OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 25 November 1999 *

I — Introduction

1. The special linguistic regime of the Italian autonomous province of Bolzano forms the background of this case. It relates to a recruitment condition imposed by a private employer that candidates for employment possess a specified certificate of competence in German and Italian issued by the provincial authorities.

II — Factual and legal context

2. The Cassa di Risparmio di Bolzano SpA, a private banking undertaking, (hereinafter 'the defendant') advertised posts on 9 July 1997 in a local Bolzano newspaper, 'Dolomiten'. Applications for the posts were to be submitted by 1 September 1997. The advertisement made possession of a type-B certificate of bilingualism in German and Italian, commonly known as the '*patentino*', a condition of participation in the competition for the posts. The *patentino* was required for what used to be known as careers in an advisory capacity in the public service of the province of Bolzano. It is issued exclusively by the authorities of Bolzano. At the material time, four examination sittings to obtain the *patentino* were fixed in any given year, with a mandatory delay of 30 days between the written and oral stages, which were held at a single examination centre in the province. The applicable Presidential Decree [1] specifies that the written and oral tests of linguistic proficiency be of equal difficulty for the two languages. The examinations are taken almost exclusively by residents of the province. [2]

3. The applicant in the main proceedings, Mr Angonese, (hereinafter 'the applicant') is an Italian citizen who, it appears, is regarded by the competent local authority as having been resident in Bolzano since his birth. He is perfectly bilingual but did not possess a *patentino* at the material time. [3] None the less, he applied to participate in the competition and submitted certificates pertaining to his studies in English, Polish and certain other Slavic languages at the Faculty of Philosophy of the University of Vienna from 1993 to 1997 (which had not yet resulted in the grant of a degree), as well as to his experience as a draughtsman and

* Original language: English.

1 — Presidential Decree No 752 of 26 July 1976, Title I.

2 — Of 20 799 applications to sit the examinations in 1996, only 1 077 (5.18%) were submitted by candidates residing outside the province.

3 — It appears that he acquired it on 20 October 1997.

Polish-Italian translator in Cracow. The defendant refused him admission to the competition, whereupon he commenced proceedings against the defendant before the Pretura Circondariale (District Magistrates' Court) di Bolzano (hereinafter 'the national court') seeking the annulment of the clause requiring possession of a *patentino* (hereinafter 'the contested clause') and damages for loss of opportunity.

4. The arguments of the parties have centred on Article 48 of the EC Treaty (now, after amendment, Article 39 EC) and Articles 3(1) and 7(1) and (4) of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community.[4] These provide:

'*Article 3*

1. Under this Regulation, provisions laid down by law, regulation or administrative action or administrative practices of a Member State shall not apply:

— where they limit application for and offers of employment, or the right of foreign nationals to take up and pursue employment or subject these to conditions not applicable in respect of their own nationals; or

— where, though applicable irrespective of nationality, their exclusive or principal aim or effect is to keep nationals of other Member States away from the employment offered.

This provision shall not apply to conditions relating to linguistic knowledge required by reason of the nature of the post to be filled.

...

Article 7

1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal and should

4 — OJ, English Special Edition, Series I 1968 (II), p. 475.

he become unemployed, reinstatement or re-employment.

...

4. Any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorises discriminatory conditions in respect of workers who are nationals of the other Member States.'

III — The order for reference

5. The national court referred the following question to the Court for a preliminary ruling pursuant to Article 177 of the EC Treaty (now Article 234 EC):

'Is it compatible with Article 48(1), (2) and (3) of the EC Treaty and Articles 3(1) and 7(1) and (4) of Regulation (EEC) No 1612/68 to make the admission of candidates to a competition organised to fill posts in a company governed by private law conditional on possession of the official certificate attesting to knowledge of local languages issued exclusively by a public authority of a Member State at a single examination centre (namely, Bolzano), on completion of a procedure of considerable duration (to be precise, of not less than 30 days, on account of the minimum lapse of time envisaged between the written test and the oral test)?'

6. The national court observed in its order for reference that persons not already resident in Alto Adige (the autonomous region of which Bolzano is a part) were unlikely to be in possession of a *patentino*, whereas many residents acquired one as a matter of course at the end of their secondary school studies. The time-scale of recruitment by the defendant in the present case made it difficult, if not impossible, for a potential candidate who did not already possess a *patentino* to acquire one before the closing date for applications. Furthermore, it was, in its view, theoretically possible to prove adequate knowledge of both languages by other means, through the competition procedure itself or by production of qualifications awarded by other bodies or by production of a *patentino* in due course after the closing date for applications. The national court suggested, therefore, that the requirement could constitute indirect discrimination on grounds of nationality, through use of a criterion strongly linked to residence. It cited, in particular, the Court's statement in *Groener* that 'the principle of non-discrimination precludes the imposition of any require-

ment that the linguistic knowledge in question must have been acquired within the national territory'. [5]

