2. The expression 'employment in the public service' within the meaning of Article 48 (4), which is excluded from the ambit of Article 48 (1), (2) and (3), must be understood as meaning those posts which involve direct or indirect participation in the exercise of powers conferred by public law and in the discharge of functions whose purpose is to safeguard the general interests of the State or of other public authorities and which therefore require a special relationship of allegiance to the State on the part of persons occupying them and reciprocity of rights and duties which form the foundation of the bond of nationality. The posts excluded are confined to those which, having regard to the tasks and responsibilities involved, are apt to display the characteristics of the specific activities of the public service in the spheres described above.

A period of preparatory service for the teaching profession does not come within the scope of that provision.

OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 29 April 1986 *

Mr President,
Members of the Court,

A — The case on which I am delivering my opinion today concerns the question whether, in Germany, a national of another Member State of the European Community can demand admission to preparatory service as a trainee teacher in the State school system [Zulassung zum staatlichen Vorbereitungsdienst] on the same conditions as German nationals.

1. The plaintiff, Mrs Lawrie-Blum, a British national born in Portugal who has since married a German national, went to school in Austria and England and obtained her first university degree in the latter country. She then studied at the University of Freiburg and in Spring 1979 took the Gymnasium [secondary school] teacher's examination with Russian and English as her main subjects. In August 1979, she applied to the Oberschulamt Stuttgart [Secondary Education Office, Stuttgart] in the *Land* of Baden-Württemberg, the defendant in this case, to be admitted to the period of preparatory service for the profession of teacher at a Gymnasium. It was her intention to teach in a private Gymnasium after completing her training.

From the point of view of the legislation on foreigners, the police authorities of the City of Freiburg raised no objection to her admission to preparatory service and to her assuming civil service status. After an appropriate course of instruction, the plaintiff declared that she supported the principles of the free and democratic social order, as laid down in the Grundgesetz [Constitution of the Federal Republic of Germany], that she was prepared to demonstrate her support for that order at all times in all aspects of her conduct and to work for its maintenance. However, the Oberschulamt refused her application for admission to

* Translated from the German.

preparatory service. According to paragraph 2 (1) (1) of the Verordnung über den Vorbereitungsdienst und die Pädagogische Prüfung für das Lehramt an Gymnasien [Order on Preparatory Service and the Examination for the Profession of Teacher at a Gymnasium] of 14 June 1976, only persons who satisfy the requirements for appointment as civil servants may be admitted to preparatory service. According to paragraph 6 (1) (1) of the Landesbeamtengesetz [Law of the *Land* of Baden-Württemberg on the Civil Service], only Germans within the meaning of Article 116 of the Grundgesetz may be appointed to posts having civil service status.

The Oberschulamt dismissed the plaintiff's objection by a decision of 4 February 1980.

2. The plaintiff brought an action before the Verwaltungsgericht Freiburg [Administrative Court, Freiburg] against the refusal to admit her to preparatory service for the profession of teacher at a Gymnasium and sought the annulment of the decision of the Oberschulamt Stuttgart and an order requiring the defendant *Land* to admit her to preparatory service. She left it to the defendant *Land* to decide on the legal form in which this was to be done and in particular did not seek civil service status.

The Verwaltungsgericht Freiburg dismissed her action on the ground that in principle only German nationals were entitled to be admitted to preparatory service. That rule was not contrary to Article 48 of the EEC Treaty, which required any discrimination based on nationality between workers of the Member States to be abolished, since Article 48 (4) expressly provided that that provision did not apply to employment in the public service. In the Federal Republic of Germany, that included employment in the State school system in which teachers were normally civil servants.

The Verwaltungsgerichtshof Baden-Württemberg [Higher Administrative Court for Baden-Württemberg] dismissed the plaintiff's appeal on the following grounds:

Unlike preparatory service for the legal profession, preparatory service for the profession of teacher in a Gymnasium was confined to persons having civil servant status. Consequently, only persons who satisfied the conditions for appointment as civil servants could be admitted to the period of preparatory service. One of those conditions was the possession of German nationality within the meaning of Article 116 of the Grundgesetz.

The refusal to admit the plaintiff did not infringe any of her rights under Community law. Employment as a teacher in State schools, including teacher training, did not come within the principle of the free movement of persons laid down in Article 48 of the EEC Treaty. That followed from the interpretation of the rules on freedom of movement themselves and the exception in Article 48 (4) of the EEC Treaty.

However, freedom of movement was not excluded simply because, under national law, teachers were engaged on the basis of the law relating to civil servants; the scope of a worker's freedom of movement in Community law was determined by the aims of the EEC Treaty. In accordance with the economic objective set out in Article 2 of the EEC Treaty, it applied only to activities which were part of economic life within the meaning of the abovementioned article. That was not the case in the State school system, which did not come within the scope of economic policy and was not a form of economic activity but essentially an instrument of education policy; it was not part of the market or subject to the rules of law governing the economy; consequently, it did not come within the scope of the EEC Treaty. Even private schools, at least in so

far as they granted generally recognized qualifications, were not commercially orientated either.

