OPINION OF ADVOCATE GENERAL LÉGER
delivered on 5 March 1996 *

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1. In the Treaty-infringement proceedings commenced by it on 25 October 1994, the Commission claims that the Court should:

— declare that, by imposing a Greek nationality condition for access to employment:

(a) in public, semi-public or municipal undertakings and companies distributing water, gas and electricity,

(b) in the operational sectors of the public health service,

(c) as teachers in nursery, primary and secondary schools and higher educational establishments and universities subject to the Ministry of National Education,

(d) in air and sea transport services, companies or organizations,

(e) in the Greek national railways (OSE) and the public and municipal bodies, companies and undertakings providing services in public, city and intercity transport,

(f) as scientific and non-scientific staff of public research centres for non-military purposes,

(g) in public and semi-public bodies and undertakings providing postal (ELTA), telecommunications (OTE) and radio and television broadcasting (ET) services, and,

(h) as musicians in the "Ethniki Lyriki Skini" (Athens Opera), and in municipal and local orchestras,

the Hellenic Republic has infringed its obligations under Article 48 of the EEC Treaty [1] and Articles 1 and 7 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, [2]

— order the Hellenic Republic to pay the costs.

2. In the course of the pre-litigation procedure, the Hellenic Republic did not initially contest the analyses contained in seven of the eight letters before action sent by the Commission. It did not reply to the eighth letter concerning the Ethniki Lyriki Skini and the municipal and local philharmonic orchestras.

3. In its reply to the first seven letters before action, it stated that:

— it had taken the initiative to draw up a list of the difficulties which might flow from the elimination of discrimination on grounds of nationality for access to posts in the public sector;

— the procedures for the application of Article 48 of the Treaty, and in particular those concerning the exception provided for in Article 48(4) as interpreted by the Court of Justice, had already been included in the objectives of the first programme for modernization of the administration, 1992/1994;

— to attain that objective, it had instructed a special committee to study and prepare for the changes to be made to Greek legislation, and to determine, first, the public posts to which access would be possible and, secondly, those for which free access should not be available.

4. In response to the seven reasoned opinions following those letters before action, the Hellenic Republic notified to the Commission a draft law on access for Community

1 — The application refers, incorrectly in my view, to Article 48 of the *EC* Treaty rather than the *EEC* Treaty, even though the reasoned opinions were issued before 1 November 1993, the date on which the Treaty on European Union entered into force, and the existence of a failure to fulfil obligations under Article 48 must, in principle, be assessed as at the time of those opinions. The difference of wording involved is merely formal, in so far as Article 48 has not been amended. Such a difference might, on the other hand, entail consequences for questions of substance if the provisions referred to in the application had been amended.

2 — OJ, English Special Edition 1968 (II), p. 475.

nationals to posts in the public sector, indicating that the draft was to be put to parliamentary vote in February 1993.

5. An eighth reasoned opinion, concerning the Ethniki Lyriki Skini and the local and municipal philharmonic orchestras, drew no response.

6. Since no national measure was taken within the periods set by the reasoned opinions, the Commission commenced the present action.

7. At present, the Hellenic Republic contends that the application should be dismissed. However, at the end of its rejoinder it states that, notwithstanding its submissions, it 'is continuing to examine the possibilities and means of giving effect to the principles of Article 48 in the public service'.

8. It seems to me that this action, like the two others before the Court, [3] places the Court at the crossroads of several trends in case-law. This should prompt the Court to review its present case-law and draw the appropriate consequences regarding the matter of exceptions to freedom of movement for workers permitted by Article 48(4) of the Treaty. In that respect, the Hellenic Republic requests that the Court exclude any analysis by entire sectors and opt for a post-by-post analysis.

9. I shall first (I) describe the legal background to the dispute, and then (II) consider whether the Treaty-infringement proceedings are well founded.

I — The legal background to the dispute

10. After (A) outlining the Community provisions relied on by the Commission, I shall (B) give an overview of the Court's case-law in this area. On the basis of that case-law, the Commission (C) decided to take 'systematic action', leading to (D) objections to various provisions of Greek national law.

A — *The Community provisions*

11. Article 48(1) to (3) of the Treaty lay down the principle of freedom of movement for workers and its corollary, the abolition of

3 — See my separate Opinions of today's date in Case C-473/93 *Commission* v *Luxembourg* [1996] ECR I-3207, I-3209 and Case C-173/94 *Commission* v *Belgium* [1996] ECR I-3265, I-3267.

any discrimination on grounds of nationality between workers of Member States as regards employment, remuneration and other conditions of work and employment.

12. Article 48(4) provides:

'The provisions of this article shall not apply to employment in the public service'.

13. Article 1 of Regulation No 1612/68 provides, with regard to access to employment:

'1. Any national of a Member State shall, irrespective of his place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State.

2. He shall, in particular, have the right to take up available employment in the territory of another Member State with the same priority as nationals of that State.'

14. Article 7(1) and (2) of the same regulation, concerning employment and equality of treatment, provide:

'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 he become unemployed, reinstatement or reemployment.

2. He shall enjoy the same social and tax advantages as national workers'.

B — *The Community case-law*

15. In its judgment in *Sotgiu*, [4] the Court held [5] that '[t]aking account of the fundamental nature, in the scheme of the Treaty, of the principles of freedom of movement and equality of treatment of workers within the Community, the exceptions made by Article 48(4) cannot have a scope going beyond the aim in view of which this derogation was included'.

4 — Case 152/73 *Sotgiu* v *Deutsche Bundespost* [1974] ECR 153.
5 — Paragraph 4.

16. The Court thus held that that provision was to be interpreted *strictly*. [6]

17. It added, [7] to clarify the scope of the exception:

'In the absence of any distinction in the provision referred to, it is of no interest whether a worker is engaged as a workman [ouvrier], a clerk [employé] or an official [fonctionnaire] or even whether the terms on which he is employed come under public or private law.

