OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 24 SEPTEMBER 1980 [1]

Mr President,
Members of the Court,

I — In order to identify accurately the subject-matter of this action for a failure to fulfil an obligation the circumstances in which the Commission was moved to intervene should be recounted.

In 1973 the Société Nationale des Chemins de Fer Belges [Belgian National Railway Company] and the Société Nationale des Chemins de Fer Vicinaux [National Local Railway Company] put up vacancy notices in railway stations. The first-mentioned company advertised vacancies for unskilled workers (loaders, plate-layers, shunters) as well as for trainee locomotive drivers and signalmen; the latter company advertised a vacancy for an assistant at the printing works of the Central Administration at Brussels.

Those advertisements stipulated as a condition of entry the possession of Belgian nationality. Recruitment was to be with or without examinations; in certain cases it was provided that "titres prioritaires légaux", [persons qualifying for special treatment even though not fulfilling all the relevant conditions] would be considered. In the case of the National Railways the attention of candidates was drawn to the "stability of employment in one of the largest undertakings in the country".

Similarly, between 1974 and 1977 the City of Brussels and the Commune of Auderghem advertised vacancies in the press; the former advertised vacancies for hospital nurses and children's nurses in the crêche, for architects, general services and parks supervisors, night watchmen and permanent posts for garden hands and plumbers; the latter advertised a reserve list for future recruitment for the post of "semi-skilled worker" and "skilled worker Grade B" (plumber, carpenter, electrician).

Having drawn the attention of the Belgian authorities in January 1974 to what it regarded as the discriminatory nature of the requirement as to nationality contained in those advertisements the Commission returned to the charge in April 1977 maintaining that *those* posts could not be exempted from the principle of the free movement of workers within the Community in view of the restrictive scope which, according to the Court's case-law, should be given to the derogations contained in Article 48 (4) of the Treaty and in Regulation No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

The Commission was thereby referring to the Court's preliminary ruling in *Sotgiu* v *Deutsche Bundespost* of 12 February 1974 ([1974] ECR 153). It took the view that the nature of the duties connected with the posts in question (lacking the exercise of a power of decision over individuals and of any

1 — Translated from the French.

connexion with the exercise of official authority) did not allow them to be considered as coming within the scope of Article 48 (4); in particular, posts in public undertakings carrying on an industrial or commercial activity did not meet those criteria.

The Commission, in a letter signed by the Director-General for Social Affairs, gave the Belgian Government one month to take "immediate and appropriate measures to cause the competent authorities and departments ... to refrain from all discrimination against 'Community workers' which is incompatible with Community law" and to notify it of the measures adopted.

On 15 July 1977 the Belgian Government replied stating *inter alia* that the second paragraph of Article 6 of the Belgian Constitution, which states that "Belgians are equal before the law; only they shall be admitted to civil and military posts save in special cases for which exception may be made by law" prohibited the communes from employing staff under their staff regulations who were not of Belgian nationality.

On 21 November 1978 the Commission sent a fresh reminder signed by Vice-President Vredeling to the Belgian Minister for Foreign Affairs Mr Simonet, stating that in order for the exception in Article 48 (4) to take effect it must be a case of "employment in the public service"; in that regard whether the employment relationship falls under public or private law is hardly material; the provision covers only those posts which enable the holders of them to have a power of decision over individuals or if the activity connected with those posts "involves national interests, especially those which concern the internal and external security of the State".

Consequently the Commission *found* that Belgium had disregarded the Community provisions and had not taken the measures necessary to make its legislation conform with Article 48 of the Treaty and with the provisions of Regulation No 1612/68. That was somewhat over-hasty since Article 169 provides that if the Commission *considers* that a Member State has failed to fulfil an obligation under the Treaty and if that State does not comply with that opinion the Commission may bring the matter before the Court and it is that body which *finds* that there has been a failure to fulfil an obligation, whilst the Member State is bound to take the measures entailed by the implementation of the Court's judgment.

Be that as it may, the Commission gave Belgium a new time-limit of one month to make known its observations, failing which it reserved the right to issue a reasoned opinion.

