from the totality of posts in the public service is not permissible since it involves a restriction on the rights of such nationals which goes further than is necessary to ensure observance of the objectives of that provision.

In Case 149/79

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Jean Amphoux, acting as Agent, assisted by Louis Dubouis, a professor at the Faculty of Law and Political Science of the University of Aix-Marseille III, with an address for service in Luxembourg at the office of its Legal Adviser, Mario Cervino, Jean Monnet Building, Kirchberg,

applicant,

v

KINGDOM OF BELGIUM, represented by the Minister for Foreign Affairs, whose Agent is Robert Hoebaer, Director at the Ministry of Foreign Affairs, Foreign Trade and Co-operation with the Developing Countries, with an address for service in Luxembourg at the Belgian Embassy, Residence Champagne, 4 Rue des Girondins,

defendant,

supported by

THE FEDERAL REPUBLIC OF GERMANY, represented by Martin Seidel and Eberhardt Grabitz, acting as Agents, with an address for service in Luxembourg at the Chancellery of the Embassy of the Federal Republic of Germany, 20-22 Avenue Emile Reuter,

THE FRENCH REPUBLIC, represented by G. Guillaume, acting as Agent, and P. Moreau Defarges, acting as Deputy Agent, with an address for service in Luxembourg at the French Embassy, 2 Rue Bertholet,

THE UNITED KINGDOM, represented by W.H. Godwin, Assistant Treasury Solicitor, acting as Agent, with an address for service in Luxembourg at the British Embassy, 28 Boulevard Royal,

interveners,

APPLICATION for a declaration that the Kingdom of Belgium has failed to fulfil its obligations under Article 48 of the EEC Treaty as well as under Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, by making Belgian nationality a condition of entry for posts which do not come under Article 48 (4) of the EEC Treaty,

THE COURT,

composed of: J. Mertens de Wilmars, President, P. Pescatore and T. Koopmans, Presidents of Chambers, Lord Mackenzie Stuart, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

Advocate General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

I — Facts and written procedure

1. It was brought to the notice of the Commission that the possession of Belgian nationality had been required as a condition of entry for posts with Belgian local authorities or public undertakings (such as the City of Brussels, the Commune of Auderghem, the Société Nationale des Chemins de Fer Belges [Belgian National Railways Company] and the Société Nationale des Chemins de Fer Vicinaux [National Local Railways Company] irrespective of the nature of the duties to be performed. The Commission considered that a practice of that kind was incompatible with the provisions of Community law guaranteeing the free movement of workers within the Community.

In the Commission's opinion the only exception allowed to that principle is that provided by Article 48 (4) of the EEC Treaty in the case of "employment in the public service", an exception which must, however, be construed as covering only posts implying actual participation in the exercise of official authority by those

occupying them. In the Commission's view the posts in question (being in the case of the vacancies advertised by the railways for unskilled workers, loaders, plate-layers and so on and, in the case of the vacancies advertised by the City of Brussels and the Commune of Auderghem, for hospital nurses, children's nurses, night-watchmen, architects, skilled workmen such as plumbers, carpenters and electricians, semi-skilled workmen and so on) are no different from similar posts in private undertakings carrying on an industrial or commercial occupation.

The Commission therefore notified the Belgian Government of its concern in this matter by a letter of 1 April 1977. It then invited the Permanent Representation of Belgium to approach its government so as to acquaint the competent national authorities and services with the Community rules on the right of workers who are nationals of other Member States to take up employment and so that they might refrain from discriminating in any way against such workers in a manner contrary to those rules.

By a letter of 15 July 1977 the Permanent Representation of Belgium informed the Commission *inter alia* that the City of Brussels had referred the matter to its supervising Minister to find out whether the conduct suggested by the Commission would not be contrary to Article 6 of the Belgian Constitution and that it was in the meantime continuing to recruit its staff under the procedures complained of which were, incidentally, identical to those adopted by the Permanent Secretariat for Recruitment for the engagement of State employees.

In those circumstances the Commission took the decision to commence the procedure laid down in Article 169 of the Treaty against the Kingdom of Belgium which was given the opportunity to submit its observations regarding its alleged failure to comply with the Treaty.

The arguments put forward by the Belgian Government denying any failure to comply with its obligations were not accepted by the Commission which, on 2 April 1979, delivered a reasoned opinion inviting the Kingdom of Belgium to take the necessary steps to remedy the breach in question within a period of one month from the notification of the opinion.

At the request of the Belgian Government the Commission agreed to extend the period accorded to Belgium to comply with the Community rules until 4 June 1979.

That period expired without Belgium's having taken the necessary steps for that purpose and on 28 September 1979 the Commission therefore brought an action before the Court of Justice to establish Belgium's failure to fulfil its obligations.

2. By applications lodged respectively on 17 January, 22 January and 1 February 1980 the Governments of the United Kingdom of Great Britain and Northern Ireland, of the Federal Republic of Germany and of the French Republic asked to be allowed to intervene in the case in support of the Kingdom of Belgium. The interventions were allowed by orders of the Court of 30 January 1980 in the case of the first two governments, and of 13 February 1980 in the case of the third.

3. On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure after asking the Belgian Government to furnish before the hearing copies of all the advertised vacancies referred to in the Commission's application.

