OPINION OF ADVOCATE GENERAL LÉGER
delivered on 5 March 1996 *

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1. In the Treaty-infringement proceedings commenced by it on 17 December 1993, the Commission claims that the Court should:

— declare that, by maintaining a nationality requirement in relation to workers who are nationals of other Member States as regards access to civil servants' or public employees' posts in the public sectors of research, teaching, health, inland transport, posts and telecommunications, and in the water, gas and electricity distribution services, the Grand Duchy of Luxembourg has failed to fulfil 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 Grand Duchy of Luxembourg to pay the costs.

2. The defendant is opposing the application vigorously. It contends, first, that the action is inadmissible and, as regards the substance, claims that the action should be dismissed.

3. 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, if it

1 — The application correctly refers to Article 48 of the *EEC* Treaty rather than the *EC* Treaty, because 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.

3 — See my separate Opinions of today's date in Case C-173/94 *Commission* v *Belgium* and Case C-290/94 *Commission* v *Greece*.

declares the action admissible, 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. The Grand Duchy of Luxembourg expressly requests, as regards the substance, that the Court depart entirely from its previous case-law regarding the definition of 'public service' referred to in that provision and, in the alternative, exclude any analysis by entire sectors and opt for a post-by-post analysis.

4. I shall first (I) describe the legal background to the dispute. I shall then (II) examine the objection of inadmissibility raised by the Grand Duchy of Luxembourg, and then (III) consider whether or not the Treaty-infringement proceedings are well founded. Finally, (IV) I shall consider the defendant's request for a period of grace.

I — The legal background to the dispute

5. 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 decided to take (C) 'systematic action', leading to (D) objections to various provisions of Luxembourg national law.

A — *The Community provisions*

6. Article 48(1) to (3) of the Treaty lay down the principle of freedom of movement for workers and its corollary, the abolition of any discrimination on grounds of nationality between workers of Member States as regards employment, remuneration and other conditions of work and employment.

7. Article 48(4) provides:

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

8. 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.'

9. 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*

10. In its judgment in *Sotgiu*, [4] the Court held [5] that 'Taking 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'.

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

12. 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'.

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

5 — Paragraph 4.

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

7 — *Sotgiu*, paragraph 5.

13. 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'.

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

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

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

17. 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'.

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

9 — Paragraphs 12 and 18.

10 — Paragraph 10, emphasis added.

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.

18. 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] The assertion by the Grand Duchy of Luxembourg that the two conditions are alternative to each other by virtue of the case-law of the Court thus seems to me to be unfounded.

19. 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 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 ...'.

20. 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;

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.

— 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.

21. 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]

— 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*

22. 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]

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

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

18 — Ibid.

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).

23. 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 particular parts of the public sector, on the basis of Article 48(4) of the Treaty.

24. 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.

25. 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) 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.

26. 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.

27. 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.

28. Consequently, it decided to institute Treaty-infringement proceedings against each

of those three Member States, including the Grand Duchy of Luxembourg. [25]

D — *The national law at issue*

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

(1) *Teaching in the public sector*

30. Teaching in public nursery, primary, secondary, technical secondary and higher education is the responsibility of an administration within the Ministry of National Education and, as regards nursery and primary education, also of municipal administrations.

31. The staff of that administration is largely made up of civil servants and employees of the State or municipalities. For civil servants and State employees, the condition of Luxembourg nationality is imposed respectively by Article 2 of the Law of 16 April 1979 laying down the general regulations applicable to State officials and Article 3 of the Law of 27 January 1972 laying down the conditions applicable to State employees. For civil servants and employees of the municipalities, that condition is laid down respectively by Article 2 of the Law of 24 December 1985 laying down the general regulations applicable to commune officials and Article 3 of the Grand-Ducal Regulation of 26 May 1975 bringing the rules governing commune employees into line with those governing State employees.

32. By way of exception, Article 4 of the Law of 11 February 1974 provides that members of the teaching staff of the Centre Universitaire de Luxembourg may be of Luxembourg or foreign nationality.

33. The nationality requirement does not apply to the recruitment of private employees and workers engaged in the Luxembourg public teaching service.

(2) *Non-military research*

34. Article 4 of the Law of 9 March 1987 provides that the competent minister may assign to research and development activities, for a maximum period of two

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

years, which may be extended within the limit of the duration of the work involved, members of the scientific, technical and administrative staff of public higher education or university bodies, services and establishments authorized by Grand-Ducal regulation to undertake such activities.

35. Pursuant to Article 5 of the same Law, Community nationals may be assigned to research and development tasks under a training and research scholarship, on secondment from their employer or under private contract.

36. Under Article 4 of the Law, the restrictions imposed on nationals of other Member States are indirect: they may undertake research activity only if, by way of exception, the public university or higher educational body, service or establishment employing them does not impose the requirement of Luxembourg nationality.

(3) *Public health*

37. All the departments of the Ministry of Health, that is to say the Health Directorate, the medical, social and therapeutic service, the National Health Laboratory, the State neuropsychiatric hospital and State health care establishments are administrations governed by the same rules as other State departments. The nationality requirement is imposed pursuant to the abovementioned provisions of the general regulations applicable to State civil servants and employees.

