OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 14 February 1989 *

Mr President,
Members of the Court,

A — The facts

1. In the proceedings for a preliminary ruling on which I am giving my opinion today, the national court has submitted to the Court a number of questions of Community law which it considers necessary to enable it to assess the employment relationship of foreign-language assistants in Italian universities.

2. Article 28 of Decree No 382/1980 of the President of the Republic provides that Italian universities may engage assistants with a foreign mother tongue under a contract governed by a private law. The contracts may not extend beyond the academic year in which they are concluded and may be renewed annually for a maximum period of five years.

3. By circulars issued by the Italian Ministry of Public Education, the universities were instructed to conclude with the foreign-language assistants contracts for the supply of intellectual services, that is to say for work as self-employed persons, and not contracts of employment. According to the rules applicable to such contracts, it is up to the person concerned to deduct from his remuneration the amounts necessary for the subsequent payment of social security contributions; by contrast, in the case of employed persons it is the employer who is responsible for paying a substantial part of such contributions.

4. This administrative practice has, however, since been condemned by the Italian courts, which regarded the contracts in question as contracts of employment and held that social security cover should be provided.

5. In its request for a preliminary ruling, the national court therefore asked whether employment as a foreign-language assistant in a university was covered by the exception provided for in Article 48(4) of the EEC Treaty and, if not, whether the restriction on the duration of the employment relationship and the five-year limit on the entire period of employment should be regarded as discrimination prohibited by Article 48(2) of the EEC Treaty, as other national workers are in general guaranteed security of tenure; in addition, it raised the question whether the clause in the contracts with foreign-language assistants excluding social security cover also constituted

* Original language: German.

discrimination prohibited by the EEC Treaty.

6. With regard to the wording of the preliminary questions submitted to the Court and the observations of the parties I refer to the Report for the Hearing.

B — Assessment of the preliminary questions

Whether foreign-language assistants are workers

7. Before considering the first question asked by the national court, namely whether the exception provided for the public service in Article 48(4) precludes the applicability of Article 48(2) of the EEC Treaty, it must first be considered whether foreign-language assistants are workers within the meaning of Article 48 of the EEC Treaty. There might be some doubt as to whether they are in view of the national practice of concluding contracts for 'independent work' with such persons and making them responsible for obtaining social security cover.

8. In the proceedings before the Court it was pointed out that the competent national courts have not accepted the form of contract recommended by the Italian Ministry of Public Education and have recognized foreign-language assistants as workers. The national court which referred the case to the Court seems also to be inclined to the same view, as it apparently considers that Article 48 of the EEC Treaty (apart from its question concerning paragraph (4) thereof) is applicable to the category of persons in question.

9. It must be stated, however, in this connection that the concept of 'worker' is not defined by reference to the national laws of the Member States but has a Community meaning.[1] As this concept defines the scope of freedom of movement, one of the fundamental principles of the Community, it must according to the judgments of the Court be interpreted broadly and in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person, in return for which he receives remuneration.[2]

10. As the Court has been informed that foreign-language assistants perform their teaching duties under the supervision and in accordance with the instructions of the professors, I am entitled to assume for purposes of my opinion that foreign-language assistants are workers within the meaning of the EEC Treaty. However, it is for the national court to examine and decide this question within the scope of its jurisdiction.

1 — Judgment of 23 March 1982 in Case 53/81 *D. M. Levin v Staatssecretaris van Justitie* [1982] ECR 1035, in particular p. 1049.

2 — See judgment of 3 July 1986 in Case 66/85 *Lawrie-Blum* v *Land of Baden-Württemberg* [1986] ECR 2139, in particular p. 2144.

Whether Article 48(4) of the EEC Treaty is applicable

11. The parties to the proceedings who have submitted observations to the Court — the plaintiffs in the main proceedings, the Italian Government and the Commission — all consider that the exception provided for in Article 48(4) of the EEC Treaty which limits the application of Article 48 in the public service, does not apply in this case.

