Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaties establishing the European Communities;
Having regard to the Protocols on the Statutes of the Court of Justice;
Having regard to the Staff Regulations of Officials of the European Communities, especially Articles 55 and 57 and Article 4 of Annex V;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT (First Chamber)

hereby:

1. **Dismisses the application;**

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

Monaco Donner Mertens de Wilmars

Delivered in open court in Luxembourg on 9 July 1970.

A. Van Houtte
Registrar

R. Monaco
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 28 MAY 1970[1]

Mr President,
Members of the Court,

Today's proceedings are concerned with the conditions under which an official who has left the service of the Communities may obtain monetary compensation for leave which he had not used up. The following is a brief introduction to the case.
The applicant entered the service of the European Communities in April 1958 and was at first an official of the Euratom Commission in Grade A5. As from 10 October 1963 he became a temporary servant (under Title II of the Conditions of Employment of Other Servants of the Communities) and was employed as deputy principal private secretary to the President of the High Authority of the European Coal and Steel Community. He was made a permanent official of the High Authority by a decision of 15 April 1964, taking effect as from 16 April 1964. In spite of his continuing employment as deputy

1 — Translated from the German.

principal private secretary to the President of the High Authority at the corresponding salary (that applicable to Grade A3) he was allocated to a post of Principal Administrator in the Directorate of Inspection. This post was in Grade A5; later as holder of the post he was promoted to Grade A4 with retroactive effect from 16 April 1964. By a decision of 14 January 1966, taking effect from 16 November 1965, he was made principal private secretary to the President of the High Authority. Thenceforth his salary was that appropriate to Grade A2. He nevertheless retained his post in the Directorate of Inspection. On 5 March 1967 the President of the High Authority resigned. Thereafter the duties of the President were carried out by the Vice-President of the High Authority. Nevertheless the private office of the President remained in being under the control of the applicant. Together with the other private offices it was only closed down following the merger of the Executives, that is with the end of the mandate of the members of the High Authority on 5 July 1967. The High Authority had however decided on 14 June 1967, to retain the staff of the private offices at their current salaries, for the month of July 1967 and to put them at the disposal of the former members of the High Authority to enable the work of the private offices to be wound up. This applied to the applicant as well. In addition at its meeting on 21 and 22 June 1967 the High Authority further made the decision to release the applicant from his position of principal private secretary with effect from 1 August 1967, and to assign him to the department in which a post as Principal Administrator had been reserved for him with a Grade A4 salary, that is to say, in the Directorate of Inspection. The parties do not agree on the activities of the applicant from then on. In any event, the applicant maintains that he continued to be engaged in winding up the work of the private office of the former President of the High Authority. Following the publication of Regulation No 259/68 of the Council the applicant took advantage of the opportunity offered in Article 4 of Chapter 2 and applied for the termination of his service. This was granted by the Commission by a decision of 20 June 1968, taking effect from 1 October 1968. The applicant was informed of this in a letter from the Directorate-General for Personnel and Administration of 21 June 1968. For the purpose of these proceedings it is relevant to note that the letter contained a request to use up the leave remaining due to him before his notice took effect, unless urgent service reasons prevented this. The applicant did not comply with this request. However, after he had left the service, first on 27 November 1968 and again on 8 April 1969 he applied to the Personnel Department of the Commission claiming compensation, under the terms of Article 4 of Annex V to the Staff Regulations, for the total of 67 days leave for 1968 and earlier years which he had not been able to take before the termination of his service. His application was however unsuccessful. After referring to the request of 21 June 1968, sent to the applicant and to a statement by his superior on 19 February 1969 that no urgent service reasons had prevented him from going on leave, the Director-General for Personnel and Administration rejected the claim in a letter of 30 April 1969.

