On those grounds,

THE COURT (First Chamber)

hereby

1. **Dismisses the application;**

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

Mertens de Wilmars Monaco O'Keeffe

Delivered in open court in Luxembourg on 19 June 1975.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 28 MAY 1975 [1]

Mr President,
Members of the Court,

By Vacancy Notice No 1059 the European Parliament on 12 March 1974 declared vacant an A 3 post in the Directorate General for Committees and Interparliamentary Delegations. In the notice it was stated that the President of the Parliament had decided to fill the post by promotion or transfer within the institution. As a requirement to be fulfilled it listed *inter alia* a thorough knowledge of English. Applications were to be lodged by 25 March 1974. The notice was published in the first instance only in English, similarly to another notice, (No 1058) in which a thorough knowledge of Danish was called for and which in the first instance was published only in Danish.

Once he became aware of this fact, Mr Küster, the applicant in the present proceedings, submitted a complaint under Article 90 of the Staff Regulations to the President of the Parliament on 1 April 1974 complaining of the way in which the vacancy was announced, in that the notice was not published in all

1 — Translated from the German.

the Community languages. He further submitted that the conditions as regards knowledge of languages amounted to reserving the post advertised to a Dane, or to a Briton, as the case might be, something which under Articles 27 and 45 of the Staff Regulations was not permissible.

There followed at the beginning of April the publication of the vacancy notice in all the languages of the Community; the date by which the applications were to be lodged was extended to 25 April. In this way therefore the complaint submitted by Mr Küster was partially accepted. No change was however made in relation to the requirement as to the knowledge of languages.

This led Mr Küster who on 2 April 1974 had applied for the post specified in Vacancy Notice No 1059, to file an application to the Court on 28 October 1974. His claim was for the Vacancy Notice No 1059 to be annulled thereby rendering illegal any procedures consequent thereon.

I would add that the first stage of the procedure for filling the post evidently produced no results. At any rate, on 30 September 1974 it was announced that an internal competition No A 50 was to be held for the purpose of filling the post in question. In this connexion the conditions set out in Vacancy Notice No 1059 were adopted *in toto.*

Here too, Mr Küster submitted his application and in addition, objecting as he did to the terms of the vacancy notice, he submitted a complaint on 18 October 1974 under Article 90 of the Staff Regulations. Since his complaint was unavailing, he brought a further application on 19 February 1975 seeking the annulment of Internal Competition No A 50.

Now in examining this dispute, so far as concerns *the annulment of Vacancy Notice 1059* some preliminary remarks *as regards the admissibility of the application* are called for in the light of the objections raised by the defendant, the Parliament.

The admissibility of the application is questioned by the Parliament on two grounds: first the Parliament takes the view that the vacancy notice objected to does not amount to an act adversely affecting a person; moreover, the Parliament in its second pleading referred to the fact that the procedure for filling the post had meanwhile reached the stage of an internal competition and that the application at present before the Court must be regarded as having lost its purpose since the applicant had also contested the internal competition.

As to the first point, the Parliament considers that it can base its objection on the Court's case-law, in particular the judgment in Cases 26/63 (judgment of 1 July 1964, *Piergiovanni Pistoi v Commission of the EEC* [1964] ECR 341) and 11/65 (judgment of 14 December 1965 *Domenico Morina v European Parliament* [1965) ECR 1017). On closer examination however it will be seen that these cannot provide support for the view taken by the Parliament.

Admittedly the judgment in Case 23/63 contains the statement that only acts which are capable of directly affecting a given legal situation can be considered as adversely affecting a person. However it must not be overlooked that this dictum, which in the case in question resulted in the dismissal of the application, was given in relation to a procedure for integration of a servant after the entry into force of the Staff Regulations and the necessary report of an Establishment Board. In this connexion there were certainly good grounds for denying that the measures criticized had directly affected a given legal situation since in any event an act on the part of the

appointing authority was necessary before there could be any ground for a complaint. I have however considerable doubts whether the same can really be said in relation to a measure which — as is the present case — was taken by the appointing authority itself and in which there were laid down particular conditions for filling a post, which necessarily put certain applicants at a disadvantage.

