OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 11 December 1997 *

1. By this action, the Commission seeks from the Court of Justice an order finding that the Hellenic Republic has failed to fulfil its obligations under Community law, in particular Articles 5 and 48 of the EC Treaty and Article 7(1) of Regulation (EEC) No 1612/68 [1] (hereinafter 'Regulation No 1612/68'), by refusing, on the basis of its domestic legislation, to take into account, in the case of a person employed in the public service, periods of employment completed in the public service of another Member State, for the purposes of salary scale grading and the grant of seniority increments. The Commission also seeks an order for costs against the defendant.

2. The Commission was informed about the contested legislation by a complaint from a Greek national who, since April 1986, has been working as a musician in the Thessaloniki Municipal Orchestra, a legal person incorporated under public law, to which he is bound by a contract governed by private law. He had previously worked for the Nice Municipal Orchestra for five years. His complaint concerned the refusal of the competent Greek authorities to take into account, for the purposes of his salary scale grading and the grant of a seniority increment, the five years he had worked in France, whereas, if he had been employed for the same period by a municipal orchestra in Greece, those years would have been taken into account.

The pre-litigation procedure

3. On 13 November 1991, the Commission requested the Greek authorities to provide it with information on the facts set out in the complaint. They replied by saying that it was not possible to take into account the years during which the individual in question had worked for the Nice Municipal Orchestra as if he had worked for a Greek orchestra as this was contrary to the legislation in force, and gave no further explanation.

4. Taking the view that the legislation in question was in breach of the principle of freedom of movement for workers within the Community, the Commission decided to initiate the procedure provided for in Article 169 of the Treaty. On 5 October 1993, it issued a letter of formal notice to the Greek authorities in which it gave them two months to submit observations. The Hellenic

* Original language: Spanish.

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

Republic communicated its opinion to the Commission in a letter of 10 March 1994. Considering that the view expressed was contrary to the aforementioned principle, the Commission, on 18 May 1995, delivered a reasoned opinion with which Greece was to comply within a period of two months. On 24 August 1995, in response to that opinion, the Greek Government put forward the view which it had already expressed when submitting its observations on the alleged infringement, stating that the contested provisions were not intended to discriminate between Greek nationals or between national and foreign workers, and that, in any event, they did not produce discriminatory effects.

5. When the period laid down for the Hellenic Republic to comply with the reasoned opinion had expired, the Commission brought this action.

6. By a letter of 16 April 1997, received at the Court Registry on 24 April, the Hellenic Republic announced the adoption of Law No 2470/97, published on 21 March 1997, Article 17 of which, in its opinion, supplemented the contested legislation; it therefore asked the Commission to consider the possibility of abandoning its action. I assume that, since the Commission has made no comment in this respect, it is proceeding with its action in full.

At the hearing, the representative of the Greek Government read out a decision adopted by the Ministry of Culture on 31 October 1997, which recognises the years of service which the individual who had lodged the complaint with the Commission completed at the Nice Municipal Orchestra, and stated that the Law adopted in 1997 already provides for the recognition by the Greek authorities of periods served in the public service of other Member States, for the purposes of pay and seniority.

The Commission stated at that hearing that, while the new legislation does represent a significant step forward in this sphere, there are still points which are unclear and that, in any event, the new legislation does not have retroactive effect.

The contested national provisions

7. According to the information held by the Commission, the national provisions which were applied to the individual who lodged the complaint are contained in Law No 1505/84, as amended and supplemented by Law No 1810/88, on the pay scale for

public service staff, in particular Article 16, which provides:

'Years of service conferring entitlement to a salary increase and to the seniority allowance

1. The years of service taken into account for the purposes of advancement on the salary scale laid down in Article 3, for the award of the seniority increment provided for in Article 9 and for determining the remuneration of the employees listed in Article 15(2) of the Law shall be as follows:

(a) Years of service completed in a public service or for legal persons governed by public law or for local authorities under a contract of employment governed by public law;

(b) Years of service for one of those bodies, under a contract of employment governed by private law, in so far as they are treated as pensionable by the competent local agency or have been taken into account for the purposes of grading or any increase in salary;

