Having regard to the Protocols on the Statute of the Court of Justice;
Having regard to the Staff Regulations of Officials of the European Communities, especially Articles 90 and 91;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Article 91;

THE COURT (First Chamber)

hereby:

1. **Dismisses the application as inadmissible;**

2. **Orders the parties to bear their own costs.**

Mertens de Wilmars Donner Monaco

Delivered in open court in Luxembourg on 15 December 1971.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 2 DECEMBER 1971[1]

Mr President
Members of the Court,

Mr Tontodonati, the applicant in the case on which I have to give my opinion today, entered the service of the Euratom Commission on 11 September 1958. He was first employed on the basis of a contract concluded in accordance with the provisions of Belgian Labour Law, but, with effect from 1 March 1959 he was, with the rank of clerk, subject to the conditions of employment of other servants of Euratom. At his request and with effect from 31 July 1961, he was transferred to the Ispra Nuclear Research Centre, where he is still at present working.

After the entry into force of the Staff Regulations of Officials of the Community, he was appointed an official with the designation of Chief Clerk in Grade C 1, step 1, with effect from 1 January 1962. Mr Tontodonati had been aware since 28 February 1963 of the decision to appoint him, which seems to have been taken on 20 February 1963. But the official dispatch of the act of appointment is dated 16 July 1963, which is the date on which he was notified of it.
As regards the applicant's duties it should be said that he works in the 'Supplies and Stores' Department at the Research Centre. In his 1962 periodic report his duties were indicated by the title 'adjoint responsable pour la section

1 — Translated from the German.

douanière' ('assistant responsible for the customs section'). After his transfer to the 'Inventory' section of the Supply Department (a transfer effected with classification in Grade C 1, step 2) the 1963, 1964 and 1965 reports described Mr Tontodonati's duties as 'responsabile dell'esecuzione del lavoro inventario' ('responsibility for inventory work'). In 1965, this description was further added to by the words 'statistique des biens du CCR' ('statement of material at the JRC'). Finally, in the reports for the years 1967 and 1969, the applicant's duties were described as being: 'Codification pour le bureau local des inventaires de tout le matériel commandé pour l'établissement. Détermination du caractère d'inventariabilité et verification de la conformité de la commande du matériel livré à l'établissement'. ('Classifying for the local office inventories of all the material ordered for the Centre. Ascertaining the appropriate category of the material supplied to the Centre and checking that it conforms with orders').

From the outset, the applicant has contested his classification within the salary structure. Thus, as early as 28 February 1963, he addressed, pursuant to Article 90 of the Staff Regulations of Officials, a complaint to the Commission and he reminded the President of the said Commission of this by letter dated 5 July 1963. But the complaint was unsuccessful. A letter sent to Mr Tontodonati by the Directorate-General for Administration on 19 September 1963 informed him that his complaint was rejected because, in the Commission's view, there was no inconsistency between the work he was doing and his classification. A second complaint, on similar lines, which, again pursuant to Article 90 of the Staff Regulations, Mr Tontodonati had addressed on 28 April 1966 to the Director of the Ispra Research Centre was, as is made clear in a letter of 25 May 1966, also rejected. On 28 January 1969, the applicant sent the Director of the Centre a fresh request for the correction of his classification and this, too, was rejected in a letter dated 25 March 1969 which fully explained why. Finally on 8 December 1970, again pursuant to Article 90 of the Staff Regulations, Mr Tontodonati addressed a formal complaint to the President of the Commission in which he claimed that, in view of his duties, he ought to be classified in career bracket B 3/B 2 with retroactive effect to 1 January 1963 and to receive appropriate arrears of salary. This complaint, which reached the Commission on 15 December 1970, has evoked no reply.

It was as the result of the Commission's silence that Mr Tontodonati brought his case before the Court on 13 April 1971. Although no claims are formulated in his application of 13 April 1971, it is clear from the reference made therein to the subject of the dispute that what he is seeking is recognition of his right to obtain the correction of his classification which he had claimed in his complaint.

The defendant Commission's response to the action brought against it was to submit an application under Article 91 of the Rules of Procedure in which it contended that the action was inadmissible and claimed that the Court should so rule without going into the substance of the case. As the oral proceedings on 10 November were devoted to this application and to the observations submitted by the applicant, my opinion is concerned only with the admissibility of the action.

1. It is clear that this question presents no difficulties in so far as it is concerned with compliance with the period prescribed for an appeal and in so far as one only has to examine whether the periods prescribed under Article 91 of the Staff Regulations, which commence to run from the day on which the complaint reached the Commission, namely, 15 December 1970, have been observed. As no express decision was taken in answer to the complaint, and as the appeal was brought before you on 13

April 1971, that aspect seems really to present no difficulty.

