On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to pay the costs.**

Bahlmann Pescatore Due

Delivered in open court in Luxembourg on 12 July 1984.

For the Registrar

H. A. Rühl

Principal Administrator

K. Bahlmann

President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL LENZ DELIVERED ON 21 JUNE 1984 [1]

Mr President,
Members of the Court,

The question in this staff case is whether an official's appointment to the next grade of a higher career bracket after successful participation in an open competition is governed by Article 45 *et seq.* of the Staff Regulations, which deal with promotion, or by the rules on recruitment laid down in Article 31 *et seq.* of those regulations.

A — The facts of the case, the details of which are to be found in the Report for the Hearing, may be summarized as follows:

1 — Translated from the German.

The applicant, Mrs Sophie Moussis, is a Greek national. In 1961 she obtained a degree in economics and political science in Greece and in 1962 a diploma from the European University Centre of Nancy. From 1963 to 1968 she worked for the Centre of Planning and Economic Research in Athens.

After completing a traineeship she worked for the Commission as an expert from 1968. In 1971 Mrs Moussis was assigned to the Directorate General for Agriculture as a temporary servant in Grade A 7. After passing an open competition, she was appointed in August 1972 as a probationary official in Grade A 7 and established in that grade in May 1973. In 1975 she was promoted to Grade A 6.

After taking part in an open competition to which only Greek nationals were admitted, Mrs Moussis was appointed as a Principal Administrator in Grade A 5, Step 3, by a Commission decision of 8 June 1982 which took effect on 1 June.

On 11 January 1983 Mrs Moussis submitted a request to the Grading Committee under Article 90 (1) of the Staff Regulations for a review of her grading with reference to the Commission decision of 1973 entitled "Decision on the Criteria Applicable to Grade and Step Classification upon Recruitment", published in March 1981, (hereinafter referred to as "the grading criteria"), and for her appointment to Grade A 4. Her request was rejected by a letter of 20 January 1983 on the ground that she had been promoted.

Pursuant to Article 90 (2) of the Staff Regulations she submitted a complaint against that decision within the prescribed period. After her complaint had also been rejected by a Commission decision of 14 July 1983, Mrs Moussis brought an action on 6 October 1982 for the annulment of the decision of 14 July 1983 rejecting her complaint and for an order directing the Commission to reclassify her with reference to the 1973 grading criteria.

B — My views on her claims are as follows:

1. Admissibility of the application

(a) The Commission contends that the application is inadmissible. It points out that, according to Article 91 (2) of the Staff Regulations, an appeal to the Court lies only if the appointing authority has previously had a complaint submitted to it pursuant to Article 90 (2) within the period prescribed therein. The act adversely affecting the applicant is, however, the Commission's decision of 8 June 1982 to classify her in Grade A 5 which was notified to her on 18 June 1982. The applicant did not submit a complaint against that decision within the three-month period laid down in Article 90 (2).

The applicant's reply to that objection is that she relied upon the fact that the appointing authority is prepared to look into a complaint notwithstanding the expiry of the period laid down in Article 90 (2). After all, the purpose of the provisions of the Staff Regulations on the appeal procedure and legal redress is to ensure that justified grievances of officials are eliminated. Consequently,

she was entitled under Article 90 (1) of the Staff Regulations, which lays down no time-limit, to submit the request for a review of her grading. To that extent the time-limits were observed in the complaint procedure. Moreover, the defendant did not raise the objection of admissibility at any stage during the administrative procedure and thus recognized that her action was not irregular.

(b) As far as this issue is concerned, it should be noted that, according to Article 91 (2) of the Staff Regulations, an application to the Court of Justice lies only if the appointing authority has previously had a complaint submitted to it pursuant to Article 90 (2) within the three-month period prescribed therein against the act affecting the complainant and the complaint has been rejected by an express or implied decision. The function of that period is to shorten disputes with the result that upon its expiry the measure in question is no longer subject to appeal. It therefore, as the Commission rightly points out, belongs to the sphere of public policy and the parties have no discretion in regard to it.

If, after the expiry of that period, a request is submitted under Article 90 (1) of the Staff Regulations for the purpose of redressing the grievance, the rejection of that request by the appointing authority is by its very nature merely a confirmatory decision which, according to a consistent line of decisions of the Court of Justice, is not, as a matter of principle, subject in itself to appeal. If the refusal of such a request were to be regarded as a new act, having adverse effect for the purposes of Article 90 (2), it would always be possible, by adopting such a course of action, for which there is no time-limit, to circumvent the time-limits laid down in Article 90 (2) of the Staff Regulations.

The Court of Justice has accordingly held, in its judgments in the *Tontodonati, Williams, Blomefield, Michael*[1] and other cases, that an official may demand a review of his administrative status only if new facts, likely to adversely affect him, arise after the period for submitting complaints has expired. One of the events regarded by the Court as such a new fact was the publication in March 1981 of the Commission's grading criteria of 1973.