These legal designations can be varied at the whim of national legislatures and cannot therefore provide a criterion for interpretation appropriate to the requirements of Community law'.

18. In a judgment of 17 December 1980, [8] the Court emphasized: [9]

'the concept of public service within the meaning of Article 48(4) ... requires uniform interpretation and application throughout the Community.

...

the demarcation of the concept of "public service" within the meaning of Article 48(4) cannot be left to the total discretion of the Member States'.

19. The concept of public service is thus a matter of Community law.

20. In the same judgment, the Court held: [10]

'[Article 48(4)] removes from the ambit of Article 48(1) to (3) 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

6 — See also Case 225/85 *Commission* v *Italy* [1987] ECR 2625, paragraph 7.

7 — *Sotgiu*, paragraph 5.

8 — Case 149/79 *Commission* v *Belgium* [1980] ECR 3881.

9 — Paragraphs 12 and 18.

10 — Paragraph 10, emphasis added.

State and reciprocity of rights and duties which form the foundation of the bond of nationality'.

21. A *functional* [11] definition was thus given of posts forming part of the public service.

22. The Court thus excluded any purely *organic* definition of the concept of public service, emphasizing that [12] '... the effect of extending the exception contained in Article 48(4) to posts which, whilst coming under the State or other organizations governed by public law, still do not involve any association with tasks belonging to the public service properly so called, would be to remove a considerable number of posts from the ambit of the principles set out in the Treaty and to create inequalities between Member States according to the different ways in which the State and certain sectors of economic life are organized'.

23. The restrictive nature of the exception in Article 48(4) was reinforced by the requirement of two cumulative conditions relating to participation in the exercise of powers conferred by public law *and* functions intended to safeguard the general interests of the State or of other public authorities. A later judgment replaced the conjunction 'and' by the conjunction 'or'. [13] However, the requirement of simultaneous fulfilment of both those conditions was maintained in the other decisions given before and after that judgment. [14]

24. In its judgment in *Commission* v *Belgium*, cited above, the Court also emphasized the restrictive nature of the exception, ruling out any prohibition debarring nationals of other Member States from the totality of posts in sectors where there is State involvement or in public authorities solely on the ground that, following promotion or transfer, the new post to which the employee might gain access would be liable to involve functions and responsibilities specific to the public service: [15]

'... in referring to posts involving the exercise of powers conferred by public law and the conferment of responsibilities for the safeguarding of the general interests of the State, Article 48(4) allows Member States to reserve to their nationals by appropriate rules entry to posts involving the exercise of

11 — That adjective was expressly used in the judgment in Case 307/84 *Commission* v *France* [1986] ECR 1725, paragraph 12: '... the criterion for determining whether Article 48(4) of the Treaty is applicable must be functional ...'.

12 — *Commission* v *Belgium*, cited above, paragraph 11.

13 — *Commission* v *Italy*, cited above, paragraph 9.

14 — *Commission* v *France*, cited above, paragraph 12; Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraph 27; Case 33/88 *Allué and Coonan* [1989] ECR 1591, paragraph 7, and paragraph 12 of the Opinion of Advocate General Lenz, who drew attention to the conjunction 'and'; and Case C-4/91 *Bleis* [1991] ECR I-5627, paragraph 6, *which expressly refers* not only to the judgment in *Commission* v *Belgium*, cited above, *but also to the judgment in* Commission v Italy, *also cited above, as a precedent requiring simultaneous fulfilment of both conditions.*

15 — Paragraphs 21 and 22, emphasis added.

such powers and such responsibilities within the same grade, the same branch or the same class.

... the interpretation ... which has the effect of *debarring* [the] nationals [of other Member States] *from the totality of posts in the public service*, involves a restriction on the right of such nationals which goes further than is necessary to ensure observance of the objectives of the provision ...'.

25. To summarize, it is to be inferred from the case-law of the Court that:

— a nationality requirement may not be imposed for access to posts which involve no direct or indirect involvement in the exercise of powers conferred by public law and functions intended to safeguard the general interests of the State or of other public authorities; the principle of freedom of movement for workers must apply to such posts;

— a nationality requirement may not be imposed even for posts which at the outset do not fulfil the conditions laid down in Article 48(4) but of which the occupants may be called on, following a transfer or promotion, to discharge functions and responsibilities specific to the public service; the Member States may reserve only those functions and responsibilities to their own nationals.

26. To date, the Court has held that the following posts do not come within the exception contained in Article 48(4):

— postal services: workers; [16]

— railways: shunters, loaders, drivers, platelayers, signalmen, office cleaners, painters' assistants, assistant furnishers, battery servicers, coil winders, armature servicers, nightwatchmen, cleaners, canteen staff, workshop hands; [17]

— municipal councils: joiners, garden hands, hospital nurses, children's nurses, crèche nurses, electricians, plumbers; [18]

16 — Implied in *Sotgiu*, cited above, paragraph 4, fourth subparagraph.

17 — Case 149/79 *Commission* v *Belgium* [1982] ECR 1845.

18 — Ibid.

— public hospitals: male and female nurses; [19]

— public education: trainee teachers, [20] secondary school teachers, [21] foreign language assistants in universities; [22]

— civil research: researchers. [23]

C — *The action taken by the Commission*

27. The present proceedings relate to the final phase in 'systematic action' taken by the Commission on the basis of communication 88/C 72/02. [24]

28. It thereby sought to eliminate restrictions on grounds of nationality which in each Member State hinder the access of workers from other Member States to posts in certain specific parts of the public sector, on the basis of Article 48(4) of the Treaty.

29. It was to deal, as a matter of priority, with the following areas:

— bodies responsible for administering commercial services (for example public transport, electricity and gas supply, airline and shipping companies, posts and telecommunications, radio and television companies);

— public health care services;

— teaching in State educational establishments;

— research for non-military purposes in public establishments.

