On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Protocols on the Statute of the Court of Justice;
Having regard to the Staff Regulations of the European Communities, especially Articles 25, 90 and 91;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Articles 69, 70 and 91,

THE COURT (Second Chamber)

hereby:

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

2. **Orders each party to bear its own costs.**

Sørensen   Pescatore   Mackenzie Stuart

Delivered in open court in Luxembourg on 21 February 1974.

A. Van Houtte
Registrar

M. Sørensen
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL TRABUCCHI DELIVERED ON 13 DECEMBER 1973 [1]

Mr President,
Members of the Court,

In the face of a judgment laying down a general principle, such as complete equality of the sexes in the allocation of the expatriation allowance provided for under Article 4 of Annex VII of the Staff Regulations, it is not surprising if new problems arise in giving effect to it in

1 — Translated from the Italian.

practice. Although the basic question was decided in the *Sabbatini* and *Bauduin* cases, Cases 20/71 and 32/71, the practical effect of the principle remained unsettled having regard to the various situations where it may be applicable or which may arise in connexion with it in individual cases. This was what the Council intended to settle by introducing certain modifications into the Staff Regulations by means of Regulation No 558 of 26 February 1973 (OJ L 55/1); but this of course does not exclude the possibility of the judicial process being called upon to make further elaboration in conformity with the spirit of your previous judgment.

The present case, however, is not so much concerned with the actual content of the general principle laid down, but rather with settling the individual and temporal effect of the new legal principle introduced by your judgment.

The applicants, to whom the provisions of Annex VII depriving them of the expatriation allowance following marriage were applied at various times extending in certain cases as far back as twenty years, now claim *restitutio in integrum*. They claim the right to benefit retrospectively from the principle of equality affirmed by this Court with regard to the allowance in question.

The preliminary objection of inadmissibility, raised by the defendant institutions on the ground that the time for appeal had expired, is countered on the part of the applicants by various arguments, some of a formal nature, others closely connected with the merits of the case. In order to consider these latter, we cannot entirely avoid touching upon points relating to the question whether the appeals are well-founded.

Let us examine first of all the argument according to which the requests for the payment of arrears constitute an independent form of action and accordingly ought not to be considered subject to the time limit for action provided under Article 91 of the Staff Regulations.

Nowhere in the application commencing the action, however, is this payment that is requested made to appear as damages compensating for loss: no claim is ever made that there exists a fault on the part of the administration such as to justify a claim for compensation. The first time that counsel for the applicants spoke of compensation, quoting in this connexion the precedent afforded by the judgment in Case 79/71, *Heinemann* (Rec. 1972, p. 588), was during the second session of the oral proceedings. The pleadings, including the observations on the issue of inadmissibility, clearly seek, on the other hand, at this point to show not the existence of a 'breach of official duty' on the part of the administration but the unlawfulness either of the original decision refusing or withdrawing the allowance, or of the current rejection of the complaint to the administration made with the same purpose as the present appeals. This rejection is claimed to be out of line with the treatment accorded to Mesdames Sabbatini and Bauduin, applicants in the cases which were the occasion of establishing incidentally the unlawfulness of the previous provision of Article 4 (3) of Annex VII of the Regulations, and which led accordingly to the annulment of the individual decisions then under attack.

It is sufficient here to establish that the appeal has been brought on the basis of Article 91 of the Staff Regulations and that a substantial alteration in the applicants' case introduced during the oral proceedings, relating to the issue of inadmissibility raised by the defendants, certainly cannot be entertained in the present proceedings.

In the second place, some of the applicants maintain that they were never duly notified, in accordance with Article 25 of the Staff Regulations, of the original decisions withdrawing or refusing the expatriation allowance in

their cases, and that consequently this prevented time from running.

