**Opinion of Advocate General Stix-Hackl delivered on 4October2001**

**Commission of the European Communities v Kingdom of Spain**

**Failure by a Member State to fulfil its obligations - Directive 93/16/EEC - Transposition of Articles 8 and 18 - Access to additional training for migrant doctors who wish to practise specialised medicine in the host Member State on the basis of a diploma, certificate or other evidence of formal qualifications of specialist doctors which is not the subject of automatic unconditional recognition under that directive - Obligation for migrant doctors in Spain to sit the standard competition for admission to training in specialised medicine - Requirement for affiliation to a public social security body for the settlement of accounts relating to medical services with an insurance body**

**Case C-232/99**

*European Court reports 2002 Page I-04235*

## Opinion of the Advocate-General

### I - Subject-matter

**1.** By this action the Commission is seeking a declaration that, by failing to transpose Article 8 of Council Directive 93/16/EEC of 5 April 1993 to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications (Directive 93/16) correctly into national law, and by failing to transpose Article 18 of Directive 93/16 into national law, the Kingdom of Spain has failed to fulfil its obligations under that directive.

**2.** The central issue in these proceedings is whether Article 8 of Directive 93/16 entitles a Member States (hereinafter the host Member State) to require candidates holding diplomas, certificates and other evidence of formal qualifications in specialised medicine (evidence of formal qualifications in specialised medicine) from other Member States (Member States of origin), who must undergo additional training in specialised medicine (additional training) in order to acquire evidence of formal qualifications in specialised medicine in the host Member State (migrant specialist doctors), to take part in a selection process the principal element of which is a test in which the majority of the questions deal with basic medical training.

**3.** In addition, there is the issue whether Article 18 of Directive 93/16 requires that, in general, national social security schemes must also bear the cost of services performed by doctors who are established in other Member States and are not members of those schemes.

### II - Legal framework

#### A - Directive 93/16/EEC

**4.** The 2nd, 3rd, 12th, 15th and 22nd recitals are worded as follows:

... pursuant to the Treaty, all discriminatory treatment based on nationality with regard to establishment and provision of services is prohibited as from the end of the transitional period; whereas the principle of such treatment based on nationality applies in particular to the grant of any authorisation required to practise as a doctor and also to the registration with, or membership of, professional organisations or bodies;

...

... it nevertheless seems desirable that certain provisions be introduced to facilitate the effective exercise of the right of establishment and freedom to provide services in respect of the activities of doctors;

...

... in the case of the provision of services, the requirement of registration with, or membership of, professional organisations or bodies, since it is related to the fixed and permanent nature of the activity pursued in the host country, would undoubtedly constitute an obstacle to the person wishing to provide the service, by reason of the temporary nature of his activity; whereas this requirement should therefore be abolished; whereas, however, in this event, control over professional discipline, which is the responsibility of these professional organisations or bodies, should be guaranteed; whereas, to this end, it should be guaranteed; whereas, to this end, it should be provided, subject to the application of Article 62 of the Treaty, that the person concerned may be required to submit to the competent authority of the host Member State particulars relating to the provision of services;

...

... the coordination of the conditions for the pursuit of these activities, as envisaged by this Directive, does not exclude any subsequent coordination;

...

... this Directive does not affect the power of the Member States to organise their national [social] security schemes and to determine what activities are to be carried out under those schemes;.

**5.** Article 2 (recognition of qualifications in medicine) provides as follows:

Each Member State shall recognise the diplomas, certificates and other evidence of formal qualifications awarded to nationals of Member States by the other Member States in accordance with Article 23 and which are listed in Article 3, by giving such qualifications, as far as the right to take up and pursue the activities of a doctor is concerned, the same effect in its territory as those which the Member State itself awards.

**6.** Article 4 and Article 6 (recognition of qualifications in specialised medicine) provide as follows:

Each Member State shall recognise the diplomas, certificates and other evidence of formal qualifications in specialised medicine awarded to nationals of Member States by the other Member States in accordance with Articles 24, 25, 26, and 29 and which are listed in Article 5, by giving such qualifications the same effect in its territory as those which the Member State itself awards.

Each Member State with provisions on this matter laid down by law, regulation or administrative action shall recognise the diplomas, certificates and other evidence of formal qualifications in specialised medicine awarded to nationals of Member States by the other Member States in accordance with Articles 24, 25, 27 and 29 and which are listed in Article 7, by giving such qualifications the same effect in its territory as those which the Member State itself awards.

**7.** Article 8 provides:

1. Nationals of Member States wishing to acquire one of the diplomas, certificates or other evidence of formal qualifications of specialist doctors not referred to in Articles 4 and 6, or which, although referred to in Article 6, are not awarded in the Member State of origin or the Member State from which the foreign national comes, may be required by a host Member State to fulfil the conditions of training laid down in respect of the speciality by its own law, regulation or administrative action.

2. The host Member State shall, however, take into account, in whole or in part, the training periods completed by the nationals referred to in paragraph 1 and attested by the award of a diploma, certificate or other evidence of formal training by the competent authorities of the Member State of origin or the Member State from which the foreign national comes provided such training periods correspond to those required in the host Member State for the specialised training in question.

3. The competent authorities or bodies of the host Member State, having verified the content and duration of the specialist training of the person concerned on the basis of the diplomas, certificates and other evidence of formal qualifications submitted, shall inform him of the period of additional training required and of the fields to be covered by it.

**8.** Article 18 provides:

Where registration with a public social security body is required in a host Member State for the settlement with insurance bodies of accounts relating to services rendered to persons insured under social security schemes, that Member State shall exempt nationals of Member States established in another Member State from this requirement, in cases of provision of services entailing travel on the part of the person concerned.

However, the persons concerned shall supply information to this body in advance, or, in urgent cases, subsequently, concerning the services provided.

**B - National law**

**9.** Article 12a of Royal Decree 1691/1989 governs the requirements for awarding Spanish qualifications in specialised medicine to persons who have undertaken periods of specialised medical training in other Member States.