38. The Centre Hospitalier de Luxembourg is a public establishment managed under private law. The staff are not required to be of Luxembourg nationality.

39. On the other hand, health establishments administered by the communes are subject to the same conditions as State establishments and therefore the nationality requirement applies.

(4) *Société Nationale des Chemins de Fer Luxembourgeois (hereinafter 'the SNCFL')*

40. The SNCFL is governed by public law. Article 2 of its staff regulations requires Luxembourg nationality for access to posts on the permanent staff. There are no exceptions to that rule '... other than the exceptions laid down in international conventions,

except where there are no suitable Luxembourg candidates [and, in that event, by] authorization of the government ...'. The Luxembourg Government has stated that the same applies to access to posts not governed by the staff regulations.

41. The collective agreement applicable to auxiliary staff also imposes the requirement of Luxembourg nationality.

(5) *Public urban and interurban transport*

42. In most cases this service is provided by the municipal administrations. Luxembourg nationality is therefore required for access to posts as civil servants or public employees, on the basis of Article 2 of the Law of 24 December 1985 and Article 3 of the Grand-Ducal regulation of 26 May 1975.

43. Under those rules, the Luxembourg city bus service, for example, most of whose employees are civil servants, imposes the requirement of Luxembourg nationality for access to employment.

(6) *Posts and telecommunications*

44. The Administration des Postes et Télécommunications was converted into the 'Entreprise des Postes et Télécommunications' by the Law of 10 August 1992.

45. However, Article 24 of that Law makes it clear that the employees of the latter undertaking are subject to the general regulations applicable to State civil servants and employees, so that the nationality requirement applies to access to employment.

46. Community nationals can be employed only as private employees or workers.

(7) *Water, gas and electricity supply*

47. At national level, the water, gas and electricity supply services are provided by the State or undertakings granted a concession by the State, such as the Société Grand-Ducale d'Électricité du Luxembourg.

48. At local level, those services are provided either by the municipalities or by groups of municipalities.

49. In general, they are run on a public-law basis. Luxembourg nationality is therefore compulsory under the abovementioned

provisions applicable to civil servants and employees of the State, and those applicable to civil servants and employees of municipalities.

50. On the other hand, where they are administered on a private-law basis (for example the Compagnie Grand-Ducale d'Électricité du Luxembourg), Luxembourg nationality is not in principle required.

II — The plea of inadmissibility

51. The defendant contends that the Commission did not allow it a reasonable period to comply with the reasoned opinions issued on 14 July 1992. The period of four months allowed was, it claims, manifestly insufficient to enable it to undertake the wide-ranging reforms of the Constitution and other legislation and regulations necessary for that purpose.

52. In its judgment of 2 February 1988 in *Commission* v *Belgium*, [26] the Court held [27] 'that the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under Community law and, on the other, to avail itself of its right to defend itself against the complaints made by the Commission'.

53. From this the Court inferred: [28]

'In view of that dual purpose the Commission must allow Member States a reasonable period to reply to the letter of formal notice and *to comply with a reasoned opinion, or,* where appropriate, *to prepare their defence. In order to determine whether the period allowed is reasonable, account must be taken of all the circumstances of the case.* Thus, *very short periods* may be justified in particular circumstances, especially ... *where the Member State concerned is fully aware of the Commission's views long before the procedure starts'.*

54. On 18 March 1988, upon publication of Communication 88/C 72/02, the Grand Duchy of Luxembourg, like all the other Member States, was informed of the Commission's position as to the limits of the exception contained in Article 48(4) of the Treaty in sectors such as those covered by the application. It was thus fully aware of that position almost three years before the six formal letters were sent to it on 12 March

26 — Case 293/85 [1988] ECR 305.
27 — Paragraph 13.
28 — Paragraph 14, emphasis added.

1991, under Article 169 of the Treaty, setting a period of six months for the Grand Duchy to submit its observations.

55. As early as 30 October 1990, by a communication unrelated with any infringement proceedings, it notified its observations to the Commission concerning the action taken by the latter.

56. In fact, it had almost 14 months in which to formulate its replies to the formal letters.

57. In its reply, of 4 May 1992, it wrote:

'The government, having analyzed and examined in detail the Commission's arguments, has decided to *maintain the position already notified to the Commission on 30 October 1990.*

It considers that, in the specific sectors covered by the Commission's action, freedom of movement for workers has now largely been achieved'. [29]

29 — Emphasis added.

58. The 'Position of the Luxembourg Government', a very detailed document attached to that reply, concluded:

'On the basis of all the above factual and legal arguments, Luxembourg does not envisage, for the time being at least, adopting any special additional measures with a view to promoting freedom of movement for workers in the public service'.

59. Seventeen months passed between the sending of the reasoned opinions and lodgment of the application commencing Treaty-infringement proceedings on 17 December 1993.

60. The period of four months officially notified by the reasoned opinions is not a 'very short' period within the meaning of the judgment in Case 295/85, cited above, having regard to the circumstances of the case. It is twice the period of two months usually granted by the Commission.