II — Conclusions of the parties

The *applicant* claims that the Court should:

"1. Declare that the Kingdom of Belgium, by requiring or permitting to be required the possession of Belgium nationality as a condition of recruitment to posts not covered by Article 48 (4) of the Treaty, has failed to fulfil its obligations under Article 48 of the Treaty and Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community;

2. Order the Kingdom of Belgium to pay the costs."

The *defendant* claims that the Court should:

"1. Declare the Commission's application unfounded;

2. Order the Commission to pay the costs."

III — Submissions and arguments of the parties

The *Commission of the European Communities* first of all observes that it is essential not to misconstrue the proper scope of the derogation made by Article 48 (4) of the EEC Treaty to the principle of the prohibition, in the matter of employment, conditions of work and remuneration, of discrimination between nationals of the Member States on the ground of nationality. It is not permissible to interpret that derogation widely, as the Belgian Government argues. The case-law of the Court has now established very clearly that, owing to the very nature of the principle of the free movement of persons, the derogations allowed by Article 48 (4) of the Treaty are necessarily to be strictly interpreted.

According to the Commission the concept of "employment in the public service" is itself a Community concept. If that were not so the Member States could by means of a unilateral definition of that concept thwart the application of the principle of the free movement of workers whenever they chose.

As to the substance of the concept it is clear that it cannot be determined by reference either to the status of the employer or to the kind of legal relationship existing between the person occupying the post and the administration to which he is attached. The only criteria which must be applied are in actual fact, as specified by Mr Advocate General Mayras in Case 152/73 *Sotgiu*, "factual criteria based upon the duties which the post held within the administration entails and the activities actually performed by the holder of this post".

In the Commission's view those criteria are meant to allow Member States to restrict the entry of aliens to public posts only if such posts put the holders thereof in the position of directly participating in the exercise of official authority or of making use of prerogatives in the nature of powers conferred by public law in regard to members of the public. That is clearly not the case in regard to the vacancies in question in this dispute.

The Commission further contests the arguments put forward by the Belgian Government during the discussions before the matter was referred to the Court.

As regards the reference to the second paragraph of Article 6 of the Belgian Constitution the Commission points out first that it is established case-law that a

Member State cannot rely upon difficulties of a legal or constitutional nature or on provisions, practices or situations in its domestic law to justify a failure to comply with its obligations under the Treaty and, secondly, that since the concept of "employment in the public service" is a concept of Community law, Member States are not entitled to refer to their own legal system to determine that concept each in its own way.

As to the argument that the application of the provisions of Article 48 of the Treaty and of Regulation No 1612/68 are dependent upon the prior adoption of Community harmonization measures regarding the concept of "employment in the public service", the Commission stresses that it has never supported or accepted such a point of view.

It concludes, therefore, that a Member State may not, without failing to comply with its obligations, reserve or allow to be reserved to its nationals posts not involving actual participation in the exercise of official authority.

In its defence the *Belgian Government* states that its observations concern basically two matters: the scope of the exception constituted by Article 48 (4) of the Treaty and an analysis of the concept of official authority.

As to the first matter it is obvious that "employment in the public service" is a clear and precise concept which does not seem to require any interpretation. If nevertheless it is thought an interpretation is required then it is necessary to refer to the intention of the legislature, in this case to the intention of the Member States at the time when the Treaty was drafted. There is no doubt that the objects of the Treaty do not fetter the power of the State to determine the boundaries of the public sector and that there is no Community concept of the objectives, scope and detailed rules of application of the acts of public authorities. In this context it is logical to assume that when the Treaty was drafted the Governments wished conditions of entry to public office to remain their preserve.

Furthermore, the principle of the non-admission of aliens to public posts is enshrined in the constitutions of several Member States. Although it is true that Community law overrides the law, even the constitutional law, of Member States, none the less the constitutions of the Member States help to determine the substance of Community law in its basic principles and may therefore serve as aids in the interpretation of Community rules whenever those principles are in question. The interpretation suggested by the Commission supposes that such constitutional provisions, including Article 6 of the Belgian Constitution, are incompatible with Community law. The Commission does not however adduce any evidence of such incompatibility. On the other hand by reference to constitutional provisions it is possible to ascertain what the intentions of the States were at the time when the Treaty was drafted: it is clear that the States refused to be obliged to employ staff of foreign nationality and that that refusal is embodied in the exception provided in Article 48 (4).

Article 8 of Regulation No 1612/68 provides that "a worker who is a

national of a Member State and who is employed in the territory of another Member State . . . may be excluded from taking part in the management of bodies governed by public law and from holding an office governed by public law". If a foreign worker may therefore be barred from certain activities which are normally connected with the exercise of his trade-union rights because they are activities involving participation in the management of public affairs (for example, the presence of trade-union representatives on the boards of administration of many public bodies with powers in the economic sphere), the same principles which allow that exclusion must be valid in the case of the entry of aliens to posts in the public service.

It should also be pointed out that the wording of Article 48 (4) does not correspond to the wording used elsewhere dealing with exceptions to other rules of the Treaty. For example, the first paragraph of Article 55 lays down a derogation to freedom of establishment in the case of occupations which may involve "the exercise of official authority". That article therefore refers to a functional concept whereas Article 48 (4) is concerned with an institutional concept, in this case, the public service.