Employment as a teacher in State schools also fell under the exemption provided for in Article 48 (4) of the EEC Treaty. The entire domain in which a teacher in the State school system exercised his activity was marked by the authority of the State. The fact that teachers exercised public authority had prompted the German legislature, having regard to Article 33 (4) of the Grundgesetz, to put trainee teachers in a position in which their status, service and loyalty were governed by public law. Under the relevant regulation, a Studienreferendar [trainee teacher] in Baden-Württemberg was required to do a certain amount of teaching on his own in the school in which he was training; further teaching could also be entrusted to him. He was therefore entrusted, in the course of his training, with the discharge of public functions.

The plaintiff appealed to the Bundesverwaltungsgericht [Federal Administrative Court] against that judgment of the Verwaltungsgerichtshof Baden-Württemberg. The Oberbundesanwalt [Higher Federal Prosecutor] intervened in the proceedings before the Bundesverwaltungsgericht. He considered that the rules contained in Article 48 of the EEC Treaty and Council Regulation No 1612/68 on freedom of movement for workers did not apply to temporary civil servants undergoing a period of preparatory service because the real purpose of the traineeship was not to earn a wage but to complete the training which began with their university education.

3. By order of 24 January 1985, the Bundesverwaltungsgericht stayed the proceedings and referred the following question to the Court for a preliminary ruling:

'Do the rules of European law on the free movement of persons (Article 48 of the EEC Treaty) and Article 1 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 (Official Journal, English Special Edition 1968 (II), p. 475, later amended) give nationals of a Member State the right to be appointed trainee teachers in the State school system of another Member State under the same conditions as nationals of that Member State, even where such trainee teachers, according to national law, have civil service status (in this case, as temporary civil servants [Beamte auf Widerruf] under German law) and conduct classes independently, and where national law requires that persons appointed to the civil service must in principle be nationals of the Member State concerned?'

In the statement of the grounds for its decision the Bundesverwaltungsgericht first points out that, under German law, the plaintiff has no right to be admitted to the period of preparatory service; such a right might possibly arise under Community law but not in this case.

The Bundesverwaltungsgericht expresses doubts about accepting the proposition that the term 'workers' in Article 48 (1), (2) and (3) of the EEC Treaty and Article 1 of Regulation No 1612/68 [1] covers an occupation in a legal relationship such as that of the German civil service. It accepts that the term 'worker' should not be defined by reference to the law of the Member States. However, that does not exclude the possibility of obtaining guidance for interpreting terms used in Community law from the law of the Member States as it stood at the time when the EEC Treaty was concluded. In

1 — Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (Official Journal, English Special Edition 1968 (II), p. 475).

any event, in German law, the term 'workers' means persons whose legal relationship to their employer (Arbeitgeber) is governed by private law. Persons whose legal relationship to their employer, being a body governed by public law (Dienstherr), is subject to public law — particularly civil servants, judges and soldiers — are not covered by the term. That view is reinforced by the consideration that, if civil servants or judges and soldiers were in principle covered by the term, this would have constituted a much more extensive incursion into the existing national legal order than would the granting of freedom of movement to workers whose employment relationship is governed by private law. The essence of such an employment relationship is a mutual obligation to engage in an economic exchange of labour in return for remuneration. On the other hand, civil service status has not only economic but primarily political significance and is characterized above all by a wider obligation of loyalty.

It is not necessary to decide whether the expression 'activity as an employed person' in Article 1 (1) of Regulation No 1612/68, considered in isolation, suggests that the Council, in adopting the regulation, intended that freedom of movement should apply to all employed persons other than self-employed persons, because that provision presupposes that Article 48 of the EEC Treaty determines which activities are subject to the rules on freedom of movement.

Further doubts as to the applicability of Article 48 of the EEC Treaty to the period of preparatory service at issue arise from the fact that it does not involve a remunerated professional activity but constitutes the last stage of vocational training. The purpose of preparatory service is not to meet the employing authority's needs in regard to the giving of lessons but rather to train the persons undergoing it. The latter are to be made sufficiently familiar with the theory and practice of education and teaching that they are in a position to perform independent, successful work as teachers in a Gymnasium. Teaching, carried out at first under supervision and later independently, is also subordinated to that purpose. The trainee's salary is not, as are the salaries of other civil servants, a maintenance allowance commensurate with the office occupied and paid in return for their comprehensive obligation to perform certain duties, but is intended to ensure that the purpose of the training is achieved.

If the disputed training period none the less comes within the scope of Article 48 (1), (2) and (3) of the EEC Treaty, the exemption in Article 48 (4) must apply.

According to the decisions of the Court of Justice of the European Communities, 'the posts in question [should be] typical of the specific activities of the public service in so far as the exercise of powers conferred by public law and responsibility for safeguarding the general interests of the State are vested in it'. That must be understood, according to the Bundesverwaltungsgericht, as meaning not that the posts in question must display both those characteristics but rather that they must be connected either with the exercise of powers conferred by public law or with the responsibility for safeguarding the general interests of the State. A limitation to the effect that not all posts which are connected with the exercise of powers conferred by public law come within the scope of the exemption cannot be deduced from the decisions of the Court. Accordingly, in the passage quoted above, the Court of Justice did not relate the two characteristics to the 'posts in question' but rather used them to indicate the entire range of activities specific to the public service.

