II — Costs

The applicant has failed in his application.

Consequently, in application of the combined provisions of Articles 69 (2) and 70 of the Rules of Procedure, he must bear the costs of the case, with the exception of those incurred by the defendant.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Articles 69 and 70;
Having regard to the Staff Regulations of Officials of the European Economic Community and of the European Atomic Energy Community, especially Article 91;

THE COURT (Second Chamber)

hereby:

1. **Dismisses the application as being inadmissible;**
2. **Orders the applicant to pay the costs of the case, with the exception of the costs incurred by the defendant.**

Strauß Donner Monaco

Delivered in open court in Luxembourg on 14 December 1965.

A. Van Houtte
Registrar

W. Strauß
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 2 DECEMBER 1965[1]

Mr President,
Members of the Court,

The application made to you by Mr André Saudray is directed against the refusal of the President of the Commission of the EEC on 29 October 1965 of his claim of the previous 3 August that he should be reclassified as from 1 January 1962 in the career bracket of

1 — Translated from the French.

administrator in Grade A6. Because of this it has many similarities with other applications upon which you have given judgment during these last few months.

The applicant, having entered the service of the Commission on 16 June 1968, was integrated by a decision of 12 December 1962 in Grade B1, Step 5, which he held under the former system. Since 1959 he has carried out the duties of Head of the Special Cases Section of the Staff Administration Division.

Following Vacancy Notice No 872 concerning a post which appeared to him to have the same features as that which he held, but concerning which it was later indicated that it would be filled by means of Reserve List Competition No 165A, Mr Saudray entered for that competition. As he was not allowed by the Selection Board to take part, he was one of the authors of Application 18/64 which led you, by the judgment of 14 July 1965, to annul the competition procedure. He was then informed on 6 August that the Selection Board, having resumed its work, had included him in the list of suitable candidates.

Parallel to these approaches to enter Category A by way of competition, Mr Saudray pursued others for the same purpose, but by way of reclassification. On 3 August 1964 he made an appeal through official channels to the President of the Commission under Article 90 of the Staff Regulations, in which, relying upon both the definitions of posts adopted on 27 July 1973 and your case-law (in particular the judgments in the Maudet, Erba and Reynier cases), he asked to be reclassified in Grade A6 with effect from 1 January 1962. It was the refusal on 29 October of his request which led to Application 5/65.

Is this application admissible? The Commission disputes it, also relying upon your case-law. It states that the express refusal of 29 October 1964 simply confirms the decision of 12 December 1962 from which the disputed classification results. As Mr Saudray did not dispute this decision at the time, his complaint of 3 August 1964—the first concerning his classification under the conditions provided for by Article 102 of the Regulations—could not extend the period from bringing an appeal to the Court, as it was not made within the prescribed period. It could only have been extended if the applicant had been able to reply on a substantial new factor leading to an alteration in the circumstances of fact and of law concerning his situation (Joined Cases 109/63 and 13/64, *Charles Müller* v *Commission of the EEC*, Rec. 1964, p. 1293). This new factor cannot be found in the judgments in the Maudet case (Joined Cases 20 and 21/63, Rec. 1964, p. 213) or the Erba and Reynier case (Joined Cases 79 and 82/63, Rec. 1964, p. 511) which he cites, because the force of *res judicata* in respect of these judgments is limited solely to the legal relationships within the knowledge of the Court, and only the legal situation of the parties to the proceedings can be affected by it. It could be constituted on the other hand by the publication on 2 October 1963 of the decision of the Commission of the previous 29 July concerning the definitions of basic posts; but a complaint against the first decision as to classification was not capable of causing the period for lodging an appeal to start to run afresh, except on condition of the appeal's having been brought within three months of the publication of the measure constituting the new factor. The complaint of 3 August 1964 is on any hypothesis out of time and the application against the refusal which was made in respect of it is not admissible.

In order to set aside the argument of inadmissibility thus raised, Mr Saudray pointed to various arguments at the oral procedure:

The first is based upon the distinction made by the judgment in the Maudet case between the establishment of a

servant in his former grade and the reclassification which he may possibly claim. If I have understood it correctly, he concludes from this that, as these two measures are distinct, whilst the first cannot be disputed on the ground that, in order to determine the grade on establishment, no account is taken of the duties actually carried out, reclassification may on the contrary be requested at any time. Such an interpretation does not follow from the judgment cited, even though in the present case the complaint through official channels by Mr Maudet against his classification had been submitted within the period for appeals to the Court against the decision which integrated him and classified him in the disputed grade. Contrary to what Mr Saudray maintains, there is thus no contradiction between the result of this judgment and that of the judgment in the Charles Müller case cited by the Commission.

The applicant emphasizes in the second place that, although the decision of 29 July 1963 might have constituted a new factor as far as he was concerned, it could not in any way amount to an act adversely affecting him, so that it was not admissible for him to ask for it to be annulled—which is evident—and that this act could not be the starting point of a new period. Only a new decision in respect of him could have caused the period to start to run afresh; it cannot be denied that the decision refusing his reclassification was not notified to him until 29 October 1964, that is, less than three months before the lodging of his application. This argument takes no account of case-law which was, however, well established at the time the argument was put forward. You consider in fact that knowledge of the new factor, if it permits a new appeal against a decision which is in principle definitive, is at the same time the starting point of the period of time within which a complaint or an appeal to the Court may be made against that decision (see particularly Case 46/64, *Schoffer* v *Commission of the EEC,* 14 July 1965).

Lastly, Mr Saudray refers to your judgment in the Marcillat (née Capitaine) case (Case 69/63, 9 June 1964, Rec. 1964 p. 471): prior administrative proceedings are highly desirable in respect of disputes by officials, in order to allow the administration to conduct an internal examination of requests before the case comes before the Court, and the dictates of fair play require that an official should attempt to obtain an amicable solution to his dispute. I am in agreement with this, but in that case Mrs Marcillat, as the judgment mentions, had acted 'with both diligence and good judgment' in making a complaint through official channels as early as 22 February 1963, whilst time had begun to run in respect of the period prescribed in Article 91 on the previous 6 February. One cannot say as much of Mr Saudray whose argument appears to me to find no support in the judgment which he cites, because, and it is necessary to emphasize this here, his complaint of 3 August 1964 is the first and only one which is directed towards his retroactive reclassification on integration. It must be distinguished from the approaches which he was able to make previously, from the claims that he was able to submit to attain Grade A6 by means of promotion or of competition. Neither the basis of these requests nor their possible effect can merge with those of the complaint of 3 August 1964, the rejection of which led to the present application.

Finally, you are faced with a situation which you have encountered many times, that of an official who did not dispute his original classification either at the moment when this was fixed by the decision as to integration or within three months after the publication of the decision of the Commission setting out the definitions of the basic

posts. The belated complaint cannot start time to run afresh (Schoffer already cited,—Case 50/64, Loebisch 14 July 1965).

I do not think in these circumstances that there are grounds for going into the substance of the case and I am of the opinion:

— that Application 5/65 should be dismissed as inadmissible,

— and that the costs should be borne by both parties in accordance with the conditions laid down by Article 70 of the Rules of Procedure.