OPINION OF MR ADVOCATE GENERAL DA CRUZ VILAÇA
delivered on 10 December 1986*

Mr President,
Members of the Court,

1. The applicant, Mr Georges Cladakis, successfully took part in Competition No COM/B/362 for the creation of a reserve list for senior administrative assistants of Greek nationality (Grades B 3/B 2). By a decision dated 9 March 1983, he was appointed a probationary official of the Commission of the European Communities in Grade B 3, Step 3.

The competition was held pursuant to Council Regulation No 662/82 of 22 March 1982, which approved a number of special and temporary measures applicable to the recruitment of officials of the European Communities following the accession of Greece.

On 18 November 1983, the applicant was established as an official in the same post.

On 12 July 1984, hearing, as he states, that one of his Greek colleagues was going to be regraded, the applicant requested the Chairman of the Joint Grading Committee to regrade him pursuant to the Decision on the Criteria Applicable to Grade and Step Classification upon Recruitment.

The applicant maintained that his 20 years' specific professional experience in the field of accountancy was well in excess of what was necessary under that decision in order to be classified in Grade B 3 (nine years) — or indeed in Grade B 1 (14 years), had that grade been within the terms of reference of the competition — and hence that he should have been classified in Grade B 2 from the date of his appointment.

The request was rejected by the Director of Personnel by a memorandum dated 30 October 1984, subsequently confirmed by a memorandum dated 29 November 1984, on the ground that the applicant had exceeded the three-month time-limit for the submission of requests for grading reviews laid down by the Director-General for Personnel and Administration in a notice dated 21 October 1983, and also that the applicant had been classified in the highest grade provided for by the classification criteria.

The notice of 21 October 1983 referred to above gave Commission officials an opportunity to submit a request for regrading within three months if they considered that their classification was not in accordance with the criteria laid down in the Decision on the Criteria Applicable to Grade and Step Classification upon Recruitment of 6 June 1973. That decision was published in March 1981, and the notice of 21 October 1983, as well as setting a fresh time-limit for requests for regrading, stated that a new

* Translated from the Portuguese.

decision superseding the 1973 decision had been adopted with effect from 1 September 1983.

On 15 January 1985, the applicant lodged a complaint pursuant to Article 90 (2) of the Staff Regulations against the refusal to apply to him the 1973 decision on classification criteria, requesting a review of his case in the light of that decision and of Regulation No 662/82.

The applicant's complaint was rejected by an express decision dated 4 June 1985, which was notified to him the following day.

On 9 September 1985 the applicant lodged the application giving rise to these proceedings, in which he asks the Court to annul the part of the Commission decision of 9 March 1983 classifying him in Grade B 3, Step 3, or, alternatively, to annul the decisions of 30 October and 29 November 1984 and 4 June 1985 refusing his requests.

2. I shall now analyse the legal issues raised by this action.

In its defence, the Commission contends that the application is inadmissible as being out of time because the complaint through official channels was not lodged within the prescribed period.

Since that complaint was directed against the decision appointing the applicant, which was notified to him on 18 June 1983, it should have been lodged — as required by Article 90 (2) of the Staff Regulations — within three months thereafter, which did not happen.

It is common ground that, as we have seen, the notice from the Director-General for Personnel and Administration of 21 October 1983 granted a 'final period of three months' from the date of lodging a request for regrading.

If that notice was intended, as the Commission stated at the hearing, to enable patent errors in grading to be corrected, it must, if it was to have any meaning, have given rise to fresh time-limits for bringing an action; if that were not the case, any errors would have become part of the definitive decision and therefore been incapable of correction.

It is, however, at least doubtful whether a notice from the Director-General for Personnel and Administration can have had the effect of renewing the mandatory time-limits laid down by a Council regulation (in this case the Staff Regulations of Officials), and hence it can at most be interpreted as granting interested parties the opportunity to have their cases reviewed, on a discretionary basis, by the administration.

