

JUDGMENT OF THE COURT
2 July 1996^{*}

In Case C-290/94,

Commission of the European Communities, represented by Maria Patakia, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Hellenic Republic, represented by Aikaterini Samoni-Rantou, Special Deputy Legal Adviser to the Special Department for Contentious Community Affairs of the Ministry of Foreign Affairs, and Stamatina Vodina, of the Athens Bar, Special Scientific Assistant in the same department, acting as Agents, with an address for service in Luxembourg at the Greek Embassy, 117 Val Sainte-Croix,

defendant,

APPLICATION for a declaration that, by imposing a Greek nationality condition in relation to workers who are nationals of other Member States as regards access to employment in public, semi-public or municipal undertakings and companies distributing water, gas and electricity, in the operational sectors of the public health service, to teacher posts in nursery, primary and secondary schools and higher education establishments and universities subject to the Ministry of National Education, to posts in air and sea transport services, companies or organizations, in the

^{*} Language of the case: Greek.

Greek National Railways (OSE), and in the public or municipal bodies, companies and undertakings providing public city and inter-city transport services, to posts for scientific and non-scientific staff in public establishments conducting research for non-military purposes, to posts in public or semi-public bodies or undertakings providing postal services (ELTA), telecommunications services (OTE) and radio and television broadcasting services (ET), and as regards access to musicians' posts at the Athens Opera and in municipal and local orchestras, the Hellenic Republic had failed to fulfil its obligations under Article 48 of the EC 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 (OJ, English Special Edition 1968 (II), p. 475),

THE COURT,

composed of: G. C. Rodríguez-Iglesias (President), C. N. Kakouris, D. A. O. Edward, J.-P. Puissochet and G. Hirsch (Presidents of Chambers), G. F. Mancini, F. A. Schockweiler, J. C. Moitinho de Almeida, P. J. G. Kapteyn, C. Gulmann, J. L. Murray, P. Jann (Rapporteur), H. Ragnemalm, L. Sevón and M. Wathelet, Judges,

Advocate General: P. Léger,
Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 23 January 1996, at which the Commission was represented by Dimitrios Gouloussis, Legal Adviser, and the Hellenic Republic by Aikaterini Samoni-Rantou,

after hearing the Opinion of the Advocate General at the sitting on 5 March 1996,

gives the following

Judgment

1 By application lodged at the Registry of the Court on 25 October 1994, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by imposing a Greek nationality condition in relation to workers who are nationals of other Member States as regards access to employment in public, semi-public or municipal undertakings and companies distributing water, gas and electricity, in the operational sectors of the public health service, to teacher posts in nursery, primary and secondary schools and higher education establishments and universities subject to the Ministry of National Education, to posts in air and sea transport services, companies or organizations, in the Greek National Railways (OSE), and in the public or municipal bodies, companies and undertakings providing public city and inter-city transport services, to posts for scientific and non-scientific staff in public establishments conducting research for non-military purposes, to posts in public or semi-public bodies or undertakings providing postal services (ELTA), telecommunications services (OTE) and radio and television broadcasting services (ET), and as regards access to musicians' posts at the Athens Opera and in municipal and local orchestras, the Hellenic Republic had failed to fulfil its obligations under Article 48 of the EC 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 (OJ, English Special Edition 1968 (II), p. 475).

2 Article 48(1) to (3) of the EEC Treaty, which is now the EC Treaty, lays down the principle of the free movement of workers and the abolition of all discrimination based on nationality between workers of the Member States. Article 48(4) of the Treaty provides that the provisions of this article are not to apply to employment in the public service. According to the case-law of the Court, Article 48(4) covers 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 and thus 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. On the other hand, the Article 48(4) exception does not cover 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 (judgment in Case 149/79 *Commission v Belgium* [1980] ECR 3881, paragraphs 10 and 11).

