unless such nationals, when recruited, enjoy conditions, advantages and safeguards which are in every respect equivalent to those enjoyed by nationals of the said Member State by virtue of their status as members of the established staff, with the exception of the possibility of access to posts in the public service within the meaning of Article 48 (4) of the Treaty.

OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 15 April 1986 *

Mr President,
Members of the Court,

1. The Court is called upon to give judgment in an action brought under Article 169 of the EEC Treaty by the Commission of the European Communities against the French Republic. The charge made against the defendant is that by making the possession of French nationality a precondition for the appointment and establishment in permanent employment as a nurse in public hospitals it has infringed Article 48 of the Treaty.

I shall summarize the facts. Under Article L 809 of the code de la santé publique [Public Health Code], which appears in Book IX entitled 'General Rules applicable to staff in public hospital establishments and in certain establishments of a social nature', 'no person may be appointed to a post . . . 1. unless that person possesses French nationality . . . '. That rule merely renders applicable to the area of employment under review here a condition already laid down in Article 16 of the General Rules applicable to employment in the public sector (Order No 59-244 of 4 February 1959), which is now contained in Article 5 of Law No 83-634 of 13 July 1983 on the rights and duties of employees in the public sector.

Considering that condition to be in breach of Article 48 (1) of the EEC Treaty and not to be justified by virtue of the exception provided for in Article 48 (4), the Commission initiated the procedure for establishing that a Member State has failed to fulfil its obligations by a letter dated 1 December 1982. Having received no reply from the French Government, on 23 March 1984 it delivered the prescribed reasoned opinion. In that opinion, the Commission stated that by requiring possession of French nationality for the engagement and establishment in permanent employment as a

* Translated from the Italian.

nurse in public hospitals and certain establishments of a social character, France had failed to fulfil its obligations under the EEC Treaty regarding the movement of workers.

It is appropriate to add that, according to the opinion, the rules on requirements for the appointment and establishment in permanent employment as a dentist in public hospitals gave rise to a similar infringement. But since France amended those rules by Decree No 84-131 of 24 February 1984, a fact which the Commission acknowledges having discovered at a late stage, the charge relating thereto was dropped.

The French Government did not react to the reasoned opinion either. Therefore, on 18 December 1984, the Commission delayed no longer and brought an action before the Court under the second paragraph of Article 169 of the Treaty.

2. The Court's task, as I have said, is to determine whether the posts of nurses in public hospitals fall within the purview of Article 48 (4), by virtue of which the principle of freedom of movement for workers does not apply to 'employment in the public service'. Let me say straight away that the problem is not a new one. The Court has delivered judgment in similar cases: on 12 February 1974 in Case 152/73 *Sotgiu* v *Deutsche Bundespost* [1974] ECR 153, on 17 December 1980 (interim judgment) and 26 May 1982 (final judgment) in Case 149/79 *Commission* v *Kingdom of Belgium* [1980] ECR 3881 and [1982] ECR 1845. The first case concerned an Italian worker who, although already employed by the German postal administration, was denied an allowance granted to nationals on the ground that he was an alien; the second dispute, on the other hand, related to a number of advertisements offering employment with Belgian public authorities and undertakings (the City of Brussels, the Commune of Auderghem, the Société nationale des chemins de fer vicinaux and the Société nationale des chemins de fer belges), subject to fulfilment of a condition as to nationality.

But that is not all. One of the Belgian advertisements related to a post — for a children's nurse — which was virtually the same as the one under discussion here. The Court held that it fell outside the scope of the provision mentioned earlier, rejecting the arguments put forward by the Belgian Government and by three States — Germany, the United Kingdom and France — which intervened in support of Belgium. In the present proceedings, the French Government has reverted to those arguments and has reiterated them slavishly. However, it made no mention of the fact — of which I became aware only three days ago — that the disputed provision was repealed by Article 133 of Law No 86-33 of 9 January 1986 (JO, 11 January 1986, p. 547): that is to say, 20 days before the oral procedure in this case. In those circumstances, I could conclude my task by inviting the Court purely and simply to repeat the decision which it gave in 1982.

However, I prefer to take a different course, and not merely because France is asking the Court to depart from its previous decisions. The decisions to which I have

referred gave rise to severe criticisms from academic lawyers and, what is more important, they have not been 'taken in' by numerous governments. Such resistance is not surprising if it is borne in mind how deep-rooted is the conviction that the public service is an area in which the State should exercise full sovereignty and how widespread is the tendency, in times of high unemployment, to see the public service as a convenient reservoir of posts. Such resistance is nevertheless a matter for concern and should be tackled head-on before cases similar to the present one multiply (Cases 66/85 *Deborah Lawrie-Blum* v *Land Baden-Württemberg* and 75/86 *Commission* v *Belgium* are at present pending before the Court). I shall therefore take this opportunity to return to the problem, according to it, as Montaigne would say, 'une poincte non pas le plus largement, mais le plus profondement que je sçay'.