61. It is clear from a more detailed analysis of the judgment just cited that a Member State is not entitled to contend that the

Commission has granted it an insufficient period where, first, the period was longer than that usually granted and, secondly, the Member State was fully aware of the Commission's views almost three years before the proceedings commenced.

62. Furthermore, the Grand Duchy of Luxembourg contends that the period of four months was not sufficient to enable it to undertake the far-reaching reforms necessary, even though it had decided not to carry out any reform, with the exception of a measure limited to the railways which it claimed to be ready to consider and which it could have adopted within a period of four months.

63. It does not criticize the Commission for preventing it from properly preparing its defence, the second aim of the pre-litigation procedure, which justifies a 'reasonable period'. [30] Even in that respect, it must be noted that the defendant was given ample opportunity to prepare its defence and it did so in the normal way.

64. In view of the foregoing observations, I consider that the Commission's application is admissible.

30 — See paragraph 51 above.

III — The existence of an infringement

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 Grand Duchy of Luxembourg is asking the Court primarily to make a new departure from its case-law (1). In the alternative, it maintains that the Court's case-law precludes any analysis based on entire sectors and in all cases calls for an analysis of each individual post (2).

67. In my view, the Court should not adopt either of the approaches 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 authori-

ties *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 (3).

(1) *Should there be a new departure in the case-law?*

69. The Grand Duchy of Luxembourg claims that the fundamental concept of employment in the public administration was defined '... at the expense of the institutional concept which is in any event advocated by numerous Member States.' [31] Taking the view that that functional concept raises problems of implementation, 'The Luxembourg Government therefore requests reliance on the text of Article 48(4) and recognition that the authors of the Treaty in fact sought to exclude from freedom of movement for workers "the posts", that is to say all posts in the public service and not merely some of them'. [32]

70. The fundamental premiss of the present case-law of the Court is that the concept of employment in the public service is a concept of Community law.

71. That classification was made in pursuit of the principles of unity and effectiveness of Community law which have guided the Court since it was established in its interpretation of that law and the building up of the Community legal order.

72. A departure from the Court's case-law would imply that the Court had decided that the concept of employment in the public service was a matter of national law. Freedom of movement for workers would be excluded as regards all posts in the public service on the basis of the meaning given to that expression by the provisions of the various national laws. Each State would thereby be entitled, by adopting a broad definition of the exception, to restrict the scope of the fundamental principles of freedom of movement and equal treatment for workers laid down by Article 48 of the Treaty. Those fundamental principles would be applied under conditions which would vary considerably from one Member State to another or indeed within

31 — Defence, p. 12.

32 — Ibid., p. 16.

the same Member State, from one period to another, depending on the view taken by the public authorities of the scope of their activities. The legal classification of the employment relationship would again achieve the particular importance which the Court ruled out in the *Sotgiu* judgment, cited earlier. [33]

73. It is easy to imagine the extent to which freedom of movement for workers would be affected. It need merely be borne in mind that in certain Member States several million people are within the public sector in the broad sense.

74. Such a retrograde step would not be without repercussions for the Community legal order itself.

75. I consider that the Court should not take that step.

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

76. 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.

77. 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.

78. In its judgment of 17 December 1980, the Court did indeed state: [34]

'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'.

79. The Court said the same in its judgment of 26 May 1982. [35]

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

33 — Paragraph 5.

34 — Paragraph 12.

35 — Paragraph 7.

81. 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'. [36] 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.

82. 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.

83. 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.

36 — Judgment of 17 December 1980, paragraph 1 (emphasis added).

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

85. 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.

86. 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.

87. 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.

88. 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.

89. 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.

90. I do not therefore share the analysis of the Court's case-law advocated by the Grand Duchy of Luxembourg.

91. In this case, the scope of the infringement of which the defendant is accused differs from the earlier cases.

92. 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.

93. The alleged infringement is thus that the defendant adopted an improper approach, having misapplied the distinction between principles and exceptions. As emphasized in the letters before action, the reasoned opinions and the application, the Commission's approach based on sectors guarantees '... that the Member States are able to demonstrate that, for a specific post and contrary to what might normally be expected, there is a relationship with activities specific to the public service'.

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

94. 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.

95. 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

96. As indicated earlier,[37] the Court has adopted a *functional* definition of employment in the public service.

97. 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.

98. 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.

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

100. 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.

101. 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.

37 — Paragraph 16 and the footnote thereto.

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

103. 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.

104. It has been apparent, since the first judgment in *Commission* v *Belgium*, cited above, [38] 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*'. [39]

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

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

107. 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.

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

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

38 — Paragraph 11, emphasis added.
39 — Emphasis added.

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

111. 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.

112. 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.

113. Let us consider directly the objection which might be raised, which is that it is not possible, without recourse to artifice, 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.

114. 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.

115. 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.

116. It did so in two judgments of 21 March 1991 in *Delattre* [40] and *Monteil and Samanni*. [41]

117. 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. [42]

118. In considering the justification for the monopoly, the Court established a distinction between two types of goods, [43] namely 'medicinal products' and other products, such as those known as 'para-pharmaceutical products'.