7. The national court also noted that the Community rules on the freedom of movement of workers do not apply to cases whose facts are entirely confined to a single Member State. [6] It suggested that a connecting factor between the facts of the case and Community law could be found in the applicant's period of study in Austria. Alternatively, should the contested clause be contrary to Community law, through hypothetical breach of the rights of third parties who are nationals of another Member State, it would be null and void by virtue of Article 1418 of the Italian Civil Code. By virtue of Article 1421 of the Italian Civil Code, nullity 'may be relied upon by anyone with an interest therein and may be established by the court of its own motion'. If the contested clause, or Article 19 of the National Collective Labour Agreement for Savings Fund Employees of 19 December 1994 (hereinafter 'the 1994 Collective Agreement') which permitted the defendant to set its recruitment conditions, were void pursuant to Article 7(4) of Regulation No 1612/68 in that they discriminated, or permitted discrimination, on grounds of nationality, the applicant could also rely upon their nullity before the national courts even if his situation had no connection with Community law. Article 19 of the 1994 Collective Agreement provides that savings banks shall decide whether the recruitment of personnel should be undertaken by way of internal competitions on the basis of either qualifications or tests or in accordance with selection criteria laid down by the savings bank. Article 21 states that, for recruitment purposes, candidates must produce on demand, *inter alia*, any document which the undertaking deems to be necessary.

IV — Observations

8. Written and oral observations were submitted by the applicant, the defendant, the Italian Republic and the Commission. They concentrate on three issues, namely (i) the existence of a connecting factor with Community law, (ii) whether the relevant rules are applicable to a private undertaking and (iii) whether unlawful discrimination was suffered by the applicant.

(i) *Existence of a connecting factor with Community law*

9. The defendant and Italy consider that the case has no connection with the application of Community law, as the applicant is an Italian citizen residing in Italy who did not, at the material time, possess any material non-Italian educational qualification and the defendant is a company established in Italy. They argue that, in order to benefit from the line of case-law

5 — Case C-379/87 *Groener* v *Minister for Education and the City of Dublin Vocational Educational Committee* [1989] ECR 3967 (hereinafter '*Groener*'), paragraph 23.

6 — Case 180/83 *Moser* v *Land Baden-Württemberg* [1984] ECR 2539 (hereinafter '*Moser*').

commencing with *Knoors* v *Secretary of State for Economic Affairs*,[7] account can only be taken of time spent studying abroad in the exercise of Community-law rights if it results in a relevant diploma or recognised training — a condition not satisfied in the present case, as the applicant's studies in Vienna had no connection with banking and could not be relied upon by him in the competition. Otherwise, short educational exchanges or even periods of as little as one day spent abroad as a tourist could, quite arbitrarily, enable a person to invoke Community-law rights against his own Member State. Furthermore, the applicant never formally changed his residence from Bolzano to Vienna. The provisions of the Italian Civil Code on nullity do not remedy the hypothetical and, thus, inadmissible character of the reference.

10. The Commission acknowledges that the facts of the present case can be distinguished from those of earlier cases such as *Kraus* v *Land Baden- Württemberg*[8] and that the inclusion of the applicant within the scope of Community law would represent a significant new step in the case-law. It submits, none the less, that a connecting factor with Community law could be said to result from the applicant's exercise of his right of free movement as a student to follow a course of vocational training abroad, and from the fact that he wished to take up employment in Bolzano at the end of his studies. In response to questions from the bench at the oral hearing regarding the relevance for the establishment of a connecting factor with Community law of the subject-matter studied, the duration of the period of study and the interval of time between the end of those studies and the invocation of Community-law rights, the agent for the Commission submitted that the duration and temporal immediacy of the applicant's studies in the present case were not problematic. Few people get jobs which dovetail perfectly with their studies and too restrictive an approach should not be adopted in this regard. He also observed that the fact that the applicant had been registered as resident in Bolzano throughout his period of study in Austria was immaterial. Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students[9] referred (in Italian) to *un diritto di soggiorno* (a right of sojourn, that is, a right of temporary stay) as distinct from a right of permanent residence and it was clear that the applicant had benefited from this to stay in Austria while studying there.

(ii) *Rules applicable to a private undertaking*

11. The Commission and the applicant argue that Article 19 of the 1994 Collective Agreement constitutes authority for the contested clause requiring possession of the *patentino* and is, therefore, to the extent that this clause applies discrimina-

7 — Case 115/78 [1979] ECR 399 (hereinafter '*Knoors*').
8 — Case C-19/92 [1993] ECR I-1663 (hereinafter '*Kraus*').
9 — OJ 1993 L 317, p. 59.

tory criteria, incompatible with Article 7(4) of Regulation No 1612/68. When asked at the oral hearing whether the Commission took a view on the possible direct application of Article 48 of the EC Treaty to contractual relations between private employers and employees, the agent for the Commission stated that it was not necessary to address the issue in the present case because its argument regarding the 1994 Collective Agreement was sufficient. The defendant counters that individual employers are not the addressees of the obligations in Regulation No 1612/68 regarding recruitment conditions and that the contested clause in the present case had no link with the terms of the 1994 Collective Agreement. Article 7(1) of that Regulation refers exclusively to conditions imposed on workers in other Member States. The application of Article 48 of the EC Treaty to private parties is confined to circumstances where they set conditions for an entire economic sector in a collective manner. [10]

(iii) *Unlawful discrimination suffered by the applicant*

12. The applicant submits that the contested clause discriminates against persons not resident in Bolzano, who are less likely to have taken the examinations for the *patentino*. Furthermore, the *patentino* has no particular relevance to banking terminology. He complains of the fact that possession of the *patentino* was a prior condition for participation in the competition, rather than being included among the types of qualification to be compared in assessing candidates' suitability. The Commission argues that proof of bilingualism such as that furnished by the *patentino* is a justifiable condition of employment in Bolzano but that the practical obstacles to obtaining it are disproportionate and principally affect non-residents of the province. The defendant argues that the contested clause is not discriminatory because it is objectively justified by the liberty of a private firm to adopt the recruitment policy of its choice, which is appropriate to its operations in a bilingual area, and without having to carry out its own evaluation of bilingualism through oral interviews of all candidates. The *patentino* is the only linguistic qualification specifically designed to test bilingualism in the two languages at issue, German and Italian. In any event, the applicant has no qualification which is even potentially equivalent, so his arguments are purely hypothetical.

