29 The applicant has failed in her submissions.

30 However, under Article 70 of the Rules of Procedure, the costs incurred by the institutions in actions brought by servants of the Communities are to be borne by such institutions.

On those grounds,

THE COURT (First Chamber)

hereby:

1. Dismisses the application as unfounded;

2. Orders the parties to bear their own costs.

Donner O'Keeffe Bosco

Delivered in open court in Luxembourg on 12 May 1977.

A. Van Houtte
Registrar

A. M. Donner
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 30 MARCH 1977 [1]

Mr President,
Members of the Court,

The present application, lodged by Mrs Hebrant, née Macevicius, against the European Parliament on 24 March 1976, is the logical and indeed foreseeable consequence of the first dispute between the same parties, upon which the Second Chamber of the Court passed judgment last year.

The applicant, an official in Grade A 4, was a librarian in the Directorate General

1 — Translated from the French.

for Research and Documentation, which, since 1973, had been led by a British official, Mr Taylor, who was its Director General. On a proposal from him, the Bureau of the Parliament decided, in September 1974, to undertake a major reform of the library of that institution. That reform consisted, in particular, in introducing, alongside the analytical system which until then was the only one used for compiling the catalogue, a decimal classification for works, articles from reviews and other documents possessed or acquired by the library of the Parliament.

Mrs Hebrant, who considered herself as alone responsible for compiling the catalogue and keeping it in order, was hostile to this reform. In her opinion it was inopportune and useless, and she was left out of the task of reorganizing the library.

That task was confided to a working party, chaired by an official of British nationality, Mr Reid, recruited as a temporary servant in Grade A 5 at the beginning of 1974. The working party was composed, apart from him, of four servants who were also of a lower grade than that of the applicant.

Mrs Hebrant strongly resented that decision. She felt that she was being stripped of her former duties and on 22 December 1974 she submitted a complaint through official channels in which she asked for the appointment of Mr Reid to be revoked. The President of the Parliament having expressly rejected that complaint, she lodged a first application (Case 66/75) in which she applied not only for the annulment of the appointment of Mr Reid but also for a declaration that the Parliament was guilty of a wrongful act or omission in failing to give consideration to her complaint.

By judgment of 20 May 1976, the Second Chamber accepted the admissibility of the application as being directed against a measure which 'comes within the power of internal organization of the defendant institution in that it was of a nature', as the applicant argued, 'to affect adversely the rights which she has under Articles 5 and 7 of the Staff Regulations of Officials, by taking from the applicant duties which correspond to her post and grade'. However, the Second Chamber rejected the application on the ground that 'it appears from all these factors (on the file), following the appointment of Mr Reid as reorganizer of this library, that there is no ground for saying that this measure led to reducing the work of the applicant to responsibilities less than those which correspond to those of a principal administrator classified in Grade A 4'.

In the opinion which I delivered in that case, I noted that no periodic report for the years 1973/1974 appeared, at the time, on Mrs Hebrant's personal file. In fact, it was only in answer to certain questions put by the Court that in the end the Parliament produced the periodic report. At that time it was still not signed by the Secretary General of that institution.

The present application calls for the annulment of that periodic report and for its withdrawal from the applicant's file. Mrs Hebrant also claims that the European Parliament should be ordered to pay a symbolic one franc for non-material damage that she considers herself to have incurred by reason of the particularly harsh comments contained in her report.

The applicant in fact learnt on 24 April 1975 at the latest of the contents of the draft report drawn up by the competent authority, namely her Director General, Mr Taylor. She was invited to sign that report and to add her observations if she had any, and to send it back to the director responsible for the report.

Under 'Ability' the draft carried the assessment 'Good', an average rating.

Both for 'Efficiency' and for 'Conduct in the service' the applicant was judged unsatisfactory. The following reasons were given for those assessments:

— the applicant had not carried out her work with a sense of responsibility, and in several respects her work had been inadequate;
— her conduct in the service had shown insufficient willingness to cooperate with her colleagues.

