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 Treaty establishing the European Economic Community, especially Articles 119 and 184;
Having regard to the Staff Regulations of Officials, especially Annex VII;
Having regard to the Protocols on the Statute of the Court of Justice;
Having regard to the Rules of Procedure,

THE COURT (Second Chamber)

hereby:

1. **Annuls the decisions of 17 November 1970 and 24 February 1971 by which the European Parliament withdrew the applicant's expatriation allowance;**

2. **Orders the European Parliament to bear the costs of the proceedings.**

Kutscher Trabucchi Pescatore

Delivered in open court in Luxembourg on 7 June 1972.

A. Van Houtte
Registrar

H. Kutscher
President of the Second Chamber

## OPINION OF MR ADVOCATE-GENERAL KARL ROEMER DELIVERED ON 24 FEBRUARY 1972[1]

*Mr President,*
*Members of the Court,*

Article 4 of Annex VII to the Staff Regulations of Officials of the Communities provides that under certain conditions officials are entitled to an expatriation allowance. Mrs Sabbatini (née Bertoni) and Mrs Chollet (née Bauduin), who are the applicants in Cases 20/71 and 32/71 respectively on which I am giving my opinion today (in future I shall refer to them as the first applicant and the second applicant), were granted such an allowance. In fact, on taking up her appointment in Luxembourg, the first applicant, who entered the service of the European Parliament on 1 January 1960 as an official in Grade C/1, was of Italian nationality and had not during the five years ending six months before she entered the service resided or carried on her main occupation within the

1 — Translated from the French version.

Grand-Duchy. As for the second applicant, she was a French national when she entered the service of the Commission of European Economic Community on 2 July 1962 as an official in Grade C/3. She was not at that time in a position, regarding her residence or occupation, which precluded entitlement to an expatriation allowance.

The applicants however lost their right to such an allowance pursuant to Article 4(3) of Annex VII, which provides: 'An official who marries a person who at the date of marriage does not qualify for the allowance shall forfeit the right to expatriation allowance unless that official thereby becomes a head of household.' And this was indeed the case for the first applicant when she married on 4 November 1970, as her husband was born in Luxembourg, had always lived there and was not in the service of the Communities. As for the second applicant, she was married on 31 October 1970 to a Belgian national who is also unconnected with the Communities. The first applicant was informed by letter dated 17 November 1970 from the Directorate-General for Administration that her expatriation allowance would be withdrawn as from 1 December 1970. As for the second applicant, she first of all continued to receive the expatriation allowance until and including the month of January 1971, but from her salary slip for February 1971 she discovered that the allowance had been discontinued. Furthermore, a letter from the Administration of 12 March 1971 informed her that in accordance with a memorandum from the 'Individual Rights' Division, her expatriation allowance was withdrawn as from 1 November 1970 and that she was required to refund amounts received as expatriation allowance for the months of November 1970 to January 1971.

The applicants both consider that the measures taken in their regard are illegal. Consequently, on 15 February 1971, the first applicant sent a memorandum to the Directorate-General for Administration in which she pointed out that the concept of 'head of household' no longer existed in the legal systems of a number of Member States and concluded from this that the provision applied in her case should not be interpreted too restrictively. Arguing further that the said provision was incompatible with Article 119 of the EEC Treaty, which embodies the principle of equal pay for men and women for the same work, she maintained that the measure taken against her should be reversed. But this complaint did not succeed. In a letter of 24 February 1971 the Directorate-General for Administration replied that the provisions which had been applied were perfectly clear and that the arguments which she advanced were not such as to alter the decision affecting her.

The second applicant suffered a similar fate. On 2 March 1971 she submitted to the President of the Commission a complaint under Article 90 of the Staff Regulations of Officials asserting, as in the case of the first applicant, that the principle of equality of treatment had been violated. She also argued that, notwithstanding her marriage, she still had the status of head of household on the grounds that she retained ownership of her property under the matrimonial system of separate estates, that she owned property in France and that furthermore she had to pay frequent visits to France to look after her parents' estate. But her request for a reversal of the decision did not receive any reply.

Such, Gentlemen, are the circumstances in which the cases brought before you by the first applicant on 26 April 1971 and by the second applicant on 18 June 1971 have arisen.

