OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 27 January 1987 *

Mr President,
Members of the Court,

A — The facts

1. The facts of the infringement proceedings with which I am to deal today are as follows:

2. On 20 March 1975 the Italian Republic issued Law No 70 on new rules relating to public corporations and the terms of employment of staff. It is provided among other things in Article 36 (3) and (4) of that law that persons employed under contract by the Consiglio nazionale delle ricerche (CNR) who have the requisite qualifications and fulfil the prescribed requirements should be given established posts. If that should not be possible owing to a lack of posts, the staff concerned should be kept on under contracts for an indefinite period and receive the remuneration laid down for the corresponding established posts.

3. Article 5 (3) of Law No 70 refers to the legal rules in force in the civil service with regard to recruitment requirements. Those rules include the provisions of the Staff Regulations for Civil Servants, Article 2 of which provides that Italian nationality is a requirement for appointment as a civil servant.

4. Under Order No 82 of 1 March 1945, taking the place of a law, the CNR is an autonomous government agency having legal personality and answering to the President of the Council of Ministers. It is responsible *inter alia* for the coordination of the activities of the State in the various scientific fields, for drawing up technical standards, compiling bibliographic and documentary material and for conducting research of its own.

5. Where necessitated by particular requirements of scientific research, the CNR may under Article 36 (1) of Law No 70 of 1975 recruit foreign staff for advanced research under contract; however, the maximum duration of such contracts is five years.

6. To date, the provisions of Article 36 (3) and (4) of Law No 70 have not been applied to foreign researchers working for the CNR; in the view of the Italian authorities, such workers, being foreign nationals, were not entitled to be established. Instead, the researchers in question continued to be employed under contracts of limited duration.

7. In 1981 the CNR attempted to maintain in employment researchers from other Member States of the Community at least on the basis of contracts of indefinite duration; however, that came up against resistance on the part of the supervisory bodies, which maintained that Italian nationality was also a requirement in the case of contracts of indefinite duration.

* Translated from the German.

8. In 1983 a number of researchers brought an action against the CNR before the Tribunale Amministrativo Regionale (Regional Administrative Court) of Lazio following the conclusion of new employment contracts for a limited period. Those actions were dismissed. One researcher appealed to the Consiglio di Stato (Council of State); the appeal is still pending.

9. The fact that researchers who are nationals of other Member States are not established has a series of consequences as far as they are concerned.

10. In the first place, their posts are less secure than those of their Italian colleagues, since the contracts of employment concluded with them from time to time are only for a limited period. Secondly, they cannot be promoted since participation in the competitions leading to promotion is restricted to Italian nationals.

11. However, it has not been possible to establish definitely whether there is also discrimination with regard to remuneration, since it has not been made absolutely clear what is meant by 'ricostruzione della carriera' (career rebuilding) which is alleged to have given rise to a difference in remuneration.

12. In view of this state of affairs the Commission of the European Communities has brought an action for failure to fulfil its obligations against the Italian Republic. It considers that the contested rules infringe the prohibition of discrimination set out in Article 48 of the EEC Treaty and Article 7 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community. [1]

1 — OJ English Special Edition 1968 (II), p. 475.

13. Since the defendant complied neither with the Commission's letter of 2 August 1984 putting it on formal notice nor with its reasoned opinion issued under Article 169 of the EEC Treaty on 18 March 1985, the Commission brought this action before the Court of Justice.

14. The *Commission* claims that the Court should

(a) Declare that by discriminating, as regards conditions of work and employment, against researchers working for the Consiglio nazionale delle ricerche who are nationals of other Member States in favour of researchers of Italian nationality working for that same body, the Italian Republic has failed to fulfil its obligations under Article 48 of the EEC Treaty and Article 7 (1) and (4) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968;

(b) Order the Italian Republic to pay the costs.

15. In its defence the Italian Republic does not formally contest the Commission's claims. It merely points out that the researchers concerned have been kept on under contracts for a limited period and that their remuneration corresponds to that of researchers holding established posts. For the rest, efforts are being made to enable established posts to be given to the researchers in question. Consequently the action is unnecessary.

16. The Italian Republic repeats this assertion in the rejoinder where it also points out that the Italian Government has prepared a bill designed to enable researchers who are nationals of other Member States to be given established posts.

17. In the *rejoinder,* however, the *Italian Republic* claims that the Court should dismiss the application and order the applicant to pay the costs.

18. In the course of the oral proceedings the Italian Republic substantiated its claim that the application should be dismissed. It referred to the tasks of the CNR and maintained that the employment contracts of the researchers in question do not fall within the scope of Article 48 of the EEC Treaty as a result of the exception provided for in Article 48 (4), which stipulates that Article 48 is not to apply to employment in the public service.

19. Officials employed by the CNR might reach the highest positions in that agency, which served the general interest of the State. Consequently, there was justification for requiring those officials to be of Italian nationality.

20. In so far as it is necessary, I shall consider the parties' other arguments in the body of my Opinion; for the rest, reference is made to the Report for the Hearing.