These criticisms are reiterated and summarized in the general report which appears at the end of the report. It accuses Mrs Hebrant of continuing to show a lack of the sense of responsibility to be expected in an official of her seniority and of appearing to have decided on a policy of non-cooperation and says that this attitude was all the more unfortunate as she is clearly capable of valuable work.

That rating was very unfavourable because the expression 'Unsatisfactory' used both as to her efficiency and as to her conduct in the service, corresponds to the lowest rating in the assessment scale. The said rating confirms the progressive but very perceptible decline in the opinion of the competent authority on the professional worth of Mrs Hebrant.

It is necessary to refer to the periodic report for the years 1971/1972, which accepted that the ability of the applicant was 'Good' but already commented that her efficiency was only 'Fair', and the opinion of the person making the report was summarized in the following assessment:

'Mrs Hebrant has continued to perform a certain number of services which are not without value, but which are *not sufficiently* in line with what can be expected of the person directly responsible for the library.'

The fact that the applicant's work was unsatisfactory was thus already conveyed, although in more indulgent terms than in the reports for the following two years.

Mrs Hebrant has not omitted to suggest that the harshness of her latest report is attributable to malice against her on the part of her new Director, Mr Taylor.

In a 'commentary on Mr Taylor's assessment' and in a 'memorandum on the periodic report', she made her views known. They attribute to the Director General, whom she described as a layman as regards library management, the intention of ousting her from her post with a view to replacing her by a fellow countryman. The latter, according to Mrs Hebrant, had no professional ability whatsoever. Next, on 7 October 1975, the applicant submitted a complaint to the President of the Parliament under Article 90 of the Staff Regulations of Officials.

It is against the implied decision of refusal resulting from the silence maintained by the latter that she has brought her application before the Court.

This dispute is comparable to the one on which you passed judgment on 25 November 1976 in Case 122/75, *Berthold Küster* v *European Parliament.*

In the first place, it raises questions of admissibility put forward *in limine* by the defendant institution. Those questions go on the one hand to the nature of the contested measure, and on the other to the belated nature of the complaint submitted by Mrs Hebrant through official channels.

The Parliament has argued first that the biennial periodic reports, the making of which is required by Article 43 of the Staff Regulations of Officials, cannot be the subject of an application for annulment because they are purely preparatory measures which only constitute one factor to be weighed up in adopting decisions concerning the careers of officials and which, therefore, do not directly affect them adversely.

It is argued that the right of officials to make complaints against their periodic reports is exhausted by the use of the power which is available to them of submitting observations on the assessments contained in the said reports.

That line of reasoning was rejected by your judgment in the *Küster* case. That case, moreover, reflects the position already adopted on this point by the administrative courts in several Member States.

In France, the Conseil d'État had first taken the view that applications for annulment could not be brought before a court against periodic reports because they constitute *measures of internal order* (the *Meyer* case, 1 December 1950, Recueil Lebon, p. 594) or, from 1953, *preparatory* measures the defects of which could only be invoked in support of applications directed against decisions concerning the person's career and adopted having regard to the reports themselves (the *Martin* case of 20 March 1953, Recueil Lebon, p. 140).

However, and not following this case-law, the Conseil d'État has, since the judgment of principle in the *Camara* case (Section Contentieux, [section for adversary proceedings] 23 November 1962, Recueil Lebon, p. 627) confirmed by the judgment in the *Vanesse* case (22 November 1963, Recueil Lebon, p. 577) that 'reports and assessments made concerning officials by the administrative authority rank amongst the measures which may be brought before the administrative court by means of an action for abuse of powers'.

