OPINION OF MR ADVOCATE GENERAL JACOBS
delivered on 8 May 1991 *

My Lords,

1. In this case, the Cour de Cassation, Luxembourg, has asked the Court for a preliminary ruling on the following question:

'Are Articles 7, 48, 117, 118, 118a and 189, second paragraph, of the EEC Treaty and Articles 7 and 8 of Regulation (EEC) No 1612/68 of the Council, or any one of those provisions, to be interpreted as prohibiting national legislation of a Member State of the Community from requiring payment of a contribution from a foreign employee who is a national of a Member State and who is compulsorily affiliated to an occupational guild while refusing him the right to take part in the election of the persons composing the guild, which right is reserved to nationals?'

2. That question has arisen in the course of a dispute between the Chambre des Employés Privés and the Association de Soutien aux Travailleurs Immigrés ('ASTI') over the compatibility with Community law of certain provisions of Luxembourg legislation concerning the rights and obligations of the Chambre. In order to explain the nature of the dispute, it is necessary for me to describe briefly the principal features of the contested legislation.

The background to the dispute

3. The Chambre des Employés Privés is a 'chambre professionnelle', or occupational guild. It was established, along with a number of other such bodies, by a Law of 4 April 1924 ('the Law'). The number of guilds was increased in 1964 and there is now a guild for all occupations except the liberal professions. Any person who exercises within the territory of the Grand Duchy an occupation which falls within the jurisdiction of a guild is automatically and compulsorily affiliated to that guild.

4. The functions of the Chambre des Employés Privés are outlined in the first paragraph of Article 38 of the Law. According to that provision, the task of the Chambre is to promote the establishment of organizations and the provision of services aimed at improving the conditions of private employees, to give its opinion on draft legislation and to collect information and produce statistics. Under the second paragraph of Article 38, the Chambre also has the right to propose legislation on any matter falling within its jurisdiction. The Government is obliged to examine any such proposals and to submit them to the Chambre des Députés (the parliament of the Grand Duchy). Under the third paragraph of Article 38, the Chambre des Employés Privés must be asked for its opinion prior to the adoption of laws and ministerial and

* Original language: English.

Grand Ducal orders ('*arrêtés*') the principal concern of which is private employees.

5. Article 38 then lists certain matters as being within the jurisdiction of the Chambre des Employés Privés, although it is expressly stated that the list is illustrative only. The matters mentioned are the following:

— protecting the interests of private employees and in particular ensuring the observance of legislation and regulations relating to such employees;

— supervising the observance of individual and collective contracts of employment;

— giving its opinion prior to the adoption by the Chambre des Députés of laws concerning private employees;

— presenting observations to the Chambre des Députés on public expenditure relating to private employees; and

— making proposals on the supervision of vocational training for private employees.

6. The Chambre des Employés Privés is composed of 20 members and 20 alternate members, who are elected for a term of five years. Members may stand for re-election. In order to vote in membership elections, a person must hold Luxembourg nationality (see Article 6 of the Law). In principle, anyone who has the right to vote may stand as a candidate (see Article 5 of the Law), but membership of a guild is not open to members of the Chambre des Députés or of the Conseil d'État (see Article 8 of the Law). In practice, it appears that the members of occupational guilds are often elected from lists presented by trade unions.

7. Occupational guilds are entitled under Article 3 of the Law to take certain steps to cover their expenses. In its original form, Article 3 authorized the guilds to levy a charge or subscription on their 'électeurs', that is on all those who had the right to vote in elections for membership of the guild concerned. However, even in the 1920s the working population of the Grand Duchy included a high proportion of foreigners. The effect of Article 3, as originally drafted, was therefore to exclude from the obligation to contribute a large number of those who were affiliated to the guilds.