In German law, appointment as a civil servant is permissible only for the purpose of discharging public functions or functions which, for reasons connected with State security or with public life, may not be exclusively carried out by persons whose relationship to their employer is governed by private law.

In view of those statutory requirements and the special rights and duties connected with civil service status, posts to be occupied by civil servants thus appear to be typical of the specific activities of the public service, as defined by the Court of Justice of the European Communities.

The activity exercised by a teacher in a State school constitutes an exercise of powers conferred by public law, whatever the type of employment relationship involved. It is necessary, when applying Article 48 (4) of the EEC Treaty, to determine in accordance with Community law which forms of State activity are to be regarded as the exercise of powers conferred by public law, while each Member State must decide which functions it wishes to have carried out by way of that form of activity, which functions it wishes to have carried out through other forms of State activity and which tasks it wishes to leave to private individuals.

According to German legislation on schools, the State, through the public institution of the school system and the persons acting for it, is exercising powers conferred by public law in relation to pupils. That can be seen *inter alia* from the fact that decisions concerning not only transfers to a higher class and formal disciplinary measures, but also, for example, decisions concerning a controversial curriculum are public administrative acts. Individual measures such as, for example, the continuous assessment of pupils' performance during the school year are also administrative acts. Trainee teachers take part, under supervision at first but later independently, in the preparation of administrative acts of that kind.

At the same time, a teacher's activity in the State school system safeguards the general interests of the State. The national law applicable in this regard ranks education highly as a fundamental public function. According to Article 7 (1) of the Grundgesetz, the entire educational system is to be under the supervision of the State.

4. In its reply to questions put by the Court of Justice, the defendant in the main proceedings stated that the numbers of teachers employed in Gymnasien in the *Land* Baden-Württemberg in the 1984/85 school year were as follows: 18 248 teachers with civil service status; 651 teachers who were not civil servants working in the State school system; 1 269 trainee teachers and 1 894 teachers in private schools.

It stated that, as a general rule, only teachers who were civil servants were employed in State schools; teachers who were not civil servants were employed only in special cases. In order to teach in private schools it was not legally necessary to have completed the period of preparatory service and to have passed the teacher's examination, but, in view of the scarcity of posts in State schools and the excessive number of fully trained teachers, it was usual for teachers who had passed the First and Second State Examinations to be employed in private schools.

The defendant *Land* also provided details about the conditions applying in the other *Länder* to trainee teachers and trainee lawyers as regards admission to preparatory service and the Second State Examination. It appears that in some *Länder* nationals of other Member States are admitted to preparatory service and allowed to take the teacher's examination.

Nationals of other Member States of the European Communities may be admitted in all the *Länder* to preparatory legal training; they are employed either under private law or under public law but not as trainees with civil service status. That is the position partly because of provisions of written law and partly because of the practices of the various *Länder*, which took the necessary steps to comply with the Court's judgments in the *Reyners*[2] case and in the *van Binsbergen*[3] case.

5. The parties to the main proceedings, the Commission of the European Communities and, in the oral procedure, the United Kingdom submitted observations to the Court on the preliminary question. The plaintiff and the Commission are of the opinion that the question should be answered in the affirmative whereas the defendant *Land* takes the opposite view and relies on the statement of the grounds in the order for reference. The United Kingdom was primarily concerned with establishing the line of demarcation between pure training and employment based on a balanced relationship of service and reward.

I will consider the details of the parties' observations in the course of my Opinion.

B — I. First, I consider it necessary to describe in more detail the preparatory service for the profession of teacher in the State system and to point out some characteristics of the German school system. It is not a matter of interpreting national law — the Court would have no jurisdiction to do that in the context of a reference for a preliminary ruling — but of setting out facts which are touched upon in the national court's question but not described in detail.

1. In the Federal Republic of Germany, teacher training is primarily a matter for the *Länder*. The training consists of a period of study at a university, which leads to the First State Examination, and a period of preparatory service, which is followed by the teacher's professional examination.

At the time when the main proceedings were instituted, preparatory service in Baden-Württemberg was governed by the Order of the Ministry of Education and Sport of 14 June 1976 on Preparatory Service and the Examination for the Profession of Teacher at a Gymnasium. That order was subsequently replaced, on 31 August 1984, by another order, issued by the same ministry, on Preparatory Service and the Second State Examination for Admission as a Teacher in the Higher Education Service.

According to paragraph 1 of the latter order, a trainee teacher is to be introduced to the task of education and instruction and trained in such a way that he can responsibly and successfully perform his teaching duties in a Gymnasium.

Preparatory service is divided into two one-year stages. The first stage is devoted to introducing the trainee teacher to the task of education and instruction. It involves training at a teacher-training institute and at a school, that is to say, a State Gymnasium, or, with the permission of the competent ministry, a private Gymnasium. During this stage the trainee teacher must attend eight to ten lessons per week and take an increasing part in supervised teaching (begleiteter Ausbildungsunterricht).

2 — Judgment of 21 June 1974 in Case 2/74 *Jean Reyners* v *Belgian State* [1974] ECR 631.