Having received an unsatisfactory reply from the Permanent Representation of Belgium on 15 January 1979, the Commission adopted a reasoned opinion on 2 April 1979 which stated that "by imposing or allowing to be imposed the possession of Belgian nationality as a condition of recruitment to posts (in local authorities or public undertakings) not covered by Article 48 (4), the

Kingdom of Belgium has failed to fulfil its obligations under Article 48 of the EEC Treaty and under Regulation No 1612/68".

On 27 September 1979 the Commission brought the matter before the Court, re-stating in its conclusions the text of that reasoned opinion.

II — Thus for once a matter has been brought before the Court otherwise than through the indirect means of Article 177 and it is perhaps surprising that although Article 48 (4) does have a "direct" effect no court of a Member State has referred questions to the Court of Justice for a preliminary ruling on it save in the *Sotgiu* case which I have cited.

There is certainly no need to stress the importance of the case both from the point of view of the principles of Community law involved and from the point of view of the actual interests at stake — the intervention of three Member States on the side of Belgium is evidence of that.

In those States certain posts are available to nationals only. For example, in France, Article 19 (1) of the Law of 28 April 1952 requires candidates for posts with communes to have possessed French nationality for at least five years unless they were naturalized pursuant to Article 64 of the French nationality law.

By Article 16 of the Ordinance of 4 February 1959 on the general regulations for officials [fonctionnaires] "No person shall be appointed to a public post (1) if he does not possess French nationality ..."; however, according to Article 1 of that Ordinance that provision concerns only the appointment to permanent posts of persons established in the central administrative services of the State, in associated external services, or in public undertakings of the State.

Certain statutes of public undertakings (Société Nationale des Chemins de Fer, Electricité de France, Gaz de France, Régie Autonome des Transports Parisiens), the statutes for persons employed by local authorities and the charters of public hospitals expressly require French nationality as a condition of establishment in a post. For a period of five years from the decree of naturalization a naturalized foreigner may not be appointed to "public offices remunerated by the State" (Article 81 of the Nationality Law).

In the Federal Republic of Germany the first subparagraph of Article 7 (1) of the Federal Law on Public Officials (Bundesbeamtengesetz) restricts public office to nationals.

However, in the judgment of the Court in *Commission* v *French Republic* of 4 April 1974 ([1974] ECR 360), the Court held (paragraph 35 at p. 371) that "since the provisions of Article 48 and of Regulation No 1612/68 are directly applicable in the legal system of every Member State and Community law has priority over national law, these provisions give rise, on the part of those concerned, to rights which the national authorities must respect and safeguard and as a result of which all contrary provisions of internal law are rendered inapplicable to them". Consequently even a provision of constitutional law may not be invoked against a Community national should it be incompatible with the Treaty or with secondary Community law.

III — In this area one should be specific; care must be taken not to mix

"posts in public undertakings carrying on an industrial or commercial activity" with, for example, posts with local public authorities. It is not a question of indiscriminately declaring that, by refusing Community citizens other than nationals access to posts in national, regional and local services, in public undertakings in general, or in "régies directes" [State corporations] a Member State is failing to fulfil its obligations. This was the view that the Court itself was taking when it asked the Commission to furnish the texts of the vacancy notices in dispute.

It then emerged that the post advertised by the Société Nationale des Chemins de Fer Vicinaux [National Local Railway Company] concerned a post not for an unskilled worker but for an "assistant in the printing works of the Central Administration". For good measure the Commission also furnished an advertisement concerning the constitution of a "reserve for future recruitment" for the Commission d'Assistance Publique [Social Assistance Commission], Brussels, in particular for "supervisors of civil works in the Public Works Deparment" and for "male or female welfare officers", as well as an advertisement to recruit a deputy director and lecturers to the Academy of Music of the City of Brussels. But those latter advertisements were not dealt with in the reasoned opinion and must be left out of the discussion for in this field one cannot make shift with the expressions "such as" or "etc.".