The legality of such an offer to amend a classification decision which has become definitive as a result of the expiry of the periods prescribed for bringing an action is, however, highly questionable.

At all events, it is clear that an answer to that question is unnecessary for the purposes of this action. Even if it is maintained that, as a result of the notice, fresh time-limits became available for bringing an action, the applicant failed to act within the period of three months allowed by that notice, in so far as his request for review of his grading was not submitted until 12 July 1984.

An alternative submission made by the applicant in support of the admissibility of his action, namely that the updated version of the Staff Regulations had not been translated into Greek at the time of

Greece's accession, does not seem to me to have any relevance.

Indeed there seem to be no grounds whatsoever for maintaining that the absence of a Greek translation of the current version of the Staff Regulations constituted an insuperable difficulty for the applicant and an infringement of the Commission's duty of due diligence in so far as he was unaware of the time-limit laid down in Article 90 and the Commission nevertheless sought to rely on it. The post in question required a *satisfactory* knowledge of a second Community language (paragraph III. B.3 of Notice of Competition No COM/B/362). In view of the fact that Article 90 is absolutely clear regarding the periods prescribed for bringing an action, a satisfactory knowledge was certainly sufficient to enable that provision of the Staff Regulations to be understood in one of the languages in which it was available.

Quite apart from that, if the applicant had any doubts as to his rights, there was nothing to prevent him from approaching some other person, not necessarily a lawyer, who had a better knowledge of one of the languages in which the Staff Regulations were available and could give him proper guidance as to the exact effect of the time-limits laid down in Article 90.

However, the applicant relies on a further argument in favour of the admissibility of his action. In his contention the request for regrading was lodged within a period of three months after the emergence of a new fact which, according to a judgment of the Court,[1] justifies the submission of a request for a review of the decision. The applicant considers that his being informed that a colleague — Mr Georgios Batras — *was going* to be regraded constituted the emergence of a new fact of that kind.

It should immediately be noted that the applicant seeks to prove the admissibility of his request for regrading — and hence the admissibility of the subsequent complaint — on the basis of a 'fact' (the possibility that Mr Batras might be regraded) which was merely prospective and uncertain at the time. Mr Batras was not actually regraded until 19 September 1984, that is to say after the applicant lodged his request for regrading dated 12 July 1984. Thus it is somewhat strange that the applicant now claims that an instance of discrimination which had not actually taken place at the time of his request for regrading was a measure adversely affecting him.

When it was submitted, therefore, that request was based not on existing discrimination but on possible future discrimination; not, indeed, on any fact or event, but on a mere presumption or suspicion stemming from information whose source has not been revealed. It follows that the applicant's request may be regarded as out of time on the ground that it was submitted before the occurrence of the event which, being new, might otherwise establish its admissibility.

Nevertheless, should it be held that the subsequent regrading of Mr Batras had the effect of validating the applicant's request, it must be ascertained whether that fact constitutes a substantial new fact capable of establishing the admissibility of the request.

In other words, it is necessary to consider whether Mr Batras' reclassification was carried out according to the same principles or criteria as those governing the applicant's original classification, because only if those principles or criteria are different will there be a substantial new fact, consisting in the administration's refusal to apply to the

1 — Judgment of 15 May 1985 Case 127/84 *Esly* v *Commission* [1985] ECR 1437.

applicant the same rules as those which it applied to other officials in the same position. [2]

To answer the question of the admissibility of the action, therefore, it will be necessary to examine the substance of the case, in so far as it must be determined whether only Mr Batras, and not the applicant, was classified in accordance with the provisions of Council Regulation No 662/82 of 22 March 1982. According to the applicant, Article 1 (2) of that regulation renders inapplicable Article 3 of the decision of 6 June 1973, which provides that the higher grade in career bracket B 3/B 2 is reserved for promotions within that career bracket. Therefore, the applicant argues, Articles 3 and 4 of that decision required that he should be appointed in Grade B 2 in view of his previous experience.