It is further necessary to stress that there was nothing to prevent the draftsmen from using the wording of Article 55 in Article 48. The fact that they did not do so indicates that they wished to give the derogation in Article 48 a scope which would not be restricted to "the exercise of official authority".

The report submitted on behalf of the Legal Affairs Committee of the European Parliament on 12 January 1972 (Session Document No 225/71) also found that the Member States have no legal obligation to admit aliens to posts in the public service.

Finally, in the *Sotgiu* judgment (Case 152/73) cited by the Commission, the Court simply declared that all discrimination based on nationality against an alien admitted to a public post is incompatible with Community law; the Court did not express its view on any duty of Member States to admit an alien to a given post in their public service.

Even supposing that the concept of "employment in the public service" were a Community concept, which it is not, the Belgian Government denies that it may be interpreted in the light of the concept of "actual participation in the exercise of official authority". Such an interpretation would in fact only be possible on the basis of a classification of posts in the public service. Such a classification, which might be carried out either according to the nature of the body involved or the nature of the duties performed, has never been attempted because of the enormous difficulties which it entails. In practice the only distinction taken into consideration by the Belgian administration in admitting aliens to public posts is that between a system of staff regulations and a contractual system. Aliens may be employed only under the latter, which are

temporary and rule out any possibility of the pursuit of a career in the public service.

In any case the problem of determining what the exercise of official authority means is a very difficult one to resolve. On this point the Belgian Government recalls a sentence of Mr Advocate General Mayras in his opinion in the *Sotgui* case in which he said: "It is necessary therefore both to avoid the divergences and contradictions which an interpretation based on criteria taken from domestic law could conceal and at the same time attempt to avoid giving the concept too rigid and too narrow a definition which would prove to be difficult to apply to very varied situations".

The attitude of the Commission to this is paradoxical and contradictory. While emphasizing the direct effect of a clear and unequivocal provision it nevertheless still thinks it is necessary to construe it according to a general and imprecise concept. When urged to clarify this largely unworkable concept by means of a regulation or directive it refuses to do so yet sets itself up as a judge over the application of the concept by the Member States.

If the European Communities were to contemplate a study of the problem of access to the public service of a Member State by nationals of the other Member States the Kingdom of Belgium would be prepared, in common accord with the other Member States, to consider the matter. What is more, it agrees forthwith to let nationals of other Member States have entry to certain posts in its public service.

In its reply the *Commission* observes that the argument made in the first point of the defence amounts to a denial that the concept of "employment in the public service" has any Community substance at all. Article 48 (4), in which that concept is contained, stands in a very close relationship with the other provisions of the same article, which are without any doubt rules of Community law. By allowing exceptions to the application of those provisions, paragraph (4) helps to determine their scope, and therefore it too must be regarded as a rule of Community law. To rely on each Member State to determine by its own national criteria what should be understood by "employment in the public service" would amount to leaving them free to decide for themselves the scope of the exception of Article 48 (4) and therefore the ambit of the sphere of application of the principle of the freedom of movement of persons, without any restriction or review by the Community. In time the States would then vary the scope of that exception whenever it suited their purpose by invoking the changing nature of their national concept of "employment in the public service", which, in view of the constant tendency in the Member States for the public sector to expand, would involve the risk of a contraction of the area of free movement. The argument of the Belgian Government, which would lead to a wide view of the derogation contained in Article 48 (4), does not moreover have any support in the Treaty in which all derogations to Community principles operated in favour of

independent action on the part of the States are subject to very narrow limits and conditions.

The Commission then specifically replies to the arguments put forward by the Belgian Government.

As historical interpretation plays hardly any part in Community law it would be futile to refer to the intentions of the authors of the Treaty who, moreover, in so far as they are known, would certainly not support the defendant's argument.

As regards domestic constitutional rules it is clear that Community rules override national rules, irrespective of their status, and that it is impossible to admit the existence of general principles of law recognized by the Member States which are contrary to Community law.

Nor does reference to Article 8 of Regulation No 1612/68 militate in favour of a wide interpretation of Article 48 (4) because the former is inspired by the same idea as the latter and should accordingly be applied within the same narrow limits.

As to the terms used in Article 48 (4) and the first paragraph of Article 55 of the Treaty, whilst admittedly those two articles are not formulated in the same manner, they are none the less designed to accomplish the same principle, namely the free movement of persons within the Community, and the derogations made to them must be interpreted in the same restrictive manner. The difference in wording can moreover be easily explained by the difference in the situations envisaged: it is evident that wage-earners coming under Article 48 can only participate in the exercise of official authority when they occupy a public post whereas in the case of the self-employed occupations it was necessary to specify that the exception operates when an occupation comprises activities connected with the exercise of official authority.

As to the view taken by the European Parliament, it should be emphasized that in the resolution adopted on 17 January 1972 on the basis of the report of its Legal Affairs Committee the Parliament recognized, even if it did not draw from it the conclusions drawn by the Commission, that the spirit of the EEC Treaty and its objectives called for an interpretation of Article 48 (4) based upon the criteria of "actual exercise of official authority".

Finally, it is very clear from the *Sotgiu* judgment that Article 48 (4) is of strict interpretation and that it is not applicable to every post falling within the public sector. That judgment refers in fact to the possibility of restricting the admission of foreign nationals "to certain activities in the public service" and not "to all activities" or "the activities" of that service.