**10.** Annex II to Article 12a of the Royal Decree lists the qualifications in specialised medicine which are recognised in Spain in accordance with Articles 4 and 6 of Directive 93/16. In respect of any qualifications in specialised medicine which are not listed in the annex, Article 12a(2) of the Royal Decree provides that periods of specialised medical training undertaken in the Member State of origin will be assessed according to clearly-defined criteria, by reference to their correlation with the relevant Spanish qualifications in specialised medicine, and, where appropriate, the migrant specialist doctor will be informed of the need to undertake additional training and also of the content and duration of that training.

**11.** Article 12a(3) of the Royal Decree provides that additional training must take place at accredited training centres for the specialty in question. Migrant specialist doctors must apply for a post at those centres and must go through a selection procedure under the same conditions as all the other candidates for specialist training posts.

**12.** The selection procedure is governed by Royal Decree 127/1984. Essentially, it consists of an evaluation of the results obtained in the candidate's basic medical training and the sitting of a multiple-choice test. The selection procedure bears the name used in Spain to denote a Resident Medical Intern, that is MIR (hereinafter MIR).

**13.** Under Article 12a(4) of the Royal Decree, migrant specialist doctors who passed a national selection test in their Member State of origin for admission to periods of specialised medical training undertaken there will not be required to take part in the MIR. In such cases, the period of additional training will take place at the accredited specialised training centre to which the competent Spanish authority assigns the migrant specialist doctor.

**14.** In accordance with Royal Decree 63/1995, the national health scheme is only required to cover the cost of medical services where the insured person has received those services from doctors or at medical centres operating under the national health scheme. This rule applies without prejudice to any international conventions which may provide otherwise.

**15.** An exception to that rule is provided for in urgent cases. The cost of medical services provided outside the national health scheme will be financed by that scheme if it can be proved that it was not possible for the services to be rendered by a national-health-scheme doctor or hospital, provided that there has not been an abuse of that exception.

## III - The pre-litigation procedure

**16.** The wording of Articles 8 and 18 of Directive 93/16, which are the subject of these proceedings, is identical to that of Articles 8 and 17 of Council Directive 75/362/EEC of 16 June 1975 concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in medicine, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services (Directive 75/362), which was repealed by Directive 93/16. Under Article 44, in conjunction with Annex III, Parts A and B, and with the correlation table in Annex IV, Articles 8 and 18 of Directive 93/16 were, in principle, required to be transposed into national law within the periods laid down in Directive 75/362 for the transposition of Articles 8 and 17 thereof into national law. Since the Kingdom of Spain acceded to the European Communities later, it was accorded a special time-limit and was therefore required, in accordance with note (*) to Annex III, Part B, to adopt the necessary laws, regulations and administrative provisions by 1 January 1986.

**17.** As early as 1990, while Directive 75/362 was still in force, the Commission initiated a pre-litigation procedure against the Kingdom of Spain, which, in 1995, led the Spanish Government to insert the current version of Article 12a into the Royal Decree.

**18.** However, the Commission, since it still felt that Directive 75/362 or, following its repeal, Directive 93/16, had not been correctly transposed into Spanish law, brought these infringement proceedings. Having already invited the Kingdom of Spain, by supplementary letter of formal notice, to submit observations, the Commission then sent a supplementary reasoned opinion in which it required the Kingdom of Spain to adopt the necessary measures within two months from the date of the notice. The Spanish Government replied by letter of 23 November 1998. Since that letter also failed to meet its obligations, the Commission brought this action, which was registered at the Court on 17 June 1999.

**19.** The Commission claims that the Court should:

(1) declare that the Kingdom of Spain,

- by failing to transpose Article 8 of Directive 93/16 correctly into national law, and

- by failing to transpose Article 18 of Directive 93/16 into national law,

has failed to fulfil its obligations under that directive;

(2) order the Kingdom of Spain to pay the costs.

## IV - Consideration of the pleas in law put forward by the Commission

### A - The first plea in law: incorrect transposition of Article 8 of Directive 93/16/EEC into national law

#### 1. Arguments of the parties

**20.** By its first plea in law, the Commission claims that the Kingdom of Spain failed to transpose Article 8 of Directive 93/16 correctly into national law by means of Article 12a of the Royal Decree, since migrant specialist doctors must also be successful in the MIR selection procedure in order to gain access to specialised training, despite the fact that they only require training posts for the additional training referred to in Article 8(2) and (3) of Directive 93/16.

**21.** First, to require them to participate in the MIR is unlawful under Directive 93/16 because, under the scheme of the directive, specialised training completed in other Member States must be recognised. This follows from the Court's judgment in Vlassopoulou. As is clear from its wording and purpose, the basic premiss of Article 8 of Directive 93/16 is that migrant specialist doctors are entitled to undertake additional training.

**22**. The MIR is an unlawful additional examination, since Article 8(3) of Directive 93/16 only permits the host Member State to evaluate specialised training undertaken in the Member State of origin on the basis of the qualifications submitted and to require, where appropriate, that individuals undertake any additional training which may be necessary as a result. However, it does not authorise the host Member State to verify a person's specialised knowledge.

**23.** As regards the Spanish Government's contention that, for budgetary reasons, only a limited number of training posts may be offered each year in Spain, the Commission submits, essentially, that, according to settled case-law of the Court, budgetary reasons are not a ground for exemption from obligations arising under Community law.

**24.** As regards the Spanish Government's argument that the purpose of requiring migrant specialist doctors to undergo the MIR is to prevent abuses of the system, the Commission doubts that the procedure under Article 8 of Directive 93/16 would be appropriate for preventing evasion of the law. First of all, the Commission states that

access to additional training under Article 8 must be granted only to those persons who have undergone full specialised training under the legislation of the Member State of origin. Second, the Commission cites the settled case-law of the Court on the possibilities of using Community law to prevent circumvention of national law and on the extent to which this is permissible.