8. One way to overcome this difficulty would have been to extend the right to vote to all those who were affiliated to a particular guild, regardless of their nationality. Instead, by a Law of 3 June 1926, the term 'électeurs' in Article 3 was replaced by the term 'ressortissants', or affiliates. The result was to break the link established by the Law between the right to vote and the obligation to contribute. Henceforth, any person who was affiliated to an occupational guild could be required to contribute to the expenses of that guild,

regardless of whether he had the right to vote in membership elections or to stand as a candidate in such elections.

9. Under a Grand-Ducal Regulation of 3 February 1982, the contributions payable by those who are affiliated to the Chambre des Employés Privés are collected from employers, who may deduct the appropriate amount from the salaries paid to their employees. In 1987, ASTI refused to pay contributions amounting to LFR 350 per person in respect of three employees who were nationals of other Member States. ASTI objected to being required to contribute on its employees' behalf to an organization in which, it claimed, the employees concerned had no right to participate. The sum due was paid instead to the Luxembourg Red Cross. The Chambre instituted proceedings against ASTI before the Tribunal de Paix, which, by judgment of 13 October 1989, ordered ASTI to pay the sum claimed to the Chambre. ASTI appealed against that judgment to the Cour de Cassation, which has referred to the Court the question set out above.

10. In the meantime, the Commission began to investigate the compatibility with Community law of the Luxembourg legislation concerning occupational guilds. A letter of formal notice under Article 169 of the Treaty was sent to the Luxembourg Government on 27 November 1989. On 20 February 1990, the Luxembourg Government asked the Conseil d'État for its advice on the matters raised in the Commission's letter. The opinion of the Conseil d'État was delivered to the Government on 10 October 1990. The Conseil d'État was divided on the compatibility of the contested legislation with Community law, but a majority of its members took the view that, as a matter of principle, nationals of other Member States and of third countries should be allowed to participate in the activities of occupational guilds on the same basis as Luxembourg nationals. On 23 October 1990, the Commission issued a reasoned opinion pursuant to Article 169, but it has not yet commenced proceedings before the Court.

The issues before the Court

11. It is not entirely clear from the order for reference whether the national court is seeking guidance only on the compatibility with Community law of provisions such as those governing the right to vote in elections for membership of the Chambre des Employés Privés, or whether it is also requesting a ruling on the legality of provisions such as those relating to the right to stand as a candidate in such elections. Most of the argument before the Court has, however, been concerned with the right to vote and it may well turn out to be unnecessary in these proceedings for the legality of the provisions governing the right to stand as a candidate to be resolved. This is because the issue which the referring court is called upon to decide is essentially whether Community law prevents the Chambre from enforcing payment of contributions from workers falling within its jurisdiction who are nationals of other Member States. If this Court decides that provisions of national law such as those governing the right to vote at issue in the main action are incompatible with Community law and that payment of the contributions due under national law cannot be enforced, the national court will not need to consider, in

order to give judgment, the legality of the consequential rule that only Luxembourg nationals may stand as candidates for membership of the Chambre.

12. It is common ground that the three employees in respect of whom ASTI refused to pay contributions are affiliated to the Chambre des Employés Privés and that they are workers within the meaning of Article 48 of the Treaty. It is not therefore necessary in these proceedings to consider whether national legislation such as that at issue in the main action is compatible with the Treaty rules on the right of establishment and the freedom to provide services, even though the affiliates of some occupational guilds may fall within the scope of those provisions rather than that of the rules on the free movement of workers. Of the provisions of Community law mentioned in the question referred to the Court, only Article 48 of the Treaty and Articles 7 and 8 of Regulation No 1612/68 (Official Journal, English Special Edition 1968 (II), p. 475) are therefore relevant. It is not necessary to consider separately the prohibition against discrimination on grounds of nationality laid down in Article 7 of the Treaty since, in the context of the free movement of workers, effect is given to that prohibition by Article 48 of the Treaty: see Case 36/74 *Walrave* v *Union Cycliste Internationale* [1974] ECR 1405, paragraph 6. The Court's case-law makes it clear that Article 7 'applies independently only to situations governed by Community law in regard to which the Treaty lays down no specific prohibition of discrimination': see Case 305/87 *Commission* v *Greece* [1989] ECR 1461, paragraph 13; Case C-10/90 *Masgio* v *Bundesknappschaft*, judgment of 7 March 1991, paragraph 12.