In Case 11/65 it was primarily the legality of a decision to make an appointment arising from an internal competition which was in issue and in this context criticism was also expressed as to the conduct of the competition. Now admittedly on this point the judgment states that the application directed against the competition is only admissible to the extent that it serves to support the application brought against the appointment. However it is not my impression that this was intended to establish the thesis that in such cases only determinative acts of appointment or transfer can be contested, but not measures of a preparatory kind such as the vacancy notice involved in this case, for if this had been intended as establishing a principle then it would have been in contradiction to earlier cases. In the judgment in Case 15/63 (judgment of 4 March 1964 *Claude Lassalle v European Parliament* [1964] ECR 31) upon which, incidentally, the applicant relies, no objection to the admissibility of the application was raised although — just as in the present case — it was only a matter of annulling a vacancy notice on the grounds that certain conditions had been laid down. One can therefore proceed on the basis that if in Case 11/65 it had been intended to depart from this case-law, a reference under Article 95 of the Rules of Procedure would certainly have been made to the Court. Since this was not done, I cannot assume in the case now before the Court that the judgment in Case 11/65 intended to establish new law as regards admissibility of an application. Added to this there is the fact that other judgments likewise favour a liberal view of admissibility and thus go against the point of view expressed by the Parliament. I have in mind, for instance, the judgment in Joined Cases 12 and 29/64 (judgment of 29 March 1965, *Ernest Ley v Commission of the EEC* [1965] ECR 107) in which an application was considered admissible against the decision which laid down that a post was not to be filled by way of promotion or internal competition but that the transfer procedure under Article 29 (1) (c) was to be followed. Here too, it was not a case of concluding the procedure for filling a post but rather the initiation of a particular stage of this procedure. I also have in mind the judgment in Case 44/71 (judgment of 14 June 1972, *Antonio Marcato v Commission of the European Communities* Rec. 1972, p. 147) in which an application against the decision of the Selection Board that the applicant's candidature could not be entertained, was declared admissible and this notwithstanding the fact it was not a case of a decision concluding the procedure for filling a post.

The direction in which this case-law points seems to me perfectly correct. It in no way gives rise to the danger of a proliferation of legal proceedings for in such cases it is not absolutely necessary to contest every act adversely affecting someone; rather as was emphasized in the judgment in Joined Cases 12 and 29/64 can it be asserted within the framework of an application against a later act in the course of the procedure for filling a post that earlier acts were illegal. On the other hand it cannot be denied that all parties must have an interest in being able to verify the correctness of the procedure for filling a post at the earliest possible moment, so as to avoid the taking unnecessarily of illegal measures for appointment.

I therefore think — thus concluding this aspect — that there is nothing to be said against the view that a vacancy notice,

the conditions of which prejudice the prospects of candidates for promotion, can also amount to an act adversely affecting them. Since according to the applicant's argument this is the case here, one cannot declare the application inadmissible by reference to the legal nature of the act impugned.

Further – let me say at once – the inadmissibility of the action cannot be established on the basis of the second argument raised by the defendant, the Parliament.

The procedure for filling the post has admittedly already reached the second stage, that of internal competition, and against this too – nothing having been changed in the conditions – the applicant brought legal proceedings. It can therefore be said that the act involved in the present proceedings, the vacancy notice initiating a procedure for promotion or transfer, has been superseded by another act and that the application against the first act has thus become pointless. This does not necessarily mean that is inadmissible, provided only that there exists an interest in finding the illegality of the act which has meanwhile been replaced. The existence of such an interest can certainly be admitted. For once it is established that the first step in the procedure for filling the post was illegal then, having regard to the requirements of Article 29 of the Staff Regulations, it must undoubtedly recur. In my view it also cannot be said than an interest in obtaining a ruling ceases to exist by reason of the fact that the same question of legality is also now in issue in the internal competition procedure. Any such notion can be countered in particular by the argument that with a view to limiting litigation it would certainly make sense here and now to decide the question raised. For thus it might be possible to terminate at an early stage the procedure for filling the post without awaiting clarification of the question as part of the second annulment proceedings which are only in an early stage.

I therefore take the view that the action is admissible and I shall now proceed forthwith to consider *whether it is well founded.*

As you know, the vacancy notice is in the applicant's view illegal since it provides that a thorough knowledge of English shall be a pre-requisite for appointment to the post advertised. The applicant is convinced that this conceals the intention to reserve the post to a candidate of British nationality. In his view this amounts to an unwarranted limitation of the opportunities of other candidates and so to disregarding the Staff Regulations (Articles 29 and 45) as well as the relevant case-law which establishes that reservations of this kind are not permissible.

As regards this criticism, it must first be remembered that its legal basis is certainly correct. In fact, it was said quite clearly in the judgment in Case 15/63 that a vacancy notice may not impose a condition that the applicants shall be of a particular nationality. In so far as the Staff Regulations provide that recruitment shall be on the broadest possible geographical basis, this only amounts to an additional factor to be borne in mind; nationality can therefore only be decisive, where other qualifications are shown to be equal. These principles will also have to be adhered to in future. Although, following upon the accession of the new Member States, different considerations applied for a time to their nationals there can no longer be any question of this after expiry of period of the temporary transitional provisions. No different considerations can apply to the Committee Service of the Parliament and in particular the heads of the Committee Secretariats. Admittedly, as regards the national quota, certain political considerations cannot be excluded. However, so long as the Staff Regulations

make no special provision for this service, for which good grounds can be adduced, there is indeed no alternative but to apply to it the general principles of the Staff Regulations.