By her request of 11 January 1983 the applicant demanded a modification of the classification decision notified to her on 18 June 1982. This was after the period for submitting a complaint against that decision, which, she alleged, adversely affected her, had expired. At that point in time the publication of the grading criteria in March 1981 was not a new fact which would have appeared to justify a review of the applicant's administrative status. For practical purposes, the appointing authority's decision of 20 January 1982 refusing the applicant's request should therefore be regarded as a decision which merely confirmed the grading decision of 8 June 1982 and which was not capable of constituting a new act adversely affecting the applicant. To that extent the complaint submitted against that decision and the application lodged on 14 July 1983 against the rejection of that complaint must be regarded as out of time.

1 — Judgment of 12. 7. 1973 in Case 28/72, *Leandro Tontodonati* v *Commission of the European Communities*, [1973] ECR 779;
Judgment of 6. 10. 1982 in Case 9/81, *Calvin Williams* v *Court of Auditors of the European Communities*, [1982] ECR 3301;
Judgment of 1. 12. 1983 in Case 190/82, *Adam Blomefield* v *Commission of the European Communities*, [1983] ECR 3981;
Judgment of 1. 12. 1983 in Case 343/82, *Christos Michael* v *Commission of the European Communities*, [1983] ECR 4023.

(c) Nor is it possible in this regard to accept the applicant's argument that her grievance did not clearly arise from the decision of 8 June 1982 because, according to her, the main purpose of that decision was to inform her that, following an open competition, she had been appointed as an official to a particular post. For it is clear from the decision in question that the applicant had been appointed as a Principal Administrator in Grade A 5, Step 3. The lack of reasons which is also alleged by the applicant cannot defeat the objection either.

(d) Finally, contrary to the applicant's view, the fact that the Commission did not draw the applicant's attention during the administrative procedure to the inadmissibility of her course of action does not form an estoppel preventing it from raising before the Court the objection regarding the admissibility of the application. As already explained, the Court must consider the question of admissibility of its own motion. Moreover, as the defendant rightly points out, there is no rule of law according to which inadmissibility may no longer be pleaded if this point has not already been raised in the procedure prior to the appeal to the Court. Finally, one must agree with the defendant that it is good administrative practice for the appointing authority to deal with an official's request by giving substantive reasons first of all and not merely to rely on procedural rules.

The application must accordingly be dismissed as inadmissible.

2. The merits of the application

In view of that result, which to my mind is clear-cut, I think that I should express only a brief, *alternative* opinion on the merits of the application.

(a) The applicant takes the view that, after successfully participating in an open competition, she was entitled to be treated in accordance with the grading rules laid down in Articles 31 and 32 of the Staff Regulations and in Article 3 of the 1973 decision. She maintains that the application of the provisions of the Staff Regulations dealing with promotion placed her at a disadvantage with regard to external candidates who took part in the same competition and whose professional experience was taken into account in full. If a choice exists between applying the provisions of the Staff Regulations regarding recruitment and those concerning promotion, the rules most favourable to the official concerned should be applied in the event of doubt.

(b) In reply to that argument the Commission objects, quite rightly in my opinion, that each candidate can be appointed only once as an official within the meaning of Article 1 of the Staff Regulations. When that happens, the official is classified in a particular grade and in a particular step. This must be done in accordance with Articles 31 and 32 of the Staff Regulations and with reference to the Commission's grading criteria of 1973. However, as happened in this case, an official classified in a particular grade can move to the *next higher* grade only pursuant to the provisions of Article 45 *et seq.* of the Staff Regulations dealing with promotion. As I stated in my Opinion in

the *Angelidis* case [1], those rules are based on the principle of equal treatment of officials in the same category or in the same service which is laid down in Article 5 (3) of the Staff Regulations. If a derogation were made from those provisions when an official moved to the next higher grade, this would lead to unequal treatment of all other officials as regards their careers.

(c) The fact that the applicant took part in an open competition does not change the situation. As the Commission rightly points out, the principle that all the participants in a competition should be treated equally merely requires the *candidates* to be tested under the same conditions; it does not require the successful participants, who have different qualifications, to be classified in the same grade. The status of the applicant, who was already an official when she took part in the open competition, is, however, fundamentally different from that of all the other participants who had not previously served as Community officials. This is also clear not least from the fact that the applicant, after being appointed as a Principal Administrator in Grade A 5, did not have to serve a further probationary period under Article 34 of the Staff Regulations. The Commission has already drawn the applicant's attention to that fact during the administrative procedure. In this connection I may refer to what I said in my Opinion in the *Angelidis* case. [1] The difference between that case, in which I argued in favour of applying the provisions of the Staff Regulations on recruitment, and the present case is, *inter alia*, that Mr Angelidis was a temporary servant who was appointed as an established official and on that ground was classified not one grade higher but two grades higher.

In view of these considerations the application would also have to be dismissed as unfounded.

C — In conclusion, I propose that the application should be dismissed and that, in accordance with Article 69 (2) and Article 70 of the Rules of Procedure, the parties should be ordered to bear their own costs.

1 — Opinion of 21. 6. 1984 in Case 17/83, *Angel Angelidis* v *Commission of the European Communities*, [1984] ECR 2923.