employment contracts of foreign-language assistants in universities in any event to one year, with the possibility of renewal, where in principle no such limit exists with regard to other teachers.

Although the provisions of the Treaty do not preclude the adoption by the Member States of measures which are applicable without distinction, which are intended to ensure the proper management of their universities and which could affect, in particular, the nationals of other Member States, such measures must respect the principle of proportionality and must be appropriate and necessary to attain the objective pursued. Community law does not prevent the conclusion of contracts of employment of foreign-language assistants for a limited period if it appears, at the time of the appointment, that the teaching requirement will not exceed that period. However, contracts which are intended to meet continuous needs for teaching must be concluded for an indeterminate period in the same way as the employment relationship of other teachers fulfilling such needs. If changes are necessary, surplus foreign-language assistants could be dismissed in order to adjust staff numbers to the new conditions, as such a measure would be less restrictive of the freedom of movement of workers than the limit on the duration of their contracts.

REPORT FOR THE HEARING
in Joined Cases C-259/91, C-331/91 and C-332/91 *

I — Facts and procedure

1. *Legislative background*

Article 28 of Italian Presidential Decree No 382 of 11 July 1980 concerning university education (GURI No 209, 31 July 1980) provides:

'Within the limits of the funds decided upon and allocated in the manner laid down by Article 25 above and entered in university budgets, rectors may, on a reasoned proposal by the faculty concerned in order to meet the actual needs for practice of students attending language courses, appoint by private-law contract and, if necessary, otherwise than on the basis of specific international agreements, assistants of foreign mother-tongue of proven, recognized ability verified by the faculty, in number not more than a ratio of one assistant to 150 students actually attending the course. In all cases the faculty must certify the specific ability of foreign-language assistants. The costs of such appointments shall be covered by the funds provided for this purpose by each university by decree of the Minister for Public

* Language of the case: Italian.

Education after obtaining the opinion of the National University Council. Forecasts of expenditure shall be made in the light of the numbers of students having taken the courses in question during the preceding academic year.

Exceptions entailing a lower ratio than that laid down in the previous paragraph may be allowed by the Minister for Public Education only in cases of recognized necessity, on a reasoned resolution of the Faculty Council and after obtaining the opinion of the National University Council.

The contracts referred to in the first paragraph may not be extended beyond the academic year for which they are concluded and may be renewed every year for a maximum of five years.

The services to be provided by foreign-language assistants and their remuneration shall be determined by the University Council of Administration after obtaining the opinion of the Faculty Council.

The remuneration shall not exceed the starting salary of an assistant lecturer appointed for a fixed period.'

By judgment No 55, of 9 February 1989, delivered on 23 February 1989, the Corte Costituzionale (Constitutional Court) held that the third paragraph of Article 28, cited above, was contrary to the Italian Constitution 'in so far as it does not permit the annual renewal of the contracts referred to in the preceding paragraph for more than five years'.

2. *Main proceedings*

(a) Case C-259/91

Pilar Allué and Carmel Maria Coonan ('the plaintiffs in the main proceedings'), of Spanish and British nationality respectively, worked as foreign-language assistants at the Università degli Studi di Venezia ('the University') from the 1980/81 academic year on the basis of contracts valid for one year, as provided for by Decree No 382 ('the Presidential Decree').

At the end of the 1985/86 academic year the University refused to renew the contracts on the ground that the third paragraph of Article 28 of the Presidential Decree authorized renewal for a maximum of five years only.

The plaintiffs in the main proceedings subsequently obtained provisional reinstatement in their posts pending judgment on the substance of the case by the court to which the matter was referred.

On the substance, they claim in particular that the court should 'declare that the contract concluded between the parties is a contract for an indeterminate period, annul the term stipulated for its expiry, grant the plaintiffs the right to the continuance of the contract after 1 November 1986 and, consequently, order the University to pay the remuneration due from 1 November 1986'.