Under the rules of interpretation developed by case-law the meaning of the exception clause contained in Article 48 (4) should be determined according to the scheme and objectives of the Treaty as regards freedom of movement for workers. Since the objective of the provision is to reconcile the principle of freedom of movement and of equal treatment of workers with the requirements of the independence retained by

the States as regards their sovereignty, it follows that the derogation which it lays down can operate only when the independence of the States requires devotion and loyalty from officials which is more readily to be expected from nationals than from aliens. Only factual criteria based on the duties connected with the posts and the functions actually performed by the holders of them help to identify the posts for which special loyalty is required, and which therefore lie outside the application of the principle of freedom of movement. On the other hand the same result is not to be obtained by means of criteria based upon the nature of the public entities concerned or upon the nature of the activities pursued by the public body in question or, again, upon the legal relationship existing between the employee and the organization employing him. Even the position contended for by the Commission would not stop its results from varying from one Member State to another; yet since such variations only reflect the independence of the Member States in the matter, it is impossible to avoid them and their importance should not be exaggerated.

The Commission is accused of having adopted a criterion of interpretation which is imprecise and difficult to apply and of not wishing to propose the prior adoption of Community rules of application. It is important not to forget in this respect first that Article 48 (4) is in any event a rule which has direct effect and secondly that the constrained attitude of the Commission takes account of the serious problems which arise when the attempt is made to lay down a precise and restrictive definition of the concept of "public service".

As regards in particular the difficulty of applying that criterion, although there is undoubtedly a "grey area" which needs to be reduced case by case to take account of progress towards European integration, there are also posts which clearly involve the exercise of official authority and others which, equally clearly, do not involve the exercise of such authority. It is to the second category that the posts over which the dispute has arisen belong. Even supposing that such posts may occasionally be connected with the exercise of official authority, they are marginal and exceptional activities which may easily be set apart from the posts under consideration without there being any need systematically to bar subjects of other States from occupying such posts. By the same token it should be permissible to debar aliens admitted to the public service from promotion to posts involving as their principal duties the exercise of official authority, but it would be disproportionate to exclude them from recruitment to lower grade posts not involving the exercise of such authority.

In its rejoinder the *Belgian Government* observes that even an identical interpretation by the Member States of the provision in question could not prevent the area of application of the concept of "employment in the public service"

varying in each State according to the extent of the public sector which in its turn depends on the view prevailing in each State about the role of public authorities. The risk of a systematic extension of the public sector and a corresponding contraction of the freedom of movement of workers would however be ruled out owing to the adhesion of the Member States to certain well-determined principles of political, social and economic organization.

The Belgian Government further remarks that since Community law does not deal with human rights or with the political and administrative organization of the Member States — those domains being specifically subject to fundamental constitutional rules — a constitutional rule might undoubtedly serve in those matters as a reference point to help to amplify and interpret a Community rule.

It emphasizes that the interpretation advocated by the Commission would imply the application by the Member States of concepts which are not really workable and that in the absence of secondary Community legislation clarifying those concepts Member States would inevitably end up applying the tenor of Article 48 (4) in an arbitrary and inconsistent fashion.

The criterion at present applied by the Belgian administration in the recruitment of aliens (by means of contracts of employment) is justified precisely because it is workable and because it is temporary and does not involve promotion. The solution advocated by the Commission on the other hand, consisting of preventing foreigners, if need be, from being promoted pursuant to staff regulations, would constitute a discriminatory measure which would be incompatible with the very idea of civil service regulations.

Finally, as far as the alleged non-compliance with the Treaty is concerned, the Commission does not indicate in the case of any of the posts in question the reasons for which they may not be regarded as "posts in the public service". In actual fact those posts come within the exception contained in Article 48 (4) even if it is necessary to interpret the concept of "employment in the public service" in the way the Commission desires. There are in fact features about all of those posts (for instance, the police powers given to railway workers, the administrative tasks falling upon hospital nurses and children's nurses in local government, the loyalty and special discretion required of night watchmen and local government workers and the involvement of local government architects in the supervision of buildings) which compel them to be regarded as corresponding wholly to the concept of public service.

The *Government of the United Kingdom*, intervening in support of the Kingdom of Belgium, stresses that it is common ground that each Member State has the power to "assert its own concept of State intervention in national life" with the result that the concept of "employment in the public sector" varies from one Member State to another according to the laws or traditions of each of them, although it is generally recognized that employment in the public service always

calls for a commitment and devotion which is more readily to be expected from nationals than from non-nationals.

That said, it still however remains true that according to the case-law of the Court of Justice the operation of Article 48 (4) is "subject to judicial control". The problem is to identify the principles on which this judicial control is to be exercised.

The Commission's case is based on the idea of "participation in the exercise of official authority" which is wholly unknown in the United Kingdom. Any attempt to apply the concept to employment in the public service of the United Kingdom would in practice produce chaotic and arbitrary results.

A close analysis of the opinion delivered by Mr Advocate General Mayras in the *Sotgiu* case, particularly of the passages on which the Commission seems to have based its case, discloses that the Advocate General approached the problem in a broad, circumspect and flexible manner. In fact he suggested the interpretation adopted by the Commission as only a starting point and one possible approach in the search for a definition of the idea of "employment in the public service".