Article 8 of Regulation No 1612/68

13. I will begin by considering the first sentence of Article 8 of Regulation No 1612/68 ('the regulation'), with which much of the argument in these proceedings has been concerned. Article 8 (as amended by Regulation No 312/76, Official Journal 1976 L 39, p. 2) provides as follows:

'A worker who is a national of a Member State and who is employed in the territory of another Member State shall enjoy equality of treatment as regards membership of trade unions and the exercise of rights attaching thereto, including the right to vote and to be eligible for the administration or management posts of a trade union; he may be excluded from taking part in the management of bodies governed by public law and from holding an office governed by public law. Furthermore, he shall have the right of eligibility for workers' representative bodies in the undertaking. The provisions of this Article shall not affect laws or regulations in certain Member States which grant more extensive rights to workers coming from the other Member States.'

14. This provision may be regarded as a *lex specialis* which gives effect, within its field of application, to the principle of non-discrimination laid down in Articles 7 and 48 of the Treaty. It will be apparent, however, that it is only the first sentence of Article 8 of the regulation which is relevant in these proceedings. The essential question is whether a body such as the Chambre des Employés Privés constitutes a trade union within the meaning of the first part of that

sentence and, if so, whether the exclusion of migrant workers from the right to vote is justified under the second part of that sentence.

15. The Luxembourg Government emphasizes that occupational guilds do not constitute trade unions for the purposes of the national law of the Grand Duchy. Moreover, it argues that the guilds' right to levy a charge on their affiliates and the fact that affiliation is compulsory for those holding certain occupations are incompatible with the notion of a trade union.

16. I do not, however, consider any of those factors conclusive. The concept of a trade union for the purposes of Article 8 must clearly be given a Community meaning and cannot be limited by the national laws of any one of the Member States. I note that the French text of Article 8 appears to be more widely framed than the English text, although this is not true of some of the other language versions. None the less, since the first part of the first sentence of Article 8 is intended to promote the fundamental principle of freedom of movement for workers, that provision should not in my view be confined to trade unions in any strict sense.

17. It is apparent from Article 38 of the Law that several of the functions attributed to the Chambre des Employés Privés would in other Member States be carried out by trade unions. The Luxembourg Government claimed at the hearing that many of the tasks referred to in Article 38 were now performed by trade unions in the traditional sense and that the main function of the Chambre today was to take part in the legislative process. I note that this view is not shared by at least some members of the Luxembourg Conseil d'État. In version A of its opinion delivered on 10 October 1990 (see p. 7, paragraph 14), it is stated, reference having been made to the role played by occupational guilds in the legislative process, that the guilds' essential function remains a socio-economic one, namely the protection of the interests of their affiliates.

18. As far as the Chambre des Employés Privés is concerned, the view expressed in version A of the opinion of the Conseil d'État is supported by the terms of Article 38. The first paragraph of that article states essentially that the task of that Chambre is to protect the interests of workers falling within its jurisdiction. It is true that the Chambre is given a formal role in the legislative process, but it is difficult to resist the conclusion that the fulfilment of that role is merely one of the ways in which the Chambre is empowered to fulfil its primary function, which is to improve the conditions of the workers who are affiliated to it.

19. I therefore take the view that, although a body such as the Chambre is not a trade union in the strict sense, it must none the less be considered, in the light of its objectives, an analogous organization and that accordingly it falls within the scope of the first part of the first sentence of Article 8 of the regulation.