However, there can be no doubt that these applicants too had become aware of the withdrawal of or the failure to grant them the expatriation allowance more than three months (and generally many years) before the submission of a complaint to the administration, lodged by each of these applicants on different dates between 25 July 1972 and 14 November 1972. Article 90 (2) of the Staff Regulations provides that the official may submit a complaint against an act adversely affecting him within a period of three months, which period starts to run, if the measure affects a specified person, on the date of notification of the decision to the person concerned, or in any case on the date on which the latter becomes aware of it. Under Article 91 (2) an appeal by an official to this 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.

It follows that the appeals lodged by the parties concerned do not satisfy the condition relating to the time limit for lodging the complaint which is a condition precedent to an appeal to this Court. The possible absence of an explicit formal decision concerning the withdrawal of the allowance or the failure to grant it can be of no importance insofar as concerns the running of time for the appeal in the system under the Staff Regulations in force prior to 1 July 1972, or for the complaint prior to appeal under the new Staff Regulations, since all the ladies concerned could have ascertained how the question of their eligibility for the expatriation allowance had been decided, if only by means of the monthly salary statements, as these clearly contain in the appropriate column a heading relating to the allowance in question, and no entry appeared thereunder. Further, the withdrawal of the allowance from a woman official upon her marriage or the refusal of it to a woman already married at the time of entering the service corresponded to a general practice of the Community institutions based upon a specific provision of the Regulations, so that there can be no doubt that in this context the transmission of the salary statement was capable of constituting valid notification sufficient to start time running for an appeal. A similar criterion has already been accepted by the decisions in the *Gunnella* and *Meganck* cases (33/72 and 36/72). Where a sufficiently clear and exact rule of the Regulations is currently being applied, explicit and detailed reasoning need not be held indispensable. In any case, within such a framework, once an actual decision is known, the question of the reasons on which it is based could be raised at once, and lack of reasons may prove a sufficient defect to secure annulment of the decision, provided action is taken within the time limits set; but such a defect is of course quite unable to prevent time from running.

However, the applicants claim that new facts have arisen, sufficient to start time for an appeal running afresh. These facts consist, first, of the judgments of the Court in the *Sabbatini* and *Bauduin* cases and, secondly, of the consequent action taken by the defendant institutions, which, even before the coming into effect of the new provision relating to the expatriation allowance, which abolished the discrimination condemned by the Court, and restored the allowance in favour of all the parties concerned with effect from the month of July 1972.

The two judgments in question annulled two individual decisions withdrawing expatriation allowances as a result of marriage, on the grounds that Article 4 (3) of Annex VII of the Regulations on which the said decisions were based was itself unlawful. It is this finding of illegality respecting a rule in the Staff Regulations (applied similarly to their disadvantage), on which the applicants

primarily rely to obtain a waiver of the time limits in their favour.

It is clear that the only legal effect of the judgments in Cases 20/71 and 32/71 cited was to annul the individual decisions impugned by the applicants in those cases. The finding as to the unlawfulness of the rule in the Regulations which was at the base of the decisions annulled was purely incidental and accordingly limited to holding that the rule was inapplicable only insofar as concerned the applicants in those two cases. A finding of this kind clearly could not have an effect equivalent to annulment.

If the judgments cited had annuled the rule in the Regulations that was recognized as unlawful, there might have been some question of retrospective effect in relation to third parties. But if the nature, object and results of an appeal are to be effective only in a particular case, and if the distinction between an incidental finding that a rule is unlawful and an annulment of such a rule is to be maintained, then different results must follow and accordingly it is impossible to deduce from an incidental finding that a regulation is unlawful a general principle which would produce results equivalent to the annulment of the said act from the outset. Any other view would jeopardize the rule of public policy implicit in the general adoption of fixed procedural time limits, applied in our case by Article 91 of the Staff Regulations, and the principle of legal certainty would thereby be impaired. Hence, the discovery of a 'new fact' was not the discovery of a declaration of nullity, but of a subsidiary finding, effective only within the limits of the proceedings to which it related and no further. No new fact has intervened to affect the past in the slightest degree: only an objective declaration of nullity could have called this in question. These are affirmations as fundamental as they are elementary, repeatedly and constantly reiterated by our Court, so that it is not necessary to dwell upon them.