3. As in Case 149/79, the French Government's reading of the term 'public service' (Article 48 (4] is 'organic' or 'institutional', excluding every kind of employment in the public service, regardless of the nature of the activity involved, from the scope of the principle of freedom of movement for workers. Six factors are mentioned in support of that interpretation:

(1) The wording of the provision, which speaks only of the 'public service'; in other words, no distinction is drawn as between the various sectors and functions involved.

(2) Certain organizational details. Specifically:

(a) various provisions, and in particular Articles 36, 37, 48 (3), 55, 122 and 223, prove that the authors of the EEC Treaty recognized the special role of the Member States by making them alone responsible for the protection and promotion of the public interest;

(b) the provision at issue here does not make reference to the concept of 'the exercise of official authority' which appears in Article 55; it is therefore wider in scope;

(c) whilst Article 48 (3) makes 'partial' derogations from the principle of free movement (grounds of public policy, public security or public health), the exclusion under Article 48 (4) is 'general'.

(3) The pronouncements of the Court regarding equality, according to which different situations should be treated in different ways. The situation of a French national is, by definition, different from that of other Community citizens as regards his claim to work as a civil servant for the community to which he belongs.

(4) The operational requirements of the service, whose purpose is to look after the public interest. Public service employees are thus entrusted with duties which, in so far as they involve the exercise of public authority and therefore require special loyalty on the part of the employee, are worlds removed from those of employees in the private sector;

(5) The career principle whereby the possibility of promotion to the highest grades should be open to all civil servants. Since, however, the nationals of other Member States would be excluded from such senior posts, to treat them on the same level as French nationals would

ultimately infringe the principle of equality, to their disadvantage.

(6) Entitlement to employment provided for in Article 48. France has not breached that principle by denying Community nationals access to posts on a permanent basis. The French rules enable them to occupy the posts concerned on a contractual basis.

To conclude, the French Government states that it is prepared, under the auspices of the Council, to consider the merits of any proposal for a Community definition of the concept 'employment in the public service'. However, as Community law stands at present, the French Government is — or purports to be — convinced that the definition of that concept is a matter for the Member States.

4. I have already stated that the points of defence which I have just described coincide exactly with those already relied upon in Case 149/79, which were rejected in the judgments delivered by the Court. Is this a case of faithful adherence to a centuries-old heritage of ideas or, more simply, of difficulty in presenting to the Court a fresh and more cogent line of argument? I shall leave the Court to answer that question and go on to consider the established body of case-law regarding exclusion from employment in the public service. The principal milestones may be summarized as follows: (1) Article 48 (4) is to be interpreted strictly; (2) the concept of 'employment in the public service' is a Community concept and, (3) that concept is to be appraised in functional terms; (4) in any event, it is of decisive importance to determine whether the activity at issue involves 'exercise of official authority and protection of the general interests of the State or of other public authorities'.

The first statement reflects a tenet adopted by all legal systems, and it is not therefore worthwhile considering it in great detail. I would say, however, that in the case-law of the Court that principle has been developed and perfected and has been applied with increasing rigour. Thus, in *Sotgiu* the Court held that in view of the 'fundamental nature' of the principles of freedom of movement and equality of treatment, 'the exceptions made by Article 48 (4) cannot have a scope going beyond the aim in view of which this derogation was included' (paragraph 4 of the decision; and to the same effect, with respect to the first paragraph of Article 55, the judgment of 21 June 1974 in Case 2/74 *Reyners* [1974] ECR 631, paragraph 43); but, having adopted that form of words, the Court went no further than to guarantee foreign nationals admission to 'certain activities in the public service' (*ibid*). On the other hand, in the judgments of 1980 and 1982 it is clearly apparent that the Court intended to confine the scope of the derogation to cases where to apply the principle of free movement would place the State in question in an intolerable situation. In short, there is today no reasonable ground for doubting — or, therefore, failing to react appropriately when it comes to interpretation — that freedom is the rule and the provision on the public service is the exception.

There is likewise little to be said regarding the second observation. Upholding the view expressed by Mr Advocate General Mayras in his brilliant Opinion in *Sotgiu* (the concept embodied in Article 48 (4), he stated, 'must be given an independent [Community][1] definition, unaffected by variable national criteria which depend upon the conception which each State has of its tasks and upon the structure of the bodies

1 — Translator's note: The English version of the judgment omits this word.

responsible for carrying them out' [1974] ECR pp. 169 and 170), the Court held that:

(a) '... the concept of public service ... requires uniform interpretation and application throughout the Community'; (b) its 'demarcation ... cannot be left to the total discretion of the Member States ...'; (c) 'it is necessary to ensure that the effectiveness and scope of the provisions of the Treaty on freedom of movement ... 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 and which would obstruct the application of Community rules' (judgment of 17 December 1980, paragraphs 12, 18 and 19).