- 3 As regards Articles 1 and 7 of Regulation No 1612/68, these provisions lay down the rule of equal treatment in access to employment, on the one hand, and in its exercise, on the other.
- 4 Having found that, in certain Member States, a large number of posts regarded as belonging to the public service had no connection with the exercise of powers conferred by public law or with the safeguarding of the general interests of the State, the Commission decided in 1988 to implement a 'strategy' on the basis of Communication 88/C 72/02: 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). In that communication, the Commission reminded the Member States to give nationals of other Member States access to posts in bodies responsible for administering commercial services, such as public transport, supply of electricity and gas, airlines and shipping lines, posts and telecommunications, radio and television companies, and in public health care services, State education and research for non-military purposes conducted in public establishments. The Commission considered that the functions involved in posts falling in those areas would only in very rare cases be covered by the exception provided for in Article 48(4) of the Treaty.
- 5 In these proceedings, after having been informed of the Athens Opera's refusal to engage a German musician on the ground of his nationality, the Commission, on 26 March 1991, 2 April 1991 and 21 May 1992, sent eight letters calling for observations from the Greek Government concerning the areas of water, gas and electricity distribution, health, education, transport by sea and air, railways, research for civil purposes, posts, telecommunications and radio and television

broadcasting, and musical orchestras. In those letters, the Commission requested the Greek Government to take the measures needed to abolish the nationality condition which that State applies to access to employment in those areas and to submit its observations within a period of six months.

- 6 In reply to the first seven letters, the Greek Government stated on 18 October 1991 that it accepted the principles stated by the Commission regarding Article 48(4) of the Treaty and that it had decided to implement them by incorporating new rules in its administration modernization programme, which was soon to be adopted, and in a future legislative programme.
- 7 Since the announced plans had still not been carried out and since the last formal letter of 21 May 1992, relating to the Athens Opera and municipal and local orchestras, had received no reply, the Commission, on 13 July 1992 and 3 March 1993, sent eight reasoned opinions requesting the Hellenic Republic to take the measures necessary within a period of four months in the first seven opinions and within a period of two months in the last opinion.
- 8 In response to the seven reasoned opinions dated 13 July 1992, the Hellenic Republic sent to the Commission, by letter of 1 February 1993, the text of a draft Law on access by Community subjects to employment in the public service, which was to be submitted to Parliament in February 1993 but had still not been laid before it. As for the reasoned opinion of 3 March 1993, on the Athens Opera and municipal and local orchestras, the Greek authorities gave no reply.
- 9 When it emerged that no national measures had been adopted in the periods laid down in the reasoned opinions, the Commission brought these proceedings.

- 10 It appears from the documents before the Court that in Greece the areas with which the application is concerned belong to the public service. In all those areas, Greek nationality is in principle required as a qualification for the relevant posts.
- 11 That principle is laid down, first, in Article 4(4) of the Greek Constitution, which provides that all public functions are to be occupied by Greek citizens, save where exceptions are made by special Laws. Second, Law No 1735/87 and Ministerial Decree No DIPPP/F of 7/8 January 1988 on access to employment in the public sector require Greek nationality for access to all posts in the public sector, which is defined in Article 1(6) of Law No 1256/82 and delimited by Article 51 of Law No 1892/90. Finally, Article 18 of the Public Service Code provides that only other than Greek nationals may be appointed.
- 12 Articles 7 and 66 of Consolidating Presidential Decree No 410/88 on recruitment under private-law contract of specialized scientific staff and technical and auxiliary staff in the public sector refers to Article 18 of the Public Service Code as regards recruitment under private-law contract of seasonal staff or manpower engaged to meet temporary needs in the various branches of the entire public service.
- 13 Greek nationality is also prescribed by laws or regulations specific to the areas of activity in question.
- 14 Thus, water, gas and electricity distribution services, if not already in the public service *stricto sensu*, are provided either by local authorities or by State-controlled undertakings governed by special legislation or regulations such as Article 5(5) of the General Regulations applicable to staff of the Public Electricity Corporation, or by local undertakings to which the legislation and regulations governing temporary servants of local authorities apply, such as Article 260 of Law No 1188/81 and Articles 7 and 66 of Presidential Decree No 410/88, as well as internal regulations of the undertakings or companies in question.

