Having regard to the Convention on certain Institutions common to the European Communities;
Having regard to the Protocols on the Statute of the Court of Justice annexed to the Treaties establishing the ECSC, the EEC and the EAEC;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;
Having regard to the Staff Regulations of Officials of the European Communities, especially Articles 4, 7, 25, 45 and 91,

THE COURT (First Chamber)

hereby :

1. **Annuls the decision of the Secretary-General of the European Parliament of 6 January 1970 calling upon Mrs dell'Omodarme temporarily to occupy a post of translator;**

2. **Orders the European Parliament to pay the costs.**

Donner Monaco Mertens de Wilmars

A. Van Houtte
Registrar

A. M. Donner
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 10 FEBRUARY 1971[1]

Mr President,
Members of the Court,

The applicant in the case which concerns us today has been in the service of the European Parliament as an assistant translator since October 1966. He was at first a temporary servant and then established in Grade L/A 7 as from 1 May 1969. At the beginning of the past year he believed he had discovered some irregularities in the Italian section of the language service of the European Parliament. That is why on 6 April 1970 he put before the appointing authority a formal complaint in accordance with Article 90 of the Staff Regulations of Officials. In that letter which was received by the appointing authority on 10 April 1970, he dealt with two questions: on the one hand the rules governing missions to Strasbourg and on the other hand the temporary allocation of two posts as translator under Article 7 (2) of the Staff Regulations of Officials. In respect of the first matter he pointed out that only a category of privileged officials benefited permanently from these missions, whilst others (among whom was the

1 — Translated from the French version.

complainant) were sent to Strasbourg more rarely and only in turn, although they are not less qualified to undertake the duties attached to these missions. Further, the complaint criticized the fact that among the persons always sent on mission, appeared also a temporary servant who, in a competition, had been given lower marks than he. On the second point, he alleged that Article 7 (2) of the Staff Regulations was sometimes applied for the purpose of obtaining personal advantages. The proof of it was that in the Italian section of the language service a colleague, who was also classified as Grade L/A 7 was twice given a temporary posting to a post as translator, although as concerns her ability, her qualifications and her experience, she did not reach the level of the complainant. Further, that colleague had already been favoured because of the fact that her husband was also an official in the European Parliament and classified in Grade A 5. Further, since the decisions in question were not published, they are therefore open to criticism from the point of view of the form. For these reasons the complainant submitted to the appointing authority the following requests:

(1) that it should replace the temporary servant continually sent on mission to Strasbourg by an official in a higher grade or of greater seniority;

(2) alternatively: that it should review the criteria applicable to missions to Strasbourg, in such a way as to ensure a fairer alternation;

(3) that it should annul *ex tunc* the two decisions taken in application of Article 7 (2) of the Staff Regulations of Officials concerning the allocation of a temporary posting as translator;

(4) that it should apply Article 85 of the Staff Regulations of Officials.

By letter of 25 June 1970 the Secretary-General of the European Parliament replied in the negative to these requests. He recalled that the mission orders were discretionary decisions which were taken exclusively in the interest of the service. Temporary servants could also benefit from them when they had to be regarded as the most fitted to fulfil certain duties, as was the case in the matter raised by the application. It was therefore not possible to see in this fact any discrimination against the applicant. As to the temporary postings, Article 25 did not provide for their publication: nevertheless they had been published by posting in the premises of the institution for ten days, from 19 December 1968 to 22 January 1970 respectively. For the rest, the decisions in question were justified because of the fact that it was apparent from two competitions which took place in 1967 and 1968 (one of which concerned a post of translator) that the official given the temporary posting showed better qualities than the applicant. Consequently the complaint had to be rejected in its entirety.