3 — Judgment of 3 December 1974 in Case 33/74 *Johannes Henricus Maria van Binsbergen* v *Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299.

The second stage is devoted to developing the trainee's abilities and skills in the work of educating and instructing pupils. During this period the trainee teacher must teach by himself for eight or nine hours a week in his subjects. He must also do a certain amount of supervised teaching in various classes and at various levels.

Independent teaching and supervised teaching must not amount in total to more than 11 hours per week (paragraphs 11 and 13).

Candidates admitted to preparatory service are appointed trainee teachers by the Oberschulamt with the status of temporary civil servants [Beamte auf Widerruf]. Only persons who satisfy the personal requirements for appointment as public servants may be accepted as trainee teachers. According to paragraph 6 (1) of the Landesbeamtengesetz für Baden-Württemberg, one of those requirements is that candidates must be German nationals within the meaning of Article 116 of the Grundgesetz. Paragraph 6 (3) allows the Ministry of the Interior to authorize exceptions in the case of imperative requirements of the service.

Paragraph 59 of the Bundesbesoldungsgesetz [Federal Law on Civil Servants' Salaries] provides that trainee teachers [Studienreferendare] are to receive Anwärterbezüge [trainee teacher's pay] during their training; it is calculated on the basis of the salary which they would receive in a public service post at the end of their training. For trainees engaged after 31 December 1983, it amounts to about 39% of the salary of a Studienrat [fully qualified teacher] in Grade A 13, Step 1.[4]

4 — It must be borne in mind, however, that as a result of the determination of seniority in accordance with paragraph 28 of the Bundesbesoldungsgesetz, the first appointment of a Studienrat will normally be at a step higher than Step 1. Consequently, the percentage stated must be somewhat further reduced.

Trainee teachers must pay income tax on their salary on the basis of the rules applying to income from work performed other than as a self-employed person.

Preparatory service ends with the Second State Examination; if the trainee teacher passes it, he is admitted as a teacher in the Higher Education Service qualified to teach in a Gymnasium (paragraph 25).

On the termination of their employment as public servants trainee teachers not appointed to posts in the State school system are subsequently insured under either paragraph 1232 of the Reichsversicherungsordnung [Imperial Insurance Order] or paragraph 9 of the Angestelltenversicherungsgesetz [Law on Insurance for Employed Persons].

2. As far as the organization of the school system in the Federal Republic of Germany is concerned, regard must be had first of all to Article 7 of the Grundgesetz, paragraph (1) of which provides as follows:

'The entire educational system shall be under the supervision of the State.'

The first sentence of paragraph (4) contains the following provision:

'The right to establish private schools is guaranteed. Private schools, as a substitute for State schools, shall require the approval of the State and shall be subject to the laws of the *Länder*.'

Thus, the State is responsible for the entire school system but there is *no State school monopoly*. The Grundgesetz guarantees every person's fundamental right to establish private schools and there is a right to have

such schools authorized under the conditions laid down in Article 7 (4) of the Grundgesetz.[5] The school system in Baden-Württemberg is accordingly governed by two different pieces of legislation: The Schulgesetz für Baden-Württemberg [Baden-Württemberg Schools Law] in the version which came into force on 1 August 1983, which applies to State schools, and the Gesetz für die Schulen in freier Trägerschaft or the Privatschulgesetz [Law on Private Schools], in the version in force since 19 July 1979.

Finally, it should also be pointed out that, according to paragraph 38 (1) of the Schulgesetz, teachers in *State* schools are in the service of the *Land*. No provision is made as to what the nature of the legal relationship between teachers and the *Land* must be; however, civil service status is not mandatory.

II. I will now deal with the wording of the preliminary question and then with the question whether persons in a situation such as that of the German Studienreferendar are to be regarded as workers within the meaning of Article 48 of the EEC Treaty and, if so, whether the exception regarding employment in the public service laid down in Article 48 (4) of the EEC Treaty is applicable to them.

1. In the view of the *United Kingdom*, the question is formulated too widely. It presupposes that a single answer can be given which covers all persons studying or training to become a teacher. A single answer of that kind is not possible since the organization, the financing, the structure and the duration of pedagogic education varies greatly from Member State to Member State.

2. It seems to me that that view is based on a misunderstanding. It must be conceded that the formulation of the question, particularly in the English translation,[6] which speaks of 'trainee teachers', could give the impression of being broader than it is actually meant to be.

However, if the question is considered in the context of the dispute which is the subject of the main proceedings, it becomes clear that not every conceivable type of teacher traineeship is meant but merely the particular legal position of the Studienreferendar in Germany, and in particular in Baden-Württemberg.

If the reference for a preliminary ruling is therefore related to the legal position of a Studienreferendar as described in detail above, there is no reason to narrow the question. On the other hand, in formulating the answer, it must be borne in mind that in proceedings for a preliminary ruling the Court must not decide the concrete case but must provide the court which made the reference with criteria for interpretation so that it can itself reach a decision in the main proceedings.

III. The next matter to be considered is whether Studienreferendare are covered by Article 48 of the EEC Treaty. That was disputed on the ground that Studienreferendare are not in employment but in training. It was also argued that the term

5 — See the judgment of the Bundesverfassungsgericht [Federal Constitutional Court] of 14 November 1969, *Entscheidungen des Bundesverfassungsgerichts*, Vol. 27, pp. 195 and 201.