V — Analysis

13. The observations submitted to the Court correctly identify, in my view, the issues to be addressed in this case. Inevitably, they are not entirely independent of each other. In particular, as will be seen below, the question whether the applicant's situation displays a sufficient connection with Community law is inevitably linked

10 — Case 36/74 *Walrave* v *Union Cycliste International* [1974] ECR 1405, paragraphs 16 and 19; Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others* v *Bosman and Others* [1995] ECR I-4921.

with the nature of his claim to be the victim of discrimination prohibited by that law.

(i) *Existence of a connecting factor with Community law*

14. It is settled case-law that '[t]he provisions of the Treaty on freedom of movement for workers cannot ... be applied to situations which are *wholly internal* to a Member State, in other words, where there is no *factor connecting* them to any of the situations envisaged by Community law' (emphasis added).[11] The highlighted expressions have acquired the status of terms of art used to express the test of applicability of Community law.

15. The rights conferred on workers by Article 48 of the EC Treaty and by the measures implementing it are typically and most readily invoked by workers of the nationality of one Member State wishing to move to the territory of another Member State in pursuit of employment there. The Court has also recognised that a person may invoke those provisions, or those in respect of establishment and services, against his own Member State where his circumstances are assimilable to those of a migrant worker or a foreign self-employed person or service-provider by reason of his prior exercise of his Community-law right to freedom of movement.

16. I will discuss, firstly, a number of cases in which the Court has found the condition of a connecting factor with Community law to be met. In *Knoors*,[12] the Court stated that nationals of all the Member States could rely upon the provisions of a Council Directive on recognition of foreign periods of relevant work experience for the purpose of authorisation to carry on certain trades,[13] even to contest rules applied by the State whose nationality they possess. The liberties guaranteed by, *inter alia*, Article 48 of the Treaty, 'which are fundamental in the Community system, could not be fully realised if the Member States were in a position to refuse to grant the benefit of the provisions of Community law to those of their nationals who have taken advantage of the facilities existing in the matter of freedom of movement and establishment and who have acquired, by virtue

11 — Case 175/78 *Regina* v *Saunders* [1979] ECR 1129, paragraph 11. See also, for example, as regards the freedom of movement for workers or freedom of establishment, Joined Cases 35/82 and 36/82 *Morson and Jhanjan* v *State of the Netherlands* [1982] ECR 3723, paragraph 16; *Moser*, op. cit., paragraph 15; Case 298/84 *Iorio* v *Azienda Autonoma delle Ferrovie dello Stato* [1986] ECR 247, paragraph 14; Case 204/87 *Criminal Proceedings against Bekaert* [1988] ECR 2029, paragraph 12; Joined Cases C-54/88, C-91/88 and C-14/89 *Nino and Others* [1990] ECR I-3537, paragraph 11; Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraph 23; Case C-332/90 *Steen* v *Deutsche Bundespost* [1992] ECR I-341, paragraph 9; Case C-206/91 *Koua Poirrez* v *CAF* [1992] ECR I-6685, paragraphs 10 and 11; *Kraus*, op. cit., paragraph 15.

12 — Op. cit., paragraph 18.

13 — Council Directive No 64/427/EEC of 7 July 1964 laying down detailed provisions concerning transitional measures in respect of activities of self-employed persons in manufacturing and processing industries falling within ISIC Major Groups 23-40 (Industry and small craft industries), OJ, English Special Edition, Series I, 1963-1964, p. 148.

of such facilities, the trade qualifications referred to by the directive in a Member State other than that whose nationality they possess'. [14]

17. In *Broekmeulen* v *Huisarts Registratie Commissie*, [15] the Court gave the same reason for permitting the invocation, by a doctor of Dutch nationality, of two Council Directives concerning recognition of medical qualifications and authorisation to practise as a doctor. [16] He had obtained his medical qualifications in Belgium. The Dutch authority responsible for the registration of general medical practitioners had required him to undergo an additional year's training. A similar result was reached in *Gullung* v *Conseils de l'Ordre des Avocats du Barreau de Colmar et de Saverne*. [17] A person of dual nationality, who had been admitted to the legal profession in one of the Member States whose nationality he held, was permitted to rely on the provisions of Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services [18] in the territory of the other Member State, provided the conditions for the application of that directive were satisfied.