30. The Commission stated that the work and responsibilities involved in employment in those areas were for the most part so remote from the specific activities of the public service as defined by the Court of Justice that they would only in very rare cases be covered by the exception in Article 48(4)

19 — *Commission* v *France*, cited above.
20 — *Lawrie-Blum*, cited above.
21 — *Bleis*, cited above.
22 — *Allué and Coonan*, cited above.
23 — *Commission* v *Italy*, cited above.
24 — Freedom of movement of workers and access to employment in the public service of the Member States — Commission action in respect of the application of Article 48(4) of the EEC Treaty (OJ 1988 C 72, p. 2).

of the Treaty. It considered that each of those activities also existed in the private sector, to which Article 48(4) did not apply, or might be exercised in the public sector without the imposition of nationality requirements.

31. The Commission indicated that it intended informing the Member States concerned of the conclusions of its review of the sectors chosen and requesting them to open access to employment in those sectors to workers who are nationals of other Member States. It relied on active and effective cooperation by the Member States with a view to avoiding proceedings wherever possible. It reserved the right, if necessary, to institute Treaty-infringement proceedings.

32. On conclusion of its correspondence with the Member States, it found that most of them had adopted legislative measures and/or rules to bring their national law into line with Community law, but that three States had either not commenced or not completed any legislative procedure to that effect.

33. Consequently, it decided to institute Treaty-infringement proceedings against each of those three Member States, including the Hellenic Republic. [25]

25 — Regarding the other two cases, see footnote 3 above.

D — *The national law at issue*

34. It appears from the documents before the Court that Greek nationality is or was required, under the conditions described below, for access to the posts in the sectors mentioned in the application.

(1) *Water, gas and electricity supply services*

35. The public, semi-public or municipal undertakings responsible for supplying water (for example EYDAP in Athens), gas (for example DEFA, a municipal gas undertaking in Athens) and electricity (DEH, a public undertaking responsible for production and distribution throughout the country) are controlled either by the State or by local authorities.

36. In the case of undertakings and companies controlled by the State, Greek nationality is required by Law No 1735/87 and by Ministerial Decree No DIPPP/F.1/116 of 7 and 8 January 1988 for access to employment in the public sector. The same condition is also imposed by the special legislation or regulations applicable to the public

undertakings concerned which set out the regulations applicable to their staff, such as for example Article 5(5) of the general staff regulations for the public electricity undertaking (DEH).

37. In the case of municipal undertakings and companies (for example DEFA), Greek nationality is required by the legislation and rules governing staff of local authorities (for example Article 260 of Law No 1188/81 and Articles 7 and 66 of Presidential Decree No 410/88), and by the internal regulations of the undertakings or companies concerned.

(2) *Public health care services*

38. Article 2(4) of Law No 1821/88, which implicitly amends Article 26 of Law No 1397/83 on the national health scheme, provides, by way of exception, for the appointment of Community nationals with knowledge of the Greek language to the posts of doctor and nurse in public hospitals.

39. Access to all other posts in public hospitals (legal persons governed by public law) or other public health facilities (health centres, and so on) is reserved to Greek nationals.

40. All those establishments in fact form part of the public sector and are consequently covered by the Greek nationality requirement laid down in Law No 1735/87 and Ministerial Decree No DIPPP/F.1/116 of 7 and 8 January 1988, referred to earlier, which cover both civil service and non-civil service staff in the public sector.

41. Moreover, Article 7 of Presidential Decree No 410/88 on recruitment under private contract of specialized technical and other technical staff and auxiliary staff in the public sector refers to the Public Service Code and, therefore, imposes the requirement of Greek nationality.

42. Finally, Article 66 of the same decree requires Greek nationality even for the recruitment under private contract of seasonal workers and those recruited for temporary needs.

(3) *Teaching in the public sector*

43. Pursuant to Article 2 of the Public Service Code, public teaching in nursery, primary and secondary schools (general, technical and vocational) falls within its scope. The Greek nationality requirement laid down generally by Article 18 of that code therefore applies to access to employment in those areas.

44. The same principle applies, pursuant to Law No 1404/83, to teaching and non-teaching staff in technical educational establishments, and, by virtue of Law No 1268/82 and Article 16(6) of the Constitution, to university teaching staff.

45. By way of exception, Article 79(7) of Law No 1566/85 which, in particular, supplements Law No 1268/82, provides for the possibility, in the absence of Greek candidates, of recruiting foreigners to certain posts (specialized scientists, assistant professors), but only under private annual contracts which are renewable once only and under which the persons concerned have no right to be members of management bodies.

46. Finally, exceptions are laid down by Articles 4 and 5 of Law No 5139/31 for teachers of foreign languages and literature teaching in universities.

(4) *Sea and air transport*

47. Until publication of Presidential Decree No 12/1992, [26] Greek nationality was required in the sea transport sector by:

— Article 4(1) of Decree-Law No 2651/53 on the composition of crews of merchant vessels, subject to exceptions laid down in Article 4(2) of the same decree-law;

— Article 5 of the Royal Decree of 1(14)/3 November 1836 on the merchant marine, as regards three-quarters of the crew of the vessel;

— Article 57 of the Maritime Code for the entry of mariners on the registers, whereas Article 59 of the same code imposed no nationality requirement for the registration of sea workers.

26 — *Official Journal of the Hellenic Republic*, 1993, part A, No 5, of 1 February 1993.

48. Articles 1 and 2 of Presidential Decree No 12/1992 provide:

'Article 1

The present presidential decree is intended to harmonize the provisions of Greek legislation and, in particular, Articles 56, 57, 87 and 88 of the Code of Public Maritime Law (Decree-Law 187/73) and the provisions of Emergency Law No 192/36, in so far as they deny access to posts in the Greek merchant marine to mariners who are nationals of Member States of the European Communities ... to conform with the provisions of Articles 7 and 48 of the EEC Treaty and Articles 1, 2, 3 and 4 of Regulation (EEC) No 1612/68 of the Council, which concern freedom of movement for workers within the Community ...