12. I must accept that view. The Court has consistently held [3] that Article 48(4) of the EEC Treaty excludes from the ambit of paragraphs (1) to (3) of Article 48 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 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 from paragraphs (1) to (3) of Article 48 are therefore 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. [4]

13. All these characteristics do not seem to be displayed in the present case. In particular, language teaching cannot constitute specific activities governed by public law which might justify the restriction of freedom of movement. Moreover, the persons concerned by the special rules at issue in this case are, in the main, precisely those persons who do not have Italian nationality. [5] The persons occupying such posts therefore have no special allegiance to the State, nor is there any reciprocity of rights and duties which form the foundation of the bond of nationality. Ultimately, however, this must be decided by the national court.

Consequently, I need only examine the question whether there is discrimination on grounds of nationality.

Whether there is discrimination within the meaning of Article 48(2) of the EEC Treaty

14. In examining this question, it should first be stated that the national rules at issue in this case are not expressly based on the criterion of nationality. On the contrary, the decisive factor is the mother tongue of the foreign-language assistants, so that even Italian nationals may be affected by the rules.

15. However, the existence of discrimination cannot be ruled out in principle, since the principle of equal treatment in the Treaty prohibits not only overt discrimi-

3 — See judgments of 17 December 1980 and 26 May 1982 in Case 149/79 *Commission* v *Belgium* [1980] ECR 3881, in particular p. 3900, and [1982] ECR 1845; and judgments of 3 July 1986 in Case 66/85 *loc. cit.* and of 16 June 1987 in Case 225/85 *Commission* v *Italian Republic* [1987] ECR 2625.

4 — Judgment of 3 July 1986, *loc. cit.*, p. 2147.

5 — See Report for the Hearing, part III, point 3.1, also, observations of the agent of the Italian Republic at the hearing on 14 December 1988.

nation by reason of nationality but also indirect or covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result. [6]

16. At the hearing, the Italian Government stated that approximately 25% of foreign-language assistants were Italian nationals, although some did not acquire Italian nationality until after they settled in Italy — usually through marriage.

17. As this means that 75% at least of the assistants of foreign mother tongue — if not more — are nationals of other States and therefore also nationals of other Member States of the European Communities (hereinafter referred to as 'Community nationals'), it may be concluded that the national rule at issue here results in Community nationals being treated differently. There are three different aspects of such difference in treatment, as described by the national court: the conclusion of a contract limited to *one* academic year, the limit imposed on the duration of the entire employment relationship and, in so far as this is still the case, the refusal to pay the employer's social security contributions.

18. It must now be considered whether this difference in treatment can be justified; it is appropriate to consider separately the two rules on the time-limit, on the one hand, and the refusal to pay the employer's social security contributions, on the other hand.

The limit imposed on the duration of contracts and the employment relationship

19. Apart from 'lecturers on contracts', who are engaged on the basis of a one-year contract for services, which may be renewed no more than twice, the teaching and research staff (lecturers, assistant lecturers and university researchers) have permanent posts which are filled by competition. In addition — as was stated by the representative of the Italian Government at the hearing — contracts of employment are concluded according to the general rule of Italian labour law for an indeterminate period.

20. The special rules applicable to foreign-language assistants are justified by the Italian Government first on the ground that it is easier to obtain such a post because there is no competitive recruitment procedure. Moreover, it states that the universities have to be in a position to adjust the number of foreign-language assistants whom they employ according to the changing needs of the students and to the varying funds available to them in the annual budget. Furthermore, the Italian State is concerned to ensure that the foreign-language assistants employed have

6 — See judgment of 15 October 1969 in Case 15/69 *Württembergische Milchverwertung-Südmilch AG* v *Ugliola* [1969] ECR 363, in particular p. 369; judgment of 12 February 1974 in Case 172/73 *Sotgiu* v *Deutsche Bundespost* [1974] ECR 153, in particular p. 164.

an up-to-date knowledge of their mother tongue. In principle, it is undeniable that the Italian State is entitled to determine the structure of its universities.

21. Since the plaintiffs in the main proceedings have not asked to be treated in the same way as any category of other university staff in Italy, or even to be given the status of civil servants, but are only contesting the restriction on the duration of their contracts, I do not consider it necessary to compare their legal status with that of other university staff or to consider the questions raised by the representative of the Italian Government as regards the Italian law relating to civil servants. It is sufficient to refer to the general rule of labour law in Italy, whereby employment contracts may be concluded for an indeterminate period even where there is no competitive recruitment procedure.

