the official whould have had in the event of an express decision of rejection being *notified* to him originally starts to run afresh.

By letter dated 3 March 1975, registered on 6 March, Mr Jänsch made a complaint through official channels in accordance with Article 90 (2) of the Staff Regulations against the application to his case of the 'Procedures to be implemented prior to decisions on transfer from Category B to Category A of officials in the scientific and technical services'.

The Commission made no reply to this complaint within the 4 months following its registration. Accordingly an implied decision of rejection had to be deemed to have been taken on 7 July 1975. Mr Jänsch thus had 3 months, that is until 7 October 1975, to bring the matter before the Court if he wished to litigate.

However, on 2 October 1975 the Commissioner concerned with staff problems took in the name of the Commission an express decision rejecting Mr Jänsch's complaint through official channels. This decision was sent from Brussels to Luxembourg for the purpose of notification to the applicant through his superior officer.

However, Mr Jänsch did not have knowledge of it until 16 October 1975 at his place of work in Luxembourg by reason of the fact that he was on leave from 29 September to 15 October.

Against this express decision of rejection the applicant brought an action which was lodged at the Registry on 16 January 1976.

The Commission claims that the application is inadmissible whatever date is taken as being that of the express decision contested:

If it is the date when this decision was *taken* which is capable of making the period for bringing the action start to run afresh, then, since this decision was 'taken' on 2 October 1975, the applicant, who did not bring the matter before the Court until 16 January 1976, is alleged to have been out of time since he ought to have done so before 3 January.

If on the other hand it is the *notification* of the decision which is capable of making the period for bringing the action start to run afresh, since this notification took place on 16 October that is after the expiration of the period in which the implied decision should have been challenged, the Commission claims that it only confirmed this implied decision and could not cause the period for lodging the appeal to start to run afresh.

1 – Translated from the French.

For my part however I can support neither of these propositions.

Although it is desirable and theoretically possible for a decision to be taken and notified to the person to whom it is addressed on the same day, in actual fact this rarely occurs. The best evidence of this is that the provisions as to procedure take care to distinguish the date of *taking* a decision from that of its *notification* to the person to whom it is addressed.

It would be contrary to the spirit of the above-mentioned provision of the Staff Regulations not to maintain this distinction: although the system of legal remedies in the sphere of the Community public service evidences a tendency to restrain as far as possible the flow of actions before the Court, it cannot have the effect of abolishing all possibility of proceedings. The interpretation given by the Commission appears to me in any event contrary to the spirit of the reform of 1972 which, for whatever reason, aimed at extending the periods for bringing actions even in the case of a negative decision.

It is true, as the Commission rightly says, that quite a long time may elapse between the *taking* of a decision and its *notification* — which is capable of creating legal uncertainty. But the Community legislature itself has provided (Statute of the Court of Justice of the EAEC, Article 43): 'No right shall be prejudiced in consequence of the expiry of a time-limit if the party concerned proves the existence of unforeseeable circumstances or of *force majeure*'.

It is clear that the present case is one of unforeseeable circumstances perhaps due to the dispersal of the places at which the institutions carry on their work, but in no way the fault of the applicant who has neither occasioned nor facilitated it since he has been its first victim. It appears to me therefore unjust not to give him the benefit of the provisions of the second indent of Article 91 (3) of the Staff Regulations.

It was not by any caprice or for any reason of purely personal convenience that the applicant was not able to be reached in due time. The reason why he was absent from his normal working place in Luxembourg from 29 September to 15 October was that he was allowed to take part in an intensive course to prepare for an internal competition for assistant translators to be employed in Luxembourg, a course organized by the administration itself in its own premises in Luxembourg. The written part of this competition took place on 6 and 7 October in Brussels in premises of the Commission.

To take part in this competition the applicant did not need to submit a written application for leave, since the Staff Courier No 49 of 7 July 1975 provided 'automatic dispensation from duties' for all candidates allowed to prepare themselves for the said competition (2 days of competition + 4 days for preparation). As a result no day was counted as annual leave; there is no mention of this on his 'leave record sheet' nor does it contain any mention of his address during the leave.

In these circumstances — and although this seems to me in fact superfluous — it appears that the applicant was regarded as having remained on duty while the tests were taking place and that the administration had in any event the means of knowing where he was and notifying him of its answer before 7 October 1975 if, as everything indicates, it intended, by taking an express decision, to cause the period for lodging the application to start to run afresh.

It appears to me that where, as in the present case, a complaint is rejected by express decision, that is to say where the decision *is taken* by the appointing authority before the period for lodging

an appeal against a previously implied decision has expired, it is the *notification* of this express decision which causes the period to start to run afresh. Only the notification enables the official to have effective knowledge of the existence of the decision, the date at which it was taken and the grounds by which the administration justifies it legally. Accordingly if this notification has been delayed by reason of unforeseeable circumstances or *force majeure,* it is the date of notification which constitutes the commencement of the new period for bringing an appeal by the person concerned.

It is only where a complaint is not rejected by an express decision until after the expiration of the three months from the date when the implied decision took effect that the express rejection must be regarded as merely confirming the implied decision and accordingly cannot cause the period for lodging the appeal to start to run afresh.

Alternatively I think that if the application were held to be out of time, the applicant would be entitled to claim that there had been maladministration and that he was entitled to compensation under the head of liability for a wrongful act or omission.

The Commission's claim that the application has not been preceded by a prior complaint through official channels in accordance with Article 90 (2) of the Staff Regulations does not appear to me to be well founded since the letter from the administration dated 2 October 1975 refers expressly to the 'complaint through official channels' of 3 March of the same year.

As for consideration of the applicant's interest in the submission of the unlawfulness of the 'Procedures' drawn up in 1974 and Article 92 of the Staff Regulations and its validity, this comes under consideration of the substance of the claim.

My opinion is that the preliminary objection of inadmissibility made at this stage by the Commission should be rejected and the costs relating to this stage of the procedure should be borne by the Commission.