Article 2

1. Nationals of Member States of the European Communities who have the status of mariners under the legislation of their State shall have the same possibilities of access to posts on Greek merchant vessels as those available to Greek mariners under the relevant provisions of Greek legislation, with the exception of the post of master and the person lawfully designated to deputize for him.

2. To that end, where the legislation in force concerning employment in the Greek merchant marine contains the terms "Greek mariners" or "nationals" or any other term designating a person of Greek nationality, those terms shall include nationals of Member States of the European Communities who have the status of mariner under the legislation of their Member State of origin or provenance.'

49. Airline companies are in the public sector. The nationality requirement therefore applies by virtue of Law No 1735/87 and Ministerial Decree No DIPPP/F.1/116 of 7 and 8 January 1988.

(5) *Railways and urban and regional public transport*

50. Article 19(1) of the general staff regulations for the Greek railways (OSE) provides that only Greek nationals may be employed. Article 19(3) makes the recruitment, on an exceptional basis, of foreign nationals subject to conditions laid down by special laws.

51. Urban and regional transport is within the public sector.

52. The Greek nationality requirement therefore applies by virtue of Law No 1735/87 and Ministerial Decree No DIPPP/F.1/116 of 7 and 8 January 1988.

53. The same condition is laid down by the legislation and rules applicable to transport bodies, undertakings or companies, whether or not in the public sector (for example Article 8 of the staff regulations for the internal departments of the Greek electric railways, Article 15 of the staff regulations of the external departments of the same undertaking and Article 11 of the general staff regulations for the Athens electric bus company).

(6) *Scientific and technological research*

54. Pursuant to Article 16(2) of Law No 1514/85 on development of scientific and technological research, and the decrees adopted under Article 25 of that law, all members of the scientific research staff of the competent bodies must in principle possess Greek nationality.

55. By way of exception, a foreigner may be appointed manager of a national research centre if the centre has been established by an inter-State agreement containing an express provision to that effect.

56. Article 19(1)(a) of Law No 1514/85 also allows the recruitment of foreigners as visiting research experts, but only under private contracts for a term of three months to two years, renewable for an additional period of one year in exceptional cases.

57. Article 25(1)(b) provides that implementing decree-laws may make exceptions to the nationality requirement for the assessment of results of research programmes.

58. As regards technical, administrative and auxiliary staff with the status of civil servants, Greek nationality is required by virtue of Articles 20 and 21 of the Law and by the general provisions applicable to all civil servants of the State and other legal persons governed by public law (Public Service Code, etc.).

59. Finally, Greek nationality is a requirement for all contract staff of the bodies con-

cerned, pursuant to Articles 24 of Law No 1514/85, 7 of Law No 1735/87, 7 and 66 of Decree No 410/88, and to Ministerial Decree No DIPPP/F.1/116 of 7 and 8 January 1988.

(7) *Posts (ELTA), telecommunications (OTE) and radio and television (ET)*

60. Public and semi-public bodies running posts or telecommunications and radio and television services are in the public sector.

61. Greek nationality is required by virtue of Law No 1735/87 and Ministerial Decree No DIPPP/F.1/116 of 7 and 8 January 1988.

62. The same condition also applies by virtue of special legal provisions and rules laying down the staff regulations for the bodies in question (for example, Article 7 of the general staff regulations for the Greek postal service (ELTA), Article 6(1) of the general staff regulations of the OTE, and so on).

(8) *The Ethniki Lyriki Skini Opera and municipal and local philharmonic orchestras*

63. Ethniki Lyriki Skini employs only Greek nationals and excludes all foreigners, including nationals of other Member States.

64. Similarly, local authorities impose the requirement of Greek nationality for recruitment, for an indeterminate period, of musicians in municipal and local philharmonic orchestras. Thus, for example, the Mayor of Athens refused to apply to a musician in the philharmonic orchestra of that city, recruited under a fixed-term contract, Law No 1874/90, which provides for the conversion of any fixed-term employment contract into a contract of indeterminate duration, on grounds relating to the nationality of the musician concerned; the Mayor relied on Article 7 of Presidential Decree No 410/88, which requires Greek nationality for the recruitment of specialized, scientific, technical and auxiliary contract staff to work for the State, local authorities and legal persons governed by public law.

II — The existence of a failure to fulfil obligations

65. As I stated at the outset, the Court finds itself at the intersection of several trends in the development of case-law. A choice must be made, in the light of the options available (A). Once that choice is made, it must be

applied having regard to the circumstances of this case (B).

A — *Community case-law*

66. The Hellenic Republic contends that the case-law of the Court excludes any analysis based on entire sectors and in all cases calls for an analysis of each individual post (see (1) below).

67. In my view, the Court should not adopt the approach advocated by the defendant.

68. It would then be able to choose between two possible logical developments within its case-law:

— it may either consider that the burden of justifying an exception under Article 48(4) falls on the national public authorities *in all areas* of their activity and therefore, in particular, those to which these proceedings relate,

— or it may *establish a distinction* between, on the one hand, the areas which do not involve functions specific to the public service, in which case the public authorities would bear that burden, and, on the other, the areas which do involve those specific functions, in relation to which the Commission or a Community national would have to prove that a particular post did not fulfil the conditions for a post to be classified as part of the public service within the meaning of the case-law of the Court (see (2) below).

(1) *Has the case-law established the principle that posts are to be analysed individually?*

69. The action brought by the Commission displays the particular feature of undertaking a systematic analysis of several entire sectors in which the State or public authorities are involved.

70. According to the defendant, the Court has established the principle, in particular in its judgments of 17 December 1980 and 26 May 1982, both delivered in Case 149/79 *Commission* v *Belgium*, cited earlier, that a case-by-case analysis is required.