So far as concerns the first applicant, she claims in her application that the Court should:

— annul the decision notified to her by letter dated 17 November 1971, under which she has lost, by reason of her marriage, her entitlement to the expatriation allowance as from 1 December 1970;

— annul the decision notified to her by letter dated 24 February 1971 rejecting her complaint of 15 February 1971;

— rule that, notwithstanding her marriage, she may still claim the expatriation allowance.

As for the second applicant, she requests the Court to:

— annul the decision of the Commission whereby, by reason of her marriage, she has lost entitlement to the expatriation allowance as from 1 November 1970;

— annul the implied decision rejecting her complaint of 2 March 1971;

– rule that, notwithstanding her marriage, she may still claim the expatriation allowance.

The second applicant also requested in the alternative that the Court should find that she has retained the status of head of household but (if I have properly understood her) she withdrew this plea at the hearing.

As the applicants are represented by the same counsel and as, in substance the arguments advanced in support of their claims are identical, the two cases have been joined for the purposes of the oral procedure by Order of 3 December 1971. Consequently, I think I may be permitted to consider them together in my opinion.

1. I must begin my analysis with a few brief observations on certain problems of admissibility. It is true that the representative of the European Parliament did not raise these issues until the hearing, and this despite formal declarations at the stage of the written procedure that the defendant did not intend to contest the admissibility of the action. But since these are issues which must necessarily be examined by the Court, the lateness of this plea is of no consequence.

As you will remember, Gentlemen, the representative of the Parliament submitted that, by relying as her principal submission on the illegality of a provision of the Staff Regulations, the applicant is thereby challenging a legislative measure. The institution has called into question the admissibility of such a plea. Apparently, the defendant is inclined to interpret Article 91 of the Staff Regulations as meaning that an official may submit to your scrutiny only the legality of actual measures adversely affecting him, that is to say, measures taken in pursuance of the Staff Regulations, but that in the absence of any formal provision, it is impossible for him to challenge the normative rules on which the measure is based.

I have searched the Treaty in vain for a decisive answer to the question of the validity of this argument. Article 179 of the Treaty refers, in the matter of Community staff appeals, to the limits and conditions laid down in the Staff Regulations.

However, contrary to what the defendant considers, I think that there is no reason to adopt a restrictive interpretation of Article 91 of those regulations, under which the Court has jurisdiction in any dispute 'between the Communities and any person to whom these Staff Regulations apply regarding the legality of an act adversely affecting [faisant grief à] such person'. Several considerations lead me to this conclusion. First of all, it is certain that in principle the right of appeal of servants of the Communities is very wide. We need do no more than remember that the Court enjoys 'unlimited jurisdiction' in 'disputes of a financial character' which those servants may bring before it. Let us further observe that Article 91 is couched in very general terms. The determination of legality does not rest solely on whether it is the directly contested measure itself which is illegal; in other words, there is nothing to prevent an examination of whether the illegality of the measure does not derive from the fact that it is adopted in pursuance of a provision which appears to be illegal in the light of a provision of higher authority. Let us not forget, finally, that in a case involving Article 36 of the ECSC Treaty (Judgment of 13 June 1958, Case 9/56, *Meroni* v *High Authority*, Rec. 1958, p. 26 *et seq.*) the Court declared that that provision (like Article 184 of the EEC Treaty) constitutes a 'general principle'. In my opinion, this must also apply in disputes between the Communities and their servants. Therefore I believe that even if there is no formal provision in the Staff Regulations conferring the right to raise what may be called a plea of inadmissibility of provisions of general scope, such a right cannot be considered to be precluded in this case. It appears therefore that the submissions on the merits put forward by the applicant

withstand the objections which the Parliament has raised against them with regard to admissibility.

2. As for the merits, I have already explained that the main question is whether the system set up by Article 4(3) of Annex VII can be considered to be in accordance with the law. In view of the arguments advanced by the applicants in this connexion, my analysis must be divided into several stages.