In seeking a proper interpretation of the words "employment in the public service" it would no doubt be possible to draw support from the difference between Articles 48 and 55. That difference is explained by the fact that, in the case of self-employed persons, the exercise of official authority of some kind represents a wholly exceptional activity and one which is therefore worthy of note whereas, in the case of employed persons, the category of posts in the public service very often involves the exercise of that authority. It is evident that Article 48 is meant to refer not to individual activities or responsibilities, but to the public service as a whole.

The reason for adopting the institutional criterion may be adduced from an examination of the practical effect of the Commission's argument; first it would lead to a result incompatible with the *Sotgiu* judgment which decided that any discrimination against a national of a Member State employed in the public service of another Member State is unlawful. Secondly, it would impose an extremely heavy burden on Member States which wished to preserve the national integrity of their public service. Such States would in effect be obliged to have machinery for re-examining the position of a non-national, not only at the time of his appointment to a post, but also at each stage of his career, whether on promotion, transfer or alteration of his job functions, to ensure that it does not admit him, even accidentally, to a post in the public service. Moreover that examination would be enormously difficult in what the Commission calls the "grey area", that is to say, in the case of posts which are difficult to classify. Those considerations show very clearly that the Commission, in the very process of expounding its criteria, demonstrates their impracticability.

In the United Kingdom's submission the exception contained in Article 48 (4) of the Treaty covers employment in the

public institutions of the Member States, subject to the role of the Court in determining whether or not an institution forms part of the public service within the meaning of the article. The approach of the Court should be cautiously developed case by case and no general rules should be laid down.

As no two Member States have public institutions which are precisely similar there would be bound to be some variation from State to State. But the Commission accepts that even if its approach were to be adopted, such variations would continue to exist. In those circumstances it is clearly appropriate to adopt the interpretation of the Treaty which can be satisfactorily applied in practice.

In the meantime the United Kingdom would be prepared, in common accord with the other Member States, to study the problem of access to the public service for nationals of Member States.

The *Government of the Federal Republic of Germany,* intervening in support of the Kingdom of Belgium, states that it is first necessary to determine the exact meaning of the concept of "employment in the public service".

It does not contest that Article 48 (4) is a rule of Community law but argues that, as regards the definition of the concept, the provision refers to the legal systems of the Member States and therefore leaves those States with a discretion to identify the boundaries of the areas of public activity.

In support of its argument that the concept of "employment in the public service" may only be determined in accordance with Community law the Commission quotes the opinion of Mr Advocate General Mayras in the *Sotgiu* case. In fact Mr Mayras advised a step by step approach to clarify the concept and against adopting a too rigid interpretation once and for all. Furthermore the method of interpretation proposed in that opinion cannot be operated unless the substance of the concept to be interpreted is first of all defined according to the respective national law of the Member States.

As the matter has not yet been dealt with by the Court of Justice in the submission of the Federal Government the best approach is to identify the factors which determine the interpretation of Article 48 (4) of the EEC Treaty.

The sometimes considerable differences between the Member States regarding the areas covered by the public service themselves show that when the Community was established it was not possible to speak of any uniform concept of "public service". If it had been intended to create a Community concept of "public service" it would have been necessary to define it in the actual wording of the provision, which was not done.

Consequently the content of the concept of "public service" cannot be defined with exclusive reference to Community law.

That result is borne out, in the first place, by the very structure of the EEC Treaty.

If the Commission's argument were accepted then in fact it would have to be accepted that the Community is

empowered to determine the sphere of operation of the public service in the Member States whereas no provision of the Treaty gives it such power, which is therefore reserved to the States themselves.

An analysis of the object of Article 48 (4) does not lead to different results either. That object becomes clear from a comparison between the treatment accorded to aliens before the establishment of the European Communities and that accorded to nationals of countries of the EEC who may move freely in the Member States other than their own in order to pursue an occupation there. That comparison shows that the status of aliens has been changed in regard to EEC nationals solely in the sense that freedom of movement is conferred upon them and not in the sense of creating Community citizenship or of putting the nationals of the various Member States on an equal footing in all respects. Moreover since even now it is not clear that the nationals of the various federated States of a federal State enjoy equality of treatment from the legal point of view, then *a fortiori* the position must be the same in a grouping of States like the Community.

From those considerations it may be deduced therefore that Article 48 (4) of the EEC Treaty is intended only to specify a restriction placed upon the freedom of movement of persons and not to lay down exceptions to any equality of the nationals of the Member States. Accordingly it follows that the provision is simply intended to signify that freedom of movement is not meant to alter the legal situation existing before the Communities were established as regards the organization of the State and in particular access for foreigners to the public service. The Commission has gradually come nearer to this view itself during the course of the proceedings.

The powers reserved to the Member States by Article 48 (4) are however subject to limits arising from Community law, the observance of which is ensured by the Court of Justice.

The question is therefore one of identifying those limits. The Commission, having stated at the outset that only public posts involving participation in the exercise of powers conferred by public law come within the exception contained in the provision in question, has to a large degree weakened its own case by accepting that the exception covers a much wider category of posts. Be that as it may, the Commission's case is susceptible of a certain number of both methodological and practical objections.