The Pretore di Venezia (District Magistrate, Venice) decided that, to determine the issue before him, it was necessary to interpret certain Community provisions and therefore referred several questions to this Court for a preliminary ruling, including in particular the question whether 'the national law of a Member State and/or a contract governed by private law which limits the duration of the employment relationship to a predetermined period of five years is compatible with Article 48(2) of the EEC Treaty, inasmuch as the free movement of workers within the Community entails and requires the abolition of any discrimination, and the derogation from the general rule in force in Italy concerning the duration of employment relationships would appear to be discriminatory'.

In reply to that question the Court held, in Case 33/88 *Allué and Coonan* v *Università degli Studi di Venezia* [1989] ECR 1591, that

'Article 48(2) of the EEC Treaty precludes the application of a provision of national law imposing a limit on the duration of the employment relationship between universities and foreign language assistants where there is, in principle, no such limit with regard to other workers.'

When the same case came before it, the Corte Costituzionale held, by the judgment of 9/23 February 1989 cited above, that Article 28 of the Presidential Decree was contrary to the Constitution only in so far as it provided for a maximum duration of the employment relationship in question.

It appears from the order for reference that, since the judgment in Case 33/88, the Italian courts (the Pretori of Trieste, Padua and Parma) have, in several cases, interpreted the said judgment as meaning that the third paragraph of Article 28 of the Presidential Decree is incompatible with Article 48 of the Treaty both in so far as it limits the duration of the contract to one year and also in so far as it limits the maximum duration of the employment relationship to five years, whereas the Corte di Cassazione has held in identical cases, in particular in a judgment (Combined Civil Chambers) of 19 April 1990, that the Court of Justice regarded only the provision concerning the five-year maximum term of the disputed contracts as incompatible with Community law.

In those circumstances, the national court considers it appropriate to make a further reference to the Court of Justice to give a ruling on the interpretation of its judgment in Case 33/88 and to state whether Article 48 of the Treaty precludes the application of the whole of the third paragraph of Article 28 of the Presidential Decree.

In support of that interpretation, which the national court favours, it cites the Advocate General's Opinion in Case 33/88 from which it appears that the Court was asked to rule on both points (see point 17 of the Opinion) and that all the Italian Government's submissions in justification of the restriction on the duration of contracts and of the fixed maximum duration of the employment relationship were taken into account and examined.

In view of these differences of interpretation, the Pretore di Venezia asked the Court, by order of 4 October 1991,

'to give a preliminary ruling, pursuant to Article 177 of the EEC Treaty, on the interpretation of the judgment which it delivered on 30 May 1989 in Case 33/88 in which it ruled that "Article 48(2) of the EEC Treaty precludes the application of a provision of national law imposing a limit on the duration of the employment relationship between universities and foreign-language assistants where there is, in principle, no such limit with regard to other workers", and to state whether Article 48(2) of the EEC Treaty also precludes the application of the third paragraph of Article 28 of Presidential Decree No 382 when it stipulates that contracts cannot be of more than one year's duration.'

As a result of her letter of 26 November 1985 informing the University that she was pregnant, she was informed that a new contract could not be concluded for 1985/86. In spite of the termination of her pregnancy by a miscarriage, renewal of her contract was refused for that year and for 1986/87.

In both cases the plaintiffs in the main proceedings have, by decision of the Pretore di Parma, obtained provisional reinstatement as foreign-language assistants pending a decision by the court on the substance of the case.

(b) Cases C-331/91 and C-332/91

It appears from the written observations submitted to the Court that Beatrice Sellinger, Rosalba Del Maestro and Gillian Mansfield, all three British nationals and the plaintiffs in the main proceedings in Case C-332/91, worked as foreign-language assistants at the Università degli Studi di Parma ('the University') from the 1980/81 academic year to the end of the 1985/86 academic year on the basis of annual contracts within the meaning of Article 28 of the Presidential Decree. Their contracts were not renewed thereafter, pursuant to the third paragraph of Article 28.

Susanne Herman Barta, a German national and the plaintiff in the main proceedings in Case C-331/91, held a similar post in the same University from the 1981/82 academic year to the end of the 1984/85 academic year or, more precisely, until 9 December 1985.

Just as in Case C-259/91, the plaintiffs in the main proceedings here ask the Pretore to declare that their contracts have been concluded for an indeterminate period and that they are entitled to the continuation of their employment relationships, and to order the University to pay them the salary due.