**25.** The Commission also raises objections to the structure of the MIR. It claims that the evaluation of basic studies is conducted in accordance with the Spanish syllabus, which is unfair to candidates who completed their basic medical training in other Member States. In addition, the multiple-choice test, which migrant specialist doctors must pass as part of the MIR, is similar in content to an examination on the subjects covered in basic medical training. The Commission states that this is unlawful, since Directive 93/16 provides that basic medical training must be recognised automatically. In any event, it is unreasonable to require migrant specialist doctors to sit the same test as doctors who have only completed their basic training.

**26.** The Commission considers, lastly, that the exception contained in Article 12a(4) of the Royal Decree, whereby migrant specialist doctors who have already passed a selection test for access to specialised medical training in their Member State of origin will not be required to undergo the MIR, is not sufficient to make the Spanish legislation compatible with Directive 93/16. Migrant specialist doctors who were trained in their Member State of origin, without any limitations being placed on access to that training, must still go through the MIR. Nor, in this regard, is it a valid argument to say that in practice the Spanish authorities give a very wide interpretation to Article 12a(4) of the Royal Decree and that, therefore, most migrant specialist doctors can avail themselves of the exception, since the Court has repeatedly held that the fact that in administrative practice complies with Community law does not cause binding provisions of national law to cease to be contrary to Community law.

**27.** Finally, the Commission complains that even those migrant specialist doctors who have passed the MIR are not guaranteed the training posts in their specialty which are necessary for the purpose of the additional training.

**28.** The Spanish Government contends that neither the limitation of training posts in specialised medicine, nor the MIR selection procedure and its content, are contrary to Community law.

**29.** With regard to the limitation of the number of training posts in specialised medicine, the Spanish Government submits that Article 8 of Directive 93/16 only entitles migrant specialist doctors to have periods of specialised training not undertaken in Spain evaluated, and to have the content and the duration of any additional training which they may require determined. However, the directive does not require Member States to make available for that training an unlimited number of places which are not subject to national selection procedures.

**30.** In the Spanish Government's submission, the limitation of training places is in the public interest and is therefore not open to challenge under Community law. First, there are budgetary reasons, including, in particular, the fact that, according to the case-law of the Court, adequate remuneration must be provided for work undertaken as part of training. Second, the supply of trained specialist doctors far outstrips demand, the Kingdom of Spain having the highest density of doctors of all the Member States of the European Union.

**31.** According to the Spanish Government, the MIR is simply a selection procedure for a limited number of training posts, rather than an aptitude test or an entrance examination. Therefore, the requirement that migrant specialist doctors must take part in it does not mean that there it is an additional specialist examination which is not covered by Article 8 of Directive 93/16. It is true that the multiple-choice test includes questions on subjects which are also covered in basic medical training. However, in this regard, the Spanish Government relies here on the distinction between the notion of an examination and that of a selection procedure. There is an examination where access to training posts in specialised medicine is dependant upon passing a test; in other words, each candidate who passes the examination is also entitled to access to additional training. By contrast, there is a selection procedure where training posts in specialised medicine are awarded irrespective of individual results; in other words, irrespective of whether or not the person has passed the examination. Consequently, where the available posts are awarded each year to the most suitable candidates in each round of applications, irrespective of whether or not they passed the multiple-choice test, what is involved is not an examination but rather - as in the case of the MIR - a selection procedure.

**32.** As regards those specialties which are particularly in demand, the selection procedure for special training places is conducted in the same manner among the best candidates from each round of applications, by reference to the marks they received in the MIR.

**33.** In the Spanish Government's opinion, the requirement that migrant specialist doctors must take part in the MIR cannot be waived because it is the only means of preventing abuses of Community law by candidates who have undertaken their basic medical training in Spain. The Spanish Government considers that Article 8 of Directive 93/16 also applies in cases where evidence has been presented of periods of specialised medical training which were undertaken in another Member State, and which, by themselves, do not count as full specialised medical training in the Member State of origin. In the Spanish Government's opinion, accepting the Commission's legal argument would mean that doctors who had completed their basic training in Spain could undergo brief periods of specialised training in other Member States for the sole purpose of obtaining, by means of the route apparently made available to them by Article 8 and by circumventing the MIR, a specialised training post in Spain.

**34.** In the opinion of the Spanish Government, the content of the MIR is not open to challenge either. The allocation of training posts by means of the MIR is not discriminatory because it applies equally to all candidates. Candidates who have trained as specialist doctors in Spain, including those who have several years of professional experience, must also participate in the MIR if they wish to train in another specialised field.

**35.** The selection of candidates for additional training posts in specialised medicine is made on the basis of aptitude and ability. Aptitude and ability are determined by evaluating the results obtained in basic medical training by reference to a standard scale, and by ascertaining the candidates with the best overall performance in the multiple-choice test. The focus on the state of an individual's specialised medical knowledge serves the public interest in having doctors who are competent in their specialised field and, with respect to the quality of the health scheme, constitutes the most objective of all selection criteria.

**36.** Finally, the Spanish Government submits that the Royal Decree, by means of Article 12a(4), which provides that any selection tests passed in the Member State of origin, leading to periods of specialised training undertaken there, must be taken into account, provides an exception which ensures that Article 12a is entirely consistent with Community law. In practice, this exception has a wide scope. The Spanish Government claims that, owing to the fact that the majority of Member States restrict access to specialised medical training in some way (whether by the use of selection interviews or formal selection tests), all migrant specialist doctors have, to date, obtained posts to undertake their additional training without having to participate in the MIR.

**2. Analysis**

**37.** There are two elements to the Commission's complaint that the Kingdom of Spain failed to transpose Article 8 of Directive 93/16 correctly into national law. First, the Commission complains in general terms that migrant specialist doctors must also participate in the MIR. Second, the Commission objects to the content of the MIR, and in particular the fact that, in its view, a person's basic medical knowledge is used as a deciding factor.

(a) The requirement that migrant specialist doctors must participate in the MIR

**38.** The assessment of the relevant Spanish legislature provisions from the point of view Community law turns, essentially, on the aim of the provision complained of. Accordingly, it is permissible to set out some general considerations in this regard.