Those posts have been further reduced in number in the course of the proceedings, since, unless I am mistaken, the Commission no longer questions the offering of posts for architects, supervisors of general services and for hospital and children's nurses with the City of Brussels. During the oral procedure the only relevant argument was over the advertisements by the Société Nationale des Chemins de Fer Belges [Belgain National Railway Company] and over certain posts advertised by the City of Brussels (for night-watchmen, garden hands and plumbers) and by the Commune of Auderghem (for semi-skilled workers and B qualified workers: plumbers, carpenters, electricians).

Therefore, it is specifically with regard to those posts that the alleged failure by Belgium to fulfil its obligations should be examined.

IV — The main difficulty in the present case is that the "directly applicable" Community provisions are extremely concise.

Article 48 (2) of the Treaty takes up the principle in the first paragraph of Article 7 of the Treaty; it states that freedom of movement "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".

By the terms of paragraph (3) (which corresponds to Article 56 (1) relating to self-employed persons) that abolition "shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made . . ."

Paragraph (4) specifies that "the provisions of this article shall not apply to employment in the public service".

It has perhaps not been sufficiently emphasized until now that the German version of that latter provision, which is equally authentic, does not speak of employment in the public service but of "being employed" in the public service or of exercising an activity in it (Beschäftigung — see also paragraph (k) of Chapter VII of Annex VII referred to in Article 133 of the Act of Accession — Zulassung zu einer unselbständigen Erwerbstätigkeit [access ... to employment]. It is much more than a technical term, it is a factual concept, different from the the expression "offers of employment actually made" (tatsächlich angebotene *Stellen*) used in Article 48 (3) (a).

In any event paragraph (4) does not overlap with paragraph (3); it contains an additional qualification. That is why it seems to me to be inaccurate to state as the Commission does that "in particular only (posts) which concern the *internal or external security* of the State are covered", since the protection of *"public security"* is already covered in Article 48 (3). In the minds of the authors of the Treaty the exclusion of "employment in the public service" made it unnecessary, in the case of that category of posts, to refer to "limitations justified on grounds of public policy and public security" although there is undoubtedly a certain link between those two expressions.

Although Article 49 provides that "as soon as this Treaty enters into force, the Council shall, acting on a proposal from the Commission and after consulting the Economic and Social Committee, issue directives or make regulations setting out the measures required to bring about, by progressive stages, freedom of movement for workers, as defined in Article 48", no further provision has been adopted since Regulation No 1612/68 of the Council of 15 October 1968 and since Council Directive No 68/360 of the same date on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families.

Similarly, whilst Article 56 (2) provides for the adoption of directives for the co-ordination of national provisions providing for special treatment for foreign nationals on grounds of public policy, public security or public health (Council Directive No 64/221 of 25 February 1964 and Directive No 68/360 cited above were adopted pursuant thereto), no directive has been issued specifically pursuant to Article 48 (4).

It may be legitimately inferred therefrom, as the intervening governments argue, that there is no provision in the Treaty which contemplates the harmonization of national administrative structures, except in the case of the Commission when using the powers conferred upon it by Chapter 3 of Title I of Part Three on the approximation of laws (Articles 100 to 102); the exception contained in Article 48 (4) therefore refers to the public service as it exists in the various Member States. In the absence of the achievement of uniformity in the area of nationality at Community level, different national rules are and will remain possible and legitimate and there will always be inequality of treatment owing to factual differences in an unintegrated sector.

Under the heading "Eligibility for employment" (Zugang zur *Beschäftigung* in German), Article 1 (1) of Regulation No 1612/68 provides:

"(1) Any national of a Member State shall, irrespective of his place of residence, have the right to take up an activity as an *employed* person, and to pursue such activity, within the territory of another Member State in accordance with the

provisions laid down by law, regulation or administrative action governing the employment of nationals of that State.

(2) He shall, in particular, have the right to take up available employment ('Zugang zu den verfügbaren *Stellen*', in German) in the territory of another Member State with the same priority as nationals of that State".