71. In its judgment of 17 December 1980, the Court did indeed state: [27]

'it is appropriate to examine whether the posts covered by the action may be associated with the concept of public service ... [that] classification depends on whether or not the posts in question are typical of the specific activities of the public service in so far as the exercise of powers conferred by public law and responsibility for safeguarding the general interests of the State are vested in it'.

72. The Court said the same in its judgment of 26 May 1982. [28]

73. However, I do not consider that there is any case-law actually requiring a post-by-post analysis.

74. It will be remembered that Case 149/79 was the one in which the Court was for the first time called on to define precisely the concept of employment in the public service. A pragmatic approach was then required for the purposes of that definition. Moreover, in the Treaty-infringement proceedings the Kingdom of Belgium was criticized for requiring or permitting to be required 'the possession of Belgian nationality as a condition of recruitment *to posts* not covered by Article 48(4) of the Treaty'. [29] In view of that wording, the Court was *obliged*, in order to give judgment, to verify whether or not the 'posts' in question were covered by Article 48(4). That is why, in the course of the proceedings, it had to ask the parties to provide it with additional information concerning the list of posts in question and then, in the interlocutory judgment of 17 December 1980, information concerning the actual nature of the functions involved in those posts.

75. As regards the subsequent judgments, referred to earlier, although they examined particular posts and not entire sectors, that was solely because the Court was giving judgment in preliminary-ruling proceedings or Treaty-infringement proceedings concerned with those particular posts.

76. The approach taken by the Community court seems to me therefore to have been defined by the particular circumstances of the cases before it rather than by the intention to establish a principle of interpretation.

77. By placing the concept of employment in the public service amongst those which are a matter of Community law, the Court

27 — Paragraph 12.
28 — Paragraph 7.
29 — Judgment of 17 December 1980, paragraph 1 (emphasis added).

sought to ensure that freedom of movement for workers and the principle of non-discrimination did not vary from time to time and from place to place.

78. If the principle were established that posts have to be considered individually, each Member State would be able in practice, and in any area of activity which it chose, to impose its national definition of public service, as long as the Commission or a Community national had not raised objections concerning one or more particular posts.

79. By thus relying on the rules on burden of proof, the Member States could mask the principle of freedom of movement with a veil of exceptions.

80. The Commission or Community nationals would bear the burden of *proving a negative, in all circumstances,* namely that the conditions for an *exception* to a Community freedom were not fulfilled. That result would be at the very least contrary to the rules governing the interpretation of principles and exceptions thereto.

81. The contribution of the Court's case-law to giving effect to one of the fundamental freedoms of the Treaty would be singularly limited, in view of the far-reaching practical effects of the way in which the burden of proof would have to be discharged.

82. Indeed, a Member State and its public authorities would be required to open up their departments only post by post, in response to proceedings brought by the Commission or Community nationals. It would thus take decades to ensure the uniform application of Community law.

83. I do not therefore share the analysis of the Court's case-law advocated by the Hellenic Republic.

84. In this case, the subject-matter of the infringement of which the Hellenic Republic is accused differs from that in the earlier cases.

85. The defendant is not charged with excluding Community nationals from specific posts. It is criticized for establishing, without specific justification, a prohibition of access to all or most of the posts in an area of activity, instead of opening up that sector to free movement subject only to

exceptions for posts which are positively, but restrictively, identified on the basis of reasoning based on the case-law definition of employment in the public service.

86. The alleged infringement is thus that the defendant adopted an improper approach, having misapplied the distinction between principles and exceptions.

(2) *Must the national public authorities justify exceptions* ab initio *in all sectors of their activity, or must a distinction be drawn according to sectors?*

87. Given that a departure from earlier case-law appears to be out of the question and establishment of the principle of analysis on a post-by-post basis is liable considerably to reduce the impact of the Court's case-law as it now stands, it is still necessary to identify the logical consequences of that case-law regarding the various areas of activity of the State and public authorities.

88. It is first necessary to consider (a) the question of a distinction according to areas of activity and then (b) to suggest general outlines for such a distinction.

(a) The question of a distinction according to sectors of activity

89. As indicated earlier, [30] the Court has adopted a *functional* definition of employment in the public service.

90. It might be deduced from a functional approach *relating to posts alone* that the Court's definition of an exception to freedom of movement must be applied uniformly to all areas of activity of the public authorities.

91. By virtue of the rules for the application of principles and exceptions thereto, the public authorities would in all sectors have to justify *ab initio* the exceptions relied on by them. Access for nationals of other Member States would only be prohibited for the posts positively indicated by the public authorities as fulfilling the conditions of the Community definition, subject to subsequent review by the national courts and, if necessary, the Community court.

92. That analysis appears attractive in terms of legal logic, because it involves applying

30 — Paragraph 21 and the footnote thereto.

the same reasoning without distinction to all activities of the State and at the same time observes the rule that exceptions must be strictly interpreted and the rule that a person claiming an exception must prove it.

93. It would have the advantage of guaranteeing equality of access for Community citizens, whether or not nationals of a given State, to the major part of any activity unconnected with the specific activities of the administration, since the exceptions validly based on Article 48(4) of the Treaty constitute a minority.

94. However, it would entail the disadvantage, in the areas of activity specific to the public service, of compelling the public authorities concerned to draw up a list of a very large number of exceptions. In those areas of activity, the number of individual posts fulfilling the case-law definition of employment in the public service is large and by far exceeds the number of posts to which the principle of freedom of movement applies.

95. The imposition of such a constraint upon the public authorities might not perhaps be the best legal approach.

96. I therefore do not suggest that the Court adopt that approach, since there appears to be an alternative, namely drawing a distinction according to the areas of activity involved.

97. It has been apparent, since the first judgment in *Commission* v *Belgium*, cited above, [31] that the Court had analysis by sectors in mind:

'However, determining the sphere of application of Article 48(4) raises special difficulties since in the various Member States *authorities acting under powers conferred by public law have assumed responsibilities of an economic and social nature or are involved in activities which are not identifiable with the functions which are typical of the public service yet which by their nature still come under the sphere of application of the Treaty*'.