18. In these cases, there was, independently of the nationality of the person seeking to rely upon the Community legislation at issue, an intrinsic trans-frontier element. The legislation required one Member State, for the purpose of authorising an economic activity, to recognise educational qualifications acquired by all Community nationals in another Member State, or to recognise periods of employment or self-employment deemed equivalent to such qualifications, which were directly material to that activity. [19]

19. In *Bouchoucha*, [20] the defendant, a French national, was prosecuted for practising osteopathy in France, an activity restricted to qualified doctors. He had acquired a diploma in osteopathy in the United Kingdom which permitted him to pursue that activity in that country. The Court stated that it followed from the fact that he, a French national practising in France, held a professional diploma issued in another Member State that the scope of the case was not purely national and that the applicability of the Treaty provisions on freedom of movement must be considered. [21] However, the Court held that, in the absence of provisions for the mutual

14 — *Knoors*, op. cit., paragraph 20. Although *Knoors* concerned the right of establishment, the Court confirmed in *Kraus*, op. cit., paragraph 16, that the same reasoning must be followed as regards Article 48 of the EC Treaty.

15 — Case 246/80 [1981] ECR 2311 (hereinafter '*Broekmeulen*'), paragraph 20.

16 — Council Directive 75/362/EEC of 16 June 1975 concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in medicine, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services, and Council Directive 75/363/EEC of 16 June 1975 concerning the coordination of provisions laid down by law, regulation or administrative action in respect of activities of doctors, OJ 1975 L 167, pp. 1 and 14 respectively.

17 — Case 292/86 [1988] ECR 111 (hereinafter '*Gullung*'), paragraph 12.

18 — OJ 1977 L 78, p. 17.

19 — See also Case 271/82 *Auer* v *Ministère Public* [1983] ECR 2727, paragraph 20.

20 — Case C-61/89 [1990] ECR I-3551.

21 — Op. cit., paragraph 11.

recognition of qualifications in osteopathy, France was entitled to restrict the activity in question to medically qualified persons. [22] Similarly, in *María Teresa Fernández de Bobadilla* v *Museo Nacional del Prado and Others*, [23] the Court was willing to examine the claims of discrimination regarding access to an art restoration post in Spain of a Spanish national who relied on a United Kingdom diploma in the field.

20. In *Kraus*, the Court addressed the somewhat different circumstances of a German national who merely sought recognition by the German authorities of his right to use a postgraduate academic title conferred on him by a university in the United Kingdom following a course of study there. The Court noted that, although possession of a postgraduate academic title is not usually a prerequisite for access to a profession, it constitutes an advantage for the purpose of gaining entry into and prospering in such a profession. [24] It could improve its holder's chances relative to candidates who did not have such a supplementary qualification by attesting to the former's fitness for a particular post and, as the case may be, his command of the language of the country where it was awarded. [25] Furthermore, such an additional qualification might be necessary for access to certain academic posts, or could contribute to more rapid promotion, or facilitate establishment as an independent practitioner. [26] The Court concluded, therefore, that 'the situation of a Community national who holds a postgraduate academic title which, obtained in another Member State, facilitates access to a profession or, at least, the pursuit of an economic activity, is governed by Community law, even as regards the relations between that national and the Member State whose nationality he possesses'. [27]

21. Although it does not relate to the recognition of educational or other qualifications, a brief reference should also be made to the Court's judgment in *Singh*. [28] That case related to the Indian husband of a United Kingdom national. They spent a two-year period working in Germany, after which they returned to the United Kingdom to set up a business. As a consequence of his wife's right to freedom of movement to exercise an economic activity, the Court held that the husband's right to enter and remain in the United Kingdom with her was governed by Article 52 of the EC Treaty (now, after amendment, Article 43 EC) and Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services. [29] It stated that a national of a Member State might be deterred from leaving his country of origin in order to pursue an activity as an employed or self-employed person as envisaged by the Treaty in another Member State if, on returning to the Member State of which he is a national in order to pursue

22 — Ibid., paragraphs 14 to 16.

23 — Case C-234/97 [1999] ECR I-4773 (hereinafter '*Fernández de Bobadilla*').

24 — Op. cit., paragraph 18.

25 — Ibid., paragraph 19.

26 — Ibid., paragraphs 20 to 22.

27 — Ibid., paragraph 23.

28 — Case C-370/90 [1992] ECR I-4265.

29 — OJ 1973 L 172, p. 14.

an activity there as an employed or self-employed person, the conditions of his entry and residence, or those applied to his spouse and children, were not at least equivalent to those applicable to them under the Treaty or secondary law in the territory of another Member State. [30]

22. Before returning to the application of these principles to the present case, I will refer to some cases which the Court has found to fall outside the scope of Community law. In cases where a Community national challenges rules applied by his own Member State, the Court has refused to treat as a sufficient connecting factor with Community law a merely hypothetical possibility of that person exercising free-movement rights. Thus, *Moser* concerned a German national who had always lived and maintained his residence in Germany, [31] but who, in order to establish a connection with the Community provisions he invoked, claimed that the German legislation denying him access to the teaching profession in that country because of uncertainty as to his loyalty to the Basic Law (he was said to be a member of the Communist Party) also precluded him from applying for posts in schools in the other Member States. [32] The Court did not accept this argument, responding that '[a] purely hypothetical prospect of employment in another Member State does not establish a sufficient connection with Community law to justify the application of Article 48 of the Treaty'. [33]

23. The Court applied the same approach in *Kremzow* v *Austrian State.* [34] It declined to address the question whether the deprivation of an Austrian national's liberty by virtue of a prison sentence imposed by the Austrian courts for murder and possession of firearms constituted an unlawful restriction on the prisoner's freedom of movement, stating that '[w]hilst any deprivation of liberty may impede the person concerned from exercising his right of free movement, ... a purely hypothetical prospect of exercising that right does not establish a sufficient connection with Community law to justify the application of Community provisions'. [35]

24. Even the fact that an economic actor resides in a Member State other than that in which he works may not be sufficient to establish a sufficient connection with Community law. In *Werner* v *Finanzamt Aachen-Innenstadt,* [36] a German national who resided in the Netherlands and worked as a self-employed dentist in Germany, where he earned virtually all his income, challenged German tax rules which denied to non-residents, who were subject to tax only on their German income, the benefit of rules regarding the splitting of spousal income and the deduction from taxable

30 — Op. cit., paragraphs 19 and 20.