It is clear, in my view, that the applicant's argument is incorrect.

In the first place, it is obvious that Regulation No 662/82 does not make it compulsory to appoint any successful candidate to a post in Grade B 2.

It should be remembered that Regulation No 662/82 creates a legislative exception in the same way as those adopted following the accession of other new Member States in order to provide in an equitable manner for the appointment of their nationals to the various types of post in the Community administration.

This happened at the time of the first enlargement (Regulation No 2530/72 of the Council of 4 December 1972) and, more recently, on the accession of Spain and Portugal (Council Regulation No 3517/85 of 12 December 1985).

2 — See *Esly* v *Commission*, cited above, at paragraphs 11 and 12 of the Decision.

The regulations cited all contain similar provisions and the differences in wording between them are largely accounted for by differences in the provisions of the Staff Regulations in force when they were adopted.

The purpose of Article 1 (1) of Regulation No 662/82 is simply to derogate from certain provisions of the Staff Regulations, to which specific reference is made, in order to enable vacant posts to be filled only by nationals of the new Member State, Greece. The first subparagraph of Article 1 (2) provides merely that certain appointments (including appointments to Grades B 2 and B 3) may only be made by means of a competition based on qualifications, thus ruling out the possibility of filling those posts by holding competitions based on tests as provided for by Article 29 (1) of the Staff Regulations and Annex III thereto.

Regulation No 662/82 does not, however, contain any classification criteria requiring a candidate to be appointed in one or other of the possible grades, and in particular in Grade B 2 as opposed to Grade B 3. In other words, Regulation No 662/82 does not of itself suffice to determine the classificaion of a candidate, nor does it even refer to the matter.

That regulation does not therefore affect the internal directives, such as the decision of 6 June 1973, adopted by the Community institutions in order to define general criteria applicable to appointments within the various grades and classification in step.

At all events, the applicant's interpretation, which would have the effect of disregarding those provisions of the 1973 decision which are disadvantageous to him and retaining

only the favourable ones, is wholly untenable. His argument is that the part of Article 3 restricting the higher grade in Career Bracket B 3/B 2 to promotions within the career bracket is not applicable to him but that he is nevertheless entitled to benefit from the classification criteria based on professional experience contained in Article 2 and in the first paragraph of the selfsame Article 3.

As is consistent with the internal directives adopted by the Commission, Notice of Competition No COM/B/362 for the creation of a reserve list for senior administrative assistants of Greek nationality within the career bracket comprising Grades 3 and 2 of Category B does not provide for the possibility of appointments in Grade B 2 since paragraph II, which deals with remuneration, states in the clearest possible manner that the basic salary will lie between the salary for Grade B 3, Step 1, and that for Grade B 3, Step 3.

It has been established that the decision regrading Mr Batras refers expressly both to the list of suitable candidates drawn up by the selection board in Competition No COM/B/362 and to Regulation No 662/82, whilst the decision appointing the applicant refers only to the list of suitable candidates and to Notice COM/1720/82.

As the Commission explains in its defence, that is due to the fact that that notice was published before the post filled by the applicant became available, which did not happen in the case of Mr Batras' appointment.

Notice No COM/1720/82 is not included among the documents before the Court. However, it may be concluded from a simple analysis of Notice of Competition No COM/B/362 that the competition was held 'in accordance with Regulation No 662/82'. That is why recruitment was limited to senior administrative assistants of *Greek nationality* and why the competition was *based on qualifications* but not tests (except that the notice allowed the selection board to carry out an additional examination of documents evidencing academic and other qualifications and to verify professional experience by means of an interview).

The reference to Competition No COM/B/362 contained in both the decision appointing the applicant and the decision regrading Mr Batras therefore incorporates an implicit reference to Regulation No 662/82, under which that competition was held.

What that regulation, taken by itself, did not do was to enable candidates to be classified on the basis of their professional experience.