119. With regard to medicinal products, the Court held that, having regard to the 'very particular nature of the product and the market involved', [44] the pharmacists' monopoly might 'be *presumed* to constitute an appropriate way of protecting public health', [45] 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 ...'. [46]

120. 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*'. [47]

40 — Case C-369/88 [1991] ECR I-1487.

41 — Case C-60/89 [1991] ECR I-1547.

42 — 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.

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

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

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

46 — Ibid.

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

121. 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.

122. 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

123. The classification made by the Commission in its Communication 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.

124. 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.

125. 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.

126. I cannot accept the defendant's contention that: [48]

'In areas as essential as health, teaching, posts and telecommunications, water and gas

48 — Defence, p. 15.

distribution and public transport, the State needs people who feel complete allegiance and full accountability to the national community.'

127. The Court has linked the 'special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality "only with 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'. [49] However, the vast majority of posts in the sectors in question do not meet the definition of such posts. A nationality requirement can therefore be imposed only for those posts which meet the conditions of that definition and not for each sector in its entirety.

128. With regard in particular to teaching, the Court has held on several occasions that that activity does not meet the terms of the Court's definition of public service, [50] regarding participation in the exercise of authority conferred by public law and in safeguarding of general interests. That entire sector cannot therefore be presumed to fall within the exception contained in Article 48(4) of the Treaty.

129. The Grand Duchy of Luxembourg contends [51] that '...the fact that teachers have Luxembourg nationality guarantees that traditional values are passed on and, for a small country, it is essential in order to safeguard national identity.'

130. It adds:

'... it is difficult to imagine that a primary school teacher coming from abroad would be sufficiently familiar with the atmosphere in which Luxembourg children have spent the first years of their life, that he would know the national customs, songs, poems and all the other elements forming part of the national psychological outlook which play a role in teaching at that level.

Even in secondary education, a teacher's work cannot be regarded simply as an economic activity whereby knowledge is imparted in return for remuneration.

The transmission of natural culture continues at that level too. It cannot be properly carried out by someone who has spent the first twenty-five or thirty years of his life in another country.

49 — See paragraph 15 above.

50 — *Lawrie-Blum* (paragraphs 27 and 28), *Allué and Coonan* (paragraph 7) and *Bleis* (paragraphs 6 and 7).

51 — Defence, p. 9.

If on the contrary he has actually spent most of his youth in the country in which he wishes to become a teacher, he will have no difficulty in being naturalized. If he does not wish to take that step, that proves that he lacks, with regard to the host country, a sufficient bond of affection for him to claim the right to educate that country's youth.'

131. Although my earlier reference to the case-law of the Court is sufficient to defeat that plea by the defendant, I will nevertheless provide a reassuring response to the arguments on which it is based.

132. The freedom of movement upheld by the Treaty confers no privilege greater than that conferred on the nationals of a given Member State upon the nationals of the other Member States. It merely grants them access to posts within the territory of the former State, in strict observance of the equality of treatment which constitutes its corollary. It assures them equality of opportunity rather than any certainty in terms of results. Citizens of other Member States must, like the local citizens, fulfil all the requirements laid down for recruitment, as regards in particular training, experience and knowledge of languages. [52]

133. In teaching, the passing on of a country's traditional values is primarily ensured by *determination of the content of the curriculum*. That task is largely undertaken by the public authorities, not the teachers themselves.

134. It should be noted that not all subjects taught are a vehicle for the transmission of traditional values. For example, science and technology, foreign languages and sports do not a priori serve that function. Only subjects like the teaching of the national language, literature, history, geography and civics are undeniably capable of fostering and preserving national identity, provided that the content of the curricula is determined with that aim in view.

135. In secondary and higher education, where in principle the teachers are trained in specific subjects, the preoccupation of the Grand Duchy of Luxembourg can therefore be focused only on certain subjects, not all of them. In nursery and primary education, where the same teacher is responsible for most subjects, that preoccupation may in fact go further.

136. However, whatever the type of teaching, nationals of other Member States will not be able to participate validly in recruitment procedures unless they have a good knowledge of the subject or subjects involved in the posts offered, and, in any

52 — On the later point, it must be emphasized that the second subparagraph of Article 3(1) of Regulation No 1612/68 makes it possible to impose 'conditions relating to linguistic knowledge required by reason of the nature of the post to be filled'.

event, of the national language [53] and/or other languages necessary for the teaching of a particular subject.

137. In the case of a State like the Grand Duchy of Luxembourg, it therefore seems highly unlikely that a national of another Member State who has spent his youth and received his education in his State of origin could be in a position to participate with any chance of success in a recruitment procedure for primary teachers, since he will not be able to speak Luxemburgish and will not have studied the subjects in which the values and culture of the host State play an important part. The same will apply to teachers of those subjects in secondary and further education. In all subjects, a non-national may also have linguistic requirements imposed on them, provided that the level of knowledge required is not disproportionate in relation to the aim pursued. [54]

138. In principle, only nationals of other Member States who have spent their youth and been educated in the Grand Duchy or at least have lived there for several years will be in a position to compete for posts involving particular subjects. These will necessarily be only people who are perfectly integrated, having the same knowledge as nationals of the national language and the other two languages used in Luxembourg. They will thus themselves be imbued with the values and culture of Luxembourg. Depending on the subject taught, they will inevitably make a personal contribution, in implementation of the curricula drawn up by the competent public authorities.