98. When giving judgment in each case, the Court did not fail to raise the incidental question, *by way of background*, whether *the general activity of the sector* was associated with the specific activities of the public service. For example, in the cases of nurses and teachers, the Court necessarily considered the question whether, first, the health care characteristic of the public hospital sector

31 — Paragraph 11, emphasis added.

and, secondly, the teaching activities constituting the essence of the public education sector were activities specifically associated with the public service.

99. Now the Court is expressly called upon to consider a Treaty infringement in relation to entire sectors.

100. If the action is to be successful, the implication is that the Court must expressly uphold the principle of analysis by sectors which it merely touched upon in 1980 in the first *Commission* v *Belgium* case, cited above.

101. I am in favour of that course of action.

102. I suggest that the Court develop its reasoning in two stages.

103. The first involves *analysis of the general activity of the sector* concerned, and determination of its consequences as regards the burden of proof.

104. It may be described as follows:

— if the activity in a sector is an activity specifically associated with the public service, it must be conceded that most of the posts which it comprises fulfil the conditions of the Community definition of employment in the public service; consequently, the sector will be regarded as falling a priori within the scope of Article 48(4) of the Treaty and it will be for the Commission or a Community national to establish that the conditions for an exception are not satisfied;

— if on the contrary the activity in a sector is remote from the specific activities of the public service, it must follow that most of the posts which it comprises do not fulfil the conditions of the Community definition; in such a case, the sector will be regarded as falling a priori within the scope of Article 48(1) to (3), which provide for freedom of movement of workers, and it will be for the national public authorities to show, for specific posts, that in fact the requirements of Article 48(4) are fulfilled.

105. The second stage, in the event of a dispute concerning a particular post, involves *analysis of the functions inherent in it*: the national court or the Community court hearing the case will verify, in accordance with

the rules as to sharing the burden of proof, whether the post involves direct or indirect participation in the exercise of powers conferred by public law and functions intended to safeguard the general interests of the State or of other public authorities, within the meaning of the settled case-law of the Court.

106. Let us consider directly the objection raised by the Hellenic Republic, which is essentially that it is not permissible to apply to a given sector a *presumption* of the applicability of either Article 48(1) to (3) or Article 48(4) according to the nature of the general activity in that sector.

107. In that connection, it is important to bear in mind that, where a course of action is advocated which allows only a post-by-post analysis, to the exclusion of any analysis by sectors, it is necessarily *presumed* that Article 48(4) is a priori applicable *to any post, whatever the sector* to which it belongs, *provided that it is associated with action by national public authorities.* By virtue of that presumption, it is left to those authorities to determine initially the scope of an *exception*, merely by their decision to make a sector subject to the State or a public authority. It seems to me therefore to be more debatable than the presumption based on the objective finding that the activity of a particular sector does or does not involve activities specific to the public service and that, consequently, most of the posts concerned do or do not meet the conditions of the Community definition of public service.

108. Moreover, I think it is relevant to bear in mind that the Court has already, in connection with Articles 30 and 36 of the Treaty, had recourse, in a very comparable manner, to two-stage reasoning involving a presumption.

109. It did so in two judgments of 21 March 1991 in *Delattre* [32] and *Monteil and Samanni.* [33]

110. The issue there was a pharmacists' monopoly, in so far as it was liable to constitute a measure having an effect equivalent to a quantitative restriction on imports, within the meaning of Article 30 of the Treaty. [34]

111. In considering the justification for the monopoly, the Court established a distinction between two types of goods, [35] namely 'medicinal products' and other products, such as those known as 'para-pharmaceutical products'.

32 — Case C-369/88 [1991] ECR I-1487.

33 — Case C-60/89 [1991] ECR I-1547.

34 — See paragraphs 50 and 51 of *Delattre* and paragraphs 37 and 38 of *Monteil and Samanni.* The Court's judgment in Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097 was then able to rule out the possibility that a marketing monopoly, in so far as it related to the arrangements for selling a product, might come within the scope of Article 30 of the Treaty. However, this does not in any way detract from the fact that, in the two judgments in question, the Court resorted to a presumption in relation to Article 30 of the Treaty concerning one of the major freedoms recognized by it along with freedom of movement for workers.

35 — In this case too, I suggest a distinction be drawn between two types of activity.

112. With regard to medicinal products, the Court held that, having regard to the 'very particular nature of the product and the market involved', [36] the pharmacists' monopoly might 'be *presumed* to constitute an appropriate way of protecting public health', [37] in other words it might come within the exception contained in Article 36 of the Treaty. That presumption having been made, the Court stated that '*evidence to the contrary* [might] be produced with respect to certain products whose use would not involve any serious danger to public health and whose inclusion within the pharmacists' monopoly would seem manifestly disproportionate ...'. [38]

113. With regard to the other products, the Court held on the contrary that 'if pharmacists are granted a monopoly of other products ..., the need for such a monopoly in order to protect public health or consumers must ... *be established in each individual case*'. [39]

114. With regard to medicinal products, the Court thus placed on the Commission or a trader the burden of proving the contrary. As far as the other products were concerned, it held that Member States were responsible for establishing positively that the pharmacists' monopoly, as an exception to the free movement of goods, was justified by the need to protect public health within the meaning of Article 36 of the Treaty.

115. The analogy between that analysis and the course of action which I suggest seems to me to be such that there need be no hesitation.

(b) The broad outlines of a distinction according to sectors of activity

116. The classification made by the Commission in its notice 88/C 72/02, referred to earlier, provides a useful point of reference for a distinction between the sectors of activity of the national public authorities.

117. Like the Commission, I consider that, within the meaning of the case-law of the Court, the specific activities associated with a public service exercised by the State and the public authorities are essentially linked with national defence, internal security, public finance, justice and foreign affairs, and posts in State ministries, regional or local authorities, other bodies of a similar nature and central banks. In those sectors, the activities carried out revolve specifically around a political or judicial authority.