- 15 Operational public-health services fall entirely within the public service domain: both public officials employed in this area and staff who are not public officials are thus subject to the general provisions mentioned above. However, Community subjects with knowledge of Greek may occupy posts as doctors or nurses in State hospitals.
- 16 Education also falls entirely within the public sector, including technical and higher education (Law No 1404/93) and university education (Law No 1268/82 and Article 16(6) of the Constitution). However, the Greek nationality condition may be waived for certain posts when there are no Greek candidates (Article 79(7) of Law No 1566/85) or for university lecturers in foreign languages and literature (Articles 4 and 5 of Law No 5139/31).
- 17 In the air and sea transport sectors, Article 4(1) of Decree-Law No 2651/53 on the composition of crews of Greek vessels requires Greek nationality for recruitment to any post, save in the few cases defined in Article 4(2) of that decree. Article 5 of Royal Decree No 1(14) of 3 November 1836 on the merchant marine also provides that at least three-quarters of the crew of a Greek vessel must be Greek nationals. The same condition is laid down by Article 57 of the Maritime Code regarding entry of sailors in the respective registers, with the exception of the sea workers' register. Air transport companies come within the public sector and are therefore subject to the general provisions mentioned above.
- 18 The railways and the organizations, companies or undertakings which provide public city and inter-city transport services in principle come within the public sector and the general condition of Greek nationality therefore applies to them. Furthermore, Article 19(1) of the General Regulations applicable to the staff of Greek Railways provides that no person not having Greek nationality may be engaged, although Article 19(3) does provide for a few exceptions. For posts not in the public sector, specific laws and regulations also lay down the condition of Greek nationality. Thus, Greek nationality is required by Article 8 of the Regulations applicable to staff of the internal services of Greek Electric Railways, by

Article 15 of the Regulations applicable to staff of the external services of Greek Electric Railways and by Article 11 of the General Regulations applicable to staff of Athens Electric Motorbuses.

- 19 In the area of research for civil purposes, Articles 16(2), 20 and 21 of Law No 1514/85 and the provisions of decrees adopted pursuant to Article 25 of that Law in principle require all members of scientific research staff to have Greek nationality. However, there are a few exceptions for visiting research experts and for specific programmes. As regards technical, administrative and auxiliary staff, Greek nationality is required, where the staff concerned are public officials, by the general provisions mentioned above and, where the staff concerned are persons working under contract, by Article 24 of Law No 1514/85, Article 7 of Law No 1735/87, Ministerial Decree No DIPPP/F of 7/8 January 1988 and Articles 7 and 66 of Decree No 410/88.
- 20 As far as post, telecommunications and radio and television broadcasting services are concerned, the organizations in question form part of the public sector and the nationality condition laid down by the general provisions therefore applies. That condition is also incorporated in the regulations of the various organizations providing those services, for example Article 7 of the General Regulations applicable to Greek Post Office staff and Article 6(1) of the General Regulations of Greek Telecommunications.
- 21 Finally, Article 7 of Presidential Decree No 410/88 restricts access to musicians' posts at the Athens Opera and in municipal and local orchestras to Greek nationals.
- 22 In all the cases in which the requirement of Greek nationality is laid down, it is framed in general terms, without any distinction according to the nature of the duties entailed by, or the hierarchical level of, the posts in question.
- 23 The Commission contends that, in all the areas with which its action is concerned, the functions involved in the posts subject to the nationality condition are for the most part too remote from the specific activities of the public service to be covered

virtually without exception by the derogation in Article 48(4) of the Treaty. The Hellenic Republic cannot therefore require Greek nationality for all posts in those areas. As regards special posts having such a relation with the specific activities of the public service, it is for the defendant government to demonstrate that link.

