Having regard to the Treaty establishing the European Coal and Steel Community;
Having regard to the Protocol on the Statute of the Court of Justice of the European Coal and Steel Community;
Having regard to the Staff Regulations of officials of the European Coal and Steel Community, especially Articles 90 and 91;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT (First Chamber)

hereby:

1. Dismisses Application 20/65 as inadmissible;
2. Orders the parties to bear their own costs.

Delvaux Trabucchi Lecourt

Delivered in open court in Luxembourg on 17 November 1965.

H. J. Eversen
Assistant Registrar
for the Registrar

L. Delvaux
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 21 OCTOBER 1965[1]

Mr President,
Members of the Court,

After the entry into force of the new Staff Regulations, the applicant, then the Head of our Language Department, considering that he had not been classified in accordance with these Regulations, commenced an action against the Court of Justice (Case 70/63) and obtained from it a judgment (7 July 1964) which decreed that the improvement in his classification which he sought in his conclusions should be granted. The administration of the Court implemented the operative part of the judgment: it amended the applicant's classification in the scale of salaries of the Staff Regulations of officials with retroactive effect from 1 January 1962 and it paid him the corresponding arrears of salary (21 July 1964).
Shortly after tendering his resignation (which the Court, by letter of 4 November 1964, accepted with effect from 1 February 1965), the applicant on 9 December 1964 addressed a letter to the President of the Court (wherein he formally denied that it was in the

1 — Translated from the German.

nature of an administrative complaint) with the request for a new revision of his classification (with effect from 1 January 1962) on the basis of certain principles which, he claimed, clearly emerge from the grounds of the judgment in Case 70/63. There was no reply to that letter.

Finally, after his retirement from the service of the Court, the applicant received a note of 18 February 1965 from the Registrar; this amended a previous note of 10 December 1964 and contained a statement of the applicant's pension rights. This statement which, in accordance with the provisions of the Staff Regulations, had to take account of the salary for the last three years prior to retirement, was based for the period prior to 1 January 1962, on the classification accorded to the applicant by the operative part of the judgment in Case 70/63.

This is the measure against which the applicant lodged his application of 9 April 1965. In it the following relief is sought:

— the annulment of the measure notified to the applicant by the Registrar's note of 18 February 1965;
— an order directed to the administration of the Court to classify him in Grade L/A3, Step 8, as from 1 January 1962;
— an order directed to the administration of the Court to draw up a new statement of his pension rights taking account of the classification resulting from the last-mentioned head of the conclusions.

The administration of the Court considered that the claim addressed by the applicant to the Court could no longer be dealt with under the Rules of Procedure, and reacted by submitting a request under Article 91 of the Rules of Procedure seeking the dismissal of the application on the ground of inadmissibility.

The subject of the oral proceedings of 6 October was limited to this matter and my examination of the dispute will thus be confined to the question of the admissibility of the application.

Legal consideration

1. The admissibility of the request under Article 91 of the Rules of Procedure

In the course of the written and oral procedures, the applicant raised the question whether an action limited to considering whether the period of time for an application has expired is admissible under Article 91 of the Rules of Procedure.

I consider however that this objection is unfounded. The procedure under Article 91 plainly aims at allowing the admissibility of applications to be argued at an early stage of the procedure, in order to save the parties, where appropriate, from having to engage in unnecessary argument on the substance of the case. The sole condition required for the employment of that procedure is that consideration of the substance of the case should not be broached. But, in my opinion, the classic example of the objection of inadmissibility is precisely the case where failure to comply with a time-limit for the application is invoked, because it is clear, if the objection is well-founded, that the right to bring the action is lost, and with it the opportunity of bringing the facts set forth in the application before the Court for examination as to the substance.

Contrary to what the applicant thinks, even the rules of German law are no different in this respect. In saying this one is by no means taking account only of the rules of civil procedure, where observance of time-limits for bringing actions generally plays no part. Under the Code of Procedure before the Administrative Court ('Verwaltungsgerichtsordnung') there is no doubt that

under paragraph 107 it is possible to give a judgment on a procedural issue—that is to say, the pre-conditions relating to admissibility—without touching upon the substance of the case, even in instances where the admissibility of the action is only disputed with regard to observation of the time-limit (cf. 'Kommentar zur Verwaltungsgerichtsordnung' by Schunck—de Clerck, 1961, note 2 (a) on paragraph 107; note 3 on paragraph 82).

There is consequently no objection to the making of an application under Article 91 of the Rules of Procedure, although the defendant only bases its request on the failure to observe the time-limit.

