OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 24 April 1986 *

Mr President,
Members of the Court,

1. Facts

The plaintiffs in the main proceedings are all surgeons. They worked under contract for the Servizio sanitario nazionale [National Health Service] and were attached to various local health authorities at Rome, Rieti, Latina and Viterbo. Those authorities unilaterally terminated their contracts. The plaintiffs applied to the Pretura di Roma [Magistrate's Court, Rome] for an interlocutory injunction on the ground that the termination of their contracts was contrary to Italian law and to the collective agreement governing emergency medical services.

According to the plaintiffs, their contracts were terminated as a result of the excessive number of young doctors arriving on the market in Italy owing to the absence of a *numerus clausus* for medical students. Before the Pretore the plaintiffs raised the question whether the absence of a *numerus clausus* for medical students was contrary to Community law. The Pretore ordered the operation of the decisions to terminate the contracts to be suspended and held that in order to rule definitively on the dispute it was 'necessary to clarify the scope and effects of Articles 3 and 57 of the Treaty of Rome . . . in order to determine whether those Community provisions require Italy to introduce a *numerus clausus* system for medical students'.

2. The questions submitted to the Court

Accordingly the Preture referred the following questions to the Court:

'Do Article 3 (c) and Article 57 (3) of the Treaty of Rome establishing the European Economic Community require all the Member States to lay down conditions for admissions to university medical studies which ensure:

a level of training corresponding to the criteria of quality fixed by the Community directives and to the criteria indicated by the Advisory Committee on Vocational Training;

the proper development of the profession in accordance with the rules of professional ethics, for which purpose it is necessary that the number of doctors available should correspond to the number required?

In particular, does the Court of Justice consider that the absence of any fixing in advance or planning of the number of students admitted to study medicine having regard to the teaching capacity of the medical faculties complies with and is compatible with the provisions and objectives of the Treaty of Rome and of the Community directives on freedom of movement for doctors?

Does the extension to all the Member States of a *numerus clausus* system, which already operates in eight of the 10 Member States, therefore constitute an indispensable measure and hence something which the Member States are obliged to adopt in order to apply the Treaty and the directives on freedom of movement?'

* Translated from the French.

It should be noted in the first place that the Italian Government and the Commission take the view that the request for a preliminary ruling is inadmissible. They consider that there is no legal connection between the contested termination of the doctors' contracts and the existence or absence of a *numerus clausus*. In particular, the Italian Government and the Commission point out that the Pretore has failed to state his reasons for considering that the questions referred to the Court are necessary within the meaning of Article 177 of the EC Treaty and for deciding the dispute in the main proceedings.

That last observation is correct and it is most regrettable because it is difficult for the Court to fulfil its task if it is not provided with sufficient information about the reasons which led the national court to submit its questions.

It should also be stated that it is doubtful whether a reply to those questions is 'necessary' to enable the national court to give judgment.

As the Commission points out, it is difficult to see how 'a finding that there is an obligation to introduce a *numerus clausus* would render unlawful the termination of an employment relationship which would otherwise be lawful, or vice versa' (page 6 of the Commission's observations).

The Court could therefore decide that it has no jurisdiction to rule on the questions referred to it.

However, I hesitate to recommend that course for the following reasons.

1. In this instance the Court is not in one of the situations in which, in the past, it found that it had no jurisdiction to give a ruling under Article 177.

Unlike the case in *Mattheus* v *Doego* ([1978] ECR 2203) or in Case 68/80, (*Reference for a preliminary ruling by the Acting Judge at the Tribunal d'instance, Hayange*, [1980] ECR 771), the questions referred to the Court in these proceedings indisputably concern the interpretation of provisions of the Treaty, which are moreover expressly cited.

Furthermore, the references are not a 'procedural device arranged by the parties' within the meaning of the Court's judgments in the *Foglia* v *Novello* cases (Case 104/79 [1980] ECR 745 and Case 244/80 [1981] ECR 3045). There is a genuine dispute between the parties.

2. In that dispute a question concerning the interpretation of the Treaty has been 'raised' (within the meaning of the second paragraph of Article 177).

In my view, the national court cannot be expected to know before the Court has given its interpretation whether or not the question was rightly raised.

It may consider, subjectively, that a clarification of the question is necessary to enable it to give judgment, even if, after receiving the Court's reply, it realizes that that was not the case.

The Court recently pointed out once again, in a judgment given on 20 March 1986 in Case 35/85 *Procureur de la République* v *Tissier* [1986] ECR 1207, that 'it is for the national court to decide whether or not the Community rule, *as interpreted by the Court of Justice* pursuant to Article 177, is applicable in the case brought before it' (paragraph 9 of the decision).

3. The Court of Justice, for its part, cannot be absolutely certain that the reply to the questions referred to it is not really necessary for the resolution of the dispute in the main proceedings.

Thus, in this case, the termination of the doctors' contracts may, in the Pretore's view, assume a different legal character in national law, depending on whether or not 'the absence of any fixing in advance or planning of the number of students admitted to study medicine . . . complies with and is compatible with the provisions and objectives of the Treaty of Rome' (see the second question).