In Italy, Article 54 of the Statuto degli Impiegati Civili dello Stato (civil service regulations) allows officials to bring an administrative complaint against annual periodic reports before the Consiglio d'Amministrazione (administrative board) which has a very wide power to revise the reports and can, even of its own motion, censure the various irregularities by which the periodic reports may be vitiated. As for judicial redress, available before the Consiglio di Stato, this can only go to the *legality* of the report. However, in cases of misuse of powers, the administrative courts can review the assessments made by the administration on the professional conduct of officials.

In German law, according to the case-law of the Bundesverwaltungsgericht, although direct applications for the annulment of periodic reports, in themselves, are not admissible (judgment of 9 November 1967, Vol. 88, p. 191), nevertheless the decision of the administrative authority on a request for the review or amendment of a periodic report can be contested before the administrative court.

In Belgian law, an application for the revision of assessments made in what the Statut des Agents de l'État (civil service regulations) define as 'the record of the official', a concept equivalent to the concept of the periodic report, is open to interested parties before a departmental or interdepartmental appeals board. An application for annulment before the Conseil d'État is then admissible against a decision of the Minister acting after obtaining the opinion of the competent appeals board.

The law of the United Kingdom, an entirely different system, regards reports on British civil servants as matters of a purely internal order against which no appeal is possible. Thus there is no case-law on this subject.

As for officials of the Communities, you have, following the opinion of Mr Advocate-General Reischl in this, accepted the admissibility of applications for annulment directed against the biennial periodic reports mentioned in Article 43 of the Staff Regulations. Such reports constitute measures which the appointing authorities within the institutions must in effect act upon, which are thus binding on those

authorities and which are of definite and even obvious importance in respect of the development of the careers of officials, particularly as regards any possible promotion or upon participation in competitions within the meaning of Article 29 of the Staff Regulations of Officials.

I am all the more readily in favour of this solution in that it corresponds to the most advanced state of law in the Member States.

A second objection of inadmissibility, put forward by the Parliament, is based on the bar for want of compliance with the period for submitting complaints which can allegedly be set up against the applicant by reason of the fact that having received notification of the periodic report for the years 1973/1974 at the latest on 24 April 1975, she only lodged her complaint through official channels on the following 7 October, that is to say after the expiry of the period of three months laid down by Article 90 (2) of the Staff Regulations of Officials.

It is argued that the application itself is therefore out of time and, since it does not satisfy the requirements of Article 91 (2), is therefore inadmissible.

But this second objection can only be rejected.

In the *Küster* judgment mentioned above you in effect held that a periodic report only becomes definitive when it has been countersigned by the Secretary General of the Parliament pursuant to the last paragraph of Article 2 of the general provisions adopted by that institution in implementation of Article 43 of the Staff Regulations of Officials (Parliamentary Document No 16808, Staff Notice No 66/17 of 21 December 1966).

Therefore the application to the Court lodged on 24 March 1976 cannot be regarded as late. It is not disputed, however, that the periodic report at issue was only signed by the Secretary General on 19 October 1976.

Should the application therefore be declared premature?

I do not think so. Moreover the defendant institution does not go so far as to argue in favour of this point of view. Furthermore, in its defence it adopted a position on the substance of the application and has thus initiated the proceedings before this Court.

Therefore the periodic report, which became definitive and could be set up against the applicant when it was signed by the Secretary General, is open to an application for annulment.

I am now in a position to turn to the substance of the dispute, and I shall do so, moreover, by putting an alternative to you:

Either, after examining the submissions put forward by Mrs Hebrant as to substance, I shall be led to suggest to you that the application should be dismissed, taking into account the narrow limits within which, to my mind, your power of judicial review is confined as regards periodic reports;

Or I shall be led to suggest to you that the considerable and, it seems to me, unjustifiable and illegal delay in the signing of the contested report by the Secretary General of the Parliament itself constitutes a substantial irregularity vitiating the report procedure laid down by Article 43 of the Staff Regulations and by the Parliament's staff memorandum of 1966 by nullity.

Let me begin by taking a look at the first part of the alternative.