(c) Years of service for legal persons governed by private law which have been taken into account on the basis of special provisions, for the purposes of appointment, posting, grading or any other increase in salary, or which are treated as pensionable by the competent local agency ...; periods of service completed by teachers in schools in Cyprus and in recognised Greek schools abroad, and a maximum period of eight years, in so far as the relevant provisions require a qualifying period for appointment. Seniority, specialisation or experience shall be regarded as qualifications for these purposes; [2]

(d) Years of service performed in the armed forces, the security forces or the harbour police, as a professional soldier, volunteer or person re-enlisting after subtraction of the period during which the employee would have served as a conscript or reservist if he had not been engaged as a member of the armed forces (whether as a professional or volunteer or after re-enlistment);

(e) Any years of service taken into account before the entry into force of this Law as an essential condition for appointment ...;

2 — This wording, and that of paragraphs (e), (f) and (g) of this article, comes from Law No 1810/88.

(f) Years of service performed in socialist countries by repatriated political refugees;

(g) Years of service as a teacher in private schools.

2. ...

3. ...

4. The years of service provided for in paragraph 1(b) and (c) of this Article, which are taken into account for the purposes of advancement on the salary scale or the grant of a seniority increment shall be calculated upon the retirement of an employee who has completed 35 years' service.'

8. The aforementioned provisions were applied to the individual in question pursuant to Article 3 of Special Collective Agreement No 128 of 10 October 1989, on the conditions of work and pay applicable to staff employed by the State and by legal persons incorporated under public law, who are bound by a contract of employment subject to private law.

The Community provisions

9. The Commission accuses the Hellenic Republic of failing to fulfil its obligations under Articles 5 and 48 of the Treaty and Article 7(1) of Regulation No 1612/68, which are worded as follows:

'*Article 5* [of the Treaty]

Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.'

'*Article 48* [of the Treaty]

1. ...

2. Such freedom of movement [for workers within the Community] shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

...'

'*Article 7* [of Regulation No 1612/68]

1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment.

...'

Examination of the action

10. The Commission considers that, even though the contested provisions may be applied without any distinction on the basis of nationality, they do, in fact, entail covert discrimination in that they are liable to put mainly nationals of the other Member States at a disadvantage. For although a Member State's recognition, as years of employment in public service, of only those years completed in its own public service, and refusal to recognise years of employment in the public service of another Member State is neutral from the point of view of Community law, it is only apparently so, since that distinguishing criterion works mainly to the disadvantage of national workers of other Member States who have worked successively in one or more of the Member States and then in Greece, as the requirement to have worked in the national public service will, in fact, be met only by workers of Greek nationality.

The Commission considers that the contested Greek legislation, in failing to provide for the possibility of taking into account employment in the public service of another Member State, also constitutes an obstacle to the free movement of Greek nationals in so far as it is capable of deterring them from moving to other Member States in order to take up employment there.

It also refers to the principle of assimilating practices in one Member State to similar practices in the host Member State, established by the case-law of the Court of Justice, in support of its argument that the

competence of the Member States to lay down conditions governing recognition of previous service is limited by Community law.

In the reply, the Commission points out that the contested Greek provisions are to be regarded as contrary to Community law only in so far as they do not provide for the recognition of previous service performed in another Member State as an employee of the public service, of a legal person incorporated under public law or of a local authority, solely because that service was not performed in the national public service, and that the other conditions imposed independently of the State in which the person concerned worked do not form part of the subject-matter of its action. It adds that the 'like treatment' principle does not mean that any previous period of employment in the public service of another Member State must automatically be recognised; rather, it requires the competent authorities to conduct a thorough examination of the service performed in another Member State as compared with that recognised by the national legislation.

11. The Hellenic Republic maintains in its defence that the reason for which its legislation does not make provision for account to be taken of employment in the public service of another Member State under an employment relationship governed by public law is that access for Community workers to the public service of a Member State the nationality of which they do not possess is a recent phenomenon. It takes the view that this legal lacuna cannot be filled by general application of the 'like treatment' principle, assuming that its existence were accepted; rather, the necessary provisions at Community level must be adopted first.

It considers the contested legislation to be justified on several grounds. First, because it is not always easy to determine whether employment in another Member State constitutes employment in the public service, since the boundaries between the private sector and the public sector differ from one Member State to another, as do the characteristics and legal effects of an employment relationship, which makes comparison difficult. Secondly, because difficulties may arise when it comes to deciding whether experience acquired in the public service of another Member State is the same as that acquired in the State in which the service in question is to be taken into account; for, although the Commission's position seems fair for certain individual cases, it leaves a wide margin of discretion, with a risk of arbitrary situations and fundamental inequalities in relation to salary increases, career development and promotion.