From the methodological point of view the Commission does not succeed either in overcoming the difficulties arising from the wording of Article 48 (4) which does not speak of "(certain) posts", but of "posts" in the public service, or in refuting the argument based on the different wording of the first paragraph of Article 55 in comparison with Article 48 (4). The reference to the object of Article 48 is not convincing either. As that provision aims in the Commission's view to reconcile the principle of freedom of movement with the requirements of the independence retained by the States in the exercise of their sovereignty, then, the Commission argues, it should take account only of

the requirements which are inseparable from that independence, which would require a special commitment and loyalty only from employees performing certain duties. But the exception was provided not only to meet any particular need for loyalty but also because it concerns a power arising from their sovereignty, the content of which is not defined by the EEC Treaty.

Finally, from the practical point of view, it must be stressed that the Commission's argument would, on the one hand, cause very serious disturbances in the operation of the public service because, by using the criterion of loyalty, it would be difficult to distinguish between officials of the public service who would all, in principle, have a duty of loyalty towards the State and, on the other hand, because the functional distinction proposed by the Commission would create discriminatory rules within the public service which would have adverse effects on its organization.

The limits placed on the powers reserved to Member States by Article 48 (4) cannot therefore be defined according to functional criteria. The conclusion to be drawn, therefore, is that they may be defined only by applying institutional criteria.

The *French Government*, intervening in support of the Kingdom of Belgium, first of all observes that the EEC Treaty, whilst aiming to promote freedom of trade and freedom of movement of persons within the Common Market, also contains several provisions which take into consideration the existence of the States and the matters of specific concern to them. Article 48 (4) is one of those provisions and it cannot therefore be interpreted in the restrictive manner proposed by the Commission. Even a literal analysis of that provision shows that the exception contained in it relates to institutions and not to duties or functions. If that were not so paragraph (4) might appear superfluous in relation to paragraph (3) of the same article which itself already provides for restrictions (public policy, public security) which may have the same effect as an exception based on a functional criterion. Besides, the difference between the wording of Article 48 (4) and that of the first paragraph of Article 55 also shows that the exception contained in the first of those provisions is general.

That approach is borne out by the case-law of the Court of Justice. In the *Reyners* judgment (Case 2/74) the Court in fact acknowledged that a criterion which looks at functions in order to identify exceptions to the rule might have a scope surpassing the functions which are strictly covered. From that judgment it emerges that even as regards freedom of establishment Community law concedes that functions may not be treated separately from the entity to which they belong. If that is true for occupations governed by the law of establishment then that is all the more reason why it should hold good for the public service.

As to the *Sotgiu* judgment mentioned by the Commission, it does not provide any support for the Commission's case as the Court did not follow its Advocate General on that occasion and declined to indicate criteria for the interpretation of the concept of "employment in the public service". The Court simply re-

stated the prohibition on discrimination in the matter of pay or other conditions of employment. Yet it is the very principle of non-discrimination which implies that a public service should be regarded as a whole. If it were otherwise discrimination would inevitably result, as regards career prospects, between nationals and other Community citizens admitted at the outset into the same units or departments of the public service.

On the basis of the foregoing considerations the conclusion to be drawn is that the argument put forward by the Commission is difficult to reconcile with Article 48 (4) of the EEC Treaty.

The argument would furthermore have extremely grave consequences throughout the whole of the French system of the public service. From the point of view of the administration it would in fact lead to a distinction's being made relating to the nature of the functions performed whereas no such distinction is known to the French administration, which is based on a unitary concept of the public service. From the practical point of view it would create serious discrimination, especially as regards employees' careers, and this would run counter to the French administration's efforts to give substance to the ideas of equality of opportunity and promotion.

In short the French Government believes that the responsibility for defining the concept of "employment in the public service" is left by the Treaty to national legislation. Demarcation of national public services remains a prerogative of the Member States; the Community only lays down limits meant to forestall any measures which States might take for the sole purpose of obstructing freedom of movement of workers. Bearing in mind the diversity of national State organizations in the Community it is hardly realistic to try to move towards a uniform definition of the concept in question by taking the path of judicial interpretation. Such a definition is rather a matter for positive Community measures which it is for the Commission to propose and the Council to negotiate, adopt and amend as domestic situations evolve.

IV — Oral procedure

The Commission of the European Communities, represented by L. Dubouis, the Government of the Kingdom of Belgium, represented by its Agent, R. Hoebaer, the Government of the United Kingdom, represented by Sir Ian Percival, Q.C. (Inner Temple), Solicitor General, assisted by Henry Brooke, barrister (Inner Temple), the Government of the Federal Republic of Germany, represented by H. Grabitz, and the Government of the French Republic, represented by its Agent, G. Guillaume, submitted oral argument at the hearing on 11 June 1980.

The Advocate General delivered his opinion at the sitting on 24 September 1980.

Decision

1 By application lodged at the Court Registry on 28 September 1979 the Commission brought an action under Article 169 of the EEC Treaty for a declaration that by requiring or permitting to be required the possession of Belgian nationality as a condition of recruitment to posts not covered by Article 48 (4) of the Treaty, the Kingdom of Belgium has failed to fulfil its obligations under Article 48 of the Treaty and Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community (Official Journal, English Special Edition 1968 (II), p. 475).