Following principles commonly accepted by most of the national systems of law and national case-law, you said, again in

the *Küster* judgment (Case 122/75), that you only have the power to annul a periodic report in the case where its adoption is vitiated for irregularity of form and procedure or if the said report is based on facts which are patently incorrect, or again if the file reveals the existence of a misuse of powers.

This means that you do not consider yourselves to have the power to substitute your own judgment of an official's conduct in the service for the judgment of the administrative authorities qualified to exercise the administrative power to make periodic reports or to review the soundness of the elements of such reports.

There is an analogous limitation in most of the national legislations.

In Germany, review by the courts concerning the matter is restricted to the finding of patent errors of fact, of failure to have regard to general rules of assessment and to misuse of powers (Bundesverwaltungsgericht, judgment of 13 May 1965, Vol. 21, p. 127).

This restrictive case-law is to be explained by the subjective and personal nature of the assessments of those making the reports. Thus the Bundesverwaltungsgericht has rejected the submission to the effect that over the years the assessments made in respect of an official varied by reason of changes in the person of the report-maker.

Similarly, according to the Belgian Conseil d'État (*Dubart* judgment of 27 January 1966, Pasycrisie 1966, IV, p. 90), an administrative court may not, as regards the assessment of facts put forward against a servant, substitute itself for the authority empowered to make the report. Its jurisdiction is limited to verifying whether that authority interpreted the provisions applicable in a manner compatible with the meaning which the legislature intended to give them. In other words, only a mistake of law or a ground which is legally incorrect may be complained of.

In France, the Conseil d'État refuses to review an assessment made by the hierarchical superior, that is to say the authority empowered to make reports, as appears from the judgment of one of its sections of 19 November 1971 *(Ministère de la Santé* v *Delle Bruguière,* Lebon, p. 692). It only examines defects of form or procedure, provided that the formalities which have not been complied with or have been irregularly followed are substantial *(Vanesse* judgment, mentioned above), the material inaccuracy of the facts on which the assessments are based *(Massoni* judgment, 4 February 1955, Lebon p. 71), an obvious mistake of law vitiating the periodic report (judgment of the Full Assembly of the Conseil d'État in *Volff and Exertiers),* and, finally, misuse of powers, particularly the influence of a political motive in making the report *(Camara* judgment, mentioned above).

Italian public law runs along the same lines, while being more restrictive as regards the admission of the submissions that may be raised in support of an application for annulment on the grounds of abuse of powers.

Taking into account the limits which you have yourselves set as to the extent of your power of judicial review of the legality of periodic reports, it seems to me that, as to the substance, the submissions of the application cannot be entertained.

The applicant asserts that there has been a misuse of powers in that the periodic report was drawn up by the very person against whom she had already lodged her complaint through official channels in the earlier Case 66/75. The report-maker was thus judge in his own cause. This submission means that his alleged malice towards the applicant which showed itself in leaving her out of the reorganization of the library and in

restricting her to minor duties, or at least duties reduced compared with those which she had performed before, was the basis for the misuse of powers.

That first submission must be rejected. Misuse of powers must clearly appear from the documents on the file, and that is not the position in the present case. There is no denying that there was friction between the applicant and her new Director General, Mr Taylor. But to my mind there is no decisive factor to show that Mr Taylor used the opportunity offered by the drawing-up of the periodic report for 1973/1974 to express personal dislike of Mrs Hebrant. Certainly, his assessments are rigorous and indeed even extremely harsh. But nothing justifies the supposition that he acted with the purpose of defeating the applicant and forcing her to terminate her duties in the library so that he could replace her by one of his fellow countrymen.

Both an examination of the various documents on the file, in particular the earlier periodic reports, and Mrs Hebrant's acid and indeed unpleasant observations and interventions in relation to her superior show on the contrary that she displayed reluctance, if not actual ill-will, in complying with the instructions given to her.

Similarly, it cannot be said that the ratings and assessments made concerning her were based on patently incorrect facts.