2. On the other hand, the admissibility of the application causes difficulty from another point of view.

The Commission points out that it was when the applicant was appointed as an official, in 1963, that it took an express decision on his classification. At that time, the applicant challenged the decision by complaint of 28 February 1963, which he followed up with a reminder on 5 July 1963. The complaint was then expressly rejected on 19 September 1963, and the original decision on classification was thus confirmed. But Mr Tontodonati did not challenge this measure. Nor, the Commission goes on to observe, did he protest against the measure of 25 May 1966 rejecting the complaint which he had lodged with the object of obtaining the correction of his classification. Nor, again, did he initiate proceedings before the Court when his request for a change of classification was expressly rejected by a measure taken on 25 March 1969. According to the defendant, when set against all the aforesaid measures, the implied rejection of the complaint lodged in December 1970, constitutes nothing more than a confirmatory measure which cannot revive the extinguished right of action in the matter of classification.

With regard to this argument, it must be admitted straight away that, as the Court has often emphasized, an official who has failed to challenge a measure capable of being contested or an express or implied decision taken in response to a complaint submitted in good time, cannot subsequently, by lodging a fresh complaint, try to revive his right of action and have the subject-matter of the measure which has not been contested, reviewed by the Court. It must without doubt also be recognized that as regards the present subject of dispute, which is the applicant's claim for the correction of his classification, express decisions capable of being contested were issued in 1963 and 1966 (in the form of the decision of appointment of 16 July 1963 and of the reply sent to the applicant on 19 September 1963 in response to his complaint as well as of the rejection of his complaint on 25 May 1966). What is more, there was another decision of the same kind in 1969, notwithstanding that the applicant only addressed to the appointing authority on 28 January 1969 a *request* for the correction of his classification and not a *complaint*. On this point, the deciding factor is that, on 25 March 1969, after looking into the circumstances complained of by the applicant, the competent appointing authority adopted a decision which is clear and fully reasoned. No one can seriously dispute that this is a measure capable of being contested.

The present application is also for the correction of the applicant's classification and cannot therefore be held to be admissible unless it is established that, after 25 March 1969, or after the expiry of the period prescribed for contesting the said measure, new factors arose capable of justifying reconsideration of the matters in dispute.

On this aspect the applicant advanced several arguments both in the complaint addressed to the Commission in December 1970 and in the written pleadings laid before the Court. He pointed out that on several occasions his present immediate superior, who took the view that he had not been correctly classified, had asked the management of the Research Centre to change his classification. Mr Tontodonati further alleges that, in this connexion, the management made promises on various occasions. Moreover, he says that he has for several months carried out the duties of Head of the Inventory Department, that these duties are those appropriate to a person classified in Grade B 1 and that he even has a Grade B 2 official under him.

The first comment to be made on this point is that of recent statements known to us to have come from the applicant's immediate superior, we are only aware of

those contained in a marginal note on the request which he submitted on 28 January 1969 and these state that the duties discharged by Mr Tontodonati 'correspond to the duties normally entrusted to a Grade B official'. But since this statement was taken into account when the decision of 25 March 1969 was adopted, it follows that it does not constitute a new factor in the sense which I described earlier. Moreover it was not such as, in itself, could bring about a change in the applicant's position in the service because it represented only the opinion of a third party in respect of a question on which the competent administrative authority takes a different view. As regards the applicant's remaining arguments, there can be no doubt that these do not amount to detailed submissions but only to vague statements. The same applies with particular force to the promises regarding the correction of his classification which he claims to have received from the management. Moreover, the possibility remains that the comments made by the applicant's superiors, which he has in mind on this point, are to be taken as having the same significance as the notes which appear in the annual reports of 1963 and 1969 and which, while declaring that the training and abilities of the applicant mark him out for more responsible duties, nevertheless make it clear that the only way in which he can obtain an improvement in his classification is by taking part in the competitions for vacant posts. This point emerges equally clearly from the decision of March 1969. Finally, it should be noted that the solution of the question with which we are concerned does not depend on finding out what duties he in fact discharges because the important point is to determine what tasks were entrusted to him by the authority competent to make appointments. Only acts of this authority can affect the administrative position and, accordingly, only such acts can be taken into account as new factors in the sense with which we are concerned. But even in this connexion too, the applicant has been unable to submit anything valid. His argument consists rather of a repetition of what he had already stated regarding the position in previous years (the fact that an official in Grade B 3 left the service and that the applicant took over his duties). This in fact suggests that the real position is in this respect that, as is expressly pointed out in the 1966 decision, the applicant is inclined to take too wide a view of the extent of his duties and to overestimate himself.

All these considerations thus lead to the conclusion that, on the basis of measures previously adopted and capable of being contested, the applicant could, in the course of previous years, have brought his claim for the correction of his classification before the Court and that according to the case-law hitherto established by the Court he can no longer, in the absence of new facts, seek this objective in proceedings before the Court.

3. Thus, following the Commission's view, my opinion is as follows: The application must be dismissed as inadmissible and that, in consequence, the applicant must bear his own costs.