In the opinion of the court making the reference, the Court of Justice of the European Communities did not confine itself, in its judgment, to the question of the maximum duration of the posts concerned, as the relevant provision had in the meantime been found to be contrary to the Constitution. The national court considers that the Court of Justice ruled to the effect that the provision imposing a one-year limit on the contracts in question is contrary to Article 48 of the EEC Treaty, given that in the Italian legal system there is a general principle that an employment relationship is secure in respect of time, as appears from Law No 230 of 18 April 1962.

According to the national court, there appears to be no substantive reason which would justify a fixed-term contract in so far as there is no conflict between the indeterminate duration of the contract and the University's option of ending it if there are too many foreign-language assistants in relation to actual requirements, by using the device of terminating the contract on the basis of the general rules concerning dismissal for just cause or on justified grounds (Law No 606/1966).

However, the Pretore stresses that the Corte di Cassazione, pointing out that in Italian law there is a general principle which permits a fixed term for employment relationships if there are valid reasons expressly provided for by law or by collective agreements, gave a restrictive interpretation of the Court's judgment in Case 33/88, by limiting the incompatibility which it found to exist to the provision concerning the six-year maximum duration for the contract of a foreign-language assistant.

For the court making the reference, however, there is no doubt that the issue discussed in Case 33/88 concerned both the one-year term and the maximum duration of the contract, as shown by the Opinion of the Advocate General (point 24).

By two orders of 14 November 1991, the Pretore di Parma referred a question to the Court in the following terms:

'... requests the Court of Justice of the European Communities pursuant to Article 177 of the EEC Treaty to give a ruling on the scope and the interpretation of its judgment of 30 May 1989 in Case 33/88 in which it ruled (in paragraph 2 of the operative part) that "Article 48(2) of the EEC Treaty precludes the application of a provision of national law imposing a limit on the duration of the employment relationship between universities and foreign-language assistants where there is, in principle, no such limit with regard to other workers", and to state

"whether Article 48(2) of the Treaty, as interpreted by the Court of Justice in its judgment of 30 May 1989 in Case 33/88, precludes the application of a national law of a Member State (in this case the third paragraph of Article 28 of Italian Presidential Decree No 382/1980) where it limits the duration of a contract governed by private law to one year and therefore provides for its duration to be limited in time, whilst other workers of that Member State are in general — and as a rule — guaranteed security of tenure by Law No 230 of 18 April 1962, since it is impossible to identify in the present case any specific features of the relationship which are such as to justify a derogation from the aforesaid general principle".'

3. *Procedure before the Court*

The order of the Pretore di Venezia (Case C-259/91) was received by the Court Registry on 11 October 1991. The two orders of the Pretore di Parma (Cases C-331/91 and C-332/91) were received by the Court Registry on 19 December 1991.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the

European Communities, written observations were submitted in Case C-259/91 on 15 January 1992 by the Commission of the European Communities, represented by Enrico Traversa, of its Legal Service, acting as Agent, on 22 January 1992 by the Italian Republic, represented by Professor Luigi Ferrari Bravo, Head of the Department for Contentious Diplomatic Affairs at the Ministry for Foreign Affairs, acting as Agent, assisted by Pier Giorgio Ferri, Avvocato dello Stato, acting as Agent, and on 27 January 1992 by the plaintiffs in the main proceedings, represented by Fausto Capelli, of the Milan Bar, and Maria Virgilio, of the Bologna Bar, and, in Cases C-331/91 and C-332/91, on 15 April 1992 by the Commission of the European Communities, represented by Enrico Traversa and Dimitrios Goulossis, of its Legal Service, acting as Agents, on 16 April 1992 by the Italian Republic, represented by Professor Luigi Ferrari Bravo, assisted by Pier Giorgio Ferri, acting as Agents, and on 18 May 1992 by the plaintiffs in the main proceedings, represented by Fausto Capelli and Maria Virgilio.