36 — Paragraph 54 of *Delattre* and paragraph 41 of *Monteil and Samanni*.

37 — Paragraph 56 of *Delattre* and paragraph 43 of *Monteil and Samanni*, emphasis added.

38 — Ibid.

39 — Paragraph 57 of *Delattre* and paragraph 44 of *Monteil and Samanni*, emphasis added.

118. Like the Commission again, I consider that other activities are, on the other hand, remote from the activities specific to the public service, as defined by the Court. They are in particular the activities of bodies responsible for managing a commercial service (public transport by land, air or sea, water, electricity and gas supply, telecommunications, radio and television broadcasting, and so on), public health care services, teaching in State educational establishments and research for non-military purposes in public establishments. Indeed, it is clear that each of those activities also exists in the private sector or may be exercised in the public sector without the imposition of nationality requirements.

119. As regards musical performances and singing, I consider that they manifestly belong to the second category, namely activities remote from those specific to the public service.

B — *Giving effect to the choice made*

120. Let us now (1) analyse the sectors referred to in the Commission's application, so as to draw all consequences in law concerning an infringement of the Treaty by the Hellenic Republic. Before disposing of the latter point, I shall (2) examine the merits of the defendant's submissions which, in its view, mean that the action must fail.

(1) *Analysis of the sectors of activity referred to in the Commission's application*

121. Having regard to the criteria for drawing a distinction which I described earlier, [40] all the sectors of activity involved are remote from activities specific to the public service.

122. It must therefore be considered that most of the posts involved do not fulfil the conditions of the Community definition of public service. Consequently, those sectors of activity fall a priori within Article 48(1) to (3) of the Treaty. It is incumbent on the national public authorities to establish, for specific posts, that the conditions of Article 48(4) are satisfied.

123. The action to be taken by the Hellenic Republic should therefore be to grant access to the sectors in question to Community nationals, subject only to exceptions positively indicated by reference to the Community definition of public service.

40 — Paragraphs 117 to 119 above.

124. It must be pointed out that that was not the course followed by the national legislation at issue.

125. My description of positive Greek law [41] shows that, in the sectors in question, a nationality requirement is the rule and access for nationals of other Member States continues to be the exception.

126. The exceptions relate essentially to certain types of post.

127. In the light of my interpretation of Article 48(4) of the Treaty, the Hellenic Republic is therefore liable to be found guilty of a breach of its Community obligations, although in terms different from those of the application, the overly general wording of which is liable to give the incorrect impression that Greek law at present allows no exceptions to the nationality requirement.

128. Before reaching that conclusion, I must consider the pleas on the basis of which the defendant State argues against the Commission.

41 — Paragraph 35 et seq.

(2) *The defendant's submissions*

129. The Hellenic Republic advances four specific pleas in its defence. The first (a) is based on a provision of its Constitution. The second (b) relates to domestic political difficulties. The third (c), concerning the maritime transport sector, is based on Presidential Decree No 12/1992, cited earlier. In its fourth plea (d), the defendant relies on a national judicial decision and an individual national administrative decision regarding the music and vocal arts sector.

(a) Article 4(4) of the Greek Constitution

130. Article 4(4) of the Greek Constitution provides that 'only Greek nationals shall be admitted to public duties of any kind, subject to exceptions made by special laws.'

131. In that regard, it need merely be pointed out that, according to settled case-law, [42] the primacy of Community law

42 — Order in Case 9/65 *San Michele* v *High Authority* [1967] ECR 27, at p. 29; and judgments in Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, paragraph 3, and Case 48/71 *Commission* v *Italy* [1972] ECR 529, paragraphs 8 and 9.

extends to all national provisions, even those of a constitutional nature.

132. Consequently, Article 4(4) of the Greek Constitution does not constitute any obstacle to a finding of breach of Treaty obligations.

133. In any event, I must emphasize that it is quite possible that the term 'public duties' used in that article could be interpreted in a manner perfectly compatible with the Court's definition of public service, in which case no constitutional reform would be required within the domestic legal system. [43]

(b) Domestic political difficulties

134. The Greek Government contends that, as part of its efforts to reconcile the 'functional' definition and the 'organic' definition of employment in the public service, it prepared a draft law on access by Community nationals to posts in the public sector, which was to be put to parliamentary vote in February 1993.

135. It adds, however, that the draft was not submitted to Parliament until April 1993 and that the parliamentary procedure could not be completed as a result of the premature dissolution of the national assembly prior to the general elections of 10 October 1993.

136. I would point out that the draft law was notified to the Commission on 1 February 1993, a date falling several months after expiry of the two-month time-limit set by the first seven reasoned opinions issued on 13 July 1992.

137. Even if the draft law had been adopted in February 1993, it could not have prevented a finding of non-fulfilment of Treaty obligations upon the expiry of the period laid down in the reasoned opinions.

138. For the sake of completeness, I should point out that domestic political circumstances cannot justify failure by a Member State to fulfil its obligations under Community law. In particular, delays in a legislative procedure, connected for example with dissolution of a parliamentary assembly, [44] cannot be relied upon. According to the Court's traditional form of words, 'a Member State may not plead provisions, practices or

43 — Moreover, the constitutional provision does not seem to have been an obstacle for the national court giving judgment in proceedings between a musician and the Mayor of Athens (a decision relied on by the Greek Government: see (d) below).

44 — See in particular Case 77/69 *Commission* v *Belgium* [1970] ECR 237, paragraphs 13 and 15; Case 94/81 *Commission* v *Italy* [1982] ECR 739, paragraphs 4 and 5; Case 221/83 *Commission* v *Italy* [1984] ECR 3249, paragraphs 8 and 9, and Case 225/86 *Commission* v *Italy* [1988] ECR 2271, paragraphs 6 and 10.

circumstances existing in its internal legal system in order to justify a failure to comply with its obligations under Community law'.