139. The fact of granting them access to teaching posts will not ultimately represent any threat to national identity.

140. But, in any event, Community nationals exercising a fundamental freedom recognized by the Treaty, who also fulfil all the conditions for access to a post, cannot be subjected to the requirement, as suggested by the defendant, of acquiring the nationality of the host State.

141. Such a requirement would amount to nothing less than negation of the freedom invoked.

53 — In the Grand Duchy of Luxembourg, pursuant to Articles 1, 2 and 3 of the Law of 24 February 1984 on use of languages (*Mémorial* A, 1984, p. 196), the national language is Luxemburgish, the legislative language is French and the languages to be used for administrative matters and in court proceedings are French, German or Luxemburgish.

54 — Case C-379/87 *Groener* [1989] ECR I-3967, paragraphs 20 and 21.

B — *Giving effect to the choice made*

142. For the purposes of applying Article 48(4) of the Treaty, I have suggested that the Court accept analysis based on entire sectors of activity of the State or public authorities, with a distinction being drawn between activities which are among those specific to the public service and those which are remote from it. In this case, it is now appropriate to analyse, with that distinction in mind, the sectors referred to in the Commission's application, so as to draw all the consequences in law concerning an infringement of the Treaty by the Grand Duchy of Luxembourg (1). Before disposing of the latter point, I shall examine the merits of the defendant's submissions which, in its view, mean that the action must fail (2).

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

143. Having regard to the criteria for drawing a distinction which I described earlier, [55] the six sectors of activity involved are remote from activities specific to the public service.

144. 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.

145. The action to be taken by the Grand Duchy of Luxembourg 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.

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

147. My description of positive Luxembourg law [56] 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.

148. The exceptions relate essentially to certain establishments or types of post.

55 — Paragraphs 124 and 125 above.

56 — Paragraph 30 et seq.

149. In the light of my interpretation of Article 48(4) of the Treaty, the Grand Duchy of Luxembourg 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 Luxembourg law at present allows no exceptions to the nationality requirement.

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

(2) *The defendant's submissions*

151. The Grand Duchy of Luxembourg advances four pleas which, in its view, are such that the action must be dismissed. The first (a) is based on its Constitution of 17 October 1868. The other three are based on treaty provisions, namely (b) Article 13 of the European Convention on Establishment of 13 December 1955 [57] (c) Article 61 of the Treaty of 3 February 1958 establishing the Benelux Economic Union [58] and (d) Article 2 of the Protocol on the Grand Duchy of Luxembourg adopted on 25 March 1957 and annexed to the EEC Treaty.

(a) Article 11 of the Constitution of the Grand Duchy of Luxembourg of 17 October 1868

152. Article 11(2) of the Luxembourg Constitution provides:

'Luxemburgers are equal before the law; only they may be appointed to civil and military posts, subject to such exceptions as may be provided for by a law for specific cases'.

153. The defendant refers to that provision in relation to the legal obstacles on which it relies.

154. However, it adds that it is aware of the primacy of Community law over the national law of the Member States.

155. In that regard, it need merely be pointed out therefore that, according to settled case-law, [59] the primacy of Community

57 — *European Treaties and Conventions Series*, No 19.

58 — United Nations Treaty Series 1960, p. 260.

59 — 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.

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

156. Consequently, Article 11(2) of the Constitution does not constitute any obstacle to a finding of breach of treaty obligations.

157. In any event, I must emphasize that it is quite possible that the term 'civil and military posts' 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.

(b) Article 13 of the European Convention on Establishment

158. The Convention on Establishment, concluded within the Council of Europe, is designed to lay down common rules on the treatment accorded to nationals of each of the signatory States within the territory of the others.

159. As at 1 July 1995, the Convention was applicable in ten Member States, namely the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland, as well as in two non-member countries, the Kingdom of Norway and the Turkish Republic.

160. Article 13, on which the defendant relies, provides by way of exception to the liberalization of the gainful activities provided for in Articles 10 to 12:

'Any Contracting Party may reserve for its own nationals the exercise of public functions or of occupations connected with national security or defence, or make the exercise of these occupations by aliens subject to special conditions'.

161. This raises the problem of the relationship between the EEC Treaty and international conventions concluded before 1 January 1958 by one or more Member States and one or more non-member countries.

162. That relationship is governed by the first paragraph of Article 234 of the Treaty:

'The rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty'.

163. Since its judgment of 27 February 1962, [60] the Court's interpretation of that article has been as follows:

'the terms "rights and obligations" in Article 234 refer, as regards the "rights", to the rights of third countries and, as regards the "obligations", to the obligations of Member States and ... by virtue of the principles of international law, by assuming a new obligation which is incompatible with *rights* held under a prior treaty a State *ipso facto* gives up the exercise of these rights to the extent necessary for the performance of its new obligations'.