**- General considerations**

**39.** There is no doubt that, by introducing the MIR, the Kingdom of Spain limited access to specialised medical training. According to the arguments put forward by the Spanish Government, one of the primary aims of that limitation was to regulate the market in specialised medical activities.

**40.** A priori, the introduction of legislation to regulate the market must be based on reasons of social or economic policy. In principle, it is the Member States themselves who make such decisions. However, Member States must frequently comply with secondary Community law when deciding how to regulate the market. There are several forms of market regulation which must be distinguished.

**41.** As regards employees and self-employed persons - such as specialist doctors -, there are regulations of the market which govern the activities of those operators, and there are regulations of the market which operate at an earlier stage in that they regulate access to the market by reference to certain criteria. In the case of the latter market regulations, which govern access, a distinction can in turn be made between quantitative restrictions on access to the market (for example, licences and quota systems), on the one hand, and qualitative restrictions on access to the market, on the other.

**42.** Qualitative restrictions on access to the market can pursue a variety of aims. This category comprises first and foremost minimum qualifications for market operators, and it is precisely these minimum qualifications which can be used by Member States - as is demonstrated, in particular, by the extensive case-law of the Court of Justice on this question - to permit operators from other Member States to enter the market only under the strictest of conditions, or to prevent them from entering the market at all. Another typical form of qualitative restriction on access to the market is the requirement to produce documents certifying professional integrity. There are also other forms of qualitative restriction on access to the market, such as, for example, the requirement that all market operators must have a minimum level of financial resources, etc.

**43.** The aim of the Community's so-called (diploma) recognition directives is to harmonise the powers of Member States to impose on potential market operators from other Member States specific forms of qualitative restriction on access to the market (minimum training requirements, and also, in part, professional integrity), and to regulate the extent to which they may do so.

**44.** Directive 93/16 is one such diploma-recognition directive. Article 11 et seq. of Directive 93/16 contains rules relating to a specific kind of qualitative restriction on access to the market for specialist doctors from other Member States, such as, for example, rules relating to attestation of professional integrity and of physical and mental health. Articles 4 and 8 of the directive contain certain rules on a qualitative restriction on access to the market of another kind, namely, the rules relating to minimum training requirements for specialist doctors from other Member States.

**45.** The directive regulates the powers of Member States in relation to the latter type of qualitative restriction (minimum professional requirements for doctors) according to the following system. First, it lays down a general obligation of mutual recognition of basic medical training (Article 2, in conjunction with Article 3). As regards specialised training, the directive contains provisions differentiated according to the designations of specialties. First, there is a list of specialties common to all Member States, in other words, to which mutual recognition is automatically given (Articles 4 and 5). There follows a list of specialties which do not exist in all the Member States. Accordingly, those specialties are only given mutual recognition by the Member States specifically listed

under the specialty designated (Articles 6 and 7). Those lists include the vast majority of the specialties recognised in the Member States.

**46.** Article 8 of Directive 93/16 covers the remaining specialties, that is, those which exist in the host Member State and possibly in other Member States as well, but not in the Member State of origin of the migrant specialist doctor. In such cases, Article 8(2) and (3) permit the host Member State to make access to the practice of the profession of specialist doctor subject to completion of a period of additional training. Although the content and the duration of that training are determined by the host Member State, that State must nevertheless take into account all relevant periods of specialised medical training in the Member State of origin.

**47.** Proceeding now from the distinction between quantitative and qualitative restrictions on access to the market, and from differentiating between the various forms of qualitative restriction, I shall go on to analyse the content of Article 8 of Directive 93/16, and to consider whether the requirement that migrant specialist doctors must participate in the MIR actually falls within the scope of that provision.

- Whether Article 12a(2) of the Royal Decree is compatible with Article 8 of Directive 93/16/EEC

**48.** As regards the Commission's complaint that the Kingdom of Spain failed to transpose Article 8 of Directive 93/16 correctly into national law, it must first of all be observed that, on the question of the need for and the content of the additional training of migrant specialist doctors, Article 12a(2) of the Royal Decree essentially reiterates the provisions of Article 8(2) and (3) of Directive 93/16. Accordingly, from a substantive standpoint, the provision does not at first appear in principle to be open to challenge.

**49.** The Commission's reference to the obligation of the Member States to take into general consideration all training periods undertaken in another Member State, which was first laid down by the Court in its pioneering judgment Vlassopoulou, is misplaced in the present case. In accordance with Article 12a(2) of the Royal Decree, the Kingdom of Spain is to take into account, in each specific case, the scope and the content of all periods of specialised medical training undertaken in other Member States if and to the extent to which the latter are the training required in a particular specialised medical field in Spain.

- Whether the requirement, pursuant to Article 12a(3) of the Royal Decree, that migrant specialist doctors must participate in the MIR is compatible with Article 8 of Directive 93/16/EEC

**50.** Under Article 12a(3) of the Royal Decree, before they may undertake any additional training, migrant specialist doctors are in addition required to go through the MIR selection process if they wish to obtain the necessary training post. Accordingly, owing to the high number of surplus candidates, such doctors have no guarantee that they will ever obtain that training post. The Commission now apparently considers that Article 8 of Directive 93/16 requires that migrant specialist doctors must be guaranteed access to training posts in specialised medicine.

**51.** Therefore, it is necessary to ask whether the provisions governing access to training posts in specialised medicine, which without doubt amount (at least partially) to a restriction on access to the market in question, fall within the scope of Directive 93/16, and whether any restrictions in this respect apply to the Member States.

**52.** In the light of the observations made above concerning the different forms of restriction on access to the market, what is concerned here is a quantitative restriction on access. However, the primary aim of Directive 93/16 is to remove, or limit, qualitative restrictions on access (minimum training requirements).

**53.** It is therefore necessary to examine whether Article 8 of Directive 93/16, in addition to governing that qualitative restriction on access, also applies generally to all restrictions on access to the market for migrant specialist doctors, and requires that they be abolished. In other words, it is necessary to ask the following questions: Is the sole subject of Article 8 the adaptation, so as to conform with Community law, of the - in practice, for specialist migrant doctors, undoubtedly the most common - qualitative restriction on access to the market, namely minimum training requirements? Or is it in addition the concern of Article 8 to facilitate unrestricted access to the market by migrant specialist doctors, which would mean acknowledging their entitlement to training posts in specialised medicine.