That implementing provision is not much of an aid to the construction of Article 48 (4) and the need, and the necessity, for the adoption of Community measures in implementation of that article are all the greater. However, it is at once obvious that there is no need, as Mr Broeksz suggested to the European Parliament on 17 January 1972, to amend Article 48 (4) of the Treaty on the ground that "the article is incompatible with the spirit of the Treaty". The Member States would hardly be disposed to make such an amendment except to give greater emphasis to the restrictive nature of that provision. But it is one thing to "amend" that article and another thing to draw up implementing provisions.

In order to reduce as far as possible the number of proceedings for failure to fulfil obligations and for preliminary rulings, which, inevitably, are brought at wide intervals of time, the problem should be resolved as far as possible by general Community measures, each Member State then establishing rules as precise as possible to define what should be understood by "employment in the public service" within the meaning of the Treaty.

My impression is that the role of the Commission to propose legislation has not been fully utilized in this field, ostensibly because freedom of movement should have been fully achieved well before 1980. Even if it does not appear to be very inclined to do so at the moment, nothing prevents the Council either from asking the Commission to let it have a proposal for a regulation or a directive for the purpose of putting Article 48 (4) into effect.

The Commission's statement that it does not even intend to draft proposals on the subject because it is one of extreme complexity owing to the vast range of very diverse situations covered by the concept of "employment in the public service" is especially regrettable: that complexity is at least as great for national courts and for the Court of Justice too.

In order to settle the innumerable individual disputes which occur the approach which must necessarily be adopted is to take them case by case, whilst a comprehensive solution is still required.

V — With a view to attaining a positive definition of the scope of Article 48 (4) there might have been an initial temptation to refer to criteria relating to whether the employment relationship is one governed by public or private law.

According to the preamble to the Bill to ratify the Treaty (Document No III/3660 of the Bundestag, second legislative period 1953, p. 25), "The concept of public service must be interpreted restrictively. That expression must never be taken to mean employment in public

undertakings of an industrial and commercial nature".

U. Everling writes in the commentary by E. Wohlfahrt, U. Everling, H. J. Claesener, and R.Sprung (1960, p. 160) that in the Federal Republic the exception contained in Article 48 (4) covers officials, office staff and workers and that the public service includes legal persons constituted under public law, in particular local authorities.

In his work on the right of establishment in the Common Market (Das Niederlassungsrecht im Gemeinsamen Markt, 1963, p. 46), Mr Everling writes: "In the case of workers, and therefore of office staff in the public service, the limit is clearly defined: all persons employed ('alle Beschäftigten') in the public service are excluded".

According to Professor Levi Sandri writing in the Commentary by Quadri-Monaco-Trabucchi (Volume I, 1965, p. 391), the words of Article 48 (4) must be taken to cover not only posts in the direct administration of the State, but also those which are created by the legal persons constituted under public law which make up the "indirect administration" that is, nationalized or "semi-State" public undertakings or institutions, local or regional authorities or associated undertakings which have been regionalized or municipalized. In regard to the latter, it is stated that "they must be included under that provision, despite the industrial nature of the activity carried on, since they do not have any legal personality and the employment relationship is directly with the public body".

In the commentary of J. Mégret, "Le Droit de la C.E.E." (Vol. III, 1971, p. 6), J. V. Louis writes: "According to a reply given to a parliamentary question by the Belgian Minister for Foreign Affairs (Extraordinary Session 1968, Senate, Report of Questions and Answers, 30 July 1968, No 6, question of M. Bascour of 27 June 1968), the expression 'public service' implies the power directly exercised by the State. It therefore covers Ministries, semi-State bodies and municipal administrations. The exception contained in paragraph (4) must therefore be construed restrictively. Accordingly, it is generally accepted that it does not cover public undertakings of a commercial, industrial or financial nature, or private bodies charged with running a public service. Access to teaching in State schools must be governed by that same principle. It must however be remembered, the Minister adds, that various factors (such as knowledge of languages or equivalence of degrees) in practice cause entry to posts in State education to be usually restricted to nationals. Therefore, that writer adds, "it seems that the Belgian Government does not in principle rule out the application of freedom of movement to certain public servants who are not officials involved in the exercise of authority".