6 — Official Journal 1985, C 99, p. 7.

'workers' in Article 48 of the EEC Treaty does not include civil servants.

1. (a) In the view of the *defendant*, the preparatory service for the profession of teacher in a Gymnasium does not involve the exercise of a professional activity but constitutes the last stage of vocational training. The pay of a Studienreferendar is not a reward for services performed but is intended to ensure that the purpose of the training is achieved.

According to the *plaintiff* in the main proceedings, the preparatory service for the profession of teacher in a Gymnasium guarantees the trainee a living at least as much as it prepares him for the Second State Examination. Candidates for teaching posts receive not only a small maintenance grant but also trainee teacher's pay which is fixed by Federal law. They also receive special allowances, holiday pay and capital accumulation benefits. Trainee teachers work for a substantial reward commensurate with the services which they provide.

The *Commission* also considers that a Studienreferendar should not be denied a worker's status even if the prime purpose of the preparatory service is to train and not to work. Entry into professional life is always preceded by a training period. Because of the close link between vocational training and the exercise of a profession, Community law includes vocational training within the scope of the rules on freedom of movement.

(b) As I stated at the beginning of my Opinion (B-I.1)), the period spent in training by a Studienreferendar is akin to an employment relationship. He has to give a certain number of lessons, he receives pay and is also subject to the provisions of labour law and public service law and to tax law and social security law.

Even if there may be no balance between the work done and the pay received at the beginning of training, it must be assumed that there is more balance as the training progresses. If the Studienreferendar is to be made familiar with the work of educating and instructing and trained so as to be able to perform his duties as a teacher at a Gymnasium responsibly and successfully, it must be assumed that, if he successfully completes the training period, then, at least at the end of that training, his work as a teacher, although limited in duration, must in substance be equivalent to the work of a fully-trained teacher.

If one also considers that in the second stage of training the Studienreferendar must undertake a significant amount of teaching by himself whilst his pay is less than 39% of the salary of a Studienrat [qualified teacher], then at least in that period there is undoubtedly a balance between the work done and the remuneration received.

The view that a Studienreferendar is a worker within the meaning of Article 48 of the EEC Treaty does not conflict with the purpose of the training period, which is to enable the trainee teacher to acquire through practice the knowledge and experience needed for his subsequent full professional activity. The Commission has rightly pointed out that entry into a profession is always preceded by a period of training during which the practical value of the trainee's work is still not that expected of a fully-trained member of that profession.

At the beginning of the training period the candidate for a teaching post who has already passed his examinations is no longer a student; his training period appears to be the first stage of his entry into professional and economic life.

Thus, the following conclusions must be drawn: Under the provisions of German law a Studienreferendar is treated in the same way as a worker; his relationship to his employer has some of the typical characteristics of an employment relationship; if he is not appointed a Studienrat in the State school system, he is treated like a worker for social security purposes.

It should also be pointed out that the Court of Justice, in its judgment of 9 October 1984 in Case 188/83 *Witte* v *Parliament*,[7] regarded the activity of a Rechtsreferendar, which is comparable in many respects to that of Studienreferendar, as an 'occupation'. This was contrary to the view of the Advocate General[8] who was of the opinion that a Rechtsreferendar was not yet engaging in an occupation.

I therefore see no reason for not regarding such a person as a worker within the meaning of Article 48 of the EEC Treaty. In any event, the fact that during the period of his engagement such a person is acquiring knowledge and experience for a later, fuller activity is not sufficient to deprive him of the status of worker.

2. (a) The *defendant* has adopted the position taken by the Bundesverwaltungsgericht which is that the term 'worker' in Community law does not include civil servants who have a special duty of loyalty to their employer.

In the view of the *plaintiff* in the main proceedings, the term 'worker' in Community law does not automatically exclude persons working in the public service. Paid employment with public bodies is also in principle an activity as an employed person within the meaning of Article 1 of Regulation No 1612/68. If public servants were to be excluded in principle from the scope of Article 48, the exception in Article 48 (4) would be redundant.

The *Commission* also points out that Article 48 (4) would be superfluous if Article 48 merely applied to persons performing activities under a contract of employment with an economic entity. It can be deduced from the Court's previous decisions that the nature of the legal relationship between the worker and the administration is unimportant.

Any argument based on a distinction in national law between employment relationships governed by public law and employment relationships by private law is untenable. If such a distinction were accepted, the scope of a fundamental legal concept of Community law would be limited by the application of legal definitions laid down in national legislation.

The *United Kingdom* is also of the opinion that, once it is determined that an employment relationship exists, it is immaterial whether in national law that relationship is governed by private law, labour law, the law governing public servants or any other branch of law.

7 — Judgment of 9 October 1984 in Case 188/83 *Hermann Witte* v *European Parliament* [1984] ECR 3465.

8 — *Idem*, at p. 3481.