It concludes that a combination of factors, such as the lack of provisions in Community law to harmonise or coordinate national legislation in this field, the objective difficulties

posed by the issue under consideration, and the fact that the contested legislation does not contain any direct discrimination on grounds of nationality, makes the judgment sought against the Hellenic Republic particularly onerous and disproportionate.

12. On examining the contested legislation, I note that the conditions which public employees in Greece must fulfil in order for previous years served in the public service — understood in the broad sense — to be recognised for the purposes of salary and seniority differ according to whether the employment relationship of the person concerned was governed by public law or by private law and, in the latter case, depending on whether the employee worked for a body governed by public law or for a legal person governed by private law.

13. If the employment relationship was governed by public law, previous years of service are recognised automatically. If, on the other hand, it was governed by private law, recognition of such service for the aforementioned purposes is subject to certain conditions:

— if the years of service were performed for a public body, they are recognised only where the competent institution regards them as pensionable or, alternatively, where they have been taken into account for the purpose of grading or any salary increase;

— if, on the other hand, they were performed for a legal person governed by private law, they are also recognised where, pursuant to special provisions, they have been taken into account for the purposes of appointment, assignment to a post, grading or any salary increase.

14. It is indisputable that the Greek legislation which I am examining does not provide for the possibility of taking years of service performed in another Member State being taken into account for the aforementioned purposes. It is also a fact that it does not lay down any prohibition in that respect. In practice, as the Commission has stated, without being contradicted by the Hellenic Republic, recognition is denied if the service was not performed in Greece, subject to the exceptions provided for teaching staff employed in Greek schools abroad and for political refugees, who do not form part of the subject-matter of these proceedings.

15. The question to be determined is whether a Member State is required, by Articles 5 and 48 of the Treaty and by Article 7 of Regulation No 1612/68, to take into account, for the benefit of Member State nationals, including its own, employed in its public service, years which they may have worked in the public service of another Member State, for the purposes of pay and seniority, on the same basis as it takes into account years worked in its own service.

16. I would point out, first of all, that, under the case-law of the Court of Justice, the fact that a public employee who requests in Greece recognition for years of service performed in the public service of another Member State has Greek nationality has no bearing on the application of the principle of non-discrimination. Any Community national who, irrespective of his place of residence and his nationality, has exercised the right to freedom of movement for workers and who has been employed in another Member State, falls within the scope of Article 48 of the Treaty. [3]

17. Neither the contested legislation nor its implementation by the national authorities applies the criterion of nationality as a basis for differentiating when regulating recognition of previous service. Not even residence is so used, though it must be acknowledged that, given the country's geographical location, it would be difficult to imagine anyone having been previously employed in the Greek public service without residing in Greece. I do take the view, however, like the Commission, that it may entail covert discrimination and constitute an obstacle to the free movement of persons.

18. In 1974 the Court of Justice ruled that '... the rules regarding equality of treatment, both in the Treaty and in Article 7 of Regulation No 1612/68, forbid not only covert discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result'. [4] The Court has also stated that conditions imposed by national law must be regarded as discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers, and where they are indistinctly applicable but can more easily be satisfied by national workers than by migrant workers, or where they may operate to the particular detriment of migrant workers. [5]

Only if such provisions are justified by objective considerations independent of the nationality of the workers concerned and they are proportionate to the legitimate aim pursued by the national law is the position otherwise. [6]

19. I note that, in addition to the aforementioned conditions for the recognition of previous service, there is in practice another condition, which is that the service must have been performed in Greece. It is an objective condition which applies without distinction to national workers and to workers of other Member States and which, again,

3 — Case C-419/92 *Scholz* [1994] ECR I-505, paragraph 9; and Case C-443/93 *Vougioukas* v *IKA* [1995] ECR I-4033, paragraph 38.

4 — Case 152/73 *Sotgiu* v *Deutsche Bundespost* [1974] ECR 153, paragraph 11; and Case 33/88 *Allué and Another* v *Università degli studi di Venezia* [1989] ECR 1591, paragraph 11.