22. Consequently, it is unnecessary to examine the different recruitment conditions, and in particular the competitive recruitment procedure for university staff; moreover, there is no apparent reason why the Italian authorities could not have a competitive recruitment procedure for foreign-language assistants as well.

23. It is in principle legitimate to justify the time-limit and the imposition of a maximum period of employment by reference to the changing staff requirements of the faculties and their interest in ensuring that foreign-language assistants should have an up-to-date knowledge of their mother tongue. However, it must be considered whether those objectives may not be attained by measures which are less discriminatory as regards foreign-language assistants.

24. As has been stated during the procedure before the Court, without being contested, general Italian labour law enables an employer to adjust his staff to his needs even in the framework of contracts of employment for an indeterminate period; he could therefore dismiss foreign-language assistants employed for an indeterminate period if they were no longer needed. A fluctuating need for foreign-language assistants therefore does not preclude the conclusion of a contract of employment for an indeterminate period.

25. The same applies to the argument that the paucity of funds granted annually does not permit the conclusion of contracts for an indeterminate period. It has not been shown that the conclusion of contracts for an indeterminate period — which could be terminated — should give rise to higher costs than contracts for a determinate period, or why that should be the case.

26. The interest of the Italian faculties in ensuring that their foreign-language assistants have an up-to-date knowledge of their mother tongue must also be regarded as wholly legitimate. However, it appears questionable whether the five-year time-limit on the employment of assistants is in fact justified in order to attain that objective. In the light of possibilities for

travel and technological developments in communications, a foreign-language assistant undoubtedly has alternative means of ensuring that he has an up-to-date knowledge of his mother tongue, even after an extended stay in a country in which a different language is spoken, and that he is aware of developments in his mother tongue, without having to attend a suitable training course at his employer's expense.

27. The Italian faculties would be entirely justified in checking the linguistic knowledge of foreign-language assistants at regular intervals. If their ability were to deteriorate or they failed to keep up with developments in their mother tongue, this would undoubtedly constitute a ground for dismissal, even in the case of a contract of employment concluded for an indeterminate period.

28. It therefore follows that the total ban on renewing contracts at the end of a five-year period does not seem justified. Furthermore, there is an Italian administrative practice whereby the five-year restriction on the employment of foreign-language assistants applies in each case only to a single university. It is therefore permissible for the persons in question to be re-employed at the end of the five-year period, albeit after their ability has been reassessed. It therefore seems that the interest in ensuring that the separation from the country of origin should last no longer than five years does not have the importance which might be attributed to it.

29. In view of the foregoing, although some of the objectives to be achieved by the rules at issue here seem in principle to be justified, the means used to achieve them do not. Thus it must be concluded that the difference in treatment in question is impermissible and therefore incompatible with Article 48(2) of the EEC Treaty.

30. This conclusion does not deny that the Italian Republic retains the power to organize universities. That, however, does not alter the fact that in law the Member States are bound, in exercising such power, to respect the limits imposed by the EEC Treaty.

The non-payment of the employer's social security contributions

31. It has already been established that assistants of foreign mother tongue are workers within the meaning of Article 48 of the EEC Treaty and must therefore, under Article 3 of Regulation No 1408/71,[7] be treated in the same way as nationals of the State in whose territory they reside. A difference in treatment would be contrary to that provision.

7 — Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and members of their families moving within the Community, in the version appearing in Annex I to Regulation (EEC) No 2001/83 of 2 July 1983, OJ 1983, L 230, p. 6.

C — Conclusion

32. Consequently, I propose that the Court should answer the questions submitted to it by the Pretura unificata, Venice, as follows:

'(1) Employment as a foreign-language assistant at a university is not employment in the public service within the meaning of Article 48(4) of the EEC Treaty;

(2) Article 48 of the EEC Treaty must be interpreted as precluding a national rule imposing a five-year limit on the duration of the employment relationship, where in general security of tenure is guaranteed to other national workers.

(3) Article 3 of Regulation No 1408/71 must be interpreted as precluding an administrative practice which expressly stipulates, when the employment relationship is established with foreign-language assistants, that no social security cover will be provided.'