As I have said, it is a matter for great regret that the Pretore did not explain his reasons for considering that a reply to his questions is necessary for resolving the dispute.

However, the fact remains that Article 177 provides that the 'court or tribunal may, *if it considers* that a decision . . . is necessary to enable it to give judgment, request the Court of Justice . . .'. The wording of the provision is not '*if it shows* that'.

4. In recent years there have been four occasions on which the Court has been asked by plaintiffs or governments which have intervened in proceedings not to reply to questions referred to it under Article 177 on the ground that a preliminary ruling was not necessary within the meaning of Article 177 of the Treaty.

In each case the Court overruled that objection.

In its judgment of 14 February 1984 in Case 278/82 (*Rewe-Handelsgesellschaft Nord mbH and Another* v *Hauptzollämter Flensburg, Itzehoe and Lübeck-West* [1984] ECR 721) and of 28 June 1984 in Case 180/73 (*Moser* v *Land Baden-Würtemberg* [1984] ECR 2539) the Court reiterated a principle which it has consistently applied, *inter alia* in its judgment of 14 February 1980 in Case 53/79 (*ONPTS* v *Damiani* [1980] ECR 273) according to which it is not for the Court to pronounce on the expediency of the request for a preliminary ruling, but it is for the national court, which is alone in having direct knowledge of the facts of the case and of the arguments put forward by the parties and which will have to give judgment in the case, to appreciate, with full knowledge of the matter before it, the relevance of the questions of law raised by the dispute before it and the necessity for a preliminary ruling so as to enable it to give judgment.

In the second case which I cited (*Moser*) the German Government expressly referred to the judgment of 16 December 1981 in *Foglia* v *Novello*. The Court observed that 'nothing has emerged to support the conclusion that the present case is one of the exceptional cases referred to in the above-mentioned decision'.

As I have already stated, that is equally true, in my view, of the case now before the Court.

In Case 251/83 (*Haug-Adrion* v *Frankfurter Versicherungs-AG* judgment of 13 December 1984 [1984] ECR 4277) the defendant in the main proceedings had contended that since the national court had not referred to any provision of Community law for which it sought an interpretation and *had not shown to what extent such a provision might be at all relevant to its decision,* its order amounted to a general request to the Court for legal information.

The Court was therefore faced with the argument that the statement of reasons for

the necessity of the question within the meaning of Article 177 was insufficient.

It replied as follows:

'As the Court has already held on several occasions, *although* it is essential that national courts explain the reasons why they consider that a reply to their questions is necessary for their decision in the main proceedings, and define the legal context of the request for interpretation, where questions are couched in imprecise terms *it is for the Court to extract from all the information provided* by the national court *and from the documents concerning the main proceedings* the elements of Community law that need to be interpreted, having regard to the subject-matter of the dispute.'

The Court concluded that *the subject-matter of the preliminary question was sufficiently identifiable* and that the objections raised could not therefore be upheld.

In this case, the Court could *a fortiori* follow the same reasoning, since the Pretore has clearly identified the provisions in respect of which he requests an interpretation.

Finally, in *Tissier*, which I have already cited, the national court asked whether there was 'any Community legislation concerning the concept and definition of "medicinal product"' and whether that definition covered the specific product manufactured by the defendant in the main proceedings.

The French Government asked the Court to find that it had no jurisdiction because the reference did not concern questions of the interpretation of Community law but a simple question of information.

The Court held as follows: 'it is for the Court, when faced with questions which are not framed in an appropriate manner *or which go beyond its functions under Article 177*, to extract from all the information provided by the national court and in particular from the grounds of the decision referring the questions, the points of Community law which require interpretation . . . '.

In the recent past, then, the Court has not accepted either the argument that there is no connection between the question referred to it and the dispute in the main proceedings or that no sufficient reasons are given explaining the necessity for the reply, or even the argument that the Court may be exceeding its functions under Article 177.

I therefore take the view that in this case too the Court should agree to reply to the questions referred to it, especially since if the reply to be given to those questions is that which I shall propose later in this Opinion, it would be helpful for it to be known, in particular because 20 other similar cases are pending before the same court and before other Italian courts.

3. The interpretation of Articles 3 and 57 (3) of the Treaty

It appears from the documents before the Court that the national court and the plaintiffs in the main proceedings do not claim that the introduction of a *numerus clausus* in all the countries of the Community is a condition for the operation of the free movement of doctors.

They are aware that in Case 2/74 (*Reyners* [1974] ECR 631) and Case 33/74 (*van Binsbergen* [1974] ECR 1299) the Court held that Articles 52 and 59 of the Treaty had become directly applicable and that the

free movement of doctors was no longer dependent upon coordination of the conditions for the exercise of that profession in the various Member States, provided for in Article 57 (3).

The national court and the plaintiffs have also shown that they are perfectly familiar with the two directives adopted by the Council on 16 June 1975.

The first of those directives (No 75/362/EEC) [1] concerns 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 supply services.