In France the Conseil d'État largely relies on the concept of the greater or lesser extent to which a person is involved in an activity entailing prerogatives of powers conferred by public law, at least where there is a contractual relationship (re *Robert Lafrégeyre,* 26 January 1923, Recueil 67).

However, after the delivery of my opinion of 5 December 1973, in its preliminary ruling of 12 February 1974 [1974] ECR at p. 162) the Court clearly ruled out the approach based on the nature of the employing body or on the nature of the employment relationship.

It is appropriate to recall the text of certain paragraphs of that judgment (the German version being the authentic text):

"4. Taking account of the fundamental nature, in the scheme of the Treaty, of the principles of freedom of movement and equality of treatment of workers within the Community, the *exceptions* ('Ausnahmen', in the German text) made by Article 48 (4) cannot have a scope going beyond the aim in view of which this derogation (the German text uses 'Bestimmung', which means provision) was included.

The interests which this derogation allows Member States to protect are satisfied by the opportunity of restricting admission (the German text contains the word 'Zugang', access) of foreign nationals to *certain activities* in the public service . . .

5. It is necessary to establish further whether the extent of the exception provided for by Article 48 (4) can be determined in terms of the designation of the legal relationship between the employee and the employing administration.

In the absence of any distinction in the provision referred to, it is of *no interest* whether a worker is *engaged* (the German text contains the word 'beschäftigt' which means occupied or employed) as a workman, a clerk or an official or even *whether the terms on which he is employed come under public or private law.*

These legal designations can be varied at the whim of national legislatures and cannot therefore provide a criterion for interpretation appropriate to the requirements of Community law.

6. The answer to the question put to the Court should therefore be that Article 48 (4) of the Treaty is to be interpreted as meaning that the exception made by this provision concerns only access to *posts forming part of the public service* and that the nature of the legal relationship between the employee and the employing administration is of no consequence in this respect".

Finally, in so far as it is material here, the operative part of the Court's judgment states ([1974] ECR at p. 166):

"Article 48 (4) of the Treaty is to be interpreted as meaning that the *exception* made by this provision concerns only access to *posts forming part of the public service.* The nature of the legal relationship between the employee and the employing administration is of no consequence in this respect . . ."

If proper weight is to be given to those words it follows that:

(1) Article 48 (4) constitutes a derogation or an exception clause.

(2) The interests whose protection justifies that derogation are safeguarded by the power to restrict the admission of foreign nationals to *"certain activities* in the public service" or to "posts forming part of the public service", but they may not justify discriminatory measures in matters of remuneration or other conditions of work and employment against persons already engaged in the service: the term "employment in the public service" covers the conditions upon which a person is engaged after his recruitment from the start to the end of his paid working life.

(3) In that respect it is hardly material whether the employment relationship comes under public or private law. The fact that in certain Member States disputes about the posts in question may fall within administrative jurisdiction does not in any way effect the inability to rely on Article 48 (4) if the conditions for the application of that provision are not fulfilled.

The criterion may not be sought either in the nature, economic or not, of the aim which it is sought to achieve. It is true, as the German Government points out, that the benefit of the right of establishment is not given to associations as such, yet by Article 58 they are assimilated to natural persons, and non-profit making companies or firms are clearly excepted from it. But those companies or firms may themselves be employers and require employees. That was the case of the Church of Scientology in the *Van Duyn* case.

Consequently, contrary to the arguments of the Member States who have participated in these proceedings, any post regarded by the relevant Member State as forming part of the public service must not necessarily be accepted as such a post, irrespective of the subject-matter of the activities performed in that post. That subject-matter and the scope of that reservation cannot fall to be determined exclusively by the Member States without review by the Community institutions, and especially by this Court. Allowing them the right as a matter of State power to define the domain of the public service would result in giving the obligations which are placed upon them by the principle of freedom of movement, one of the fundamental freedoms provided by the Treaty, a scope which would be very different from one State to another.