- 24 The Hellenic Republic claims that the application should be dismissed. It does not deny that in Greece posts in the areas in question are generally reserved for its own nationals. However, it points out, first, that, as far as sea transport is concerned, on 31 December 1992 the President of the Republic adopted Decree No 12/1992 on access to posts in the Greek Merchant Marine by nationals of Member States of the European Community and recognition of periods at sea served by Greek sailors on vessels registered in Member States of the European Community for the purpose of the grant of maritime efficiency certificates. That decree entered into force on 1 February 1993 and was notified to the Commission on 18 March 1993. Consequently, the action is devoid of purpose on this point.
- 25 Secondly, as regards the German musician whose case led to the issue of a reasoned opinion on 3 March 1993, the Greek Government refers to a judgment given by the Athens Court on 29 May 1992 (*Nomiko Vima* [1993] p. 328-332) which, whilst dismissing the musician's action on formal grounds, held that, as special rules, the relevant rules of Community law prevail over the national provisions in question. In its rejoinder, the Hellenic Republic also pointed out that the German musician's case has since been settled: on 23 February 1995, in accordance with his wishes, he was engaged under a contract of indefinite duration by decision of the Mayor of Athens.
- 26 Thirdly, the Greek Government points out that a draft Law on access by Community subjects to posts in the Greek public sector has been drawn up and that it has been approved by the Commission. However, the parliamentary procedure for passing that Law, which should have taken place in April 1993, could not be completed owing to the premature dissolution of the National Assembly after legislative elections were scheduled for 10 October 1993.

- 27 As far as the first two arguments are concerned, the Court must refer to its established case-law (see, in particular, the judgment in Case C-433/93 *Commission v Germany* [1995] ECR I-2303, paragraph 15), according to which amendments made to national legislation are irrelevant for the purpose of giving judgment on an action for failure to fulfil obligations if they have not been implemented before expiry of the period set by the reasoned opinion. Likewise, the Court cannot take any account of settlements of individual cases occurring after expiry of that period when ruling on an alleged breach of obligations.
- 28 In the present case, as far as the sea transport sector is concerned, the period set in the reasoned opinion was four months and commenced on 13 July 1992. The Greek Government cannot therefore rely on legislative amendments taking effect, in relation to posts in the merchant navy, on 1 February 1993. As regards the case of the German musician, the period set in the reasoned opinion was two months and commenced on 3 March 1993. Similarly, the fact that this case was settled after proceedings were brought cannot therefore be taken into account in the examination of the alleged breach of obligations.
- 29 As regards the second argument, it must also be observed that the Greek Government cannot effectively rely on an acknowledgement of the primacy of Community law by the Athens Court in its judgment of 29 May 1992. It is well established in case-law that the primacy and direct effect of Community law do not release Member States from their obligation to remove from their domestic legal order any provisions incompatible with Community law, since the maintenance of such provisions creates an ambiguous state of affairs, in so far as it leaves persons concerned in a state of uncertainty as to the possibilities available to them of relying on Community law (see, in particular, the judgment in Case 104/86 *Commission v Italy* [1988] ECR I799, paragraph 12).
- 30 As regards the third argument, again it is well established in case-law that a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with obligations arising under Community law (see, in particular, the judgment in Case C-259/94 *Commission v Greece* [1995] ECR I-1947, paragraph 5).