The applicant lodged an application at the Court on 22 July 1969 contesting the rejection of his claim. In accordance with his conclusions, we shall first examine whether a right to compensation for leave which has not been used up, actually exists. Should the occasion arise we must also decide for how many days leave compensation is payable and on which basic salary it should be calculated. Finally there is the application to have one sentence struck out of the defendant's reply because the applicant thinks that it casts aspersions on his honour.

My opinion in the case is as follows:

1. As to the claim for compensation the main question is whether (as the applicant claims) under the second paragraph of Article 4 of Annex V to the Staff Regulations, the only requirement is that an official has not *in fact* claimed the leave due to him (including leave carried forward from previous years) or whether (as the Commission claims) there are further conditions.

A comprehensive examination in depth of

this problem is not absolutely necessary at this point. For we can, in my opinion, certainly leave open the question whether reference to the second paragraph of Article 4 of Annex V in principle requires proof that it was not possible for urgent sevice reasons to take the leave remaining before leaving the service. Here I would only make the observation that there appears to be some grounds for doubt in respect of the text of this provision, in particular when compared with the first paragraph of Article 4 which expressly mentions grounds relating to the service, although I am well aware that an *argumentum a contrario* is only to be inferred with care. In fact it should be possible to find a solution to this dispute without going into the problem in very great depth, having regard to the particular circumstances of the case, that is to say in view of the official position the applicant was in before he left and in view of the request sent to him by the administration to take his remaining leave in good time. In my opinion, such a request is not open to any fundamental objections because it does not entail any encroachment on the right to leave. For, properly understood, the right to leave does not mean that the person entitled has complete freedom of choice; rather that it can only be exercised with due regard for the interests of the service. This is a concept which basically governs the relationship between an official and his employer and the exercising of rights under the law relating to the public service. As regards the rules relating to leave, the concept can be inferred from Article 55 of the Staff Regulations whereby an official in active employment is *at all times* at the disposal of his institution.

It is of no importance whether the issue is one of order of precedence of interests or merely of the necessity of harmonizing opposing interests. In any case it can be deduced from these considerations that, in questions relating to leave, the employer may intervene and that he has a right to make arrangements, not least with regard to the time at which it is taken and to the requirements of the service. If this is so in a general sense, then the truth of the notion cannot be denied in regard to the particular situation in which the Commission found itself in 1968, when it was faced with the necessity of rationalizing its posts and reducing the number of staff. As we have seen, generous notice was given to officials who had to be dismissed (which even brought criticism from the Audit Board). Moreover, in the restructuring of the departments these officials were not assigned to new posts but were treated almost as being on leave and were in a position in which all they really had to do was to bring their former activities to an end. The fact that, in such a situation, the employer is concerned to see that they use up their remaining leave in good time, to avoid additional claims for compensation under Article 4 of Annex V to the Staff Regulations seems to be not only legitimate but something which in view of the import of those provisions, can be regarded as a matter of duty. If the request to use up remaining leave, sent to the applicant and other officials who were leaving, are seen in this light, it becomes clear that even without exact instructions as to the time when it was to be taken, they were not merely recommendations without binding force but constituted clear formal notice.

After all this, there are only two questions which can be asked in the applicant's case: we must consider whether he could not comply with the request for urgent *service* reasons and in any event we need to know whether he could *not be expected* to do so for some other reasons. Only if we find the applicant's conduct justified can his right to leave be regarded as not forfeited and converted into a right to compensation.

As you know the applicant maintains, in answer to the first question, that he had to wind up work of the private office of the President who was leaving and in particular to put all the records in order; for this reason he claims that he was not free to take leave. On closer examination however it becomes clear that the applicant can hardly justify himself in this way. In this connexion it is important to note that the administrative instructions were for a limited time, and confined to the month of July 1967 by the relevant decision of the High Authority. Thereafter the applicant clearly had no grounds for being involved in the winding