The complainant did not state that he was satisfied with that reply. He therefore made an appeal to the Court of Justice which was lodged on 6 August 1970. According to the wording of the application, the subject-matter of the proceedings was, on the one hand, the implied rejection of the formal complaint (actually the applicant received no reply within the limitation period of two months laid down in Article 91 in the Staff Regulations of Officials) and, on the other hand, the express reply of 25 June 1970 from the Secretary-General of the European Parliament. Nevertheless the conclusions concerned first of all only the annulment of the two temporary postings (the applicant having expressly abandoned the alternative requests contained in the complaint). As to the first point of the complaint, the applicant stated that he left the decision to the 'discretion of the Court'. It is only in the reply that in response to remarks made concerning this by the defendant he expressly asked the Court to

declare that the merits of officials must be taken into consideration when allocating travel and that a permanent travel order could not be granted to a temporary servant (thus extending the subject-matter of the claims to the first point of his administrative complaint).
I must now discuss these claims. In my opinion they call for the following comments.

I — Admissibility

Let us consider first of all the objections raised by the European Parliament concerning a series of questions which deal with the admissibility of the claims. They deal in particular with the formulation of the claims, the time-limit for making an appeal and of the existence of an interest in bringing an action.

1. *Formulation of the claims*

As I have already said, the administrative complaint contained four requests, of which two were alternative (these were expressly deleted in the application). Only one of the principal requests was repeated in the application (that concerning the annulment of the temporary posting). On the other hand, in the application the applicant left the other (replacement of a temporary servant in the case of missions) to the discretion of the Court, without formulating express conclusions. It is a matter therefore of whether a problem can be made the subject of proceedings in that way or—if not—if it is at least possible expressly to formulate a request at the stage of the reply.
The Commission [*sic*] considers such a process to be irregular and consequently asks that the request which was formulated in the reply alone be rejected as inadmissible. In my opinion we are bound to follow that view even if it may appear to be formalistic. It follows in fact from the provisions of the Protocol on the Statute on this point (Article 19 of the EEC and EAEC Protocols, Article 22 of the ECSC Protocol) and particularly from Article 38 (1) of the Rules of Procedure that the application must include the conclusions of the applicant. It is an essential condition, for only in this way can the dispute be precisely delimited. According to our procedural system it is important that the conclusions should be formulated in the application. That is what appears clearly from the fact that they are not mentioned in Article 38 (7) of the Rules of Procedure, that is to say, in the provision which authorizes an application to be put in order upon the request of the Registrar when certain requirements for the making of an application have not been observed, and this is so, according to the provisions of the Protocol on the Statute, even after the expiration of the time-limit for making an application. As regards the formulation of conclusions, there is not, therefore, any possibility of putting them in order in the sense that conclusions which were not formulated in the application could be put forward *a posteriori* and it is obvious that in this respect it is the considerations linked to conformity to the time-limits which are decisive. But since, as I have already said, the applicant made the request in question only in the reply and at that time the time-limit for making an appeal had already expired, the only possibility remaining is to exclude it from the legal examination on the ground of inadmissibility. Furthermore the reservation contained in the application does not modify that conclusion at all because even if it were of legal importance, it would nevertheless be necessary to regard it as expressly referring only to the 'submissions of fact and of law' and not to the conclusions themselves. In the remainder of my examination I shall therefore leave aside all questions referring to the rules governing missions to Strasbourg.

2. *The observance of the limitation period*

As to the conclusions regarding the annulment of the temporary postings, in

the opinion of the European Parliament, there is certainly no objection concerning the observance of the time-limit for appeal, at least as regards the *second* decision, because it was taken on 5 January 1970 and published only on 22 January 1970. On the other hand according to the Parliament it is not possible to say as much concerning the first decision concerning a temporary posting, because it had already been taken on 4 December 1968.