By order of 28 January 1992 Cases C-331/91 and C-332/91 were joined for the purposes of the written and oral procedure and the judgment. By order of 18 June 1992 these two cases and Case C-259/91 were joined for the purposes of the oral procedure and the judgment.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the procedure without any preparatory inquiries.

II — Summary of the written observations submitted to the Court

According to the *plaintiffs in the main proceedings* in the three cases in question, the Court has already found in its judgment in Case 33/88 that the limitation of the duration of the contracts concerned to one year is incompatible with Community law.

In this connection they observe that in that judgment the Court carefully examined and then dismissed (see paragraphs 13 to 17 of the judgment) the Italian Government's arguments seeking to justify the limits on the duration of contracts laid down by Article 28 of the Presidential Decree, namely the need to have foreign-language assistants with an up-to-date knowledge of their mother tongue, the need to terminate contracts with assistants on grounds of lack of ability and the need to restrict the number of foreign-language assistants according to the number of students wishing to take these courses. Consequently the Court ruled out the possibility that particular features in the case of foreign-language assistants could justify limits on the duration of their posts.

The plaintiffs in the main proceedings consider that it is clear that the questions referred to the Corte Costituzionale and to the Court of Justice concerned in essence the same matter, namely the two limits laid down by Article 28 of the Presidential Decree. Thus the Corte Costituzionale found that the provision relating to the maximum duration of contracts was unconstitutional and that the rule concerning the one-year duration of the employment relationship was in conformity with the Constitution. It would have been illogical for the Pretore di Venezia to raise doubts as to both limits before the Corte Costituzionale and, on the other hand, to question only the

restriction relating to the maximum duration of the appointments before the Court of Justice.

The fact that the Court of Justice took account of the one-year limit on contracts is confirmed by the Advocate General's statement, in point 17 of his Opinion, that there are three aspects of the difference in treatment, one being 'the conclusion of a contract limited to *one* academic year'. The plaintiffs in the main proceedings take the view that the Advocate General's Opinion must be regarded as an integral part of the judgment itself.

The fact that the Court focused its attention, in certain passages of that judgment, on the maximum duration of six years for the employment relationship in question is to be explained by the facts of the case in the main proceedings, but does not invalidate the conclusion that the Court's judgment covered every aspect of the legal situation of foreign-language assistants.

According to the plaintiffs in the main proceedings, the situation of foreign-language assistants in Italy must also be taken into account.

First, the statement in the judgment of the Corte Costituzionale of 9 February 1989, that 'the idea underlying Article 28 is that these are foreigners temporarily transferred to Italy, usually for reasons of studying' is incorrect if only because almost all foreign-language assistants have held their posts for more than six years.

Likewise, according to the plaintiffs in the main proceedings, the Corte di Cassazione referred, in that judgment, to the wrong kind of foreign-language assistant. In reality, a distinction should be drawn between foreign-language assistants within the meaning of Article 28 of the Presidential Decree and those of other European countries. Whereas in Italy the foreign-language assistants covered by Article 28 are to be distinguished from those on exchange, in the other Member States there is only one kind of foreign-language assistant, the exchange assistant.

In addition, the Italian university system differs radically from that of other European countries. In Italy the number of foreign-language assistants (disregarding exchange assistants) is greater than in the other Member States and, above all, whereas in other European countries there are more permanent teaching staff than temporary staff, in Italy there are approximately 10 foreign-language assistants for one member of the teaching staff.

Finally, the plaintiffs in the main proceedings consider that unlimited duration of employment relationships is the rule and that any exception to that principle must be justified by particular situations, as the Corte Costituzionale found in its judgment of 9 February 1989.

Consequently, the system applying to foreign-language assistants should be one which imports security into the employment relationship.

The *Italian Republic* considers that the Court's judgment in Case 33/88 shows clearly that the limit on the duration of the employment relationship of foreign-language assistants conflicts with Article 48(2) of the

Treaty only because such a limit does not exist in principle for other workers (paragraph 12 of the judgment). Furthermore, the Court found that this limit was an exclusive feature of the employment relationship of foreign-language assistants and that it did not arise with regard to similar university posts (paragraph 16).