(b) It may be deduced from the previous decisions of the Court that the legal form of the employment relationship is irrelevant to the question whether or not Article 48 of the EEC Treaty is applicable. In its judgment of 12 February 1974 in the *Sotgiu* case,[9] the Court rejected any distinction between employment relationships governed by public law and those governed by private law; it did not matter whether a person was a manual worker, a white-collar worker or a public official or whether his employment was subject to public law or private law.

That statement must be regarded as one of the main points of the *Sotgiu* judgment particularly since the national court, the Bundesarbeitsgericht, had explained that, in its view, employment in the public service within the meaning of Article 48 (4) of the EEC Treaty meant only employment as an official and not as a manual worker or white-collar worker.

The Court further clarified that view in its judgment of 17 December 1980 in Case 149/79 *Commission* v *Belgium*.[10] In that judgment, the Court expressly disagreed with the view expressed by the Belgian and French Governments to the effect that the exception in Article 48 (4) of the EEC Treaty must in any event apply where the public service employees concerned are engaged on the basis of the law relating to established public servants.

Admittedly, the two statements of the Court quoted above were expressed in connection with the question whether or not Article 48 (4) of the EEC Treaty applied. Even so, they may be considered in relation to the question of the applicability of Article 48 of the EEC Treaty as a whole. The underlying principle is that Article 48 of the EEC Treaty applies to all workers, that is to say all persons who perform work for and under the direction of others. If public servants, who owe a special duty of loyalty to their employer, were excluded in principle from the application of Article 48 of the EEC Treaty, it would have been superfluous even to consider the question of public service status in the context of the exception provided for in Article 48 (4).

There are good reasons for the view taken by the Court. If it were possible to deduce even from the purely formal terms of the employment relationship conclusions about the applicability of the prohibition of discrimination in Article 48 of the EEC Treaty, the determination of the scope of that article would be left largely to the national authorities which could then determine the nature of their staff's employment relationship. As a result, a considerable number of posts might be removed from the ambit of the principles of the Treaty and, depending on the differences in the structure of the State and of certain branches of the economy, disparities would be created between the Member States. Particularly in times of high unemployment, the Member States could then be tempted to restrict a considerable proportion of the available jobs to their own nationals by taking appropriate organizational measures. It is clear that such a result is at odds with the objectives of Community law, which must be applied uniformly in all the Member States and

9 — Judgment of 12 February 1974 in Case 152/73 *Giovanni Maria Sotgiu* v *Deutsche Bundespost* [1974] ECR 153.

10 — Judgment of 17 December 1980 in Case 149/79 *Commission of the European Communities* v *Kingdom of Belgium* [1980] ECR 3881.

which has as its aim the establishment of a common market (Article 2). The establishment of a common market also entails freedom of movement for workers (Article 3 (c)), which would be restricted, or at any rate would become liable to restriction, by such an interpretation.

Nor is that conclusion upset by the national court's reference to the state of the law in the Member States at the time when the EEC Treaty was concluded. Although the state of the law at that time can be a point of departure for interpreting concepts of Community law, it cannot be the only criterion. Account must also be taken of the way in which Community law has developed in the meantime; this can be determined from the legislation passed by the institutions and the decisions of the Court of Justice. [11]

Consequently, I am of the opinion that the term 'worker' covers any gainfully employed person who is not self-employed. That concept stands in contrast only to the concept of self-employed persons whose activities are governed by the chapters of the EEC Treaty on the right of establishment and the provision of services.

In so far as special provisions are to be adopted for the public service and in particular for public officials, they must be assessed with regard to the exception provided for in Article 48 (4) of the EEC Treaty.

Finally, I think that one more point should be made on the question of what is to be understood by participation in economic life since one of the courts before which the main proceedings were brought took the view that the State school system is an instrument of education policy and not part of economic life. That is certainly true to the extent that education policy is not part of the market process. However, the place of education policy must be distinguished from the activity of workers who provide services in return for remuneration. Irrespective of whether or not public or private employers are engaged in economic activity, profiting from one's labour is undoubtedly part of economic life as far as the worker is concerned and in the final analysis that is all that matters in this case.

Consequently, it must be concluded that Article 48 of the EEC Treaty also applies to public officials.

3. The next question to be examined is whether the activity of a Studienreferendar is covered by the exception in Article 48 (4) of the EEC Treaty, which provides that freedom of movement for workers is not to apply to persons employed in the public service.

(a) The *defendant* contends that, if teachers' preparatory service comes within the scope of Article 48 (1), (2) and (3) of the EEC Treaty at all, the exception in Article 48 (4) must apply. According to the decisions of the Court of Justice, the exception in Article 48 (4) of the EEC Treaty relates to activities connected with the exercise of powers conferred by public law and with responsibility for safeguarding the general interests of the State. The Court has not stated that individual posts must satisfy both criteria but has used those criteria simply in order to identify the range of the specific activities of the public service. The reservation covers all posts involving the exercise of powers conferred by public law. According to the defendant, measures taken in daily school life, such as transfers of pupils to a higher class, formal disciplinary measures, curriculum changes and even measures

11 — In German case-law this has been recognized by the Bundesverfassungsgericht at least; see the decision of 23 June 1981, *Entscheidungen des Bundesverfassungsgerichts*, Vol. 58, pp. 1 and 36, and the judgment of 18 December 1984, *Entscheidungen des Bundesverfassungsgerichts*, Vol. 68, p. 1 and p. 98 *et seq.*

adopted with regard to individual pupils, constitute administrative acts in which Studienreferendare participate. At the same time, a teacher's work in State schools safeguards the general interests of the State.