When this objection is considered it is necessary to take account of the fact that the measures in question were not directly contested before the Court of Justice, but only after an administrative complaint (which, as we know is quite desirable according to your consistent case-law). As the administrative complaint was not received by the appointing authority until 10 April 1970 (and since the observance of the limitation periods which began to run later clearly raises no problems, since the application was made on 6 August 1970), everything depends on the question whether the administrative complaint was made during the period allowed for making the application or whether the latter (calculated as from 10 April 1970) did not begin to run before 11 January 1970. Nevertheless, let me say immediately, it is difficult to prove that it is really so. According to Article 91 of the Staff Regulations of Officials, in the case of measures of an individual nature the period of time begins to run on the date of notification to the person concerned. If it is a matter of measures which are addressed to certain officials, but which, further, are of interest to a large number, it is clearly not necessary to notify each one of them individually; publication which gives sufficient knowledge of the contents of the measures is enough. In the present case according to the information from the European Parliament in respect of the temporary posting made on 4 December 1968 and which entered into force on 15 December 1968, that publication took place by way of posting on 19 December 1968 (for ten days). The applicant denies this, it is true, but as no report of these facts was prepared for the Parliament we can accept that the latter gave the necessary proof by means of lists which were produced as a schedule to the rejoinder and in which the various notices posted up by the competent departments are clearly recognizable according to name, subject-matter, dates etc. At least one can see in these lists the *prima facie* evidence which the applicant should have rebutted (which in fact he did not do). If, however, one does not wish to accept this point of view, because, for example, the posting took place partly during a holiday period, it is at least certain that the decision in question was also the subject of a communication in the monthly Staff Bulletin and—according to the Parliament—in a number distributed on 20 June 1969 or—according to the applicant—in a number which came to his knowledge almost a year after the adoption of the decision, that is to say, at the beginning of December 1969. That communication included all the necessary facts of the decision (the name of the person benefiting and the post temporarily occupied); it was therefore sufficiently explicit to enable anyone who had an interest to institute proceedings. Consequently it may be said that in this case the limitation period had already started running before the date mentioned previously (11 January 1970) and not only, as the applicant thinks, on the receipt of the letter from the Director-General of Administration of the European Parliament, of 25 March 1970, in which the applicant was, at his request, informed of the dates of the temporary postings which interested him. The request for the annulment of the first temporary posting must therefore be rejected as inadmissible for failure to comply with the limitation period.

As to the rest it is not possible either to arrive at a different conclusion by arguing that because of the fact that it

was taken not by the competent appointing authority, but by the Secretary-General of the European Parliament, that decision is absolutely void on the ground of failure to observe the rules on jurisdiction in force and that it is therefore not necessary to annul it but simply to find that it is void. Leaving aside doubts as to the relevance of that argument (according to which it can only be accepted that a measure is void if there is an obvious lack of jurisdiction), it is necessary to say also that even assuming the measure were void, the applicant would have no interest in obtaining a declaration to that effect. This appears to be unquestionable because the same problem—observance of the rules on jurisdiction—arises in connexion with the second temporary posting and an examination of it may enlighten us. Accordingly we can content ourselves with this finding and conclude from it that the continuation of our examination should be limited to the *second* temporary posting.

3. *The interest in taking proceedings*

Lastly in respect of the request for the annulment of the second temporary posting, the Parliament—the defendant—again disputed the applicant's interest in bringing proceedings. That was because in no case could the applicant any longer himself benefit from such a decision. Furthermore it referred to the argument of the applicant that it was in no way necessary to adopt such a decision. If that had really been so, says the Parliament, the applicant would not therefore have obtained any advantage even if the measure adopted had been annulled at the proper time, that is to say, that he could not have hoped to occupy the post in question temporarily so that his lack of an interest in taking proceedings is plain.

I consider it possible to reply first of all to these objections that they concern mainly problems on the substance of the case and therefore questions which do not come within the framework of the consideration of admissibility. Further, even if the argument of the applicant were correct it is not possible purely and simply to deny that he had an interest in taking proceedings. I consider in fact that in cases like this it is appropriate to accept such an interest not only when the applicant endeavours to become the addressee of such a measure in place of the official to which the contested decision is addressed but also when another official has benefited from a decision which may play a role during the evaluation of *future* administrative situations, that is to say—this point was particularly emphasized—on the adoption of promotion decisions. In these circumstances the applicant therefore certainly has an interest in the annulment of the disputed temporary posting as being of importance for his career prospects and that is so even if he himself has no possibility of becoming the addressee of such a decision.

That is why I consider that from this point of view it is proper not to exclude completely the admissibility of the application but on the contrary that reasons exist to consider the substance of it, that is to say, whether the request concerning the second temporary posting is well founded.