In their applications Mrs Sabbatini and Mrs Chollet alleged, first, that the provision at issue was illegal because it disregarded a superior principle of law, that which requires equality of treatment between men and women or which, in other words, prohibits any discriminations on grounds of sex. At the hearing, this principle of law was not mentioned, so that one might well ask whether the applicants have abandoned this submission. That would be perfectly understandable since, despite all the arguments which they have developed before the Court, it must be recognized that they have not discharged the onus of proof incumbent upon them in this connexion. They have certainly not done so in their applications. And even the further arguments which the applicants devoted to this matter in their replies are not such as to show that the precept on which they rely exists in the form of a general principle of law which is binding in all circumstances. In short, the parties concerned have merely referred very vaguely to sociological concepts which are accepted in all the Member States and to the present level of social development. As for the concrete factors which they have adduced in an attempt to supplement their demonstration, they concern a narrower principle, that of equal pay for male and female workers, which is a specific problem and one with which I shall deal later. Such is the objection which may be made to the applicants' arguments, both when they rely on Article 119 of the EEC Treaty and when they refer to Convention No 100 of 1951 of the International Labour Organization, to the fact that, following the resolution of the Conference of Member States of 30 December 1961, the Commission made the attainment of equal pay for male and female workers an important objective of its policy, and finally to the report drawn up by the Commission for the Council regarding the application of the principle of equal pay.

On the other hand, by many references to national law the Commission (the defendant in Case 32/71) has been able to show that the applicants' argument is not well-founded and that the legal systems of the Member States do not recognize any general principle imposing in absolute terms equality of treatment as between men and women. Allow me to refer you in this connexion to the Commission's observations on the constitutional law of Member States and to its examples of different treatment sanctioned by the laws relating to military service, by labour law, by social security laws, by the law of public administration and by the legal provisions governing nationality. Furthermore, even in the field of family law (law of matrimonial relations and matrimonial property) we see that, not only at the time when the Staff Regulations were adopted, but even at the present day, certain Member States, which recognize the concept of head of household and the wife's duty to follow her husband, are still very far from legal equality as between men and women, and that even the 'more progressive' legal systems, despite the abolition of the concept of 'head of household', confirm male supremacy in certain situations (for example in the management of jointly owned property, in the obligation to provide for the family and in the choice of residence).

Consequently, I believe that, without dwelling further on the first argument advanced in the applications, I should now deal at once with the question whether the provision of the Staff Regulations here in issue violates the principle of equal pay for men and women which, on the basis of the Convention of the International Labour Organization of which I was speaking earlier, has been sanctioned by Article 119 of the EEC Treaty in the following terms: 'Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

For the purpose of this article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.' In this connexion, a preliminary question arises: it is whether, first of all, an indemnity of the nature of the expatriation allowance provided for by the Staff Regulations can be considered as properly falling within the ambit of Article 119 of the Treaty. This is what the applicants maintain when they assert that Article 119 covers any consideration received by workers, the word 'consideration' being interpreted widely. On the other hand, the Commission made certain objections at the hearing, pointing out that the expatriation allowance represents, not the counterpart of service rendered, but compensation for the expatriate situation of officials outside their countries of origin, a situation which is independent of the work which they accomplish. With regard to this controversy, I will frankly admit that I began by sharing the doubts of the Commission on the possibility of relying on Article 119 of the Treaty, since it is quite certain that the expatriation allowance does not constitute payment for service rendered. However, the origin of Article 119, which our eminent and lamented colleague, Mr Advocate-General Dutheillet de Lamothe, so clearly explained to the Court in his Opinion in Case 80/70 (preliminary ruling in *Defrenne* v *Belgian State*, [1971] ECR at pages 456 to 457), seems to indicate that it is an error to take so 'minimalist' a view of the scope of this article of the Treaty. It seems in fact that the relevant question is what constitutes consideration received from the employer for service rendered, and that, for the application of Article 119, it is necessary to have regard not only to pay as such, but also to any other remuneration paid by reason of the links binding the worker to his employer. This might apply in the case of the expatriation allowance, since it is closely linked to the performance of duties by an official of the Communities, for whom it is designed to provide some compensation in the event of his being required to carry out his duties abroad, that is, in surroundings different from those with which he was familiar in his former home. I therefore fail to see why Article 119 should not be applied to a situation such as that which exists in the present case. But, as, on the other hand, it is impossible to go into detail here with regard to the obscure and little known problems raised by Article 119, I think that it is preferable to leave open for the moment questions raised in this context and to continue my analysis on the basis that the principles embodied in this provision of the Treaty are also applicable to the expatriation allowance.