Those statements appear to me to be clear. In making them the Court certainly did not call in question the fact that employment in the public service is governed by the law of the individual Member States. It merely desired to point out that, in order to determine the scope of the concept, it is necessary to take account of the specific requirements of Community law. It is, of course, obvious that to allow the Member States to define the scope of that concept entirely by themselves would produce a situation where the obligations imposed upon them as a result of the principle of freedom of movement would vary in extent from one State to another and the Treaty would therefore to a considerable degree be deprived of its effectiveness (the judgment in *Reyners* cited earlier contains a statement to the same effect in paragraph 50 with respect to Article 55).

5. I shall now consider the problems raised in the last two points, that is to say the conflict — the fundamental conflict — between the 'organic' approach and the 'functional' approach to definition of the concept at issue here. As we know, in Case 149/79 *France*, in company with Belgium, Germany and the United Kingdom, espoused the organic approach. However, once again following the line suggested by Mr Advocate General Mayras, the Court took the opposite view. It held that Article 48 (4) removes from the ambit of freedom of movement 'a series of posts which involve direct or 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' (judgment of 17 December 1980, paragraph 10).

In short, the criterion according to which the post at issue is to be appraised is *material* in character: in other words, it is based on the 'duties' involved in the post and removes from the ambit of the principle of freedom of movement only those which entail the exercise of official authority *and* (not 'or' — both requirements must be satisfied) are designed to safeguard the general interests of the State and of smaller territorial units. It seems to me that that criterion is firmly rooted in the Treaty and particularly in Article 55, which speaks of 'activities which ... are connected, even occasionally, with the exercise of official authority'. As has been seen, France dissents: it considers that the very absence of those words in Article 48 (4) proves the wider scope of the exception laid down in it.

But that argument is weak. As was pointed out by the Commission in Case 149/79, the different content of the two provisions is accounted for by the difference in the situations envisaged: on the one hand, employed persons who are able to move in order to take up posts in the public service which intrinsically involve the exercise of official authority; and, on the other, self-employed persons who establish themselves abroad in order to engage in an occupation which is necessarily private in character, even though it too may possibly involve the exercise of official authority.

It is therefore clear that the functional criterion is a valid one. But how should it be applied in practice? The problem is of no little importance and the difficulties encountered in the attempts made to resolve it make the French proposal that legislation should be adopted to 'implement' Article 48 (4) appear reasonable. However, I have many misgivings about that proposal, even if I leave aside the risk of its being exploited in order to restrict the right to freedom of movement and to negate the 'acquis' represented by the case-law of the Court. The greatest danger of the action called for lies elsewhere: the danger of halting a process which, linked as it is to the aim of political unity which is being pursued by means of the integration of the European States and peoples, must be allowed to take its course with as few impediments as possible. It is indeed clear that in order to guarantee full freedom of movement it would be necessary to remove the obstacles deriving from the existence of different nationalities and to create a Community citizenship, which is no longer metaphorical, in the sense currently reflected in the judgments of this Court, but real.

On the other hand, in the work of the Court there may be found more than one helpful response to the difficulties to which I have referred. This is so, in the first place, as regards the purpose and limits of the analysis designed to establish whether or not a given post comes within the scope of the derogation. In *Sotgiu*, for example, it is stated that such an analysis may not be based on factors such as the legal nature of the relationship between the administrative authority and the employee or the category to which the employee belongs: in particular the Court stated (in paragraph 5) that, in the absence of any distinction in the provisions referred to, 'it is of no interest whether a worker is engaged as a workman, a clerk or an official or even whether the terms on which he is employed come under public or private law' (for the opposite view — albeit in an *obiter dictum* having all the appearance of a *lapsus calami* — see the judgment of 8 May 1979 in Case 129/78 *Bestuur Sociale Verzekeringsbank* v *Lohmann* [1979] ECR 853, in which the provision of Regulation No 1408/71 on social security for migrant workers which excludes special schemes for civil servants and persons treated as such was explained as 'the logical consequence of Article 48 (1) of the Treaty').