As for the subsequent conduct of the defendant institutions, which following the two judgments in *Sabbatini* and *Bauduin* granted or restored from that moment the expatriation allowance in the cases of all the women officials who had been deprived of it, this was primarily a mark of respect for the authority of the principle affirmed by the Court.

This line of conduct, benefiting so many women officials, was also consistently adhered to by the institutions for reasons of equity and administrative expediency.

To use legal phraseology, the readiness of all the institutions not to apply a rule still in force can be considered as the advance implementation of the amendment (reasonably to be expected and of which advance notice had been given) which the Council, following the judgments, had introduced and which came into effect a few months later. On the other hand there can be no question of any change of legal view on the part of the administration, since the point of law had already been decided by the Court.

The Court has already made this clear in replying to the argument of an applicant who claimed that the modification, in the case of numerous members of the staff, of the legal positions previously maintained by the Executive, following certain judgments dealing with the Staff Regulations, constituted a new fact which obliged the Commission to modify its previous decisons: when the Administration acts upon a judgment of the Court of Justice the new fact is to be found, if at all, in that actual judgment, rather than in the steps taken by the Administration, so that even on this view of the matter there are no grounds for holding that time has started running afresh. (Case 34/65, *Mosthaf*, Rec. 1966, p. 719).

A new fact, consisting of a change of administrative practice following a changed interpretation of certain rules in the regulations on the part of the Administration, could in the case of

officials be relevant for the purpose of allowing an action which would otherwise be barred to them as a result of the running of time. But such an action would be conceivable only insofar as it was aimed at obtaining a change in their situation for the future, and not at calling in question once again the way in which that situation had been regulated prior to the change in administrative practice constituting the new fact. This new fact, then, does not have the effect of reopening the time limits within which a decision must be challenged, but, because of the change introduced at the time it occurs, it provides the basis for the official to make a fresh request aimed at changing the current situation, even if this situation results from a decision of long standing which can no longer be challenged. It is in a situation exactly like the present one that the party concerned would have been within his rights in claiming that the Administration should adopt in his case a position in conformity with the new practice followed. But, in this respect, the applicants have already received full satisfaction before lodging the present appeals.

There is finally the other argument, put by the applicant in Case 137/73, according to which the provision of Article 4 (3) of Annex VII of the Regulations, as it stood prior to the amendment introduced by the above-mentioned Regulation No 558/73 of the Council, established a discrimination so blatantly unlawful and unfair that it should be considered not merely invalid, but non-existent. This argument has been adduced not only against the individual implementing decisions but directly against the basic rule.

However, despite numerous quotations from case law, the applicant has been unable to adduce a single precedent of national law which in fact applied so wide a concept of absolute nullity as is proposed today; and if she has not done so this is certainly not due to any lack of thoroughness, but simply because the nullity of a public act, especially if the act concerned is one which lays down regulations (always supposing that the doctrine can be applied to acts of this kind, a point by no means always clear in the national legal systems) would be conceivable only within strictly defined limits, in really extreme cases, involving in particular very serious and evident defects of form, (e.g. lack of signature) of procedure (e.g. lack of deliberation) or of jurisdiction (e.g. a decision by the administration on a matter reserved to the legislature, and, in general, a clear usurpation of power).

The consequences of a declaration of nullity in the case of an act having the force of law are so serious, and often not entirely predictable, that extreme caution is called for in the employment of this doctrine in relation to acts laying down regulations, the more so if these have remained in force over a long period. This is also in conformity with the safeguarding of legal certainty. In fact, if and when a rule of general application is declared null and void, it is only reasonable for a consequent duty to become incumbent upon the administration to eliminate all the consequences which derived from it *ab initio*.

In a system such as our Community law system, there appears to be no reason to depart from the criterion followed in the various national legal systems, according to which an act laying down regulations capable of implementation and which complies with the essential requirements as to procedure, form and competence as regards its introduction and publication, is an act which may be rendered invalid owing to some incompatibility of its contents with superior rules or principles, but which can never be repudiated as null and void.