31 — See also, for example, Case 20/87 *Ministère Public* v *Gauchard* [1987] ECR 4879, paragraphs 10 and 13; *Steen* v *Deutsche Bundespost*, op. cit., paragraph 10.

32 — Op. cit., paragraphs 16 and 17.

33 — Ibid., paragraph 18.

34 — Case C-299/95 [1997] ECR I-2629 (hereinafter '*Kremzow*').

35 — Ibid., paragraph 16. See also, in the field of services, Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 39.

36 — Case C-112/91 [1993] ECR I-429 (hereinafter '*Werner*').

income of various insurance contributions, expenses and levies. The Court stated that Article 52 of the EC Treaty did not preclude this heavier tax burden on non-resident nationals,[37] on these grounds:

'Mr Werner is a German national who obtained his degrees and professional qualifications in Germany; he has always practised his profession in Germany and is subject to German tax legislation. The only factor which takes his case out of a purely national context is the fact that he lives in a Member State other than that in which he practises his profession.'[38]

25. Advocate General Darmon expressly stated that he viewed Mr Werner's situation as being quite distinct from that of, for example, a Dutch national who resided in the Netherlands and was self-employed in Germany, from the point of view of the possible application of Article 52 of the EC Treaty.[39] He analysed the case-law, summarised above, on the assimilation of a Member State's own nationals to migrant workers or self-employed persons as turning on the prior exercise of the right of free movement in order to exercise an *economic* activity.[40] Furthermore, the fact that he resided permanently in the Netherlands precluded Mr Werner from relying on the Treaty and legislative provisions regarding the removal of restrictions on free movement in order to receive services.[41] No argument could be founded on the directives relating to the right of residence of non-economically active persons because they were not in force at the material time.[42]

26. It is, of course, quite clear from the subsequent decision of the Court in *Schumacker*[43] that Mr Werner's claim failed only because he was of the same nationality (German) as the Member State whose tax provisions he wished to challenge. In *Schumacker*, the applicant was a national of Belgium, where he resided. He earned his entire income from employment in Germany and was subjected, as a non-resident, to essentially the same German rules as were applied to Mr Werner. His case came within the scope of Community law

37 — Ibid., paragraph 17.

38 — Ibid., paragraph 16.

39 — Ibid., paragraph 24 of his Opinion.

40 — Ibid., paragraph 30; see also the Opinion of Advocate General Mischo in Case C-15/90 *Middleburgh* [1991] ECR I-4655, paragraph 45.

41 — Op. cit., paragraphs 36 to 43. The non-application of the Treaty rules on services in the case of a permanent change in residence was confirmed by the Court in Case C-70/95 *Sodemare and Others* v *Regione Lombardia* [1997] ECR I-3395.

42 — Ibid., footnote 19 to the Opinion. The relevant directives were Council Directive 90/364/EEC of 28 June 1990 on the right of residence; Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity; and Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students, OJ 1990 L 180, pp. 26, 28 and 30 respectively. Directive 90/366/EEC was annulled by the Court in Case C-295/90 *Parliament* v *Council* [1992] ECR I-4193 and was replaced by Council Directive 93/96/EEC, op. cit.

43 — Case C-279/93 [1995] ECR I-225. See also Case C-80/94 *Wielockx* v *Inspecteur der Directe Belastingen* [1995] ECR I-2493.

because of his Belgian nationality and the application of those tax provisions in his case was deemed to be contrary to Article 48 of the EC Treaty. The contrast highlights the established rule that a Member State may discriminate against its own nationals unless they can bring themselves within the scope of Community-law provisions which are designed for their benefit.

27. In the present case, the applicant claims that his period of study in Vienna, through German, of English, Polish and other Slavic languages, which had not, at the material time, led to the grant of a degree, permits him to invoke, in respect of the requirement that candidates hold a specific certificate of bilingualism granted only in Bolzano, the Community-law prohibition of indirect discrimination against migrant workers on grounds of nationality. In the light of the established case-law summarised above, I do not think that this claim can be accepted.