On the contrary, the file as a whole produces the impression that Mrs Hebrant withdrew into herself and confined herself to purposefully uncooperative conduct.

The second submission put forward concerns the alleged contradiction between the periodic report, which claimed that the applicant was inefficient although not incompetent, and the fact that important tasks continued to be given to her.

If there is any contradiction, it is in the successive positions of Mrs Hebrant who, in support of her first application (Case 66/75) argued that her duties had been reduced and that she had in practice been ousted from control of the management of the library, and who, in the present case, is admitting that she is still entrusted with important tasks.

For my part, I think that the report does not conceal any obvious mistake of fact or of law, and that in any event you have neither the power, nor indeed the means, to substitute your own assessment for the assessment of the authority empowered to make the report.

However, and this is the second term of the alternative, Mrs Hebrant refers to the unusual and, in that respect, suspect delay of the Secretary General of the Parliament in signing her periodic report for 1973/1974. The draft report was notified to the applicant in March 1975, and, as is not disputed, was only signed by the Secretary General in October 1976, when the procedure before the Court had already been started six months previously.

On this point a different solution can and indeed must, I think, be considered.

For you have noted not only the importance of the biennial periodic reports as regards the evolution of the careers of officials, but also the mandatory nature of periodical and regular reports. It is obvious that in so far as it is principally on the basis of those reports that the possibilities of promotion and access to internal competitions are examined, the obligation imposed on the institutions by Article 43 of the Staff Regulations of Officials to comply with that frequency is a fundamental rule. Disregard of it is such as to vitiate the report procedure, infringe the rights of officials and exert

an unfavourable influence on the evolution of their careers.

Now the report in question, which covers the period from 1 January 1973 to 31 December 1974, was drawn up by the person responsible for making the report on 19 March 1975. It was allegedly transmitted to the applicant on 20 March 1975 and, in any event, was transmitted at the latest on 24 April 1975. Since that date, the latter has supplied four pages of observations on the report made on her. Yet it was only on 19 October 1976, that is to say *about eighteen months afterwards,* that the said report became definitive by being signed by the Secretary General.

It was explained to you during the oral hearing that this delay is explained by the care with which the Secretary General had treated this 'difficult' case and by the fact that the person responsible for making the report, whom he desired to consult, was unavailable for some time.

It is possible to adopt another explanation for this failure to act: the report could have furnished the applicant with arguments in her previous application, which was specifically concerned with the nature of her duties and the curtailment thereof. However, the report does not describe the principal tasks carried out by her, and, as a total description of the duties corresponding to the post occupied, it only contains the mere word 'librarian'.

But whatever the nature of these reasons, I think that the delay with which the report was drawn up is such that it renders it valueless and that the report cannot be used against the applicant. As Mr Advocate-General Dutheillet de Lamothe said: 'the annual or biennial report and its communication are, if you will excuse the expression, no more than a farce, if it is not the report which is taken into account in considering the qualifications of the servant' (judgment of 3 February 1971 in Case 21/70, *Rittweger,* [1971] ECR 21). Therefore there is no point in rewriting the report and it must be considered as non-existent. In any event it should shortly be replaced by a new report covering the period 1975/1976.

In these circumstances, and without its even being necessary for you to examine the substance of the applicant's complaints and to take up her offer of proof, I consider that the European Parliament has infringed both Article 43 of the Staff Regulations of Officials and the rules drawn up by the Parliament itself in its Staff Memorandum No 66/19 of 21 December 1966. The delay of 18 months in the Secretary General's signing as approved the report at issue is, in itself, a substantial defect affecting the legality of the report procedure.

Finally the claim for symbolic damages of one franc ceases to be relevant if you order the report at issue to be withdrawn from the applicant's personal file.

I am of the opinion that:

— the periodic report on Mrs Hebrant (née Macevicius) for the years 1973/1974 should be declared void;

— the report should be withdrawn from her personal file;

— the European Parliament should be ordered to bear the costs.