20. The Luxembourg Government and the Chambre argue that, even if the Chambre does constitute a trade union for the purposes of Article 8, the contested legislation is nonetheless justified under the second part of the first sentence of that provision. The second limb of the derogation in question, according to which a migrant worker may be excluded 'from holding an office governed by public law', is not in my view capable of application to the right to vote (although it might in principle be applicable to the right to stand as a candidate should that issue need to be addressed). The essential question, as far as the right to vote is concerned, is accordingly whether the electors of a body such as an occupational guild may be said to take part in the management of a body governed by public law.

21. It will be observed that the derogation contained in the first sentence of Article 8 of the regulation does more than merely reiterate the derogations contained in Article 48 of the Treaty. It must therefore be considered valid only in so far as it qualifies rights conferred on migrant workers by the regulation which go beyond those contained in Article 48, for it is clear that the regulation cannot limit rights conferred directly by the Treaty. Moreover, the relevant part of Article 8 of the regulation does not in my view constitute a general limitation on all the rights granted to migrant workers by the regulation which go beyond Article 48 of the Treaty. The way in which Article 8 is drafted and the place of the derogation within the article as a whole indicate that migrant workers may be excluded from the activities mentioned only where the right to take part in them would otherwise arise as an incident of membership of a trade union or of some analogous body.

22. The derogation contained in the first sentence of Article 8 of the regulation may be regarded as a development of the principle underlying Article 48(4) of the Treaty, according to which 'The provisions of this Article shall not apply to employment in the public service'. The Court's case-law establishes that, as an exception to a fundamental principle of the Treaty, Article 48(4) must be strictly construed (see Case 66/85 *Lawrie-Blum* v *Land Baden-Württemberg* [1986] ECR 2121). Moreover, in Case 149/79 *Commission* v *Belgium* [1980] ECR 3881, paragraph 10, the Court said that Article 48(4) covered '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'. The Court explained that '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'. In view of the parallel between Article 48(4) of the Treaty and the derogation contained in the first sentence of Article 8 of the regulation, I consider that similar principles should be applied in interpreting the latter provision.

23. The Luxembourg Government has, in seeking to justify the exclusion of non-nationals from the right to vote, emphasized the right of the Chambre des Employés Privés to make legislative proposals on matters falling within its jurisdiction and the Government's obligation to consult it prior to the adoption of certain legislation. However, the right of the Chambre to intervene in the national legis-

lative process does not empower it to bind either the Government or the legislature. Moreover, as the Commission points out, its function is not to intervene in the general interests of the nation as a whole, but in the specific interests of the occupational group for which it is responsible. I do not therefore consider that the functions of the Chambre can be said to 'presume . . . the existence of a special relationship of allegiance to the State' (see *Commission* v *Belgium*, already cited) such as to justify the exclusion of nationals of other Member States from the right to vote in membership elections. Nor are occupational guilds 'entrusted . . . with responsibility for safeguarding the general interests of the State' (see Case 149/79 *Commission* v *Belgium* (No 2) [1982] ECR 1845, paragraph 7). In any event, the influence enjoyed by electors is in my view too remote for it to be said that they take part in the management of the guild concerned. I do not therefore consider that the derogation contained in the first sentence of Article 8 of the regulation is applicable in this case. It follows that legislation such as that in issue in the main action is incompatible with Article 8.

Article 7(2) of the regulation

24. Article 7(2) of the regulation states that a worker who is a national of another Member State 'shall enjoy the same social and tax advantages as national workers'. To the extent that the specific provisions of Article 8 are applicable in any particular case, the more general terms of Article 7(2) are in my view ousted. If, however, I had reached the conclusion that Article 8 was not applicable, then I would have taken the view that the right to vote in elections for membership of a body such as the Chambre des Employés Privés constituted a social advantage within the meaning of Article 7(2).