2 In its reasoned opinion and application to the Court the Commission referred generally to "various vacancies" advertised by 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] concerning posts for unskilled workers, and to vacancies advertised "during recent years" by the City of Brussels and the Commune of Auderghem and the Commission gave only a brief indication of the posts involved. Through information requested by the Court during the written and oral procedures and produced by the Government of the Kingdom of Belgium and after the Commission had specified the posts during the oral procedure without challenge from the Belgian Government, it became possible to establish an exact list of the posts in issue.

3 From that information and that list it emerges that the vacancies referred to concern posts for trainee locomotive drivers, loaders, plate-layers, shunters and signallers with the national railways and unskilled workers with the local railways as well as posts for hospital nurses, children's nurses, night-watchmen, plumbers, carpenters, electricians, garden hands, architects, and supervisors with the City of Brussels and the Commune of Auderghem. Nevertheless the information obtained during the inquiry has not enabled the Court to gain a precise idea of the nature of the duties involved in the posts for which it has been possible to draw up a precise list.

4 Those posts were in actual fact offered between 1973 and 1977 through public notices or newspaper advertisements by the public undertakings and local authorities referred to above, and among the conditions required for recruitment the advertisements stipulated the possession of Belgian nationality.

5 By a letter of 21 November 1978 the Commission notified the Government of the Kingdom of Belgium that it "considered that policy to be incompatible with Article 48 of the EEC Treaty and with the provisions of Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community" and thus initiated the procedure of Article 169 of the EEC Treaty against that Member State.

6 By a letter of 17 January 1979 the Permanent Representation of the Kingdom of Belgium replied *inter alia:*

— That the nationality requirement in question meets the requirements of the second paragraph of Article 6 of the Belgian Constitution by which "Belgians ... only shall be admitted to civil and military posts save in special cases for which exception may be made by law";

— That in any event the interpretation placed by the Commission on Article 48 (4) of the Treaty makes it necessary to distinguish within each administrative entity between posts which are connected with the exercise of official authority and those which are not so connected and thus raises a problem the solution of which for all the Member States is to be found at Community level.

7 The Commission considered that it could not accept the argument put forward by the Belgian Government. On 2 April 1979 it issued a reasoned opinion in accordance with Article 169 of the Treaty stressing *inter alia:*

— That the Kingdom of Belgium could not rely on the second paragraph of Article 6 of its Constitution to justify the disputed practices in the matter of access to employment;

— That the exception clause contained in Article 48 (4) of the Treaty covers only posts whose performance involves actual participation in official

authority, that is to say, involving a power of decision over individuals or putting in question national interests, especially those which touch upon the internal and external security of the State;

— That the conditions for applying the exception clause are not fulfilled in the case of posts of the kind covered by the vacancy notices in question.

8 The Kingdom of Belgium did not comply with that reasoned opinion within the period prescribed by the Commission and so on 27 September 1979 the Commission brought this action.

9 Article 48 (4) of the Treaty provides that "the provisions of this article shall not apply to employment in the public service".

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

11 The scope of the derogation made by Article 48 (4) to the principles of freedom of movement and equality of treatment laid down in the first three paragraphs of the article should therefore be determined on the basis of the aim pursued by that article. However, determining the sphere of application of Article 48 (4) raises special difficulties since in the various Member States authorities acting under powers conferred by public law have assumed responsibilities of an economic and social nature or are involved in activities which are not identifiable with the functions which are typical of the public service yet which by their nature still come under the sphere of application of the Treaty. In these circumstances the effect of extending the exception contained in Article 48 (4) to posts which, whilst coming under the State or

other organizations governed by public law, still do not involve any association with tasks belonging to the public service properly so called, would be to remove a considerable number of posts from the ambit of the principles set out in the Treaty and to create inequalities between Member States according to the different ways in which the State and certain sectors of economic life are organized.

12 Consequently it is appropriate to examine whether the posts covered by the action may be associated with the concept of public service within the meaning of Article 48 (4), which requires uniform interpretation and application throughout the Community. It must be acknowledged that the application of the distinguishing criteria indicated above gives rise to problems of appraisal and demarcation in specific cases. It follows from the foregoing that such a classification depends on 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.

13 Where, in the case of posts which, although offered by public authorities, are not within the sphere to which Article 48 (4) applies, a worker from another Member State is, like a national worker, required to satisfy all other conditions of recruitment, in particular concerning the competence and vocational training required, the provisions of the first three paragraphs of Article 48 and Regulation No 1612/68 do not allow him to be debarred from those posts simply on the grounds of his nationality.

14 In support of the argument put forward by the Belgian Government and supported by the interveners to the effect that the exception clause in Article 48 (4) of the Treaty has general scope covering all the posts in the administration of a Member State, that government has invoked the special provisions of Article 8 of Regulation No 1612/68 by which a worker from another Member State "may be excluded from taking part in the management of bodies governed by public law and from holding an office governed by public law".

15 Far from supporting the case of the Belgian Government that provision confirms on the contrary the interpretation of Article 48 (4) given above. Indeed, as the Belgian Government itself admits, Article 8 of Regulation No 1612/68 is not intended to debar workers from other Member States from certain posts, but simply permits them to be debarred in some circumstances from certain activities which involve their participation in the exercise of powers conferred by public law, such as — to use the examples given by the Belgian Government itself — those involving "the presence of trade-union representatives on the boards of administration of many bodies governed by public law with powers in the economic sphere".