Admittedly, the Parliament argues in its defence that the contested vacancy notice in reality certainly does not contain the reservation mentioned by the applicant and in particular it disputes emphatically that there is an intention to reserve the post for a national of a particular Member State.

In the light of these arguments, the first half of which is certainly relevant, it is therefore crucial to know whether the evidence adduced by the applicant in support of the correctness of his views, does or does not carry weight.

As you know the applicant refers to three factors in this context: he maintains that the Secretary General of the Parliament had expressly stated to a member that the post was reserved for a British national; he further refers to the fact that the notification of the vacancy had initially been published only in English and he finally argues that objectively speaking there is no need for requiring a thorough knowledge of the English language since the Committee Secretariat in question already employs at least one official of English mother tongue. I shall now have to deal individually with these arguments.

It seems to me sensible to start with the third argument, and to consider whether the Parliament had made it clear that a knowledge of the English language was required for the post advertised in the interests of the service.

On this point the representative of the Parliament has in the course of the oral proceedings stated in particular that especially in the Committee Service it is essential for all the Community languages to be adequately and reliably represented. This is of decisive importance in ensuring collaboration with parliamentarians of the different Member States who frequently have no knowledge of foreign languages and in particular in the relationship of the President of Committee with Rapporteurs on the one hand and with officials of the committee on the other. Since however so far there has not been an adequate number of officials with an advanced knowledge of English in the Committee Service it must seem justified to lay particular stress on the said language qualifications.

I take the view that such considerations are particularly suited to establish the existence of interests of the service with which we are now concerned. At any rate this applies in a case where the requirement of thorough knowledge of the English language is not understood as meaning that English must be the mother tongue — there is nothing to support this in the present case — but that a more modest level would in fact suffice.

I also take the view that no decisive weight attaches to certain objections by the applicant in relation to the explanation given by the Parliament particularly so as regards the observation that the post advertised was known to be intended for a particular committee and that it was precisely in the secretariat of this committee that a thorough knowledge of English was catered for by the employment of an official of British nationality.

In my view sufficient on this point is the statement of the Parliament that the post advertised is not intended for any particular Committee Secretariat but that a decision on the use to be made of it will in fact be taken later on within the framework of administrative organization. Further as has been emphasized by the Parliament one also cannot exclude the possibility that the services of the British national referred to by the applicant as working in a Committee Secretariat

might be utilized elsewhere. In any event, we have been assured that the special feature of the Committee service is a certain flexibility; the composition of the committees is subject to certain changes and accordingly the Committee Secretariats do on occasions have to be reconstituted in accordance with the requirements of the service. There is therefore justification generally in ensuring that within the Committee Service a certain language balance is maintained and that adequate knowledge of languages is provided for at every level of the official hierarchy.

After these remarks which the applicant was unable to counter with anything decisive and considering moreover that within the framework of the internal competition 80 % of the candidates are of a nationality other than British, it really cannot be said that the applicant has succeeded in weakening the argument that it is in the interests of the service that proof be given of a thorough knowledge of the English language for the post advertised. This therefore shows that the first argument put forward by the applicant, obviously an important one, turns out to be of no consequence in judging the case.

In relation to the other points raised by the applicant the following remains to be said.

As regards the fact that the vacancy notice was originally only published in English, this seems to have been due to technical reasons in the translation service. One could also say that applicants who are justifiably required to have a thorough knowledge of the English language must also in the nature of things be able to understand vacancy notices published in English. The facts referred to can therefore hardly support an intention to reserve the post advertised to nationals of a particular Member State.

As regards the alleged statement on the part of the Secretary General of the Parliament that only British subjects would be considered for the post advertised, it must be said at the outset that this was emphatically denied by the Parliament. Also crucial is the fact — and this justifies a refusal to hear the witness proposed to be called — that the appointment to the post is not a matter for the Secretary General. It is unlikely therefore that his opinion would add anything to the conditions laid down in writing which alone are authoritative. If however this point is not to be wholly disregarded, then I would consider it appropriate to act as was done in Joined Cases 12 and 29/64. For in those cases it was stated, in relation to the criticism that in filling the post there had been an intention to have regard to a particular nationality, that only after the conclusion of the appointment procedure would it be possible to ascertain whether this claim was justified.

In the light of all these considerations and seeing in particular that the vacancy notice does not refer to any particular nationality and that the applicant was unable to show that the interests of the service were not involved in fixing the language conditions set out in the vacancy notice, I can only conclude that the disputed vacancy notice is not defective. I therefore submit that the application brought by Mr Küster should be dismissed as unfounded and that this being the outcome, the decision on costs should be taken on the basis of Article 70 of the Rules of Procedure.