The *plaintiff* in the main proceedings also refers to the Court's case-law but takes the view that schools providing general education do not come within the reservation regarding the public service. Whilst that reservation may cover the combat effectiveness of the army or the efficiency of the police, it cannot cover ordinary teaching in schools providing general education, which does not involve the exercise of powers conferred by public law. Besides, the activities, the authority and the responsibilities of Studienreferendare cannot generally be compared with those of fully-qualified teachers.

In the *Commission*'s view, the exception in Article 48 (4) of the EEC Treaty must be interpreted restrictively. For it to be applicable, it must be shown not only that the post in question involves the performance of functions governed by public law but also that it necessitates the exercise of powers conferred by public law. The criteria laid down in the Court's case-law — the exercise of powers conferred by public law and the safeguarding of the general interests of the State — must *both* be fulfilled. Only higher-ranking posts in the school system, conferring the power to decide whether pupils should move to a higher class or to impose disciplinary measures, are covered by the exception. The marking of pupils' work, the drawing up of a syllabus or the maintenance of discipline, which are also done in private schools, do not involve the exercise of powers conferred by public law. If that is true for the teaching profession in general, it is difficult to imagine that Studienreferendare could ever find themselves in a situation which required them to exercise powers conferred by public law.

Finally, it is contrary to the principle of proportionality to restrict all teaching posts in State schools to nationals of that State merely because some higher-ranking posts involve the exercise of powers conferred by public law.

(b) In its judgment of 17 December 1980 in Case 149/79 *Commission* v *Belgium*, to which reference has repeatedly been made, the Court stated, *inter alia*, with reference to Article 48 (4) of the EEC Treaty:

'That provision removes from the ambit of Article 48 (1) to (3) a series of posts which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities. Such posts in fact presume on the part of those occupying them the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality.

...

Whilst it is true that the provision takes account of the legitimate interest which the Member States have in reserving to their own nationals a range of posts connected with the exercise of powers conferred by public law and with the protection of general interests, at the same time it is necessary to ensure that the effectiveness and scope of the provisions of the Treaty on freedom of movement of workers and

equality of treatment of nationals of all Member States shall not be restricted by interpretations of the concept of public service which are based on domestic law alone and which would obstruct the application of Community rules.' [12]

Those statements of the Court indeed suggest that the exception in Article 48 (4) of the EEC Treaty is narrowly circumscribed. It does not apply to the entire sphere of the public service but only to certain posts involving participation in the exercise of powers conferred by public law and, *at the same time*, duties designed to safeguard the general interests of the State. Such posts are characterized by the fact that they require the persons occupying them to have special allegiance to the State.

The Court arrived at that position of principle in proceedings for a declaration that a Member State had failed to fulfil its obligations under the Treaty in which the Member State concerned was supported by three other Member States, namely the Federal Republic of Germany, the French Republic and the United Kingdom. Those Member States put forward detailed arguments which, in their view, supported a wide interpretation of Article 48 (4) of the EEC Treaty. However, the Court did not accept their arguments and, although fully aware of them, took the opposite view, ruling that Article 48 (4) should be interpreted restrictively.

In the case now before the Court, no new arguments have been put forward which would not have been raised in Case 149/79. I therefore see no reason to depart from the Court's decision in that case but propose that the Court should confirm it, as Mr Advocate General Mancini also proposed in his Opinion of 15 April 1986 in Case 307/84. [13]

However, the *dicta* in the judgment of 17 December 1980 in Case 149/79 may need to be related to the present case.

In this connection, it must first be stated that not all activities which are connected in some way with the exercise of powers conferred by public law fall within the scope of the exception in Article 48 (4) of the EEC Treaty: they must involve the exercise of powers for safeguarding the general interests of the State. In the case of the school system, that could mean activities concerned, for example, with the basic pedagogical direction of teaching or its general structure. It could also conceivably cover the establishment of the principles for the awarding of marks and certificates.

However, in my view, Article 48 (4), interpreted narrowly, does not cover individual measures taken by teachers in daily school life, even if in national law they should be treated as State or administrative acts. I am thinking in particular of tuition in general, the maintenance of discipline, the award of individual marks or the imposition of disciplinary measures on individual pupils.

12 — *Idem*, paragraphs 10 and 19.

13 — Opinion of Mr Advocate General Mancini of 15 April 1986 in Case 307/84 *Commission* v *French Republic* [1986] ECR 1726.

In national law such measures may well be regarded as involving the exercise of powers conferred by public law but they are not activities to which the exception in Article 48 (4) of the EEC Treaty may apply. Moreover, such activities are *not the core* of a teacher's work but at most are ancillary to the teaching itself and have only secondary importance in relation to the actual work of a teacher or Studienreferendar. To exclude nationals of other Member States from access to preparatory service in State schools merely because of those occasional activities cannot be reconciled with the principle of proportionality.