**54.** That question can only be answered by interpreting Article 8 by reference to the overall context of Directive 93/16.

**55.** As far as concerns the specialised medical fields, listed in Articles 5 and 7 of Directive 93/16, to which automatic recognition must be given, Articles 4 and 6 of Directive 93/16 provide that the qualifications from the Member State of origin must be given the same effect as qualifications awarded in the host Member State. Therefore, irrespective of the fact that there may, in some cases, be other qualitative restrictions on access to the market in addition to minimum training requirements, it would therefore be proper to consider that, to that extent, the quantitative restrictions on access to the market which apply generally in the host Member State do not fall within the scope of Directive 93/16.

**56.** If, however, so far as the clearly vast majority of all specialist medical qualifications is concerned, Directive 93/16 only regulates recognition in the sense of abolishing qualitative restrictions on access to the market in the form of minimum training requirements for specialist doctors, it appears to be difficult to explain exactly why Article 8 of the directive, which covers only certain specialist medical qualifications which perhaps only exist, if at all, in the host Member State, should impose an obligation to abolish restrictions on access to the market which is wider in scope than other provisions of the directive governing the majority of the specialist medical qualifications which exist in the Community.

**57.** That interpretation of the provisions of Directive 93/16 is supported by various recitals in its preamble. The third recital states that the directive is intended to facilitate the effective exercise of the fundamental freedoms by doctors. A number of the recitals clearly indicate that, although the directive lays down measures to facilitate the exercise of those freedoms, it does not envisage unrestricted access to national markets in medical practice.

Thus, the third recital specifically states that it seems desirable to introduce certain provisions to facilitate the pursuit of such activities, while the 15th recital does not exclude any subsequent coordination.

**58.** It must therefore be concluded that it is not possible to deduce from Directive 93/16 with the necessary precision and clarity that its purpose is to harmonise all the opportunities for and restrictions on regulating the market in specialist medical practice.

**59.** Therefore, in so far as Article 12a(3) of the Royal Decree prescribed the compulsory participation of - also - migrant specialist doctors in the MIR, thereby creating a means of quantitatively regulating the market, that provision does not fall within the scope of Article 8 of Directive 93/16. Accordingly, Article 12a of the Royal Decree, in so far as it makes the award of training posts for migrant specialist doctors conditional on success in the selection procedure, cannot by itself be deemed to constitute a failure by the Kingdom of Spain to fulfil its obligations under the Treaty by infringing Directive 93/16.

**- Whether the requirement that migrant specialist doctors must participate in the MIR is compatible with the right to freedom of movement, freedom of establishment and the freedom to provide services**

**60.** During the proceedings, the Commission and the Spanish Government have argued at length about whether the compulsory participation in the MIR by migrant specialist doctors, having particular regard to the aims pursued (budgetary reasons, quantitative regulation of the market in specialist medical practice on health policy grounds, and preventing circumvention of the law), amounts to a restriction of the fundamental freedoms (in particular, freedom of movement for workers, freedom of establishment and the freedom to provide services; Articles 49, 57 and 66 of the EC Treaty (now, after amendment, Articles 40 EC, 47 EC and 55 EC)) which is incompatible with Community law.

**61.** If one accepts on the basis of the foregoing considerations that Article 8 of Directive 93/16 has only a limited scope (regulation of the qualitative restriction of access to the market in the form of minimum training requirements for specialist doctors), it cannot, on the other hand, be considered that the content of that article coincides fully with the sphere of protection resulting from the aforementioned fundamental freedoms.

**62.** Therefore, the Commission's objections to the application of the quantitative restriction on access to the market (compulsory participation in the MIR) to migrant specialist doctors can only be understood to mean that the Commission is claiming that there has been an infringement of the much wider protection afforded by the said fundamental freedoms.

**63.** However, in this case it is not possible to examine in more detail whether Article 12a(3) of the Royal Decree is compatible with primary law because, in its application, the Commission merely claimed that Article 8 of Directive 93/16 was incorrectly transposed into national law. The Court has repeatedly held that, in proceedings for failure to fulfil obligations, the proceedings must be restricted to the precise heads of claim set out in the application.

**64.** Recently, in the Opinion he delivered on 31 May 2001 in Case C-202/99, Advocate General Léger agreed that an exception to that rule applies in cases where, throughout the proceedings, the Commission has cited precisely and without alteration all the provisions (in that case the provisions of a directive) which it submits have been infringed, but in the actual statement of the relief claimed merely asked for a declaration that the said directive had been infringed. Advocate General Léger considers that the point at which the provisions in question were cited in the application was of secondary importance, and he proposes that, as a result, the imprecise formulation of the claim should be deemed sufficient to enable those provisions to be examined in full.

**65.** In that regard, it must be pointed out that the facts giving rise to Case C-202/99 are indeed comparable to those in this case, in so far as the Commission, here too, has claimed throughout the proceedings, although not in its statement of the relief sought by it, that certain provisions of law have been infringed. The main difference, however, lies in the fact that in this case provisions of primary and secondary law were in point, and throughout the proceedings the Commission has clearly taken the view that the scope of Article 8 of Directive 93/16 is, to an extent greater that I consider to be the case, identical to that of the provisions of primary law relied on. Only on that basis does it appear comprehensible why the Commission, in the first part of the form of order it seeks, confines itself to infringement of a provision of secondary law, namely Article 8 of Directive 93/16. This legal approach regarding the content of a provision of secondary law is clearly demonstrated in this case by the fact that the relief claimed in the application is similarly limited. Nevertheless, such a limitation of the relief claimed cannot be cured merely by regarding it as sufficient that, in addition to the secondary law it considered relevant, the Commission also takes a position on the primary law which in its view is material, but only in that context of secondary law.