But the same should be said regarding the concept of 'exercise of official authority'. The Court preferred — its choice perhaps dictated by the preoccupations to which I have just referred — not to give a definition in the abstract. A number of allusions and, of course, the operative parts of the judgments of 17 December 1980 and 26 May 1982 prove, however, that the Court has adopted the definition given by Mr Advocate General Mayras, to the effect that such authority 'is that which arises from the sovereignty . . . of the State; for him who exercises it it implies the power of enjoying the prerogatives outside the general law,

privileges of official power and powers of coercion over citizens' (Opinion in *Reyners* [1974] ECR at p. 664). In short, in order to be made inaccessible to nationals of another State, it is not sufficient for the duties inherent in the post at issue to be directed specifically towards public objectives which influence the conduct and action of private individuals. Those who occupy the post must don full battle dress: in non-metaphorical terms, the duties must involve acts of will which affect private individuals by requiring their obedience or, in the event of disobedience, by compelling them to comply. To make a list — taking account *inter alia* of the second condition laid down by the Court (the protection of general interests) — is practically impossible; but certainly the first examples which come to mind are posts which involve the exercise of powers relating to policing, defence of the State, the administration of justice and assessments to tax.

6. Much else could be said on this crucial matter. However, my observations so far are sufficient to knock the cornerstone out of the French defensive fortress. It is true that there remain the arguments put forward by France regarding both the possibility open to foreigners of entering the public service on the basis of a contract of employment and the 'career principle'; and whilst it is not worthwhile dwelling upon the first argument, in view of the fact that it is so obviously contrary to the equal treatment rule, the second calls for some further reference to the case-law of the Court. It has been seen what this consists of. According to the French Government, the result of the Court's decisions is that a foreigner is appointed to a permanent post the holder of which is 'entitled to reasonable career prospects' and is then refused promotion to a more senior post because that would involve the exercise of official authority: in the name of freedom of movement and the principle of equality the Court, it is said, has ultimately created an instance of unequal treatment. That course of action has therefore had negative results and accordingly it should be abandoned.

That argument is undeniably attractive. In fact Mr Advocate General Mayras endeavoured to adapt it to his interpretation by stating that it would be appropriate to regard as 'justified *a limine*' the exclusion of 'entry into a career [which] . . . entails access to a position of authority' (Opinion in Case 149/79, 1980 ECR at p. 3917). But the Court rejected that suggestion after a balanced analysis of the costs and benefits associated with the opposing interpretations. There is no doubt that a literal reading of Article 48 (4) provides the basis for discriminatory treatment regarding promotion to certain posts. Such treatment is, however, less intolerable than the result which would flow from the view of the Advocate General and, more so, from that of the French Government, namely a restriction on the rights granted to Community nationals 'which goes further than is necessary to ensure observance of the objectives' of the provision with which we are concerned here (judgment of 17 December 1980, paragraph 22). And it should be stated that in tackling the discrimination which, admittedly, is inevitable, account must be taken of the fundamental principles of Community law. In particular, by virtue of the principle of proportionality, the discrimination will have to be kept within the limits imposed by the

need to safeguard the general interests of the State.

It should be added that the discrimination considered here is the only kind that can be allowed. In *Sotgiu* the Court held that the exception contained in paragraph (4) operates only at the time of access to a post (and since the judgment of 17 December 1980 this must be taken to extend to promotions and transfers). It cannot therefore be relied upon to justify unequal treatment regarding remuneration or other conditions of employment as compared with existing employees.

7. Finally, a few words are called for regarding the post with which this case is concerned. Even if it were conceded that the derogation were capable of a restrictive interpretation — as argued by Belgium in 1980 and again by France today — the nurses are affected by it because they are entitled to authorize services which are charged to the State or to local authorities. Now, I do not doubt that that power is conferred upon the employees in question, nor shall I question the fact (although it seems a little strange to me) that it is 'public', in the forceful sense of the term, as described earlier. As far as I am aware, however, the activities involving the exercise of that power are occasional or incidental and can therefore be separated from the main duties of the persons concerned. It seems to me that to exclude nationals of other Member States from the posts in question merely for that reason would be contrary to the principle of proportionality. It should also be noted that the duties of nurses in public hospitals are identical to those of their colleagues in private clinics and that the derogation contained in Article 48 (4) does not apply to the latter. Am I to deduce from that fact that if a clinic is brought out of the private sector into the public sector the management is obliged to dismiss all the non-French staff?

It is a fact that an extremist disciple of Hegel might truly think that access to posts like the ones at issue here should be denied to foreigners. But anyone who does not regard the State as 'the march of God in the world' ('der Staat ist der Gang Gottes in der Welt') must of necessity take the contrary view.

8. In view of all the foregoing considerations, I suggest that the Court should uphold the action brought by the Commission of the European Communities by application lodged on 21 December 1984. The Court should therefore declare that by making the possession of French nationality a requirement for appointment to and establishment in permanent employment as nurses, the French Republic has failed to fulfil its obligations under the EEC Treaty.

Since the defendant government has failed in its submissions, it should be ordered to pay the costs.