The concept of "employment in the public service" may in that respect be compared to that of "public policy" on which the Court held in its judgment of 20 October 1975 *Rutili* ([1975] ECR 1219 at p. 1231) that:

"27. Nevertheless, the concept of public policy must, in the Community context and where, in particular, it is used as a justification for derogating from the fundamental principles of equality of treatment and freedom of movement for workers, be interpreted *strictly*, so that its scope cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community".

Moreover, although there is no provision that limitations justified on grounds of public policy, public security or public health (Article 4 (3)) and the exception contained in Article 48 (4) "must not constitute a means of arbitrary discrimination", as Article 36 provides in regard to the freedom of movement of goods, this concept must not "be put to improper use by being invoked to service economic ends" or to impair trade-union rights, which is further reinforced by Article 8 of Regulation No 1612/68 (as amended by Council Regulation No 312/76 of 9 February 1976):

"A worker who is a national of a Member State and who is employed in

the territory of another Member State shall enjoy equality of treatment as regards membership of trade unions and the exercise of rights attaching thereto, including the right to vote and to be eligible for the administration or management posts of a trade union; he may be excluded from taking part in the management of bodies governed by public law and from holding an office governed by public law. Furthermore, he shall have the right of eligibility for workers' representative bodies in the undertaking . . ."

Finally, no restrictions must be placed by virtue of Article 48 (4) on the rights secured by Article 48 other than such as are necessary for the proper functioning of the public service "in a democratic society" (paragraph 32 of the *Rutili* judgment).

It is not the simple fact of being engaged in the public service which activates the application of Article 48 (4); only admission to *certain* posts forming part of the public service or access to *certain* activities in the public service is covered that provision.

I think that on this point the drafting of the Court's *Sotgiu* judgment shows evidence of having been to some extent influenced by the provisions of the first paragraph of Article 55:

"The provisions of this Chapter shall not apply, so far as any given Member State is concerned, to *activities* ('Tätigkeiten', in German) which in that State are connected, even occasionally, with the exercise of official authority".

At the root of this latter provision is a French proposal of 3 January 1957 which ran like this:

"Sont exceptées de l'application des dispositions du présent article les activités pouvant comporter l'exercice, même occasionnel, d'une fonction ou d'une charge publique, ou celles inhérentes à l'exécution d'un service public ainsi que les associations à but non lucratif de droit public ou privé, qui demeurent soumises aux législations nationales".

["The provisions of this article shall not apply to activities capable of involving the exercise, even occasionally, of a public function or office, or those bound up with the performance of a public service, or to non-profit-making associations constituted under public or private law which shall remain subject to national law".]

The Committee of the Heads of Delegation then agreed that the right of establishment was not to apply to "les activités exercées par des fonctionnaires de l'État et les pouvoirs publics qui lui sont subordonnés ainsi que celles des avocats et des personnes investies d'une charge publique" ["activities performed by officials of the State or by the public authorities which are subordinate to the State or to activities performed by lawyers and persons holding public office".]

Is it possible, then, in order to get closer to what must be understood by "employment in the public service" within the meaning of Article 48 (4), to refer simply to that provision in the first paragraph of Article 55?

Even if those two provisions show a certain analogy they do not have the same sphere of application. The chapter (on workers) to which Article 48 belongs concerns the activities of *employed* persons exclusively, whilst the chapter (on the right of establishment) containing Article 55 concerns only the activities of self-employed persons.

The Commission argues that the only aim which the States may legitimately pursue is to restrict to their nationals offices whose nature involves their holders in participating in the exercise of official authority. However, in its observations in the *Sotgiu* case, the Commission itself stated that such an interpretation would not take account of the differences, which appear to have been intended, existing between those two provisions; it would secondly neglect the fact that Article 55 concerns ancillary public duties performed by self-employed

persons or by persons in private professional practice, in other words, by persons who perform such duties only occasionally and in a generally well-defined sphere, whilst Article 48 (4) is concerned with persons who are employed full-time in the public service.