If we examine the system of expatriation allowances in the light of the principles set out in Article 119 of the Treaty, we must no doubt agree with the defendants that the provision which governs this allowance does not discriminate between the sexes, since it merely speaks of the 'official', without distinguishing between male and female officials. And this is also true of paragraph (3), which deals with the hypothesis of an official's marriage. The only special feature of this paragraph (3) is that the status of head of household plays a part in it. As the Court is aware, the status of head of household is determined in accordance with the provisions of Article 1 of Annex VII to the Staff Regulations. This provides that it is normally the married male official who is considered to be the head of household, whereas the married female official is accorded this status only on certain conditions: either where her 'husband is unable to engage in gainful employment owing to invalidity or serious illness', or where the female official is separated from her husband and has one or more dependent children within the meaning of Article 2(2) and (3) of Annex VII, or where, by reason of exceptional circumstances, the female official assumes the responsibilities of a head of household and where her spouse does not receive an allowance of the same nature. In spite of the distinction which these rules manifestly draw between the sexes, the applicants do not consider them discriminatory in so far as they regulate the right to family allowances. But they do consider that the link between the provisions of Article 4(3) and

the provisions of Article 1 is artificial and devoid of any objective justification because they believe that the status of head of household is irrelevant to the position of an 'expatriate' official, in other words one who has been uprooted from his country of origin. It is this belief which leads them to maintain that the fact that married male and female officials are treated differently in regard to the grant of the expatriation allowance (a difference which the Commission does not deny) must be regarded as discriminatory.

Having thus defined the problem raised by the two cases before the Court, it is important first of all, in order to resolve it correctly, to elucidate the nature and role of the expatriation allowance. These emerge from an analysis of the conditions imposed for the grant of this allowance and from consideration of the cases in which it is refused, as well as from a combination of these factors with the other provisions of the Staff Regulations. Such an analysis shows that the expatriation allowance cannot be claimed by an official whose nationality and place of residence display very close links between him and the country in which he is employed. It is when such links do not exist that an official may claim the expatriation allowance, which is thus designed to compensate him to some extent for the change in his living conditions, in other words for the disadvantages resulting from having to live in a strange milieu, which are not only material, involving extra expense, but also of a non-material nature. That represents the main justification for the expatriation allowance. On the other hand, it would appear to be wrong to lay too much stress on the idea that officials should be given compensation to enable them to maintain links with their countries of origin. The achievement of that objective is mainly ensured by another allowance, namely the annual refund of travelling expenses provided for in Article 8 of Annex VII to enable officials to return to their countries of origin, which, in fact, is granted in all cases, even after the marriage of the official. One factor implying that this is the proper way to regard this matter is the fact that the expatriation allowance is not calculated on the basis of the distance from the place of origin. Furthermore, in the case of the marriage of two officials who could both claim the expatriation allowance, it is granted to only one of them, and this rule can be explained only on the ground that the maintenance of links with the country of origin is irrelevant to the allowance and that account is taken only of changes in the way of life resulting from the permanent residence in a foreign country.

The nature of the expatriation allowance having thus been clarified, it appears to be right that the Staff Regulations should provide for its withdrawal in cases where close and durable links are forged with the country in which the place of employment is situated, not only as a result of a long period of residence in that country but also by reason of ties of a personal nature, such as marriage with one of its nationals. In such a case, it must be recognized that the establishment of a household, in other words definite integration within the State in question, has the effect of eliminating or reducing both the element of expatriation and the material and non-material disadvantages deriving from it. But it also appears that in this context it is equally justifiable to attach importance to the status of head of household within the meaning which I have set out above and not to consider as abnormal and artificial the rule which brings this factor into play. In this connexion, that person should be considered as head of household who assumes the major responsibility for providing for the family, whose role it essentially is to ensure the defence of the family's interests and whose destiny the family shares, both from the economic and the geographical points of view. If it is the married official who acquires this status, it follows that the question of expatriation should be answered mainly in relation to that person. If, on the other hand, it is the person whom the official marries who becomes head of household and if that person has the close links with the country of employment and residence mentioned in Article 4(1) of Annex VII to the Staff Regulations, it would be justifiable to conclude that, through the person whom the Community official has married, that offi-