5 — Case C-237/94 *O'Flynn* v *Adjudication Officer* [1996] ECR I-2617, paragraph 18.

6 — *Ibidem*, paragraph 19.

does not differentiate according to the worker's place of residence. It is, however, a condition which, in practice, can be fulfilled only by workers of Greek nationality. So, the implementation of the contested provisions by the Greek authorities puts at a disadvantage national workers of other Member States who, exercising their right to freedom of movement, move to Greece in order to take up employment in the public service, since the problem of recognition of service in other Member States will be encountered almost exclusively by them. [7] This is why I consider that these provisions prove to be discriminatory.

20. It now remains for me to consider whether the resulting difference in treatment is objectively justified and whether it is proportionate to the aim pursued by the national law. In order to do so, I shall look at the purpose of the provision which regulates recognition, for the benefit of public employees, of previous service in the public administration.

It seems useful to point out for these purposes that in *Scholz* [8] the Court of Justice has already held that the refusal to take into consideration employment in the public service of another Member State of a German national who had acquired Italian nationality by marriage, for the purposes of the award of additional points after she had been successful in an open competition for canteen staff at an Italian university, constituted unjustified indirect discrimination.

Furthermore, in his Opinion in Case C-15/96, pending, Advocate General Jacobs, after examining the question referred for a preliminary ruling by the Arbeitsgericht (Labour Court), Hamburg, in proceedings in which a doctor of Greek nationality employed by the city of Hamburg had requested that experience she had acquired in another Member State as a doctor engaged in the same specialism should be recognised for the purposes of promotion and pay, proposed that the Court should rule that a clause in a collective agreement applicable to the public service of a Member State providing for promotion on completion of eight years' service in the performance of certain functions but not allowing account to be taken of comparable work in the public service of another Member State was contrary to Article 48 of the Treaty and to Article 7(1) of Regulation No 1612/68. [9]

21. It follows from Article 16(a), (b) and (c) of Law No 1505/84 that, for the aforementioned purposes, recognition of previous service is in any event granted to public employees if the contract binding them to the public service was governed by public law and, subject to certain conditions, if they worked in the public service under a contract

7 — Case C-349/87 *Paraschi* [1991] ECR I-4501, paragraph 24.

8 — Cited above at footnote 3, paragraph 11.

9 — Opinion of Advocate General Jacobs, delivered on 17 July 1997 in Case C-15/96, pending.

governed by private law or were employed by a legal person incorporated under private law.

Those conditions are very disparate and are not applied cumulatively. As I noted earlier, one of them has to do with social security and requires that the competent institution at the same time recognise that the period of service is pensionable; the other concerns appraisal of the experience acquired in the performance of previous functions, and requires the previous service to have been taken into account for the purposes of appointment, assignment to a post, grading or any increase in salary.

22. I conclude that the purpose of those rules, broadly speaking, is to recognise that the employees concerned have demonstrated their fitness for the public service and to ensure that they are not adversely affected as regards their pay entitlements on changing job or organisation.

In particular, where the previous employment relationship was governed by private law, I consider that the provision which makes recognition of those years of service subject to their having been taken into account for the purposes of grading, appointment, assignment to a post or an increase in salary, serves to reward the experience which the worker brings to the job, while, in my opinion, the rule which makes recognition of those years of service subject to the competent institution's regarding them as pensionable serves to unify the worker's pension rights, thus ensuring that he is not adversely affected as a result of having changed employer.

23. If those are the purposes of the legislation under examination, I can find no objective justification for limiting recognition of previous service in a public service, whether governed by the rules of public or private law, to service performed in the Member State in question and refusing to recognise service performed under identical or similar circumstances and schemes in another Member State.

24. As far as fitness is concerned, a worker who has already been employed by the public service in another Member State will be as fit for the public service in Greece as one who has already worked for the Greek service so that he cannot therefore be denied compensation by his employer for the experience which he has acquired as a public employee.

As regards the ruling which makes recognition of previous years of service subject to their having been taken into account for grading, assignment to a post or an increase in salary, I do not see why experience acquired in the performance of certain functions in Greece should be regarded as better

than that acquired in performing similar functions in another Member State.