I will not list further examples since it is not the Court's task in a reference for a preliminary ruling to deal with all the details of the case but to give the national court guidance on the question of interpretation of Community law. The practical application of Community law is the preserve of the national court.

IV. Finally, I must deal with a number of arguments which were put forward by the parties to the proceedings but which do not require a definitive view to be taken.

1. (a) It was pointed out in particular by the plaintiff in the main proceedings and the Commission that, in contrast to the legal position of Studienreferendare in the Federal Republic of Germany, nationals of other Member States of the European Communities are admitted as Rechtsreferendare [legal trainees] to preparatory legal service. Since a Rechtsreferendar discharges public functions at least to the same degree as a Studienreferendar, it is contrary to the general principle of equal treatment to require Studienreferendare to possess German nationality in order to be admitted to professional training.

(b) Those arguments will undoubtedly be important for the national courts when they re-examine the plaintiff's claim to be admitted to preparatory service for the teaching profession. They will be important first from the point of view of the general principle of equal treatment in national law and secondly with regard to the question how far the reservation regarding the public service contained in Article 48 (4) of the EEC Treaty may extend. In this respect, the national court will be able to see from the legislation of the *Länder* just how unobjectionable it now seems in German legal opinion for nationals of other Member States to be allowed to exercise powers conferred by public law. Only then will the national court have to consider whether Community law requires wider admission of such persons to teacher training in State schools.

However, the comparison to the rules regarding the training of lawyers is limited to that point. In Community law, admission to training as a lawyer stands in a different legal context.

As can be seen from a letter of the Federal Minister for Justice dated 20 August 1975, submitted to the Court by the defendant *Land*, appropriate rules were adopted in German law to give effect to the judgment of 21 June 1974 in the *Reyners* case and the judgment of 3 December 1974 in the *van Binsbergen* case.

Since, according to paragraph 4 of the Bundesrechtsanwaltordnung [Federal Regulation on Lawyers], it is a condition for admission to the legal profession that candidates should be qualified for holding judicial office in accordance with paragraph 5 of the Deutsches Richtergesetz [German Law on Judges], nationals of other Member States must be allowed to obtain such qualification or right of admission under the same conditions as German nationals. That necessarily requires admission to legal training since without that training — apart from single-stage legal education — there is no other way in which qualification for holding judicial office can be obtained. However, qualification for holding judicial office is a compulsory requirement for the exercise of the liberal profession of lawyer, whether with regard to the right of establishment or the right to provide services.

The situation is different in the case of the Second State Examination for Studienreferendare. Once the Studienreferendar has passed the examination, he is qualified to pursue a career in the higher State education service as a teacher at a Gymnasium. The passing of the examination is a condition only for appointment as a Studienassessor or later as a Studienrat in the State school system. It is not necessary to have passed it in order to be employed in a private school, to give private lessons or to establish a private school.

From the legal point of view, it is not therefore mandatory for nationals of other Member States to be qualified to pursue a career in the higher State education service as teachers in a Gymnasium in order to exercise their right of establishment or their right to provide services guaranteed by Community law.

Finally, the question whether freedom of movement for workers covers the general activities of a teacher in the State school systems of the Member States is not the point in this case.

2. The question whether the training of teachers in the State education service constitutes vocational training within the meaning of the EEC Treaty [14] need not and should not be decided in this case. A decision on that question is not necessary in the present case since a satisfactory reply can be deduced from the arguments set out above.

Furthermore, the Bundesverwaltungsgericht has not raised such a wide question and its relevance could not be directly deduced from the terms of the reference.

The United Kingdom is the only Member State to have pointed out the possible connection with the question of vocational training but at the same time it emphasized the need to draw a distinction between employment and training.

Had the question whether a period of practical training for an academic profession following a period of theoretical instruction is to be regarded as vocational training within the meaning of the EEC Treaty been clearly deducible from the order for reference, other Member States might also have expressed their views on that question. Having regard to the far-reaching and not entirely foreseeable consequences which a ruling by the Court of Justice on the question of vocational training might have, I do not consider it justifiable, particularly in view of the right to intervene which the Member States have under Article 20 of the Rules of Procedure of the Court, to consider that question in these proceedings for a preliminary ruling.

14 — See the judgment of the Court of 13 July 1983 in Case 152/82 *Sandro Forcheri and Another* v *Belgian State and Another* [1983] ECR 2323, and the judgment of 13 February 1985 in Case 293/83 *Gravier* v *City of Liège* [1985] ECR 593.

C — On the basis of all the foregoing arguments, I propose that the Court reply as follows to the questions referred to it by the Bundesverwaltungsgericht:

'Article 48 of the EEC Treaty must be interpreted as covering a relationship whose purpose consists not only in the provision of personal services in return for remuneration but which takes the form of an employment relationship or at least displays elements of an employment relationship.

The legal form which that relationship takes in national law is not decisive for the purposes of Community law. In particular, it does not matter whether civil service status is conferred.

The exception regarding the public service laid down in Article 48 (4) of the EEC Treaty excludes from the scope of Article 48 (1) to (3) only those posts which involve direct or indirect participation in the exercise of powers conferred by public law as well as the discharge of functions for safeguarding the general interests of the State.'