The Italian Government concludes that the Court regarded only the provision limiting the post in question to six years as being contrary to Article 48 of the Treaty, and not the provision laying down that contracts must be for a one-year renewable term.

Regarding the latter rule, the Italian Government observes that universities were empowered by the Presidential Decree to appoint foreign-language assistants in order to meet the actual need for foreign-language assistants. The power to conclude such contracts is thus subject to two conditions, namely the presence of a certain number of students taking the language course in order to comply with the ratio of one assistant to 150 students, and the existence of the funds necessary to pay the assistants, which are provided by the annual allocation by the State of the available funds among the different universities.

Those conditions may vary from one academic year to the next. After an assistant has been appointed for a particular language, there may be fewer students taking the teaching course for that language in the following year. Moreover, the numbers on a course for another language may increase, thus necessitating the allocation of some of the funds available to seeking an assistant for that course and the consequent dismissal of the assistant for the course which attracted fewer students.

Since the Italian legislature has made those organizational choices with regard to the use of foreign-language assistants in the teaching of foreign languages, a fixed-term employment relationship is the only one which enables the two abovementioned conditions to be met when foreign-language assistants are appointed.

Furthermore, in reply to the Italian Government's argument in Case 33/88 that the six-year limit on the contracts in question is justified by the need to restrict the number of foreign-language assistants according to the needs of the university, which depend on the number of students for these subjects, the Court stated that

'... it should be noted that this aim of good management may be achieved by other means and in particular by not renewing the contracts of assistants who are not needed, in accordance with the third paragraph of section 28 of the Presidential Decree' (paragraph 17).

In the opinion of the Italian Government, as the limit on the duration of the contract is justified by the actual needs of university organization, the contested measure can be incompatible only if it appears that other categories of university staff who are not

mainly foreign nationals receive more favourable treatment in spite of the presence of requirements similar to those which justify the temporary nature of the employment relationship of foreign-language assistants. But that is not the case.

According to the Italian Government, a suitable comparison in this connection is afforded by the situation of teaching staff appointed under contract, regulated by Article 25 of the Presidential Decree.

The duties of teaching staff under contract, whose term is also limited to one year, as for foreign-language assistants, are complementary to the teaching of the established staff. They are appointed only if the funds allocated to the university permit and are recruited directly rather than by public competition (unlike established teaching and research staff, who have security of tenure because there is a fixed appropriation for these posts which is laid down by law).

The Italian Government therefore proposes that the reply to the question from the national court should be as follows:

'Article 48(2) of the EEC Treaty does not preclude the application of a national rule which provides for a term of one year, subject to renewal, for the employment relationship between universities and foreign-language assistants, where the same limit is laid down for other categories of university staff in a similar situation'.

The *Commission* submits that, in Case 33/88, not only the Advocate General (points 23 and 27 of the Opinion), but also the Court (paragraphs 13 to 17) considered the two limits provided for by Article 28 of Presidential Decree No 382 together and then rejected the Italian Government's arguments seeking to justify those limits.

In the Commission's view, the Court was never in doubt that the two restrictions on the duration of the contracts amounted to discrimination prohibited by Article 48 of the Treaty, nor did the Italian Government deny that they were discriminatory, although it attempted to justify the measures in question (see points 20 and 23 of the Advocate General's Opinion).

In this connection the Commission refers to Case 225/85 *Commission* v *Italy* ECR 2625, in which the Italian Republic was condemned merely for having recruited scientific researchers from other Member States on fixed-term contracts, which was not the case with regard to researchers of Italian nationality. However, in the present case the difficulty arises from the fact that in the Italian university system there are at present no Italian-language assistants with tasks identical to those of foreign-language assistants.

On this point the Commission stresses that in Case 33/88 it tried to show, in paragraph 14 of its observations, that the situation of foreign-language assistants was at least comparable with that of 'university researchers' from the viewpoint of actual tasks. In the Commission's view, the Court avoided making a detailed comparison of the two categories of Italian university staff and merely

observed that Italian law did not impose a limit on the duration of the employment relationship 'for other workers', that is to say all Italian workers whether in the public or the private sector (see also points 19 and 21 of the Opinion of the Advocate General).