cial is thereafter also closely linked to the State in which he or she resides by so close ties as to eliminate the element of expatriation. Of course (as I have noted), this rule has the effect that notwithstanding their marriage, in general male officials retain their entitlement to the expatriation allowance whereas female officials placed in the same situation are entitled more rarely to this benefit. However, it must be observed firstly that this differentiation was justified in 1962 and that, in spite of advances made by the principle of equality between men and women, it is still justified at present by reason of the pre-eminence given to the husband in the family law of most Member States. Secondly, and this point seems to me to be even more important, this result is moreover in accordance with a primarily economic view of the problem (the issue of who is responsible for supporting the family), as well as with an assessment of the situation from the sociological and psychological points of view (ascertaining who is the person on whom family life is centred and who decides in what environment the family is to live).

Consequently, although it cannot be denied that the system in force at the moment cannot be described as ideal and that the legislature could establish more subtle distinctions varying according to the facts of individual cases (an improvement which will perhaps be sought when the Staff Regulations come to be revised), I still believe that a purely legal analysis, carried out in relation to the principle prohibiting discrimination, can lead only to the following conclusion: taking into account both the nature of the expatriation allowance and the principles which justify it, there can be no violation of the principle of equal pay for men and women in the fact that on marriage the grant of the expatriation allowance is related to the status of head of household and to the links which bind the head of household to the State in which the place of employment is situated. Consequently, it is impossible to maintain that Article 4(3) of Annex VII to the Staff Regulations of Officials is illegal and the applicants may not therefore rely on such illegality as the ground for the annulment of the contested decisions.

3. However, the applicants also maintain that, in the alternative, even if Article 4(3) of Annex VII to the Staff Regulations is held to be lawful, the measures which they are challenging are irregular, on the ground that they are based on a misguided application of that provision. They argue in fact that the defendant institutions applied the provision in issue to the case where an official marries a person not in the service of the Communities, whereas in reality that provision refers only to marriage between persons already in the service of the Community institutions. The applicants have put forward several arguments in support of this contention, in particular they assert that the provision must be interpreted restrictively because it derogates from the general rule and because in case of doubt only a restrictive interpretation can limit the harmful consequences of its application.

When this question is examined, it can immediately be seen that powerful textual arguments can be adduced *against* the applicants' case.

Let us note, firstly, that the use of the general term 'person' in Article 4(3) indicates that the scope of the rule is a wide one. In fact, every time that the Staff Regulations intends to refer to officials alone, it says so clearly by using the word 'official' or, at the very least (as in paragraph (2) of Article 4), it speaks of persons 'employed in the service of the three European Communities' (a fact which, moreover, clearly runs counter to the applicants' contention that the situations governed by paragraphs (2) and (3) of Article 4 are 'parallel').

Secondly, if in Article 4(3), the authors of the Regulations had really intended only to refer to officials, it is difficult to understand why they used the complicated formula 'person who at the date of marriage does not qualify for the allowance'. In this case they could simply have said: 'persons who are not entitled to the allowance', a formula which is parallel to that appearing in paragraph (2) (husband and wife who 'are both entitled to expatriation allowance').

Let us note finally in this connexion that if paragraph (3) is intended to cover only the case of marriage with an official, it is

difficult to understand why that provision refers to the date of marriage. The fact that there is no reference to such date in paragraph (2) is quite simply because the date is irrelevant to the grant of the expatriation allowance to persons already in the service of the Communities.

It is therefore clear that the wording of Article 4(3) firmly supports the conclusion that that provision extends to cases where an official marries a person who is not in the service of the Communities.