- 31 The Hellenic Republic also objects to the Commission's 'global approach', consisting in excluding entire areas from the Article 48(4) derogation in the absence of Community rules and without providing more details of the posts concerned. The Commission is thus attempting to exercise powers which it does not have by publishing communications framed in terms which can only be laid down by judgments of the Court of Justice. According to the Hellenic Republic, it is clear from the case-law of the Court (see, in particular, the judgment in Case 149/79 *Commission v Belgium*, cited above) that the Commission must examine the posts concerned on a case-by-case basis instead of designating entire areas which are to be excluded in principle from the Article 48(4) derogation by putting the burden on Member States to prove the contrary in specific individual cases.
- 32 The Commission states in this regard that in Communication 88/C 72/02 it examined the posts in the various areas concerned in the light of the criteria laid down by the Court for the interpretation of Article 48(4) of the Treaty. That examination led it to conclude that those posts are too remote from the specific activities of the public service to be covered in general by the Article 48(4) exception. In those circumstances, it must be entitled in principle to exclude application of that provision in all the areas concerned by these proceedings without any preliminary post-by-post examination being necessary.
- 33 The Commission also claims that it found that the activities performed in the areas in question either existed in the private sector, too, or could be performed in the public sector without being subject to a nationality condition.
- 34 The application concerns the areas of research, education, health, transport by land, sea and air, posts and telecommunications, television broadcasting, water, gas and electricity distribution services and, finally, music. As the Greek Government itself admits, the generality of posts in those areas are remote from the specific

activities of the public service because they involve no direct or indirect participation in the exercise of powers conferred by public law nor duties designed to safeguard the general interest of the State or other public authorities (see, in particular, as regards health, the judgment in Case 307/84 *Commission v France* [1986] ECR 1725; as regards research for civil purposes, the judgment in Case 225/85 *Commission v Italy* [1987] ECR 2625, and, as regards education, the judgments in Case 66/85 *Lawrie-Blum* [1986] ECR 2121, Case 33/88 *Allué and Coonan* [1989] ECR 1591 and Case C-4/91 *Bleis* [1991] ECR I-5627).

- 35 Consequently, the Member State may not generally make all posts in the areas concerned subject to a nationality condition without exceeding the limits of the exception provided for by Article 48(4) of the Treaty.
- 36 The fact that some posts in those areas may, in certain circumstances, be covered by Article 48(4) of the Treaty cannot justify such a general prohibition (see, also, the two judgments delivered on this same day in Case C-473/93 *Commission v Luxembourg* [1996] ECR I-3207 and Case C-173/94 *Commission v Belgium* [1996] ECR I-3265)).
- 37 In those circumstances, in order to give full effect to the principles of freedom of movement for workers and equal treatment in access to employment, the Hellenic Republic was obliged to open the areas in question to nationals of other Member States by restricting application of the nationality condition to only those posts which actually involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interest of the State or other public authorities.
- 38 As regards the basis of the action, it must be observed that Article 7 of Regulation No 1612/68 concerns conditions of exercise of employment and not access to it. However, only access by nationals of other Member States to employment is at issue in this case. No breach of obligations can therefore be found on the basis of Article 7 of Regulation No 1612/68.

39 In view of all the foregoing considerations, the Court must declare that, in not restricting the requirement of Greek nationality to access to posts involving 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 in the public sectors of water, gas and electricity distribution, the operational public health services, in the sectors of public education, transport by sea and air, railways, city and inter-city public transport, research for civil purposes, posts and telecommunications and radio and television broadcasting, and at the Athens Opera and in municipal and local orchestras, the Hellenic Republic has failed to fulfil its obligations under Article 48 of the Treaty and Article 1 of Regulation No 1612/68.

Costs

40 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Hellenic Republic has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Declares that, in not restricting the requirement of Greek nationality to access to posts involving 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 in the public sectors of

water, gas and electricity distribution, the operational public health services, in the sectors of public education, transport by sea and air, railways, city and inter-city public transport, research for civil purposes, posts and telecommunications and radio and television broadcasting, and at the Athens Opera and in municipal and local orchestras, the Hellenic Republic has failed to fulfil its obligations under Article 48 of the EC Treaty and Article 1 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community;

2. Orders the Hellenic Republic to pay the costs.

Rodríguez Iglesias

Kakouris

Edward

Puissochet

Hirsch

Mancini

Schockweiler

Moitinho de Almeida

Kapteyn

Gulmann

Murray

Jann

Ragnemalm

Sevón

Wathelet

Delivered in open court in Luxembourg on 2 July 1996.

R. Grass

G. C. Rodríguez Iglesias

Registrar

President