The Commission further recognizes that the wording of Article 48 (4) is less restrictive than that of the first paragraph of Article 55. A self-employed person cannot hold a post in the public service although he may nevertheless participate in the exercise of official authority; an employed person may hold such a post although that may not necessarily involve the exercise of such powers. Conversely, even an employed person recruited by a private person or body charged with the task of providing a public service or associated with such a service, might, in certain cases, taking account of the nature of that task or service, be regarded as "engaged in the public service".

But the public nature of the remuneration does not suffice in order to treat the post as constituting "employment in the public service".

For example, it happens that in certain industrial services run as State corporations the State employs workers who are remunerated by reference to the wages paid in the same branch of industry in the private sector.

In France, for example, they are what are called the "personnel civil des établissements militaires" [civil personnel of military establishments] or the "personnel ouvrier des arsenaux et établissements de la marine" [worker personnel of naval dockyards and establishments]. In those sectors the public authority is either in a position of competition or of monopoly *vis-à-vis* private undertakings. Nevertheless, in those cases, Article 48 (3) might have application.

Taking care to avoid attempting to create "judicial legislation", to use the phrase of Mr Advocate General Warner in his opinion of 10 July 1980 in the *Paschek* case, I may adopt the following criteria:

(1) Positively speaking, for the purpose of applying Article 48 (4), the important factor is the administrative *nature* of the activity actually performed; for example, an activity in a public undertaking running an administrative service comes under Article 48 (4).

(2) The exception contained in Article 48 (4) in any event covers posts which are directly or indirectly connected with the exercise, even if only occasionally, of prerogatives of powers conferred by public law lying outside the ordinary law.

(3) Negatively speaking, mere participation, even if direct, in the management or the performance of a public service is not sufficient to exclude a post from the normal sphere of application of Articles 48 to 51. Posts in public services having an industrial and commercial character, even if entrusted to nationalized public undertakings, come under those articles.

There remains the objection by the intervening governments about the difficulty inherent in the Commission's argument of reconciling the admission of foreigners to a post "in the public service" with their legitimate exclusion from higher posts in the career structure: on the one hand the possibility of being promoted to such posts flows from the

"career principle" established in several Member States whilst, on the other hand, the performance of the duties involved in those posts clearly justifies the application of the reservation contained in Article 48 (4).

I think that an answer to that serious argument may be to suggest distinguishing whether entry into a career *normally* entails access to a position of authority — if so, exclusion would be justified *a limine*. Indeed, Article 48 (4) does not mean that access to posts "in the public service", whatever they are, should escape the prohibition on all discrimination on grounds of nationality enunciated by Article 7. The second paragraph of that article enables the Council to adopt "rules designed to prohibit such discrimination". Just like the second paragraph of Article 55 that provision thus enables the Council to "legislate" in this matter whilst ensuring that the principle of equal access to the posts in question with the principle of the protection of the sovereign rights of the Member States are reconciled. The necessary distinctions might therefore be made on the basis of the criteria which I have just suggested and persons employed, even in the public service, as "workers" would be subject to Article 48 (4) by simple reference to that provision contained in the rules adopted pursuant to Article 7.

Moreover, none of the posts covered by the vacancy notices ultimately contested by the Commission seems to me to hold out such career prospects. A railwayman, a plate-layer, for example, even if an official, cannot be eligible for the post of general manager.

VI — The application of those criteria to the vacancy notices issued by the Belgian National Railways leads me to believe that the nationality requirement contained in those offers is contrary to the Treaty.

It is even more so in the light of the Court's judgment in *Commission* v *French Republic* of 4 April 1974. In paragraph 33 ([1974] ECR at p. 371) the Court held that "the application of Articles 48 to 51 to the sphere of ... transport" (and therefore to rail transport) "is ... obligatory for Member States".

That finding is not invalidated by the fact that once admitted to those posts nationals of Member States may be elected to administration or management posts in a trade union (Article 8 (1) of Regulation No 1612/68) or by the fact that such eligibility entails possible participation in the management of undertakings, at least under the legislation in force in some of the Member States.