28. Leaving aside for the moment the fact that the applicant had not completed his studies, it is of primary importance, in my view, that, while those studies can be characterised as a type of vocational training within the meaning of Article 127 of the EC Treaty (now, after amendment, Article 150 EC), they were, none the less, quite remote in content both from the banking post for which the applicant wished to be considered and from the certificate of bilingualism required of candidates for that post. If graduates (or students who have verifiably completed a substantial part of their course) are to use their studies abroad to establish a connecting factor with Community law for the purpose of challenging rules in their home State regarding access to a particular profession, there must, in my view, be some more than hypothetical connection between those studies and either the profession at issue or, where it is distinct in character, as in this case, the contested rule regarding access thereto. In the present case, the applicant's course of study had no apparent connection with banking, or even with commercial activity in the broadest sense. Although the applicant's Viennese studies were not hypothetical in the sense in which the term was used in *Moser* and *Kremzow*, the facts as found by the national court do not suggest any link between the nature of those studies and the employment sought by him in Bolzano or the condition imposed for access to that employment. Therefore, in the absence of a connecting factor with Community law, the applicant is unable to derive any rights from Article 48 of the EC Treaty or from the secondary measures enacted to implement it.

29. The criterion of a material link between, on the one hand, a putative connecting factor with Community law and, on the other, the Community rules invoked and the circumstances in which they are to be applied, was inevitably satisfied in *Knoors*, *Broekmeulen* and *Gullung* because, as I pointed out above, those cases directly concerned the applicability of Community legislation on the recognition of the educational qualifications or periods of economic activity in question. *Bouchoucha* provides more immediate support for my analysis — although the French defen-

dant in that case did not possess the medical qualification required by French law in order to practise osteopathy, he did hold a professional diploma in osteopathy issued in another Member State, which satisfied the Court that the case was not purely national in character. There is nothing to suggest that the Court would have taken the same view had the defendant's diploma been in law, literature or some other, unrelated, discipline. The same may be said of the judgment in *Fernández de Bobadilla*. The applicant in that case had obtained a degree following a course of study in the United Kingdom which was directly relevant to the post of art restorer she sought.

30. Kraus is a somewhat special case, as it related to the abstract recognition of an academic title. The Court indicated that it was willing to treat the case as one governed by Community law because the postgraduate legal qualification in question 'facilitates access to a profession or, at least, the pursuit of an economic activity'. It based this conclusion on as concrete an assessment of its relevance to entry into and advancement in the legal profession, either as a practitioner or as an academic, as was possible given the abstract character of the case. If the applicant in that case had held a foreign degree in English and Polish, its economic relevance would have had to be assessed by reference to an entirely different range of potential professional activities. By the same token, if the applicant in the present case had applied for a post teaching English and Polish, or for a post of any description for which English or Polish were deemed an advantage, for example in dealing with foreign clients, or for a post for which proof of mastery of one or both languages was a precondition for the consideration of candidates' applications, his Viennese studies could, in my view, constitute a connecting factor with Community law. I should add that the statement in *Kraus* that a foreign law diploma could confirm the holder's command of the language of the country where it was awarded [44] is not directly material to the present applicant's case, as it refers to the assessment of the holder's fitness to engage in an economic activity related to the substantive subject-matter of the diploma.

31. I think that this approach, whereby the sufficiency of a putative connecting factor is judged in the light of the character of the economic activity or restrictive rule at issue, is underpinned by the judgment in *Werner*, interpreted in the light of the more extensive analysis of Advocate General Darmon referred to above. That case shows that not all trans-frontier factual elements are material to establishing the existence of a connecting factor with Community law. Thus, foreign residence alone did not entitle a German national to invoke the Treaty rules on establishment against Germany, in whose territory he had always pursued his economic activity. It is an open question — and, more to the point, an

44 — Op. cit., paragraph 19.

entirely distinct question — whether, after the entry into force of Directive 90/364 and of Article 8a of the EC Treaty (now, after amendment, Article 18 EC), someone in Mr Werner's position could successfully argue that the German tax rules were a restriction on his exercise of those non-economic rights in the Netherlands, [45] but I do not see how those provisions could affect his inability to invoke the distinct Treaty rules on establishment in Germany. Similarly, periods spent abroad as a student of languages, for example, could not be expected to change the approach taken by Community law to the taxation of Mr Werner's income from his dental practice.

32. I do not think that the judgment in *Singh* is inconsistent with the approach outlined immediately above. It is true that the Court did not seek to identify any link between the nature of the wife's economic activity in Germany and that undertaken upon her return with her husband to the United Kingdom. However, the national immigration rule at issue was not connected with any particular profession or economic activity, but affected freedom of movement as such. In those circumstances, a different, more general approach was justified, permitting any United Kingdom national who had exercised his right of free movement in order to engage in an economic activity to invoke that right against rules restricting his establishment with his family in his home State.

33. In the foregoing analysis, I have not attached particular importance to the fact that the applicant had not completed his studies at the time of application for the competition. In the light of my conclusion regarding the subject-matter of the applicant's studies, it is not necessary to prejudge the question whether relevant but only partially completed foreign studies, arising from which a student already has documentary evidence of satisfactory performance at the stages reached at the material time, should also be taken into account where these attest to a level of knowledge or ability equivalent to that evidenced by the national qualification specified for a given post.

34. On the other hand, it is necessary to address the alternative argument put forward by the national court — that Articles 1418 and 1421 of the Italian Civil Code permit the applicant to benefit from the nullity *erga omnes* of the contested clause if it is established that it breaches the rights of other, perhaps entirely hypothetical, third parties, such as a candidate who is a national of another Member State and who holds a qualification which is equivalent to the *patentino*. In my view, the Court does not have jurisdiction to rule on the rights of such hypothetical third parties, even if such a ruling would be material to the national court's decision in the present case.