On the other hand, if the defect vitiating the old text of Article 4 (3) had been as serious as is now claimed, it would not be possible to explain how its clear incompatibility with the system had been able to remain undetected for so long,

despite the countless times it had been implemented and the many interests involved. And, 'last but not least', it may well appear somewhat rash to set up the existence of a radical and patent incompatibility of the principle with the elementary principles of the modern civil status of a couple living together if its validity and its fitness to survive have been directly upheld in this very Court of ours by the then Advocate-General in the *Sabbatini* and *Bauduin* cases.

The reality is quite different. The statement in the judgments, which have given rise to all these consequential proceedings, declared the incompatibility of such a rule with a general principle, but it did not disclose a scandalous conflict between the Regulations and eternal principles of equality and justice; it simply constituted a further step in the gradual approximation of the legal position of the woman in society to that of the man. A legal development of this kind, following in history the evolution of custom, has its own situation in time, and only thus can its gradual acceptance be understood and justified.

The illegality which was incidentally declared in the *Sabbatini* and *Bauduin* judgments is accordingly an illegality disclosed and evaluated at the time when it came under examination, as a result of recent changes in the prevailing ideas governing the position of the woman in the family and in society, changes which are manifested also in alterations in the law of the Member States, and which the Court has applied to the Community legal system, by means of an act showing considerable awareness of the law as a living organism.

It is therefore entirely out of place to speak here of nullity.

The current stage reached in a long process of social evolution clearly cannot be transposed into the past. Apart from being a denial of history, such retrospective effect would constitute an unjustifiable, not to say crude, legal fiction.

For all these reaons it is indeed difficult to understand the feeling of injury apparently entertained by the applicants over the refusal to pay them the arrears of expatriation allowance. They should bear in mind that it was due to the initiative of two of their colleagues who undertook the risks of bringing an action that this social change was able to be translated into action to the advantage of the whole class. The applicants came forward in great numbers purely to gain retrospective benefit from this recent victory. There is no justification for the feeling of injustice these ladies now claim to entertain at seeing themselves treated, as regards the past, differently from their two colleagues who, having in due time challenged the individual decision refusing the allowance, were able to obtain an annulment.

In this connexion, it would be entirely mistaken to think that by being denied the possibility of contesting the legitimacy of decisions made in their cases in the past and which they had not challenged within the time limits, the applicants were unfairly discriminated against, compared with those colleagues of theirs who took the initiative in safeguarding their legitimate interests, availing themselves within the time limits of the means provided for this purpose under the Regulations. This difference of treatment is not discrimination, but is merely the consistent application of the ancient and still valid maxim '*vigilantibus, non dormientibus, iura succurrunt*'.

To sum up, it must be made clear that to accept the admissibility of the present applications would be to depart from fundamental rules of procedure based on a general principle of certainty of the law and of legal relations. There would need to be extremely serious reasons, such as to carry greater weight than the safeguarding of these matters, which are rules, principles and requirements fundamental to the legal order. The case in question is clearly not of this kind. The principle of equality between man and woman insofar as concerns the

benefit of the expatriation allowance has already been established; the advance has been achieved. It is now therefore quite out of place to appeal to ideals of equality to be attained, when the actual case in hand is no longer a question of principle but simply a question of the retrospective payment of an allowance.

It is all too easy and too imprecise to quote the Ciceronian adage *summum ius summa iniuria* in all cases in which the law lays down fixed periods of limitation in order to secure legal certainty: it is only the observance of these periods which is in question here today. Long experience in various branches of legal life has taught me that the Ciceronian adage is accepted within just limits: but the same experience of life encourages me to conclude, still in the words of the Roman orator, that when there are directly at stake no great principles, no fundamental principles which bind the human conscience, it is necessary that whoever has the task of doing justice should have the humility to judge not *de legibus* but *secundum leges*.

I conclude therefore by suggesting that the defendants' objection of inadmissibility be accepted and that costs be apportioned according to the rules governing staff cases.