Similarly, although in certain Member States railwaymen are officials who may automatically be put on a requisition footing in the case of war or the threat of war, employment in this sector of transport is not covered by Article 48 (4).

Despite the public character of the service provided by an undertaking given the task by a municipal corporation under a contract governed by private law of removing household refuse using its own vehicles, the Court refused *(Nehlsen* judgment of 6 December 1979, [1979] ECR 3639) to consider those vehicles in the same way as those used by other public authorities for public services, not competing with "professional" road hauliers.

However, to prevent the admission of nationals of other Member States from leading to the creation of a "cheap labour charter" or causing any deterioration in the terms of remuneration of nationals, the Court added to its judgment in *Commission* v *French Republic* ([1974] ECR at p. 373, paragraph 45) that the absolute nature of the prohibition in Article 48 (2) also has the effect, "in accordance with the aim of Article 177 of the Treaty, of guaranteeing to the State's own nationals that they shall not suffer the unfavourable consequences" which might result from "the offer or acceptance by nationals of other Member States of conditions of employment or remuneration less advantageous than those obtaining under national law", *since such offer or acceptance is prohibited.*

As regards those of the posts offered by the City of Brussels and the Commune of Auderghem, which are the subject-matter of the dispute, they do not differ in any way from posts in undertakings or establishments carrying on an industrial and commercial activity.

Since, however, municipal administrations are involved, account should be taken of a more recent preliminary ruling given by the Second Chamber of the Court on 8 March 1979, *Lohmann* ([1979] ECR 854) which adopted the opinion of Mr Advocate General Capotorti.

The main proceedings involved a former local authority or similar official in the Netherlands.

In regard to Article 4 (4) of Council Regulation No 1408/71 of 14 June 1971 on social security for migrant workers which provides that the regulation "shall not apply to social and medical assistance, to benefit schemes for victims of war or its consequences, *or to special schemes for civil servants and persons treated as such,*" the Court held (paragraph 3, [1979] ECR at p. 860) that "that exclusion is only the logical consequence of Article 48 (4) of the Treaty which excludes 'employment in the public service' from the application of the provisions relating to freedom of movement for workers within the Community".

That decision might put in question the authority of *Sotgiu* to the extent to which the latter excludes any reference to the legal character of the employment relationship or to the nature of the employer. Inasmuch as the posts in question in the disputed advertisements are covered by a special scheme of social security which does not fall within the sphere of application of Regulation No 1408/71, the logical conclusion should be that they constitute "employment in the public service" within the meaning of Article 48 (4).

Nevertheless, the agent of the Kingdom of Belgium has neither proved nor offered to prove that the posts in question come under a special scheme within the meaning of Article 4 (4) of Regulation No 1408/71. Consequently, it has not rebutted the presumption of the non-administrative character of the posts in question, the onus of which lay upon it.

It is true that candidates for posts with municipal authorities might be required to be entitled to their *civic rights* (right to vote and stand for election), as in Article 19 (2) of the French law of 28 April 1952, especially if they may eventually come to participate, within the framework of those posts, in the management of bodies governed by

public law and in the performance of an office governed by public law.

However, Community citizens other than nationals do not automatically enjoy those rights so that the requirement as to the enjoyment of civic rights would restrict the scope of the access to such posts. But the advertisements in question do not contain any requirement in that regard, even as to the possession of a "certificate of good behaviour, life and morals".

It is may opinion that the Court should hold that by allowing Belgian nationality to be imposed as a condition of recruitment to the following posts:

— Unskilled workers, trainee locomotive drivers, signalmen with Belgian National Railways, night-watchmen, garden hands, plumbers with the City of Brussels,

— Semi-skilled worker and skilled worker, Grade B, with the Commune of Auderghem,

the Kingdom of Belgium has failed to fulfil its obligations under Article 48 (4) of the EEC Treaty and under Regulation No 1612/68 of the Council.

It is also my opinion that the Kingdom of Belgium should be ordered to pay the costs.