Furthermore, I will frankly admit that I do not share the opinion that Article 4(3) constitutes a derogatory provision and that since there are doubts as to its interpretation it must be interpreted restrictively. I believe that that provision is clear and that it cannot reasonably give rise to any doubt (and I will demonstrate this below). Nor is it possible to argue that paragraph (1) of Article 4 lays down the rule to which paragraph (3) provides for an exception: the only thing that it is possible to assert is that the various paragraphs of Article 4 govern a series of cases in which an official's claim to expatriation allowance is either accepted or rejected. Moreover, I would point out that the restrictive interpretation advocated by the applicants would result in gross discrimination, since entitlement to expatriation allowance would disappear only in the event of marriage between officials, whereas it would not be lost by an official marrying a person who was not in the service of the Communities. I find it difficult to accept that such a result really corresponds to the intention of the Community legislature.

Therefore, in this last part of my examination it only remains for me to take up the argument, strongly put forward by the applicants, that the question whether the conditions necessary for the grant of the expatriation allowance are satisfied can be raised only with regard to officials, on the ground that the nature of the conditions defined in Article 4(1) and the way in which they are formulated show that they are applicable only to officials. I do not deny that at first sight this argument impressed me. But on looking into it more closely, I had to concede that it is convincing only in appearance. In reality, the method of formulation referred to by the applicants is the outcome of a legislative method which is frequently used and which consists in ensuring that certain provisions designed to meet a specific situation should be given parallel application to another situation. As the representative of the European Parliament has emphasized, this can evidently mean application by analogy; this means that it is necessary to extrapolate from the text of the provision in question. If Article 4(3) of Annex VII is viewed from this angle, it is clear that that provision can be applied without any difficulty to the case of marriage of an official with a person who is not in the service of the Communities. What I mean is this: since it must be ascertained whether the person with whom marriage was contracted possessed, at the time of marriage, the nationality 'of the State in whose European territory the place where [he or she was] employed is situated', it is clear that this is not a question of the 'place of employment' ('Dienstort') within the meaning of the Staff Regulations, but simply the place where the principal occupation is carried out. Since it must further be ascertained whether the person concerned 'during the five years ending six months before [he or she] entered the service did not habitually reside or carry on [his or her] main occupation within the European territory of that State', it may be considered that as, according to paragraph (3), the date of marriage is the relevant date, it is necessary to have regard to that date and to suppose for the purposes of investigation that it was at that moment that the person concerned became an official. It is consequently clear that there is no insuperable difficulty in applying the provisions in question by analogy to persons who are not Community officials and that, if this method is accepted, there is certainly no reason to limit the application of paragraph (3) of Article 4 to the case of marriage between persons who are both Community officials.

I will therefore sum up by pointing out that the applicants are also unable to reproach the defendant institutions with having erroneously applied the provision in issue and that they have raised this complaint to no purpose in their attempt to secure the

annulment of the decisions which they are challenging.

4. As for the other subsidiary plea set out in the application in Case 32/71, by which Mrs Chollet further argues that in any event she should have been recognized as possessing the status of head of household, it is no longer necessary for me to deal with this since (unless I am mistaken) her counsel withdrew this plea at the hearing. He did so after the Commission had demonstrated the inadequacy of the points relied on by the applicant in support of her argument and had proved, in the light of the unequivocal wording of the text of the Staff Regulations, that the points raised were not such as to lead to the conclusions which the applicant claimed to draw from them. And in fact, if the conditions required by the Staff Regulations for a female official to be granted the status of head of household are called to mind (I examined them in detail when I analysed Article 1 of Annex VII), there is no alternative, bearing in mind the limitative nature of these conditions, but to admit that there is nothing to add to the Commission's observations. It is therefore clear that the applicant cannot substantiate her claims by reference to the necessity for her to administer the parental estate in her country of origin, to the fact that she has no property in Belgium and that the marriage is governed by the matrimonial system of separate property, to the fact that her husband has a daughter by a first marriage and, finally, to the argument that she would in any case be recognized as being the head of household should her husband die and that there is a child of the marriage.

5. I would sum up my opinion as follows:

Although admissible, the applications should both be dismissed as unfounded since there is nothing to justify the annulment of the contested measures or the making of the declaration requested. Consequently, in pursuance of Article 70 of the Rules of Procedure, each of the parties must bear its own costs.