The Commission has repeatedly stated that the applicant's appointment and Mr Batras' regrading were based on the same measure, namely the decision of 6 June 1973 on classification criteria.

In the light of all the foregoing considerations, the applicant's arguments do not succeed in refuting that assertion.

Moreover, if a literal approach were adopted, taking account only of the express wording of the appointment or regrading decisions — the approach which the applicant appears to advocate — either he would not have been appointed under any general criteria or else he would have been appointed solely under the terms of the notice of competition, which provides only

for a variation between Steps 1 and 3 in Grade B 3. Neither of those documents refers to the decision of 6 June 1973.

That decision adopted internal directives intended to ensure that all officials recruited were treated equally without reference to nationality, and the Commission has properly applied Article 3 of that decision by reserving Grade B 2 for promotions within the career bracket.

Both officials were accordingly classified in Grade B 3 and the only correction made regarding Mr Batras' grading related to additional seniority: he was moved from Step 1, at which he had been erroneously appointed, to Step 3. In the result Mr Batras was classified in the same category, grade and step as the applicant, namely Grade B 3, Step 3, which was the highest grading possible according to the Commission's classification criteria. That fact alone would suffice to dispose of the allegation of discrimination made by the applicant — whose principal concern is in fact to be classified in Grade B 2. In short, the Commission has not granted to any one else what it has refused the applicant.

In his reply, the applicant refers to Regulation No 2530/72, which was adopted at the time of the first enlargement, and to competitions organized under it by the Commission. They are irrelevant; suffice it to note that both Regulation No 2530/72 and the notices of competition to which the applicant refers ante-dated the decision of 6 June 1973.

Besides, according to the statements made by the Commission at the hearing, no Greek official has been recruited in the grade to which the applicant claims to be entitled; once again, therefore, there are no grounds for alleging discrimination and it is clear that the 1973 decision was not applied only to the applicant and Mr Batras.

On the other hand, that does not lend support to the applicant's submission based on the fact that the Commission sought, and obtained, from the Council authority to create seven new permanent posts in Grade B 2 in 1981 and five in 1982.

As the Commission explains in its rejoinder, the purpose of creating those posts was not to enable Greek nationals to be recruited in Grade B 2 but instead to avoid a distortion in its organization chart by enabling officials from the new Member State to follow a normal career structure.

That being the case, it does not appear that the applicant has been subject to any discrimination, and therefore Mr Batras' reclassification does not constitute a new fact capable of causing time to start running afresh for the purpose of lodging a complaint and for bringing an action within the prescribed periods.

Since the present application is therefore inadmissible as a result of the complaint's being made out of time it is also unnecessary to consider whether the action was brought within the time-limit laid down in Article 91 (3) of the Staff Regulations.

None the less, I would say that in my view the application would be inadmissible on the basis of that provision as well since it was lodged at the Court outside the time-limit computed according to the method adopted by Mr Advocate General Mancini in his Opinion of 18 November 1986 in Case

152/85 *Misset* v *Council* with which I entirely agree.

The rejection of the applicant's complaint was notified to him on 5 June 1985 and the application was not lodged at the Court Registry until 9 September. Thus the applicant exceeded the period of three months plus two days on account of distance to which he was entitled, which expired, according to that method of computation, on Saturday 7 September 1985.

I should just like to take this opportunity to add to the reasoning put forward by my learned friend the image of a calendar fitted with a cursor: if the *dies a quo* is included in the computation of the time-limit, the period of one month from the notification of a decision on 1 November expires at midnight on the 30th of that month; if the *dies a quo* is not counted, the cursor is moved by one day so that the same one-month period expires at midnight on 1 December, that is, the day of the following month with the same number as that on which the notification took place.

3. In conclusion, in the light of what I have said, I propose that the Court should dismiss the application as inadmissible and order the parties to bear their own costs in accordance with Article 70 of the Rules of Procedure.