16 The Belgian Government further mentions that the constitutional laws of certain Member States refer expressly to the problem of employment in the public service, the principle being the exclusion of non-nationals, save for any possible derogations. Such is also, it claims, the effect of Article 6 of the Belgian Constitution by which "Belgians . . . only shall be admitted to civil and military posts save in special cases for which exception may be made". The Belgian Government has itself stated that it does not deny that "Community rules override national rules" but it believes that the similarity between the constitutional laws of those Member States should be used as an aid to interpretation to cast light on the meaning of Article 48 (4) and to reject the interpretation given to that provision by the Commission, which would have the effect of creating conflict with the constitutional provisions referred to.

17 The French Government has propounded an argument of similar tenor, drawing attention to the principles applied in French law on the public service, which is founded on a comprehensive idea based on the requirement of French nationality as a condition of entry to any post in the public service appertaining to the State, municipalities or other public establishments, without any possibility of making a distinction on the basis of the nature and the characteristics of the post in question.

18 It is correct that Article 48 (4) is indeed intended to operate, in the scheme of the provisions on freedom of movement for workers, to take account of

the existence of provisions of the kind mentioned. But at the same time, as is admitted in the observations of the French Government, the demarcation of the concept of "public service" within the meaning of Article 48 (4) cannot be left to the total discretion of the Member States.

19 Irrespective of the fact that the wording of the Belgian Constitution does not rule out the possibility of exceptions being made to the general requirement of the possession of Belgian nationality, it should be recalled, as the Court has constantly emphasized in its case-law, that recourse to provisions of the domestic legal systems to restrict the scope of the provisions of Community law would have the effect of impairing the unity and efficacy of that law and consequently cannot be accepted. That rule, which is fundamental to the existence of the Community, must also apply in determining the scope and bounds of Article 48 (4) of the Treaty. Whilst it is true that that provision takes account of the legitimate interest which the Member States have in reserving to their own nationals a range of posts connected with the exercise of powers conferred by public law and with the protection of general interests, at the same time it is necessary to ensure that the effectiveness and scope of the provisions of the Treaty on freedom of movement of workers and equality of treatment of nationals of all Member States shall not be restricted by interpretations of the concept of public service which are based on domestic law alone and which would obstruct the application of Community rules.

20 Finally, the Belgian and French Governments argue that the exclusion of foreign workers from posts which do not at the outset involve any participation in the exercise of powers conferred by public law becomes necessary, for instance, if recruitment takes place on the basis of service regulations and the holders of the posts are eligible for a career which in the higher grades involves duties and responsibilities involving the exercise of powers conferred by public law. The German and British Governments add that such an exclusion is also necessitated by the fact that flexibility in assignment to posts is a characteristic of the public service and the duties and responsibilities of an employee may consequently change, not only on promotion, but also after a transfer within the same branch, or to a different branch at the same level.

21 Those objections do not however take account of the fact that, in referring to posts involving the exercise of powers conferred by public law and the conferment of responsibilities for the safeguarding of the general interests of the State, Article 48 (4) allows Member States to reserve to their nationals by appropriate rules entry to posts involving the exercise of such powers and such responsibilities within the same grade, the same branch or the same class.

22 The argument of the German Government on that last point, to the effect that any exclusion of nationals of other Member States from promotion or transfer to certain posts in the public service would have the effect of creating discrimination within such service, does not take into consideration the fact that the interpretation which that government puts on Article 48 (4), and which has the effect of debarring those nationals from the totality of posts in the public service, involves a restriction on the rights of such nationals which goes further than is necessary to ensure observance of the objectives of the provision as construed in the light of the foregoing considerations.

23 The Court takes the view that, in general, so far as the posts in dispute are concerned, information available in this case, which has been provided by the parties during the written and oral procedures, does not enable a sufficiently accurate appraisal to be made of the actual nature of the duties involved so as to make it possible to identify, in the light of the foregoing considerations, those of the posts which do not come within the concept of public service within the meaning of Article 48 (4) of the Treaty.

24 In these circumstances the Court does not consider itself to be in a position at this stage to give a decision on the allegation that the Belgian Government has failed to fulfil its obligations. Consequently it invites the Commission and the Kingdom of Belgium to re-examine the issue between them in the light of the foregoing considerations and to report to the Court, either jointly or separately, within a specified period, either any solution to the dispute which they succeed in reaching together or their respective viewpoints, having regard to the matters of law arising from this judgment. An opportunity will be provided for the interveners to submit their observations to the Court on any such report or reports at the appropriate time.

On those grounds,

THE COURT,

by way of interim judgment and before ruling on the application brought by the Commission for a declaration of failure to fulfil obligations, hereby:

1. **Orders the Commission and the Kingdom of Belgium to re-examine the issue between them in the light of the legal considerations contained in this judgment and to report to the Court on the result of that examination before 1 July 1981, after which date the Court will give a final decision;**

2. **Reserves the costs.**

Mertens de Wilmars Pescatore Koopmans

Mackenzie Stuart O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 17 December 1980.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President