(c) Presidential Decree No 12/1992

139. With respect to the maritime transport sector, the defendant government considers that the application has become academic since the adoption of Presidential Decree No 12/1992, the text of which it notified to the Commission on 18 March 1993.

140. It states that the requirement of Greek nationality has been removed by that decree in the maritime transport sector.

141. The Commission observes that the presidential decree has removed the nationality requirement for access to posts on 'merchant vessels', with the exception of the posts of master and the person lawfully appointed to deputize for him. It is not convinced that the expression 'merchant vessels' covers all maritime transport.

142. From a reading of the text, and subject to a detailed study of the relevant national law, it seems that the decree is of general scope: Article 1 refers 'in particular', that is to say non-exhaustively, to Article 57 of the Code of Public Maritime Law and to other provisions, and Article 2(2) provides that in the legislation in force concerning employment in the Greek merchant marine, the terms 'Greek mariners' or 'nationals' must be deemed to include nationals of other Member States.

143. However, the Court will not have to deal with the question raised by the parties' differing analyses.

144. The presidential decree is dated 31 December 1992, was published in the *Official Journal of the Hellenic Republic* of 1 February 1993 and, pursuant to Article 4 thereof, entered into force on the latter date. The amendment of national law therefore came after the end of the period laid down by the reasoned opinion.

145. The Court has held: [45]

'Because of the importance which the Treaty attaches to the action available to the

45 — Case 7/69 *Commission* v *Italy* [1970] ECR 111, paragraph 5.

Community against Member States for failure to fulfil obligations, this procedure in Article 169 is surrounded by guarantees which must not be ignored, particularly in view of the obligation imposed by Article 171 on Member States to take ... the necessary measures to comply with the judgment of the Court.

... the Court cannot give judgment ... on the failure to fulfil an obligation occurring after legislation has been adopted during the course of the proceedings without thereby adversely affecting the rights of the Member State to put forward its arguments in defence based on complaints formulated according to the procedure laid down by Article 169'.

146. In the present dispute, it will be for the Commission to commence, if appropriate, with respect to the effects of Presidential Decree No 12/1992, new Treaty-infringement proceedings on the basis, on that occasion, of Article 171(2) of the EC Treaty and if need be to bring before the Court the specific infringement in respect of which it seeks a finding. [46]

(d) The national judicial decision and the individual national administrative decision

147. In its defence, [47] the Hellenic Republic first stated, with regard to musicians employed by State bodies or local or municipal bodies, that '... the competent appointing body [could] not fail to take account of the fact that the post [belonged] to the public service ...'.

148. With regard to the case of the musician in the Athens Philharmonic Orchestra referred to by the Commission in its application, [48] the defendant State indicated [49] that a court of first instance, the Monomeles Protodikeio Athinon, by judgment No 2228/1992:

— expressly pointed out that the concept of public service is a Community law concept defined by 'the relevant provisions of Community law which have been interpreted by the case-law of the Court of Justice of the European Communities',

— and concluded that '... the combined provisions of Community law and of the Greek legislation do not prevent the plaintiff, a foreign national employed as a musician by the defendant and in no way participating in the exercise of authority conferred by public law or functions intended to safeguard the general interests of the State, from being employed under a contract of indeterminate duration ...'.

46 — See the same judgment, paragraph 6.

47 — Part A, paragraph (b).

48 — Part I(A)(8) of the application. See also point 64 of this Opinion.

49 — Defence, Part B, paragraph 5.

149. In its rejoinder, [50] the Hellenic Government contends that the Treaty-infringement action has now become academic in so far as that case has been definitively settled in favour of the musician concerned: Decision No 870 of 23 February 1995, taken by the Mayor of Athens, amended the previous decision which had been challenged and converted the musician's contract into a contract of indeterminate duration.

150. That submission, it seems to me, must clearly fail.

151. The national court decision, delivered on 29 May 1992, does indeed antedate the reasoned opinion of 3 March 1993 concerning musicians. On the other hand, the administrative decision of the Mayor of Athens was taken after the expiry of the period laid down by that reasoned opinion.

152. Above all, the fact that a national court of first instance, drawing the consequences of the direct applicability of Article 48 of the Treaty, held in a particular case that access to a post of indefinite duration could not be made subject to the requirement of Greek nationality clearly does not remove, as far as all Community nationals are concerned, the national provision or practice whose application was in issue.

153. It does not therefore expunge the breach arising from that provision or that practice.

154. It is settled case-law that: [51]

'The primacy and direct effect of the provisions of Community law do not release Member States from their obligation to remove from their domestic legal order any provisions incompatible with Community law, since the maintenance of such provisions gives rise to an ambiguous state of affairs in so far as it leaves persons concerned in a state of uncertainty as to the possibilities available to them of relying on Community law'.

155. Since none of the pleas relied on by the Hellenic Republic is well founded, I suggest that the Court make a finding in the terms of my final conclusion.

50 — Part B, paragraph 3.

51 — See Case 104/86 *Commission* v *Italy* [1988] ECR 1799, paragraph 12. To the same effect, see Case 167/73 *Commission* v *France* [1974] ECR 359, paragraph 41, and Case 38/87 *Commission* v *Greece* [1988] ECR 4415, paragraph 9.

Conclusion

156. Consequently, I suggest that the Court hold that:

(1) By not, in relation to nationals of other Member States, limiting the requirement of Greek nationality so as to apply only to posts involving direct or indirect participation in the exercise of powers conferred by public law and functions intended to safeguard the general interests of the State or of other public authorities, in the public sectors of water, gas and electricity distribution, public health care services, State educational establishments, air and sea transport, railways and urban and regional public transport, non-military research, posts, telecommunications and radio and television broadcasting, and the Ethniki Lyriki Skini Opera and local and municipal orchestras, the Hellenic Republic has failed to fulfil its obligations under Article 48 of the EEC Treaty and Articles 1 and 7 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

(2) The Hellenic Republic is ordered to pay the costs.