Finally, as regards the recognition of pension rights as a condition for the recognition of previous service, if a worker has exercised his right to freedom of movement, this matter will be governed by Article 51 of the Treaty, by Regulation (EEC) No 1408/71, [10] and by the principles laid down by the case-law of the Court of Justice. [11]

With regard to recognition of pension rights of migrant workers, it should be pointed out that, in its judgment in *Vougioukas*, [12] the Court took the view that national legislation which provides that only periods of employment completed in national public hospitals, and not comparable periods completed in public hospitals in other Member States, may be recognised as pensionable, may dissuade a Community worker from exercising his right to freedom of movement.

25. The Greek authorities plead as justification for the contested legislation, first, that it is impossible to take into account years of experience acquired in another Member State, in the absence of Community provisions in that respect. Secondly, they raise the difficulty involved in determining whether employment in another Member State constitutes employment in the public service in that the boundaries between the private sector and the public sector differ from one Member State to another, as do the characteristics and legal effects of an employment relationship.

26. With regard to the first contention, I would point out that the Court of Justice recognised the direct effect of Article 48 of the Treaty as early as 1974, which means that this article confers on individuals rights which the national courts must protect and that it imposes on Member States a precise obligation which does not require the adoption of any further measure on the part either of the Community institutions or of the Member States, and which leaves them, in relation to its implementation, no discretion. [13]

27. As for the difficulty involved in making a comparison between the scheme of rules under which the service was performed abroad and the scheme under which the same or a similar service is performed in Greece, this is a practical problem which cannot affect the application of the principle that Community nationals should not suffer

10 — Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6).

11 — *Scholz* and *Vougioukas*, cited above at footnote 3, and Case C-131/96 *Mora Romero* [1997] ECR I-3659.

12 — Cited above at footnote 3, paragraphs 39 and 40.

13 — Case 41/74 *Van Duyn* [1974] ECR 1337, paragraphs 5 to 8.

discrimination on grounds of nationality in the field of employment. Any doubt regarding the correspondence between one scheme and another can readily be resolved by certificates issued by the employer in question or by the appropriate consular authorities. [14]

28. I would also point out that a Member State may not use an alleged or actual difficulty to justify its failure to fulfil its obligations under Community law. The only legitimate excuse accepted by the Court as justification for an infringement is, of course, the absolute impossibility for the Member State to fulfil its obligations. [15]

29. I shall close by stating that the contested legislation, which establishes a difference in treatment between workers who have not exercised the right to freedom of movement and migrant workers, not only constitutes covert discrimination to the detriment of national workers of other Member States, but must also be regarded as an obstacle to the free movement of Greek nationals themselves, who may be deterred from exercising their right to freedom of movement when they learn that, if they move to another Member State in order to work there, with the intention of returning to their country of origin and working in the national public service, the years which they spend abroad will be completely 'lost' as regards the appraisal of the experience they have acquired and their seniority, which in turn will subsequently affect their salary. The Court has stated in this respect that '... the provisions of the Treaty relating to freedom of movement for persons are intended to facilitate the pursuit by Community citizens of occupational activities of all kinds throughout the Community, and preclude measures which might place Community citizens at a disadvantage when they wish to pursue an economic activity in the territory of another Member State'. [16]

Costs

Since the Commission's case is well founded, the Hellenic Republic should be ordered to pay the costs of the proceedings, pursuant to the first paragraph of Article 69(2) of the Rules of Procedure.

14 — Opinion of Advocate General Jacobs in *Scholz*, cited above at footnote 3, [1994] ECR I-507, point 30.

15 — Case C-350/93 *Commission* v *Italy* [1995] ECR I-699, paragraph 15; Case C-183/91 *Commission* v *Greece* [1993] ECR I-3131, paragraph 10; Case 94/87 *Commission* v *Germany* [1989] ECR 175, paragraph 8; and Case 52/84 *Commission* v *Belgium* [1986] ECR 89, paragraph 14.

16 — Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 94.

Conclusion

For the reasons explained above, I propose that the Court of Justice:

— Declare that the Hellenic Republic has failed to fulfil its obligations under Articles 5 and 48 of the EC Treaty and Article 7 of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community by refusing to recognise previous service performed by its employees in the public service of other Member States, on the same basis as it recognises service performed in its own public service, for the purposes of salary grading scale, the grant of seniority increments and the determination of remuneration.

— Order the Hellenic Republic to pay the costs.