II—On the substance of the case

1. *Lack of jurisdiction*

The applicant contests the legality of the decision by which one of his female colleagues was given a temporary posting, as from 5 January 1970 as a translator (the holder of the post was on maternity leave), by referring in the first place to the relevant rules on jurisdiction. As you know the decision was taken by the Secretary-General of the European Parliament. The applicant considers that it should have been taken by the Bureau of the Parliament or, according to the opinion which he put forward in the

oral proceedings, by the President of the Parliament as the competent appointing authority.

It is thus necessary to consider who, within the framework of the European Parliament, is the appointing authority in accordance with Article 2 of the Staff Regulations of Officials for the purposes of the adoption of the measures provided for in Article 7 (2). The decision designating the appointing authority, adopted on 12 December 1962 by the Bureau of the European Parliament and placed in the file at the request of the Court is important in this regard. We find from it that the powers which are vested in the appointing authority by the Staff Regulations of Officials are exercised by the President of the European Parliament (and not, therefore, by his Secretary-General), in so far as officials of the language service in grades up to L/A 6 inclusive and—which is particularly interesting at present—in so far as the application of Article 7 of the Staff Regulations of Officials are concerned. On the other hand the defendant Parliament has pointed out that Article 7 (2) of the Staff Regulations of Officials which is applicable to temporary postings, does not speak of the appointing authority. It is therefore possible to infer from this, in conjunction with the decision of the Bureau of the Parliament of 12 December 1962 already mentioned, that what is presently concerned is the exercise of normal administrative powers which are vested in the Secretary-General as Chief of the Secretariat of the Parliament.

Nevertheless I am not at all convinced that this defence is relevant. A certain number of considerations have to be taken into account in the present case. First of all although it is true that according to Article 2 of the Staff Regulations of Officials, 'Each institution shall determine who within it shall exercise the powers conferred by *these Staff Regulations* on the appointing authority', nevertheless, properly understood, that definition includes not only the articles of the Staff Regulations of Officials which speak expressly of the appointing authority but also the whole of the powers which the Staff Regulations confer upon the appointing authority. This is why the appointing authority is not mentioned in all the articles, the application of which is reserved to the President of the Parliament. I will confine myself to referring to Article 16 of the Staff Regulations of Officials which speaks of 'the institution'. Further I agree with Euler (Europäisches Beamtenstatut 1966, Vol. I, p. 36) that the delegation of powers on the basis of Article 2 of the Staff Regulations of Officials must be interpreted in a *restrictive* manner. Consequently the powers of decision remain within the competence of the higher appointing authority when their delegation to subordinate authorities has not clearly been provided for. That is important in the present case because in the decision of the Bureau of the Parliament of 12 December 1962 the application of *the whole* of Article 7 of the Staff Regulations of Officials was reserved to the President of the Parliament, in so far as it refers to officials of the language service of a grade higher than L/A 6 inclusive. If there had been a question of a purely partial application of Article 7, for example only of its first paragraph, it is certain that the decision of 12 December 1962 would have stated that expressly, as it did for other articles of the Staff Regulations of Officials, for example as regards Article 28 concerning which it confines itself to mentioning paragraph (a), or as regards Article 59 of which it mentions only paragraph (1). But as the same did not happen in the case of Article 7 of the Staff Regulations of Officials we must accept in fact that its application to posts in Grade L/A 6 is reserved entirely to the President of the Parliament. Lastly it is also necessary to consider the importance of the measures adopted under Article 7 (2). As you know temporary posting may last for a relatively long time and, further, decisions of this

nature play a considerable role in the career of the officials who have benefited from them (for example as regards promotion). For this reason also it is certainly not possible to say that temporary postings are measures of secondary administrative importance which the Secretary-General of the Parliament would be in a position to take even in respect of higher posts without being expressly empowered to do so.

On a reasonable interpretation of the decision of the Bureau of the Parliament of 12 December 1962 in the light of the provisions of the Staff Regulations, we must therefore accept that the temporary posting which concerns us here could not be made by the Secretary-General but only by the President of the Parliament, and that consequently it must be annulled for lack of jurisdiction.

2. *Infringement of Article 7 of the Staff Regulations of Officials*

The outcome of our consideration of the matter of jurisdiction renders any other examination superfluous. Nevertheless in order to put my examination on a broader basis, I will at least consider one other argument: the question whether the temporary posting was at all permissible.