B — Opinion

21. In the light of the findings made in the written and oral procedures it appears that researchers who are nationals of other Member States are treated differently from Italian researchers in at least two respects.

22. Their employment relationship is governed by contracts concluded for a limited period and is therefore less secure than the employment situation of researchers of Italian nationality. In addition, they are disqualified from taking part in the competitions which must be passed in order to be promoted.

23. It must first be considered whether the prohibition of discrimination set out in Article 48 (2) of the EEC Treaty is applicable to the researchers from other Member States of the Community or whether the researchers' posts at the CNR must be regarded as employment in the public service and hence the prohibition of discrimination set out in Article 48 (2) of the EEC Treaty does not apply as a result of Article 48 (4).

24. It must be observed in that connection that, according to the Court's judgment of 12 February 1974 in Case 152/73,[2] the scope of the exception set out in Article 48 (4) of the EEC Treaty cannot be determined by the nature of the legal relationship between the employee and the employing administration. As the Court has recently held in its judgment of 3 June 1986 in Case 307/84,[3] access to certain posts cannot be limited by reason of the fact that in a given Member State the persons appointed to such posts are governed by staff regulations which provide for establishment. To make the application of Article 48 (4) of the EEC Treaty dependent upon the legal nature of the relationship between the employee and the administration would enable the Member States to extend at will the number of posts covered by the exception laid down in that provision and hence to determine the scope of Community law unilaterally. That might result in a particular activity's being subject to different

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

3 — Judgment of 3 June 1986 in Case 307/84 *Commission of the European Communities* v *French Republic* [1986] ECR 1725 at p. 1734.

rules in different Member States by virtue of Article 48 of the EEC Treaty; that cannot be permitted under Community law.

25. As the Court stated in particular in its judgment of 17 December 1980 in Case 149/79 [4] in examining whether particular activities fall within the ambit of employment in the public service within the meaning of Article 48 (4), it must be considered 'whether or not the posts in question are 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'. In its judgment of 3 July 1986 in Case 66/85, [5] in which the Court adhered to the wording quoted above from the judgment in Case 149/79, it was held that both the said conditions, namely the exercise of powers conferred by public law and the discharge of functions whose purpose is to safeguard the general interests of the State, must be present at the same time, the national court having expressed the view that it would be sufficient if only one of the two conditions were to be fulfilled.

26. During the oral proceedings the Italian Republic argued on the grounds of the role played by the CNR that researchers working for it fell within the exception provided for in Article 48 (4) of the EEC Treaty.

27. That view cannot be accepted, since the role of a public body is not sufficient evidence in itself that all its staff are involved 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. Granted, the administrative organs and higher echelons of the CNR may be responsible for such tasks; however, the Italian Republic did not contest the Commission's claim that the researchers concerned are actually engaged in research work. In particular, the Italian Republic has not shown that the researchers in question are responsible for management duties in the laboratories or for advising the State on scientific questions. Furthermore, one cannot dismiss the Commission's argument that it is possible to infer from the fact that the researchers had already been employed by the CNR for some time that the Italian Republic impliedly admits that the general interests of the State or exclusive tasks of the public authorities are not involved in this case.

28. Furthermore, according to the case-law of the Court no case for the applicability of Article 48 (4) can be based on the argument that researchers from other Member States would, if established, qualify under national law for promotion to the highest echelons of the CNR. The Court has already rejected that argument in its judgment of 17 December 1980 in *Commission* v *Belgium*. [6] According to that judgment the exception provided for in Article 48 (4) as regards employment in the public service applies only to certain posts in the public service, not to the public service as a whole.

4 — Judgment of 17 December 1980 in Case 149/79 *Commission* v *Belgium* [1980] ECR 3881.

5 — Judgment of 3 July 1986 in Case 66/85 *Deborah Lawrie-Blum* v *Land Baden-Württemberg* [1986] ECR 2121 at p. 2139.

6 — *Loc. cit*, paragraph 20 *et seq.*

29. Accordingly the posts at the CNR fall in principle within the scope of the prohibition of discrimination set out in Article 48 (2) of the EEC Treaty.

30. If researchers who are nationals of other Member States are placed in a worse position than national research workers in the manner described solely on account of their nationality, this constitutes an infringement of the said prohibition of discrimination. That finding is not upset by the fact that the researchers in question have so far been kept on under contracts for a limited period, since they have not been employed on terms which correspond in all respects to the terms of employment as officials which are restricted to Italian nationals.

31. It should therefore be held that by discriminating, as regards conditions of work and employment, against researchers working for the Consiglio nazionale delle ricerche who are nationals of other Member States in favour of researchers of Italian nationality working for the same body, the Italian Republic has failed to fulfil its obligations under Article 48 (2) of the EEC Treaty and Article 7 (1) and (4) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968.

C — Conclusion

32. On those grounds I propose that the Court should uphold the application and order the Italian Republic to pay the costs.