164. Article 234 thus enables the Member States to comply with the *obligations* entered into with third countries. On the other hand, it does not enable the Member States to avoid fulfilling their obligations towards the Community by invoking *rights* arising from an earlier international convention.

165. Article 13 of the Convention on Establishment confers the *right*, consisting merely of an option, to reserve to nationals 'exercise of public functions or of occupations connected with national security or defence'.

166. Even if that provision should be interpreted more widely than Article 48(4) of the EEC Treaty, it cannot therefore be relied on by one of the signatories to the Convention on Establishment in order to avoid observing its Community obligations.

167. Notwithstanding the rule laid down in Article 234 of the Treaty, Article 13 of the Convention on Establishment must be read in conjunction with Article 25 of that convention, pursuant to which:

'The provisions of this Convention shall not prejudice the provisions of municipal law, *bilateral or multilateral treaties, conventions*

60 — Case 10/61 *Commission* v *Italy* [1962] ECR 1, at page 10, emphasis added. See also Case 812/79 *Burgoa* [1980] ECR 2787, paragraphs 8 and 9, and Case 121/85 *Conegate* [1986] ECR 1007, paragraph 25.

or agreements which are *already in force* or *may come into force under which more favourable treatment would be accorded to nationals of one or more of the other Contracting Parties*'. [61]

168. That provision expressly envisaged the possibility of a more favourable treaty at a later stage.

169. Article 48(4) of the EEC Treaty, as interpreted by the Court strictly in favour of freedom of movement for workers, constitutes a more favourable provision.

170. Article 13 of the Convention on Establishment cannot therefore impede its application.

(c) Article 61 of the Treaty establishing the Benelux Economic Union (hereinafter the 'Benelux Treaty')

171. The Benelux Treaty, concluded between the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands, established 'the Economic Union ... envisaged by the Customs Convention signed in London on 5 September 1944, defined and interpreted in accordance with the Protocol signed at The Hague on 14 March 1947'. [62]

172. Article 2(2) adds:

'[Nationals of each of the contracting parties] shall enjoy [on the territory of the other contracting parties] the same treatment as nationals of that State as regards:

...

(b) freedom to carry on a trade, including the rendering of services'.

61 — Emphasis added.

62 — Preamble to the Benelux Treaty, cited in footnote 58 above.

173. However, Article 61(1) imposes a restriction on that principle:

'Contrary to the provisions of Article 2, paragraph 2 b), of the present Treaty, each High Contracting Party shall remain entitled to reserve the exercise of the following economic and professional activities for its own nationals:

(a) official posts, public functions or professions, including those of notary public, solicitor and bailiff.'

174. Article 233 of the EEC Treaty provides:

'The provisions of this Treaty shall not preclude the existence or completion of regional unions between Belgium and Luxembourg, or between Belgium, Luxembourg and the Netherlands, to the extent that the objectives of these regional unions are not attained by application of this Treaty'.

175. That article was included in the EEC Treaty, at the express request of the Belgian, Luxembourg and Netherlands Governments, to deal with the question of the relationship between the EEC and Benelux Treaties, the latter still being at the negotiation stage and intended to replace the Customs Convention of 5 September 1944 mentioned earlier.

176. Let us not forget that it was the three Benelux States which took the initiative to relaunch Europe at the Messina meeting on 1 and 2 June 1955 of the Foreign Ministers of the six Member States of the ECSC, submitting a memorandum to that effect. It was following that memorandum that it was decided to hold the intergovernmental conference which was to lead to the signature of the Rome Treaties on 25 March 1957.

177. In 1955, the Benelux Union was already at a very advanced stage within the framework of the 1944 Customs Convention. It was in fact intended that the Benelux Treaty should codify the provisions already accepted in earlier instruments and forthwith establish the Benelux common market at a level of advancement which the EEC Treaty was not to attain for another ten to fifteen years. [63]

63 — See Baron Snoy and d'Oppuers, 'Le Benelux dans la Communauté Économique Européenne', *Bulletin Trimestriel Benelux*, 1959, No 9, pp. 8 and 9, second paragraph.

178. The envisaged Benelux Economic Union was thus more advanced in certain areas than the European Economic Community.

179. For the three Benelux States, 'it was important to secure a legal guarantee that their common integration efforts could be continued within the framework of the new Community and attain complete fruition within it'. [64]

180. Article 233 was concerned with '... the Benelux Union both in its [then] form and in the form which [would result] from the conclusion and implementation of the Union Treaty, which [could] effectively be regarded as the continuation and the perfecting of the existing agreements'. [65]

181. The authors of the EEC Treaty considered 'that regional integration over a more limited area [remained] possible within the European Community provided that it [was to have] *more impetus* in the attainment of the economic and social objectives pursued'. [66] In those circumstances, 'The relationship between the Communities [was] therefore a case not of parallelism or subjection of Benelux to the European Economic Community but rather of priority for Benelux over the European Economic Community in so far as Benelux [was ahead of] the Community of Six on the path to integration'. [67]

182. The concern to preserve the possibility of further development within the Benelux Union ultimately accounts for the choice, in Article 233 of the EEC Treaty, of the expression '*completion* of regional unions'. [68]

183. The Court fully endorsed that analysis in its judgment of 16 May 1984 in *Pakvries*: [69]

'The aim of [Article 233 of the Treaty] is to prevent the application of Community law from causing the disintegration of the regional union established between those three Member States or from hindering its development. It therefore enables the three Member States concerned to apply, in derogation from the Community rules, the rules in force within their union *in so far as it is further advanced than the common market*'.