**66.** At this point however, it must be pointed out expressly that, according to the case-law of the Court, the fundamental freedoms in question may indeed, under certain conditions, preclude the most varied forms of market regulation. In short, pursuant to that case-law, Member States may only restrict access to national markets on grounds related to the public interest and such restrictions must be appropriate and necessary in order to achieve the aim which they pursue; in other words, they must be proportionate.

**67.** On the basis of the foregoing considerations, therefore, in the present case account can be taken only, although this may appear unsatisfactory, of the relief expressly claimed in the application, and the question of infringement of the Treaty by Article 12a of the Royal Decree can be examined only in relation to that of infringement of Article 8 of Directive 93/16.

**68.** To summarise, it may be stated therefore, by way of a first, partial conclusion, that Article 12a(2) of the Royal Decree transposes Article 8 of Directive 93/16 correctly into national law and that Article 12a(3) of the

Royal Decree - in so far as it imposes a general requirement that migrant specialist doctors must participate in the MIR - does not fall within the scope of Article 8 of Directive 93/16.

(b) The substantive structure of the MIR

**69.** There are two reasons why the substantive structure of the MIR might be incompatible with Article 8 of Directive 93/16 in so far as it applies without restriction to migrant specialist doctors. First, the MIR could entail an individual test of general medical knowledge, which is not envisaged by Article 8 of Directive 93/16. Second, the link with the examination, on an individual basis, of general medical knowledge could in the case of migrant specialist doctors amount to unlawful discrimination.

**- The examination, on an individual basis, of general medical knowledge as a specialised examination for migrant specialist doctors possibly not covered by Article 8 of Directive 93/16/EEC**

**70.** Article 8 of Directive 93/16 contains rules governing the conditions and the circumstances under which the host Member State may impose additional training requirements on the migrant specialist doctors referred to therein. This requirement consists of additional training, whose necessity, content and duration can be determined only on the content and duration of the specialist training which was undertaken in the Member State of origin, as evidenced by qualifications. There is no doubt that those rules must be regarded as exhaustive as regards training requirements if the purpose of Directive 93/16 (harmonisation of the recognition of minimum training requirements) is not to be called into question.

**71.** The Commission's claim that migrant specialist doctors cannot be required to sit an additional examination, at least not one which tests their general medical knowledge, must therefore be accepted. However, that raises the question whether sitting the MIR multiple-choice test can actually be considered an examination in that sense.

**72.** First, it should be stated that the distinction between a selection procedure and an examination proposed by the Spanish Government sounds somewhat technical and, accordingly, it appears to offer little assistance, since, generally speaking, it is quite normal to equate passing an examination with success on the part of candidates with the best relative results.

**73.** The question whether the substantive structure of the MIR is compatible with the requirements of Article 8 of Directive 93/16 may instead be answered by reference to the observations made above regarding the purpose of the MIR, on the one hand, and the content of the directive, on the other.

**74.** By making participation in the MIR compulsory, the Kingdom of Spain clearly aims to establish a quantitative, rather than a qualitative, restriction on access to the market through the imposition of minimum training requirements. As I have already indicated, a quantitative restriction on access to the market is not, as such, the purpose of Directive 93/16. Quantitative regulation of the market in specialist medical practice in Spain is carried out through a prior authorisation procedure for entering the market (MIR) which cannot, therefore, in my opinion, be contrary to Article 8 of Directive 93/16. Accordingly, the multiple-choice test of an individual's current level of general medical knowledge does not have any value of its own; instead it is part of a procedure within the mechanism for quantitatively regulating the market. Therefore it is no different, technically or materially, from an examination, except that the test of general medical knowledge here occurs in a different context.

**75.** The Commission clearly considers that, by virtue of Articles 2 and 8 of Directive 93/16, general medical knowledge is given such comprehensive recognition under Community law that, it may no longer be the subject of verification by national authorities in any context, even irrespective of the question of recognition of qualifications in the narrower sense. However, that view does not accord with the scope which I have argued applies to Directive 93/16 (recognition of training or of periods of training in order to abolish a particular qualitative restriction of access to the market).

**76.** The verification of general medical knowledge as part of the MIR does not, in that sense, fall within the scope of Article 8 of Directive 93/16.

**- The discriminatory aspects of the structure of the MIR as an infringement of Article 8 of Directive 93/16/EEC**

**77.** As is clear, in particular, from the second recital in the preamble to Directive 93/16, the aim of the directive as a whole, and therefore of Article 8, is to abolish all discriminatory treatment with regard to the requirements for access to and the exercise of activities in the field of specialised medicine.

**78.** First, the fact that individual verification of general medical knowledge is based on an evaluation of the results obtained in basic medical training, in accordance with discriminatory criteria, could amount to unlawful discrimination against migrant specialist doctors. Second, the fact that individual verification of the current level of general medical knowledge, carried out by means of a multiple-choice test as part of the MIR, creates a situation which is disproportionately less favourable to migrant specialist doctors than, generally speaking, to doctors who have undergone basic training or Spanish specialist doctors could also amount to discrimination.

**The assessment of the results obtained during basic medical training according to allegedly discriminatory criteria**

**79.** With regard to the discriminatory elements in the structure of the MIR, the Commission claims that the evaluation of results obtained during basic medical training is carried out by reference to a criterion which is, essentially, derived from Spain's basic medical training syllabus, and it therefore favours doctors from the host Member State. In this regard, it need merely be observed that such a procedure would undoubtably be incompatible with the principle of equal treatment. The Commission submitted this as a general claim, however, merely arguing that aspects of the criterion used were discriminatory without identifying which aspects they were. Accordingly, this submission is not one on the basis of which there could be a declaration that Article 8 of the directive was incorrectly transposed into national law.