45 — On the subject of barriers to exit from a Member State in order to exercise an *economic* activity, see my Opinion of 16 September 1999 in Case C-190/98 *Volker Graf* v *Filzmoser Maschinenbau*.

35. It follows from the cooperative character of the preliminary ruling procedure that it is for the national courts alone who are seised of a case and who are responsible for the judgment to be delivered to determine, in view of the special features of each case, both the need for a preliminary ruling in order to enable them to give their judgment and the relevance of the questions which they put to the Court. Consequently, where questions submitted by national courts concern the interpretation of a provision of Community law, the Court is, in principle, obliged to give a ruling. A reference by a national court can only be rejected if it appears that a ruling is being elicited by means of a contrived dispute, or if it is obvious that Community law cannot apply, either directly or indirectly, to the circumstances of the case referred to the Court. [46] Thus, the Court has repeatedly held that it has jurisdiction to give preliminary rulings on questions concerning Community provisions in situations where the facts of the cases being considered by the national courts were outside the scope of Community law but where those provisions had been rendered applicable by domestic law. [47]

36. However, the present case is not, in my view, comparable to cases such as *Dzodzi*, *Leur-Bloem* and *Giloy*. Such cases have involved the express extension of substantive secondary provisions of Community law to purely internal situations which are comparable to the situations originally governed by the Community rules in question. They are often applied simultaneously, sometimes by the same administrative agency, but always to concrete situations which give rise to the questions referred by the national courts in those cases. The Court answers the questions referred as if the rules are being interpreted for application in their Community context, [48] but on the basis of facts which are relevant to a dispute of a purely internal character to which those rules are also applicable.

37. That is not the present case. The Community rules prohibiting discrimination against workers on grounds of nationality which have been invoked by the applicant lay down a standard of great generality, whose applicability and effects vary according to the circumstances. This is particularly so as regards the discussion of indirect discrimination. [49] I have already concluded that those rules do not apply directly to a person in the applicant's situation. They have not been expressly extended to his situation by Italian law, nor is it easy to envisage this being done, because of the need for a comparative

46 — *Dzodzi*, op. cit., paragraphs 33 to 35 and 40; Case C-231/89 *Gmurzynska-Bscher* [1990] ECR I-4003, paragraphs 18 to 20 and 23; Case C-28/95 *Leur-Bloem* v *Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2* [1997] ECR I-4161, paragraphs 24 to 26 (hereinafter '*Leur-Bloem*'); Case C-130/95 *Giloy* v *Hauptzollamt Frankfurt am Main-Ost* [1997] ECR I-4291, paragraphs 20 to 22 (hereinafter '*Giloy*').

47 — *Leur-Bloem*, op. cit., paragraph 27; *Giloy*, op. cit., paragraph 27. In addition to *Dzodzi* and *Gmurzynska-Bscher*, cited above, the Court referred in both cases to Case 166/84 *Thomasdünger* v *Oberfinanzdirektion Frankfurt am Main* [1985] ECR 3001 and Case C-384/89 *Tomatis and Fulchiron* [1991] ECR I-127.

48 — See, in particular, *Leur-Bloem*, op. cit., paragraph 33.

49 — The Court's ruling in *Fernández de Bobadilla*, op. cit., is a good example of the kind of conditional response, closely linked to a party's individual circumstances, that may be given to a question regarding recognition of educational qualifications.

element in any analysis of discrimination. It would amount to a contrived or artificial procedure, quite different from cases like *Dzodzi* and *Giloy*, for the Court to seek to determine whether those rules could, none the less, be of indirect benefit to the applicant by virtue of the general effect in Italian civil law of a finding of nullity, simply because those rules would protect a person in a quite different situation from the unconditional application of the contested clause.

(ii) *Rules applicable to a private undertaking*

38. On the assumption that, contrary to the views I have expressed, the present case falls within the scope of Community law, the question referred by the national court requires the Court to address the issue of the extent to which private employers are subject to an obligation of non-discrimination on grounds of nationality. I am not convinced by the argument of the Commission that the contested clause must be annulled because it was permitted by Article 19 of the 1994 Collective Agreement, which, by virtue of Article 7(4) of Regulation No 1612/68, must be deemed null and void in so far as it authorises discrimination on grounds of nationality. Article 19 of the 1994 Collective Agreement does not purport to regulate the conditions for recruitment to be operated by employers. It is not, in my view, consistent with the underlying autonomy of economic actors in a market economy, in the context of which Regulation No 1612/68 was clearly intended to apply, to strain the interpretation of clauses of collective agreements which leave a particular matter to be determined at the discretion of individual employers, as amounting to authorisation, within the meaning of Article 7(4), by the parties to that collective agreement of the conditions ultimately imposed. In reality, the Commission's approach avoids the fundamental question, to which I will now turn, of whether Article 48 of the EC Treaty applies directly to private employment relationships, as does, in particular, Article 119 of the EC Treaty (Articles 117 to 120 of the Treaty have been replaced by Articles 136 EC to 143 EC). The same question may be posed regarding Article 7(1) of Regulation No 1612/68. Article 3 of that Regulation may be excluded from discussion, as it clearly relates to provisions and administrative practices of the Member States. I do not think that the fact that the *patentino* is granted by a public body is sufficient to bring Article 3 into play in a case such as the present.