up of the work of the private office of the former President of the High Authority.
However, if one further presumes the possibility of a tacit extension of the task, although this is denied by the express declaration of the Commission that the Directorate of Inspection, to which the applicant had been re-assigned, did not release him for the winding up process mentioned, then it must be stated that extension of this process until September 1968, without a break, seems wholly improbable. This is still true even if one considers that the winding up of the work of the private office of the President would take longer than the winding up of the work of other private offices and that it was made more difficult by the departure of the President (who was absent from 5 March 1967). Nevertheless the applicant was in a position to start his work four months before the merger of the Executives, that is in March 1967. It should also be noted that in 1967 the applicant was already in a position to take a longer period of annual leave (43 days in all). In the light of this situation and of the fact that the amount of work involved in winding up tended to diminish, it was to be expected that the applicant would prove his case more strongly than he has sought to do with a few brief allusions and general offers of proof. It is also quite clear that his work in the administrative department to which he was re-assigned by decision of the High Authority, effective as from 1 August 1967, can also offer no justification for unused leave. In this regard the Commission has stated, without contradiction, that the applicant was only given a few cases. It should further be noted here that when the administration of the Commission was restructured he was not given any duties and that he remained in Luxembourg when the Directorate of Inspection was transferred to Brussels on 1 July 1968. It is not surprising therefore that in February 1969 his superiors in the Directorate of Inspection were able to state, categorically, that no service reasons had prevented the applicant from taking his leave in 1968.
Whilst it has thus been shown that no *service* reasons prevented the applicant from complying with the request made to him in June 1968, there only remains to be considered the question whether, for other reasons, it could have appeared unreasonable for him to take his remaining leave before he left the service. As you know he only argued basically that it was not possible to arrange a holiday trip at short notice. However even in this respect we cannot accept his argument. It must certainly be conceded that in principle, orders from an institution relating to leave and giving little notice should be judged strictly because they can unfairly restrict the sphere of individual freedom. However I would suggest that the particular situation in which the Commission found itself during the summer of 1968, justifies a different standard of judgment. Moreover as it was natural to take the annual leave in summer, the applicant's claim that it was impossible for him to arrange his leave seems, all in all, to have little credibility and I think we can safely leave it out of account.
Finally I come to the statement that in June 1968 the applicant was properly requested to take the leave remaining due to him before leaving the service, and that, because he failed to comply with this request for compelling reasons, he lost his right to leave. It is thus also clear that there is no right to monetary compensation. In the result there is no need to decide for how many days compensation would be payable — a point which as you know is also at issue — and on what basis it should be calculated (whether on the basic salary for 1967 or for 1968).

2. I must also comment on the procedural request made in the applicant's reply, to have a sentence, which he regarded as casting aspersions on his honour, struck out of the reply to the application from the Commission. I can deal with the point very briefly. In fact if one examines more closely what the Commission said in the sentence in question, one can only conclude that it chose its words very carefully. The actual words in the reply are simply as follows:

> 'On voit alors très mal comment le requérant ... peut valablement soutenir aujourd'hui que les tâches relevant de la liquidation du cabinet du Président de la Haute Autorité l'auraient retenu

jusqu'au 30 septembre 1968, c'est-à-dire pendant une période de qunize mois.'
('It is very difficult to see how the applicant can properly maintain today that the work involved in winding up the private office of the President of the High Authority, occupied him until 30 September 1968, that is, for a period of fifteen months.')

I would not regard this moderate judgment on the basis of probability as casting aspersions on the applicant's honour but in any case it should be recognized that it was made in the legitimate defence of the Commission's interests. Therefore there do not appear to be reasonable grounds for ordering the sentence to be struck out as requested by him.

3. I find no need to take evidence and reach the conclusion that the application to have the decision of the Director-General for Personnel and Administration of 30 April 1969 annulled and for a ruling that the applicant has a right to compensation in respect of leave which he has not taken, and to order the Commission to pay compensation for 67 days leave which he has not taken, is without foundation, as is the procedural request to have a sentence struck out from the Commission's reply to the application. The application should therefore be dismissed in its entirety with the result that the applicant has to pay his own costs.