25. The Court stated in Case 32/75 *Cristini* v *SNCF* [1975] ECR 1085, paragraph 12, that 'the reference to "social advantages" in Article 7(2) cannot be interpreted restrictively'. It followed, the Court said, that, 'in view of the equality of treatment which the provision seeks to achieve, the substantive area of application must be delineated so as to include all social and tax advantages, whether or not attached to the contract of employment . . .' (ibid, paragraph 13). Similarly, in Case 207/78 *Ministère public* v *Even* [1979] ECR 2019, paragraph 22, the Court explained that:

'the advantages which this regulation extends to workers who are nationals of other Member States are all those which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and the extension of which to workers who are nationals of other Member States therefore seems suitable to facilitate their mobility within the Community'.

26. Article 7(2) has been held by the Court to apply to a wide range of advantages

enjoyed by nationals of the host State but denied to migrant workers (see e.g. *Cristini*, above; Case 65/81 *Reina* v *Landeskreditbank Baden-Württemberg* [1982] ECR 33; Case 137/84 *Ministère public* v *Mutsch* [1985] ECR 2681). In Case 59/85 *Netherlands* v *Reed* [1986] ECR 1283, Article 7(2) was held to extend to a worker's right to apply for permission for his unmarried companion to reside with him, where that companion is not a national of the host State. The Court noted that extending that right to the migrant worker 'can assist his integration in the host State and thus contribute to the achievement of freedom of movement for workers' (paragraph 28).

27. The same must *a fortiori* be true where, as in the present case, the advantage denied to migrant workers is connected with employment, which is one of the principal concerns of Article 7 of the regulation. The effect of denying to private employees who are nationals of other Member States the right to vote in elections for membership of a body such as the Chambre des Employés Privés is to prevent such employees from participating fully in the activities of a body which is directly concerned with their working conditions and to which they are compulsorily affiliated. The result is to hamper their integration in the host State and thereby to prejudice the achievement of freedom of movement for workers. Such a right must therefore be considered a social advantage within the meaning of Article 7(2) of the regulation.

The effect of the incompatibility

28. It remains to be examined whether the incompatibility with Community law of withholding from workers who are nationals of other Member States the right to vote in elections for membership of a body such as the Chambre des Employés Privés means that contributions due under national law to such a body cannot be recovered. That result must in my view be regarded as a corollary of the direct effect of Regulation No 1612/68, with which I consider legislation such as that at issue in the main action to be incompatible (on the direct effect of the regulation, see Case 167/73 *Commission* v *French Republic* [1974] ECR 359; Case 36/75 *Rutili* v *Minister for the Interior* [1975] ECR 1219; Case 118/75 *Watson and Belmann* [1976] ECR 1185).

29. Support for this proposition may be found in Case 222/82 *Apple and Pear Development Council* v *Lewis* [1983] ECR 4083, paragraph 32, where the Court held that the levying by an organization of a compulsory membership charge would be contrary to Community law if the charge was used to finance activities which were themselves contrary to Community law. In the present case, it is not the activities of the Chambre des Employés Privés which are unlawful, but its internal organization. None the less, the principle applied in the *Lewis* case should in my view be extended to such a situation, for the obligation to contribute to the expenses of such a body must be regarded as the counterpart of the right to vote in membership elections, the denial of which to migrant workers I consider unlawful.

Conclusion

30. In the light of the clear view I have reached on the incompatibility with Regulation No. 1612/68 of national legislation excluding migrant workers from the right to vote in elections for membership of a body such as the Chambre des Employés Privés, and on the consequences of that incompatibility in the circumstances of the main action, it is not necessary for me to consider the effect of the prohibition on discrimination laid down in Article 48(2) of the Treaty or the legality of a rule excluding migrant workers from the right to stand as candidates in such elections.

31. I am therefore of the opinion that the question referred by the Cour de Cassation should be answered as follows:

(1) It is incompatible with Article 8 of Regulation No. 1612/68 for the legislation of a Member State to exclude workers who are nationals of other Member States and who are affiliated to an occupational guild such as the Chambre des Employés Privés from the right to vote in elections for membership of the guild on the ground of their nationality.

(2) Where nationals of other Member States are denied the right to vote in such elections, they cannot be required to pay financial contributions to the expenses of the guild.