64 — Rasquin, G., 'Considérations sur l'article 233 du traité CEE (La "clause Benelux")', *Revue Trimestrielle Benelux*, 1982, No 3, pp. 57 and 59.

65 — Karelle J. and de Kemmeter F., op. cit., p. 58.

66 — Ibid., p. 59, emphasis added.

67 — Ibid.

68 — Emphasis added.

69 — Case 105/83 [1984] ECR 2101, paragraph 11, emphasis added.

184. Article 3(c) of the EEC Treaty refers, among the fundamental objectives of the Community, to the abolition *inter alia* of obstacles to freedom of movement for persons.

185. Article 1 of the Benelux Treaty makes it clear that the Economic Union involves '*free movement of persons*, goods, capital and services'. [70]

186. The free movement of persons is therefore an objective common to the two Treaties.

187. A strict interpretation to any exception to that freedom, like the one relating to 'public service' in Article 48(4) of the EEC Treaty, comes closer to the common objective pursued than would a broad interpretation of the term 'official posts, public functions or professions' contained in Article 61 of the Benelux Treaty.

188. Consequently, a strict interpretation of Article 48(4) of the EEC Treaty must be adopted in relations between all the Member States, including the three Benelux States.

70 — Emphasis added.

189. Is there any risk of a conflict between the interpretation which might be given of the terms 'official posts, public functions or professions' for the purposes of the Benelux Union and the Court's interpretation of 'public service'?

190. I do not think so.

191. The Benelux Treaty provides that its interpretation is a matter for a College of Arbitrators, [71] unless the difference is settled within the Committee of Ministers (Article 44 of the Benelux Treaty).

192. Article 41 of the Benelux Treaty provides:

'The College of Arbitrators shall be entrusted with settling such disputes as may arise between the High Contracting Parties with regard to the application of this Treaty and of Conventions related to the aims of this Treaty'.

71 — The Benelux Court of Justice, established by the Treaty of 31 March 1965 on the establishment and statute of a Benelux Court of Justice (*Codes Larcier*, Volume IV, 1995 edition, p. 44), has jurisdiction, under Articles 6(1) and 11(1) of that Treaty, to deal with interpretation only of legal rules identified by virtue of Article 1 thereof, that is to say rules referred to either by a convention or by a decision of the Committee of Ministers.

193. A dispute could arise between the Benelux States as to the interpretation of 'official posts, public functions or professions'.

194. However, in so far as the interpretation of those concepts might cast doubt on the interpretation and application of Article 48(4) of the EC Treaty, the Benelux States should, it seems to me, observe the provisions of Article 51(2) of the Benelux Treaty, pursuant to which:

'With regard to disputes in which the interpretation or application of the Treaty for the European Economic Community or of the Treaty for the establishment of the European Atomic Energy Community are at stake, the High Contracting Parties shall, however, agree to submit such disputes to the Court of Justice established by the above Treaties. If this Court declares itself incompetent to settle the dispute, the College of Arbitrators provided for in Article 15 of the present Treaty shall be competent'.

195. Under that procedure for referring disputes to this Court, any risk of conflict should be avoidable.

196. It therefore follows that the Grand Duchy of Luxembourg has no basis for invoking Article 61 of the Benelux Treaty.

(d) Article 2 of the Protocol of 25 March 1957 concerning the Grand Duchy of Luxembourg

197. Pursuant to that Article,

'When framing the regulations on freedom of movement for workers provided for in Article 48(3) of this Treaty, the Commission shall take account, as regards the Grand Duchy of Luxembourg, of the special demographic situation in that country'.

198. The Grand Duchy of Luxembourg considers that account must be taken of its special demographic situation for the purposes of applying Article 48(4) of the Treaty, in order to preserve its national identity. The

requirement of Luxembourg nationality is in its view a *sine qua non* for the preservation of national identity. [72]

199. The defendant expresses the fear that more nationals of other Member States would apply for a post than its own nationals.

200. Let me point out immediately that Article 2 of the Protocol concerns secondary law enacted by the Commission with respect to the right of Community nationals to remain within the territory of a Member State after having been employed there.

201. It does not therefore apply to the primary law made up of the provisions of the Treaty itself and does not concern access to employment, whether in the public or the private sector.

202. In any event, I do not consider that the fear expressed by the Grand Duchy of Luxembourg is likely to be confirmed in practice.

203. As I have already stressed with regard to the particular sector of teaching, [73] freedom of movement for persons merely enables citizens of other Member States to apply for posts offered on an equal basis with nationals.

