occupying them the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality. The only posts excluded are those which, having regard to the tasks and responsibilities involved, are apt to display the characteristics of the specific activities of the public service in the spheres described above.

Employment as a secondary school teacher does not constitute employment in the public service within the meaning of Article 48(4) of the EEC Treaty.

REPORT FOR THE HEARING
in Case C-4/91 *

I — Facts and written procedure

1. *National legal framework*

Article 5 of French Law No 83-634 of 13 July 1983 on the rights and duties of employees in the public sector (the General Law relating to civil servants — *Journal Officiel de la République Française*, 14 July 1983, p. 2174) provides that:

'No-one may be appointed to the civil service:

(1) — If he does not have French nationality'.

2. *Main proceedings and question referred*

Mrs Annegret Bleis, a German national, has a degree in humanities from the University of Paris-X, Nanterre. By a letter of 14 October 1988 she applied to the Ministry of Education to be registered for the external competition for the Certificat d'Aptitude au Professorat de l'Enseignement du Second Degré (Certificate of Aptitude as a Secondary School Teacher) (CAPES) in German.

On 3 November 1988 the Deputy Director for Recruitment at that ministry replied that she could not take part in that competition owing to her nationality.

On 30 December 1988 Mrs Bleis made an administrative complaint against that

* Language of the case: French.

decision to the State Minister responsible for Education, Youth and Sport.

After receiving no response to her complaint for more than four months, Mrs Bleis decided to apply to the Tribunal Administratif (Administrative Court), Paris, for the annulment of the tacit decision to reject that complaint to be inferred from the absence of response.

The Tribunal Administratif, Paris (Sixth Division, First Chamber), in its judgment of 4 December 1990, stayed its proceedings and referred to the Court of Justice for a preliminary ruling on the following question:

'Does employment as a secondary school teacher in French public establishments constitute employment in the public service within the meaning of Article 48(4) of the Treaty?'

3. *Procedure before the Court*

The judgment of the Tribunal Administratif, Paris, making the reference was lodged at the Court Registry on 9 January 1991.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the applicant in the main proceedings, represented by Sylvie Deniniolle, of the Paris bar, by the Commission of the European Communities, represented by Jean-Claude Séché, a member of its Legal Department, acting as Agent, and by the French Republic, represented by Edwige Belliard and Claude Chavance, of the Ministère des Affaires Étrangères (Ministry for Foreign Affairs), acting as Agents.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry and to assign the case to the Third Chamber.

II — Summary of the written observations submitted to the Court

Mrs Bleis claims that the French legislation operates a discrimination on the basis of nationality with regard to access to secondary school teaching, contrary to Article 48 of the Treaty.

According to Mrs Bleis, if follows from the case-law of the Court (Case 152/73 *Sotgiu* v *Deutsche Bundespost* [1974] ECR 153; Case 149/79 *Commission* v *Belgium* [1980] ECR 3881; Case 149/79 *Commission* v *Belgium* [1982] ECR 1845; Case 307/84 *Commission* v *France* [1986] ECR 1725; Case 66/85 *Lawrie-Blum* v *Land Baden-Württemberg* [1986] ECR 2121; Case 225/85 *Commission* v *Italy* [1987] ECR 2625; Case 33/88 *Allué and Another* v *Università degli studi di Venezia* [1989] ECR 1591) that whether a post may be described as employment in the public service depends on the nature of the functions and responsibilities attached to the post.

Mrs Bleis maintains that the policy of the Commission as set out in its communication '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' (Official Journal 1988 C 72, p. 2) in favour of greater mobility for workers and the Erasmus programmes include teaching in State educational establishments as one of the priority areas.

Since the employment concerned does not include the exercise of public power prerogatives or involve any responsibility for the protection of the general interests of the State, it is suggested that the Court should answer the question referred as follows.

'Employment as a secondary school teacher in French public educational establishments does not constitute employment in the public service within the meaning of Article 48(4) of the EEC Treaty.'

The *Commission* maintains that the disputed measure infringes Article 48(4) of the Treaty. With specific regard to teachers, it is common ground that they, like other civil servants, are 'workers' within the meaning of Article 48, who thus benefit from the freedom of movement provided for by that provision (judgment in the *Lawrie-Blum* case, cited above, at paragraph 20).

According to the Commission, the Court has laid down in a series of judgments concerning Article 48(4) a number of fundamental principles in that respect: that provision, being an exception to a fundamental freedom, must be interpreted strictly; the concept of 'employment in the public service' has a Community definition; and admission to employment may be excluded only for certain administrative activities. The judgment in *Commission* v *Belgium* cited above, at paragraph 10, indicates that the only posts to come within Article 48(4) are those which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interest of the State or of other public authorities. Such posts in fact presume on the part of those occupying them the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality.

It follows that teaching posts do not come within that provision, as the Court has held on two occasions (in *Lawrie-Blum*, cited above, and in *Allué*, also cited above, paragraph 7).

The Commission observes that the French law does not prevent the employment of foreigners as non-established staff but requires French nationality for their recruitment as established staff. The Court has already had the opportunity to rule, in respect of employment as a nurse in a public hospital, on the distinction between established staff and contract staff in the French

public service with regard to access to employment by nationals of the other Member States (judgment in *Commission* v *France*, cited above, paragraph 16). In the Commission's opinion, the Court's answer with regard to the scope of Article 48(4) can be transposed to teaching posts such as those at issue in this case.

Finally, the Commission points out that in its communication on access to employment in the public service, it considered that the derogation in Article 48(4) covered specific functions of the State and similar bodies such as the armed forces, the police and other forces for the maintenance of order, the judiciary, the tax authorities and the diplomatic corps. Teaching is not included in that list.

It follows from the foregoing that the answer to the question referred should be as follows:

'Employment as a secondary school teacher in French public educational establishments does not constitute employment in the public service within the meaning of Article 48(4) of the EEC Treaty.'

The *French Government* does not dispute that the law at issue infringes Article 48 of the Treaty. It is at pains to inform the Court that the Ministry of National Education has appealed to the Conseil d'État (Council of State) against the decision of the Tribunal Administratif, Paris, to refer the matter to the Court.

The French Government states, moreover, that the French Conseil des Ministres (Council of Ministers) has just adopted a bill amending Law No 83-634 of 13 July 1983 and opening up the French civil service, with regard to employment by both the State and other public authorities, to nationals of the Member States of the Community in respect of posts whose features do not involve direct or indirect participation in the exercise of powers conferred by public law of the State or of other public authorities. The text will be submitted to Parliament during the spring session. In application of that law, the ranks of teachers will be open to Community nationals.

J. C. Moitinho de Almeida
Judge-Rapporteur