However, the Commission considers that, in deciding as it did, the Court agreed with the ruling proposed by the Commission, that where absolute security of employment is ensured for all national workers either by permanent public posts or by private-law contracts of unlimited duration, the provision of fixed-term contracts to regulate an employment relationship constitutes discrimination which is prohibited as such by Article 48(2) of the Treaty if the measure in question particularly affects nationals of other Member States.

In this context the Commission adds that the reasoning followed by the Corte di Cassazione, in particular in its judgment of 19 April 1990, that, when assessing the situation of foreign-language assistants in Italy, it must be borne in mind that in other EEC countries the employment relationship of foreign-language assistants is regulated as a fixed-term relationship, cannot be accepted. In order to determine the existence of discrimination based on nationality, a comparison should be made with the legal position only of other workers who are nationals of the State concerned, and considerations of reciprocity between Member States should be disregarded.

In the Commission's view, it therefore remains to be considered whether the Court's dismissal of the Italian Government's arguments seeking to justify the contested measure — in which the Court does not distinguish between the two limits laid down by Article 28 — may apply only to the limit on the maximum duration of the contract.

As regards the need for foreign-language assistants with an up-to-date knowledge of their mother tongue, it is clear from paragraph 14 of the judgment in Case 33/88 ('... after working for six years ...') that this requirement could logically apply only to the limit on the maximum number of renewals of one-year contracts.

As regards the need to be able to terminate the contracts of foreign-language assistants who no longer have the necessary skills, the Court compared this requirement with the six-year limit on holding the posts in question (paragraph 16 of the judgment). The Court seems to have taken the view that there was no possible justifying link between the verification of linguistic knowledge and the one-year term of the contracts. In any event, as the Advocate General remarked in point 27 of his Opinion, 'if their ability were to deteriorate or they failed to keep up with developments in their mother tongue, this would undoubtedly constitute a ground for dismissal, even in the case of a contract of employment concluded for an indeterminate period'.

With regard to the need to limit the number of foreign-language assistants according to the needs of the university, in theory the contested measure can make it possible to limit the number of such assistants according

to the number of students wishing to take those courses. In practice, however, the real problem, in view of the substantial increase in the number of students interested in the languages of other Member States, lies in appointing a constantly growing number of foreign-language teachers. In any event, the legal obligation to conclude one-year contracts only is disproportionate in relation to the desired objective, as the Court itself stated.

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

Finally, if the Italian Republic is once again adducing the arguments concerning financial costs which it put forward in Case 33/88, the Commission refers likewise to the Opinion in that case of the Advocate General, who stated that 'it has not been shown that the conclusion of contracts for an indeterminate period — which could be terminated — should give rise to higher costs than contracts for a determinate period, or why that should be the case'.

The Commission therefore considers, in substance, that:

(a) as in Case 225/85, cited above, the provision of contracts of limited duration for nationals of other Member States appointed as foreign-language assistants at Italian universities constitutes unfavourable treatment by comparison with the job security enjoyed by all Italian salaried workers whether in the public or the private sector, particularly in relation to the legal position of university teaching staff who have duties similar to those of foreign-language assistants;

(b) that unfavourable treatment, arising from the precarious nature of an employment relationship which is regulated entirely by contracts for one year, is not justifiable on objective grounds inherent in the organization of university teaching in Italy;

(c) in any event, even if it is accepted that the organization of university teaching requires a degree of flexibility when appointing foreign-language assistants, the means used by the Italian legislature, in stipulating in all cases that contracts shall be valid for only one academic year, is disproportionate by comparison with the objective pursued;

(d) in the situations referred to in points (b) and (c) above, it appears that the current wording of Article 28, paragraph 3, of

the Presidential Decree is incompatible with Article 48(2) of the EEC Treaty;

and it asks the Court to give the following reply to the question from the national court:

'Article 48(2) of the Treaty precludes the application of a provision of national law on the basis of which the employment relationship between universities and foreign-language assistants is governed by contracts of limited duration where there is, in principle, no such limit with regard to other workers.'

J. C. Moitinho de Almeida

Judge-Rapporteur