2. The admissibility of application 20/65

Let us put the situation clearly from the start: there is no doubt that the application against the note communicated to the applicant on 18 February 1965 is in itself admissible, because it relates to an act adversely affecting a person, within the meaning of Article 91 of the Staff Regulations of officials and because even the period of time for the application was complied with in this connexion.

The doubts on the admissibility of the application arise from another source. This is that the real aim of the application is not to call in question the statement of the pension rights as such, but solely to contest its basis, that is to say, the applicant's classification as from 1 January 1962. This course of action does not consist in criticizing the judgment in Case 70/63 (which would plainly be precluded as *res judicata*), but on the contrary in invoking that judgment or, more precisely, certain of its grounds, as the basis for claiming a better classification. This is the procedure which the defendant considers inadmissible. In particular it points out that the administration of the Court implemented the judgment in question immediately after it was notified to the applicant and that he did not take the opportunity given to him of contesting its regularity by an administrative complaint or, if necessary, by proceedings before the Court.

I certainly cannot agree with the defendant when it relies in its argument on admissibility on an alleged acquiescence of the applicant, consisting in his having accepted without protest the emoluments calculated by the administration on the basis of the operative part of the judgment in Case 70/63. In general the case-law of our Court rightly lays down strict requirements for making a finding of acquiescence. Consequently, with regard to the Staff Regulations of officials, it is not sufficient to prove that the behaviour of the person concerned was purely passive, but it is necessary to put forward facts clearly demonstrating that the applicant attached no importance to the rights which he possessed. That is what is lacking in this instance as is shown above all by the letter which the applicant addressed on 9 December 1964 to the President of the Court.

But the other observations of the defendant do appear to be valid. We must find that, with regard to staff matters, the Court has always been concerned to take account of the interest which the administration has in ensuring permanence and legal certainty. That is why it has on several occasions stressed the principle in its case-law that when the administration has given a clear opinion on a disputed point, the person concerned must immediately defend himself, either by directly seeking the annulment of an administrative measure, or (as has been more marked of late) by making an administrative complaint, if necessary followed by an application to the Court on the ground of a failure to act. This principle seems to me sensible; our case-law must hold to it, in order that, on the expiry of certain time-limits, the

administration may know clearly which matters may be included as incontestable in the provisions which it makes.

In the present case it is certainly impossible to consider the notification of the judgment in Case 70/63, effected on 7 July 1964, as a manifestation of the will of the administration on a specific problem, because the judgment (although this distinction may appear artificial) merely expresses the will of the Court. But the determining factor is that on 21 July 1964 the applicant received from the administration of the Court a detailed statement of the sums to which he was entitled on the basis of the judgment in Case 70/63, both as regards the past and the future. This enabled the applicant (as indeed did the statements of his salary in the succeeding months) to see clearly the consequences which the administration of the Court intended to draw from the judgment in Case 70/63. If he disagreed with these consequences, he ought to have acted immediately to protect his rights, if not by an application for annulment, then at least by an administrative complaint which would have set an administrative procedure in motion. As is clear from the most recent case-law of the Court (cf. Case 30/64) this administrative complaint had to be submitted to the appointing authority within the period of time laid down in Article 91 of the Staff Regulations of officials, or at the latest by 21 October 1964. The applicant did nothing during this period. His first reaction in face of the attitude of the administration was to address (on 9 December 1964) a letter to the President of the Court, but (as I have already said) he did not himself describe it as an administrative complaint.

I must therefore consider that the applicant has thus allowed his right to begin a new action for the correct implementation of the judgment in Case 70/63 to lapse, with all that this implies.

It could only be otherwise if, by a subsequent act, for example, after fresh facts came to its knowledge, the Court re-examined the facts as set forth, and made them the subject of an independent administrative act. But this is not the case. In particular, the note of 18 February 1965 on the calculation of the applicant's pension rights, which is directly contested at present, does not have the status of such an act. Its only aim is the mere mathematical calculation of the pension rights on the basis of the operative part of the judgment in Case 70/63 and of the administrative practice of the Court founded thereon. Where there is such a repetition of earlier administrative acts, solely for the purpose of issuing a new decision based on them, it cannot, on any sensible view, revive a right of action which is already extinguished.

But, if such is the case, if, owing to the expiry of the time-limits in question, it is no longer possible to go into the merits of the sole claim which in fact forms the subject in the application in Case 20/65, then that application as a whole appears inadmissible.

3. Summary

My opinion is then:

The defendant's request for a preliminary decision on admissibility is well-founded. The application in Case 20/65 must be dismissed as inadmissible, with the consequences laid down by the Rules of Procedure on costs.