**The uniform multiple-choice test as a possible form of discrimination against migrant specialist doctors**

**80.** In addition, the use of a uniform multiple-choice test to verify general medical knowledge might be disproportionately prejudicial to migrant specialist doctors and could, therefore, amount to discrimination. In order to be able to examine the relevant provision of Spanish law, it is first of all necessary to clarify which migrant specialist doctors are covered by the recognition rules contained in Article 8 of Directive 93/16 - all doctors who have undertaken periods of training in specialised medicine which are evidenced by qualifications from the Member State of origin, or only those doctors who are in possession of qualifications certifying that they have undertaken full specialist training.

**81.** It is true that the wording of Article 8(2) of the directive (training periods ... attested by the award of a diploma) appears to indicate that any part of training in specialised medicine, however short or limited in content it might be, must be recognised by the host Member State. In addition, Article 8(3) of the directive refers, less than clearly, to specialist training. In accordance with Article 8(2) and (3) of the directive, such specialist training or training periods must be attested by the award of a diploma, certificate or other evidence of formal training. Naturally, elements of formal training which do not (yet) entitle doctors to practise professionally may also, in principle, be attested by the award of certificates or other evidence of formal training. Article 5(2) of the directive lists the documents which must be recognised as diplomas, certificates and other evidence of formal qualifications within the meaning of Article 4. The documents in question relate, however, to full specialist training. It is true that, as a result of the position of Article 5(2) in the structure of the directive, the definition it contains refers to the fields of specialised medicine listed in Article 5(3) which are common to all the Member States and which, accordingly, are also to be given automatic mutual recognition in all the Member States. However, there does not appear to be any reason why using the same concepts in relation to the minority of specialist medical fields covered by Article 8 of the directive should also include the certificates or other evidence of formal training relating to partial specialist medical training.

**82.** Therefore, from now on I shall assume that Article 8 of Directive 93/16 only applies to qualifications which attest to full specialist training.

**83.** The MIR applies without distinction to three categories of candidate: Spanish doctors and doctors from other Member States who have undertaken basic training; Spanish specialist doctors who wish to train in a different field of specialised medicine; and, finally, migrant specialist doctors. The fact that all those candidates, without exception, are required to undergo the MIR could amount to unlawful discrimination under Article 8, in that an essential aspect of the MIR is the verification of the current level of general medical knowledge by means of a standard, wide-ranging and detailed multiple-choice test.

**84.** Owing to the length of time which may have passed since their basic training, this part of the MIR might present a specific barrier to those migrant specialist doctors who have completed their specialist training - and who quite possibly have relatively long practical experience - when it comes to obtaining a post to undertake the additional training required by Article 8(3) of the directive.

**85.** To equate fully trained migrant specialist doctors to doctors who have only undertaken basic training would appear to be open to objection in principle. A different approach would only be possible if Spanish specialist doctors wishing to become qualified in a new specialist field were also required to sit the same multiple-choice test. However, even that interpretation would entail an element of discrimination, because the Spanish specialist doctors would at least already have access to the Spanish market in specialist medical practice, whereas the migrant specialist doctors covered by Article 8 are subject to a total prohibition of access until they have a post to undertake the additional training they require.

**86.** Therefore, to that extent, the content of the MIR infringes Article 8 of Directive 93/16, in so far as it is used in an identical manner to test the current level of general medical knowledge of specialist doctors trained in other Member States who are applying for posts in Spain to undertake the additional training required by Article 8(3) of the directive.

(c) The award of specialist training posts in specialised medicine

**87.** Finally, the Commission submits that migrant specialist doctors who have been awarded a training post through the MIR nevertheless have no guarantee that they will actually be awarded a post in the specialist medical field in which they need to undertake additional training. This submission appears to be sharply contradicted by Article 12a(4) of the Royal Decree, by virtue of which, in exceptional cases, where migrant specialist doctors have already undergone a selection procedure in their Member State of origin, those doctors

will clearly in all probability be offered places to train in their specialist field. Why should the Kingdom of Spain not provide the same in the case of migrant specialist doctors who have been successful in the MIR? The Spanish Government, however, did not contest the Commission's submission and expressly acknowledged, in its general description of the MIR, that the award of training posts according to specialties follows the order of the results of the test. Therefore, for the purposes of these proceedings, the Commission's submission must be taken to be correct.

**88.** On that assumption, however, the procedure in question is not one that is envisaged by Article 8 of Directive 93/16, since migrant specialist doctors must be considered to be at a disadvantage in relation to Spanish specialist doctors. The latter are not necessarily dependent, in any event not with respect to their chances of entering the market, on being awarded a post to train in a particular specialist field since, in principle, they already have access to the market in specialist medical practice and merely wish to undertake additional or supplementary specialist training. By contrast, as regards the additional training which migrant specialist doctors require before entering the market for the first time, those doctors will always need a training post in a particular specialist field. This is the only means they have of completing the additional training in accordance with Article 8(3), taking into account the specific qualifications which they have already obtained in the Member State of origin. Since the central aim of Article 8 of Directive 93/16 is to make it possible to undertake, in Spain, additional training leading to the award of the qualifications required to practise in particular specialist fields, a procedure of the kind used by the Kingdom of Spain cannot be compatible with Community law.

(d) The taking into account of selection procedures in the Member State of origin as a possible justification

**89.** The taking into account of selection procedures which migrant specialist doctors underwent in their Member States of origin prior to the specialist training they undertook does not in any event constitute an adequate means of a general nature of eliminating the discriminatory element in the relevant Spanish legislation, because those migrant specialist doctors who are unable to satisfy that requirement and so gain free access to training opportunities in their Member States of origin must still pass the MIR.

(e) Summary

**90.** In principle, the compulsory participation of migrant specialist doctors in the MIR is compatible with Article 8 of Directive 93/16, provided that it forms part of a general restriction on access the purpose of which is to regulate quantitatively the national market in specialist medical practice. The question whether the national rules in question are compatible with primary law is not the subject of these proceedings, since the form of order which the Commission seeks is expressly confined to a declaration of infringement of Article 8 of Directive 93/16.

**91.** However, the Kingdom of Spain has failed to transpose Article 8 of Directive 93/16 correctly into national law, in that it requires fully trained specialist doctors from other Member States to undergo exactly the same selection procedure as doctors with no specialist training and specialist doctors who already have access to the Spanish market in specialised medical practice.