204. In the areas of activity at issue here, access to posts which by their nature involve contact with the public may be in particular made subject to conditions regarding the knowledge of one, two or three languages covered by the Law on the use of languages of 24 February 1984.

205. The public authorities will merely have to guard against imposing linguistic requirements which are not 'required by reason of the nature of the post to be filled' within the meaning of Article 3(1), second paragraph, of Regulation No 1612/68. [74]

206. In *Groener*, cited above, [75] the Court stressed generally that:

'The EEC Treaty does not prohibit the adoption of a policy for the protection and

72 — Defence, p. 20.

73 — Paragraph 132 above.

74 — See note 52.

75 — Paragraph 19.

promotion of a language of a Member State .... However, the implementation of such a policy must not encroach upon a fundamental freedom such as that of the free movement of workers. Therefore, the requirements deriving from measures intended to implement such a policy must not in any circumstances be disproportionate in relation to the aim pursued and the manner in which they are applied must not bring about discrimination against nationals of other Member States'.

207. In my view, the linguistic requirements to which access to numerous posts in the sectors concerned may be lawfully made subject should therefore in most cases allow only citizens born or long established in Luxembourg to respond to offers of employment or to participate in competitions conducted for recruitment purposes.

208. It is very difficult to imagine that nationals of the three neighbouring States of the Grand Duchy, established in their State of origin, could suddenly arrive in large numbers to compete with Luxembourg nationals in recruitment procedures to fill new or vacant posts the nature of which justifies the imposition of linguistic requirements.

209. In any event, I am of the opinion that Article 2 of the abovementioned Protocol cannot be relied on as against the applicant.

210. Since none of the pleas put forward by the Grand Duchy of Luxembourg is well founded, I suggest that the Court find against it in the terms of my final conclusion.

IV — The request for a period of grace

211. The Grand Duchy of Luxembourg requests that, in the event of a finding against it, it be granted a long period in order to allow it to comply with the Community requirements.

212. It contends that the nationality principle for civil servants is deeply embedded in its administrative system and changes in that area would require it to undertake draconian reforms at both constitutional and legislative level. [76]

76 — Defence, p. 18.

213. That request raises the question of the powers available to this Court in giving judgment in Treaty-infringement proceedings.

214. Article 171 of the Treaty is concerned only with findings of a failure to fulfil obligations.

215. The Community Court either 'finds' that a Member State has failed to fulfil a Community obligation or dismisses the application.

216. It is clear that the Court cannot itself bring the infringement to an end or issue any injunction.

217. Article 171 provides that the State 'shall be required to take the necessary measures to comply with the judgment of the Court of Justice'.

218. In its judgment of 5 November 1986, [77] it observed:

'That article does not prescribe the period within which such measures must be taken. However, measures to comply with a judgment must be initiated *immediately* and must be completed *as soon as possible*'.

219. Furthermore, in two judgments of 10 November 1981, *Commission* v *Italy*, [78] the Court had already held, in response to a request for extension of the period allowed by the reasoned opinion:

'The powers conferred on the Court in relation to applications under Article 169 of the Treaty do not include the power to substitute a different period for that laid down by the Commission pursuant to Article 169 in its reasoned opinion, although the legality of that opinion is subject to review by the Court. Subject to the same reservation, it is for the Commission to decide whether such a request from a Member State is to be granted'.

220. I am of the opinion that likewise in a judgment finding an infringement of the Treaty it is not for the Court to grant to the defendant State, in the abstract and in advance, a period of grace for compliance with the judgment.

77 — Case 160/85 *Commission v Italy* [1986] ECR 3245, paragraph 9, emphasis added. Consistent case-law: see in particular Case 69/86 *Commission* v *Italy* [1987] ECR 773, paragraph 8; Joined Cases 227/85, 228/85, 229/85 and 230/85 *Commission* v *Belgium* [1988] ECR 1, paragraph 11; Case 169/87 *Commission* v *France* [1988] ECR 4093, paragraph 14; Case C-328/90 *Commission* v *Greece* [1992] ECR I-425, paragraph 6; and Case C-345/92 *Commission* v *Germany* [1993] ECR I-1115, paragraph 6.

78 — Case 28/81 [1981] ECR 2577, paragraph 6, and Case 29/81 [1981] ECR 2585, paragraph 6.

221. The monitoring of compliance with judgments is initially a matter for the Commission. If it considers that the necessary measures have not been taken within the requisite period, it initiates fresh Treaty-infringement proceedings, for which purpose it will set a time-limit for a response to its formal letter before action, and then, in its reasoned opinion, a time-limit for compliance.

222. The Court would be able to examine the situation only at a later stage, by reference to the circumstances of the case, whereupon it would have to decide whether there had been a further infringement.

223. The request made by the Grand Duchy of Luxembourg cannot therefore be granted.

Conclusion

224. Consequently, I suggest that the Court rule as follows:

(1) By not, in relation to nationals of other Member States, limiting the requirement of Luxembourg 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 research, teaching, health, inland transport, posts and telecommunications and distribution services for water, gas and electricity, the Grand Duchy of Luxembourg 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 Grand Duchy of Luxembourg is ordered to pay the costs.