This question certainly poses no difficulties to the extent that Article 7 provides that the post occupied temporarily must be in a career bracket which is higher than the substantive career bracket of the official temporarily posted. That condition is in fact fulfilled because the official given the temporary posting belongs to career bracket L/A 8—L/A 7, whilst the post which was given to her comes within career bracket L/A 6—L/A 5.

Nevertheless, according to the latest case-law, which appears convincing to me, it is not sufficient to take such a formal view; in order to apply Article 7 in a reasonable manner it is necessary on the contrary to consider also the respective *duties*. It must therefore be asked whether the duties belonging to the post occupied temporarily carry greater responsibility, if they differ appreciably from the duties belonging to the official posted temporarily and if there exist marked differences on this point (Case 5/70, judgment of 16 December 1970). The applicant strongly disputes that this is in fact the case. He alleges in particular that the disputed temporary appointment did not give his colleague different duties, that she continued to carry out the duties of translator as before and that her translations still required revision. In order to be clearer on this point the Court addressed a number of questions to the defendant Parliament. Following that the Parliament produced the vacancy notices which describe both the duties attaching to the post occupied temporarily and the duties carried out by the official to which it was given. These vacancy notices show in fact no difference in the conditions required for the officials concerned to occupy the posts in question. In both cases the conditions required were university education, a perfect knowledge of Italian, a wide knowledge of at least two official languages of the Community and legal, economic and technical knowledge. The only difference is that on the subject of the duties attaching to the post of translator in career bracket L/A 8—L/A 7, it was a matter of 'translation into Italian from at least two official languages of the Community', whilst for the post in career bracket L/A 6—L/A 5 it was a matter of 'translation into Italian of *complex* texts from at least two of the official languages'. Further the Parliament stated that the difference was not so much in the character of the duties but in the qualifications of the officials to whom they were given, in the sense that in the case of the post falling within the career bracket L/A 6—L/A 5, revision could be less thorough. What can we deduce from this? Although it is not possible to deny that the post occupied temporarily meant a greater

responsibility for the official who had been given it than that which she had to demonstrate in the post in which she was placed, nevertheless it can hardly be accepted that there is a *marked* difference in the sense of the judgment in Case 5/70 in respect of the duties carried out temporarily and their degree of difficulty. According to the most recent case-law it is therefore extremely doubtful whether the Parliament was justified in taking a decision under Article 7 (2) of the Staff Regulations of Officials. In these circumstances the contested decision must also be annulled because it did not fulfil the basic condition required by Article 7 of the Staff Regulations of Officials.

3. In view of the outcome of my examination I will not go on to consider the other arguments of the application, that is to say, the complaint of misuse of powers (concerning which the applicant submitted that the official given the temporary posting was personally favoured), the complaint of infringement of essential procedural requirements (which, in view of the second paragraph of Article 25 of the Staff Regulations of Officials, is said to be established by the failure to post up a notice of the temporary posting and by the fact that the Staff Committee did not take part in the procedure), the view that it was necessary to make an examination of the comparative merits of the officials to be considered (in which the applicant would have fared better than the official granted the temporary posting), nor, lastly, the argument that the practice adopted by the Parliament was discriminatory because the officials to be taken into account were not all considered for the temporary posting under Article 7. As to what should be thought of these complaints, that question may be left open now, even if after a perfunctory examination it may be thought that the application would have difficulty in succeeding on the basis of these arguments.

III — Summary

After all the foregoing my opinion is therefore as follows:

The conclusions in which the applicant asks the Court to annul the decision concerning a temporary posting taken in December 1968 and to declare that a temporary servant cannot be given permanent missions to Strasbourg must be regarded as inadmissible. On the other hand, to the extent to which the application is directed towards the annulment of the decision concerning the temporary posting taken in January 1970, it appears not only admissible but also well founded, from which it follows that the implied decision of rejection of the complaint of the applicant which is assumed to follow from the silence of the administration upon the expiry of the period of two months, must be annulled on this point. In these circumstances I consider it proper to order the defendant Parliament to bear half the costs incurred during the case.