**92.** Furthermore, the Kingdom of Spain has also failed to transpose Article 8 of Directive 93/16 correctly into national law, in that migrant specialist doctors, who are successful in the MIR and are then awarded a training post, have no guarantee that the post they are assigned will be to train in the specialist field they require for the purpose of the additional training envisaged by Article 8(2) and (3) of Directive 93/16.

**B - The second plea in law: failure to transpose Article 18 of Directive 93/16/EEC into national law**

**1. Arguments of the parties**

**93.** By its second plea in law, the Commission claims that the Kingdom of Spain failed to transpose Article 18 of Directive 93/16 into national law. In response to the Spanish Government's contention that no transposition is necessary since national legislation already exists which fulfils the requirements of Article 18, the Commission argues as follows.

**94.** Under the provisions of Royal Decree 63/1995 which the Spanish Government relies on in support of its contention the services of doctors established in other Member States will not be paid for where those services are provided to persons insured under the national health scheme, except in urgent cases. In the Commission's opinion, this means that Article 18 of Directive 93/16 has not been transposed into national law, since the exemption from registration with a social security body in Spain is subject to the fulfilment of a condition. However, Article 18 of the directive so regulates the obligation of the Member States that the exemption in question must apply without limitations.

**95.** Nor does the reservation in the national legislation in favour of conflicting international conventions enable the legislation to be regarded as property transposing to Article 18, because it is not clear whether the term international conventions also includes the EC Treaty. Even if that were the case, however, it would still not be clear how the services of doctors established in other Member States are to be renumerated under the national health scheme.

**96.** The Spanish Government is of the opinion that no, or no separate, transposition of Article 18 of Directive 93/16 into national law is necessary, since the applicable national law, set out in Royal Decree 63/1995, complies fully with Article 18. In particular, the Spanish Government contends that it is only necessary to transpose the provisions of a directive into national law where the content of that directive is relevant to the national system in question, which, the Kingdom of Spain argues, is not so in this case for the following reasons.

**97.** In Spain, the cost of medical services provided to insured persons is only covered by the national health scheme when the services are provided under that scheme. By way of an exception, provision is also made for the cost to be covered outside the scheme where it can be proved that the case in point was one of emergency. In such cases, it is immaterial whether the doctor who provided the service is established in Spain or in another Member State.

### 2. Analysis

**98.** It is clear that the Commission and the Spanish Government have different opinions as to the context of the obligations under Article 18 of Directive 93/16. Consequently, from a legal point of view, the question as to whether there has been an infringement of Article 18 centres on what type of registration may not be required as a condition for payment of the costs of treatment for the purposes of the cross-border services covered by Article 18. Is it registration of doctors under the social security scheme in general, or is it, as distinct from this, registration merely with a public social security body?

**99.** The wording of Article 18 differentiates between insurance bodies and public social security bodies. From this it may be inferred, first, that by public social security bodies, with which there can be no requirement to register, institutions distinct from insurance bodies must be meant. A contrario, this means that registration with an insurance body - which in Spain would be the national health scheme - can in fact be required as a condition for reimbursement of the cost of treatment.

**100.** The 12th recital in the preamble to Directive 93/16, which sets out the aim pursued by Article 18, supports that interpretation. That recital states that registration with professional organisations or bodies may not be required as a condition for payment for cross-border services provided by doctors established in other Member States because it would constitute an unreasonable obstacle to the provision of temporary services, which would be difficult to justify on the ground of the purpose underlying the registration requirement. The recital clearly refers to registration with professional organisations or bodies rather than with the social security scheme or insurance bodies.

**101.** Finally, the 22nd recital in the preamble to Directive 93/16 clearly states that the directive does not affect the power of the Member States to organise their national social security schemes. Since the question of the conditions governing payment for medical services in all the Member States is one of the matters most central to national social security schemes, it is difficult to accept that the Community legislature had concealed that question in a diploma recognition directive. In neither of the two cases heard by the Court of Justice in which it considered, from a Community-law perspective, the question whether, and to what extent, hospital treatment costs incurred in another Member State must be reimbursed by national social security schemes to which the management bodies of the hospitals or the doctors who treat the patient do not belong, is any reference at all made to Directive 93/16.

**102.** Accordingly, it must be concluded that Article 18 of Directive 93/16 does not preclude legislation which provides that doctors must be registered with the national health scheme in order for the cost of medical services to be reimbursed. Therefore, there is no need to consider in any further detail the Commission's claim that the exception in favour of international conventions is far from clear and, consequently, open to objection under Community law.

**103.** Since the Commission has not claimed in these proceedings that, under the Spanish provisions, registration with a professional organisation or body is a condition for reimbursement of the cost of medical services by the Spanish health scheme, it has therefore failed to prove, in that regard too, that there has been an infringement of Article 18 of Directive 93/16.

**104.** Accordingly, the Commission has failed to prove that the Kingdom of Spain did not transpose Article 18 of Directive 93/16 into national law.

## V – Costs

**105.** Under Article 69(2) of the Rules of Procedure, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, the first subparagraph of Article 69(3) provides that where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that the parties bear their own costs.

**106.** Since the Commission and the Kingdom of Spain have been partially unsuccessful, each party must bear its own costs.

## VI – Conclusion

**107.** In view of the foregoing considerations, I propose that the Court should:

(1) declare that the Kingdom of Spain has failed to fulfil its obligations under Article 8 of Directive 93/16:

- by requiring fully trained specialist doctors from other Member States, who need a specialist training post in order to undertake additional training, to undergo exactly the same selection procedure as doctors who have only completed their basic medical training and as specialist doctors who already have access to the Spanish market in specialist medical practice;

- by failing to guarantee fully trained specialist doctors from other Member States, who need a specialist training post in order to undertake additional training and who have been awarded that post following a selection procedure, a training post in the specialist field in which they need to undertake the additional training;

(2) dismiss the remainder of the application;

(3) order the Commission and the Kingdom of Spain to bear their own costs.