The second (No 75/363/EEC) [2] concerns the coordination of provisions laid down by law, regulation or administrative action in respect of activities of doctors.

The first directive contains no provision concerning the university education of doctors. The second states that, in view of the comparable nature of training courses for general practitioners in the various Member States, coordination in that field may be confined to the requirement that minimum standards be observed, which then leaves the Member States freedom of organization as regards teaching (first recital in the preamble to Directive No 75/363).

As regards specialist medical practitioners, the Council considered that some coordination of the requirements for training was necessary but that, again, it was sufficient to lay down certain mimimum criteria concerning the right to take up specialist training, the minimum training period, the method by which such training is given and the place where it is to be carried out, as well as the supervision to which it should be subject (second recital in the preamble to Directive No 75/363).

Finally, the Council noted that the coordination of the conditions for the pursuit of those activities, as envisaged by the second directive (both for general practitioners and specialists), did not exclude any subsequent coordination.

The national court and the plaintiffs in the main proceedings apparently take the view, however, that the fixing of a *numerus clausus* is an essential measure for ensuring 'a level of training corresponding to the criteria of quality fixed by the Community directives' and 'the proper development of the profession within the framework of the rules of professional ethics' and that the need for such a measure is even greater now that doctors are guaranteed freedom of movement.

In their opinion, the Member States are therefore required, by virtue of Article 3 (c) and Article 57 (3) of the EEC Treaty and in accordance with 'the objectives of the Treaty of Rome and of the Community directives on freedom of movement for doctors', to introduce a *numerus clausus.*

First of all, it should be noted that Article 3 (c) of the Treaty sets out one of the general principles of the Community, which are to be applied in conjunction with the relevant chapters of the Treaty devoted to their implementation, as the Court held *inter alia* in its judgments in Cases 136/78 [3] (*Auer*) and 231/83 [4] (*Cullet*).

1 — Official Journal 1975, L 167, p. 1.

2 — Official Journal 1975, L 167, p. 14.

3 — Judgment of 7 February 1979 *Ministère Public* v *Auer* [1979] ECR 437.

4 — Judgment of 29 January 1985 *Henri Cullet and Others* v *Centre Leclerc* [1985] ECR 305.

That provision should not therefore be considered separately.

As regards Article 57 (3) and Article 57 in general, it should be noted that the Treaty does not require the Council to impose uniform training requirements for all doctors in the Community.

The Community's powers in that field derive solely from its task of creating freedom of establishment and freedom to provide services.

As the prohibition of discrimination on grounds of nationality has been applicable since the end of the transitional period, by virtue of the Treaty itself, it is no longer possible to infer from Article 57 (3) specific legal obligations on the Member States.

However, the Council retains the power to adopt, as indeed it has done, measures to facilitate the effective exercise of the right of establishment and the freedom of doctors to provide their services and, to that end, to coordinate national provisions concerning the activities of doctors.

As has been seen, the coordinating measures which the Council has considered necessary to adopt in that respect are limited, at least at this stage, to the establishment of minimum criteria which, as far as the right to take up training is concerned, do not require measures like the introduction of a *numerus clausus.*

The Member States therefore retain 'freedom of organization as regards teaching', as the Council itself stated in the first recital in the preamble to Directive No 75/363.

Nor can an obligation to introduce a *numerus clausus* be inferred from the letter or spirit of the directives, or from a supposed need to ensure 'a level of training corresponding to the criteria of quality fixed by the Community directives', just as it cannot be inferred from the letter or spirit of the Treaty itself.

It should be also noted that the presence in the Community of a greater number of doctors than would be the case if a *numerus clausus* were in force in all the Member States presents no legal barrier to their free movement. On the contrary, freedom of movement could even lead to a reduction in the excessive number of doctors in certain countries.

It cannot however be denied that the problem of establishing a balance between the number of medical students and the means required to provide their training exists.

In the second recital in the preamble to the Council Decision of 16 June 1975 setting up an Advisory Committee on Medical Training (Official Journal 1975, L 167, p. 17) it is acknowledged that, in the context of the mutual recognition of diplomas, certificates and other evidence of formal qualifications and the coordination of the conditions for taking up the activities of a doctor, it is important to ensure a comparably demanding standard of training.

The task of that Committee is to contribute to the achievement of that objective where necessary by communicating to the Commission and the Member States opinions and recommendations including, when it considers it appropriate, suggestions for amending the Articles relating to medical training in Directives Nos 75/362 and 75/363.

In the report and recommendations which it adopted by a simple majority on 10 March 1981 the Committee suggests that, in order

to provide and to maintain a high level of training for doctors, Member States should choose between the requirement of enlarging university structures and that of reducing the number of students.

In view of the purely advisory nature of that Committee, the Member States are nevertheless entirely at liberty to choose one or the other of those two possibilities or to disregard those recommendations.

Conclusion

I therefore propose that the Court should reply to the questions referred to it by the Pretura di Roma as follows:

'Neither Article 57 of the Treaty nor the directives adopted on the basis, *inter alia*, of that provision require the Member States to adopt the *numerus clausus* system in university medical faculties.'