39. Article 7(1) of Regulation No 1612/68 is contained in a regulation which is, in

principle, of direct application and its prohibition of discrimination on grounds of nationality in respect of, *inter alia*, conditions of employment is not confined in terms to public entities. Furthermore, Title II of Regulation No 1612/68 imposes other obligations on certain private entities, both through Article 7(4) and through the provisions on trade-union participation in Article 8.

40. Article 48(2) of the EC Treaty is couched in terms of the abolition of discrimination but does not expressly identify any particular addressee of that obligation. The Court has already held it to be applicable to rules adopted by private bodies aimed at regulating gainful employment in a collective manner, because the abolition of State barriers might otherwise be neutralised by obstacles arising from the exercise of their legal autonomy by associations or organisations not governed by public law. [50] The Court stated that if the scope of Article 48 were confined to the acts of a public authority, there would be a risk of creating inequality in its application. [51] It may seem surprising, therefore, that the Court has not to date had occasion to comment on the application of Article 48 to employment conditions specified by individual undertakings. The most that can be said is that such a step is not excluded by its reasoning in the sporting association cases. At first sight, it can certainly be argued that Article 48(2) should be interpreted by analogy with the reasoning in the second *Defrenne* v *Sabena* case [52] regarding the direct applicability to private employers of the prohibition of direct pay discrimination on grounds of sex in Article 119 of the EC Treaty.

41. It is difficult to conceive that advertisements of vacancies, for example, open exclusively to candidates of a given nationality, or, perhaps worse, excluding a given nationality, would escape the prohibition in Article 48 of the EC Treaty. However, a combination of factors dissuades me from delving further into this question in the present case. First, these possible grounds for the application to private employers of a prohibition of discrimination on grounds of nationality were not raised in the grounds for the order for reference or discussed to any useful extent in the observations submitted to the Court. The Commission, in particular, in response to a question at the oral hearing, was not prepared to go beyond the suggestion, which I have found unpersuasive, that the answer is to be found in the text of the 1994 Collective Agreement. Secondly, the present case concerns an allegation of indirect discrimination on grounds of nationality, prohibition of which may present special problems and difficulties in the case of private economic actors. As I

50 — *Walrave*, op. cit., paragraph 18; *Bosman*, op. cit., paragraphs 82 and 83.

51 — *Walrave*, loc. cit., paragraph 19; *Bosman*, op. cit., paragraph 84.

52 — Case 43/75 [1976] ECR 455, especially paragraphs 30 to 40.

conclude below that the applicant's claim of indirect discrimination would not be well founded even if his situation were assimilable to that of a non-Italian Community worker, I think it more advisable not to make any recommendation to the Court on the present issue.

(iii) *Unlawful discrimination suffered by the applicant*

42. I have already indicated above that, subject to the findings of the national court, I do not see any necessary connection between the applicant's course of study in Vienna and the *patentino* required by the defendant of candidates for its recruitment competition. It is obvious, in the light of the linguistic regime in the province of Bolzano and of the linguistic make-up of its population, that the defendant was entitled to require its potential employees to give evidence of bilingualism. Given the number of applicants which could be expected for its recruitment competition, it was legitimate for it to require such evidence to be provided at the date of application, by reference to relevant qualifications already acquired, to assist it in short-listing candidates for the competition itself. Thus, the fact that examinations for the *patentino* were held only four times a year does not appear to me to pose a problem — indeed, the examinations for many professional qualifications are much more infrequent. Furthermore, there is no reason for the work of universities and other accrediting agencies which grant educational and professional qualifications to be duplicated by requiring that employers themselves also assess the merits of candidates who have not, at the relevant time, acquired any such formal evidence of their abilities.

43. The only potential problem with the defendant's requirement that recruitment candidates hold the *patentino* is that it might discriminate indirectly against, or restrict the free movement of, migrant workers in possession of equivalent qualifications granted by other bodies. [53] Such persons could seek to invoke the Court's case-law on the requirement to determine the equivalence of different qualifications. [54] However, I have already stated that the applicant does not find himself in that position, and that any discussion of that issue would be entirely hypothetical. I conclude, therefore, that there is nothing in the facts outlined to the Court which establishes the existence of covert discrimination on grounds of nationality which affects the applicant, or which could be remedied by an assessment of the equivalence of his studies to the evidence of bilingualism afforded by the *patentino*.

53 — The case-law on the recognition of equivalent foreign qualifications tends to characterise national rules requiring a particular national qualification as restrictions on free movement rather than as a form of indirect discrimination — see my Opinion in *Volker Graf* v *Filzmoser Maschinenbau*, op. cit., paragraph 26.

54 — See, for example, *Fernández de Bobadilla*, loc. cit.

VI — Conclusion

44. In the light of the foregoing, I recommend that the Court respond as follows to the question referred by the Pretura Circondariale di Bolzano:

Article 48 of the EC Treaty (now, after amendment, Article 39 EC) and Articles 3(1) and 7(1) and (4) of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community do not apply to an allegation that a requirement in a Member State that candidates for a recruitment competition hold a specified certificate of bilingualism constitutes covert discrimination on grounds of nationality, where this allegation is made by a national of that Member State who has never exercised an economic activity elsewhere in the Community and whose studies in another Member State have no connection either with the nature of the vacant post or with the languages in question.