OPINION OF ADVOCATE GENERAL MISCHO

delivered on 13 December 2001 [1]

1. In Austria, the exercise of the profession of Heilpraktiker, as it is known in Germany, training to become a Heilpraktiker and advertising for that purpose are prohibited. Faced in the main proceedings with the question of whether such restrictions are compatible with Community law, the Oberster Gerichtshof (Supreme Court) (Austria) (hereinafter the 'national court') has referred two questions concerning the interpretation of Articles 43 EC and 49 EC and of Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC. [2]

I — Legal framework

Community law

2. Article 1 of Directive 92/51/EEC provides:

'For the purposes of this Directive, the following definitions shall apply:

...

(e) regulated profession: the regulated professional activity or range of activities which constitute this profession in a Member State;

(f) regulated professional activity: a professional activity the taking up or pursuit of which, or one of its modes of pursuit in a Member State, is subject directly or indirectly by virtue of laws, regulations or administrative provisions, to the possession of evidence of education and training or an attestation of competence... .

...'

1 — Original language: French.
2 — OJ 1992 L 209, p. 25.

3. According to Article 2 of Directive 92/51, which is the sole article of Chapter II, entitled 'Scope':

'This Directive shall apply to any national of a Member State wishing to pursue a regulated profession in a host Member State in a self-employed capacity or as an employed person.

This Directive shall apply to neither professions which are the subject of a specific Directive establishing arrangements for the mutual recognition of diplomas by Member States, nor activities covered by a Directive listed in Annex A.

...'

4. According to the third recital in the preamble to 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, [3] its aim is to facilitate the effective exercise of the right of establishment and the freedom to provide services in respect of the activities of doctors.

5. To this end, Article 2 provides:

'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'.

Austrian law and German law

6. *In Austria*, by virtue of Paragraph 1(1) of the Law on training (BGBl. No 378/1996), training for activities regulated in particular by the Law on doctors of 1984 (now the Law on doctors, BGBl. No 169/1998) is the exclusive function of the institutions designated for that purpose by the federal laws.

7. According to the Law on training, the offering or procuring of such training by

3 — OJ 1993 L 165, p. 1.

other persons or other institutions is prohibited. An attempt to do so is an offence. Advertising is regarded as an attempt. As penalty the law provides for fines of up to ATS 500 000. There is no express penalty in the form of nullity of training contracts concluded in breach of the law.

8. According to the Explanatory Notes to the law (150 BlgNR 20. GP, 24), the legislature intended, by means of the provision in question, to counteract the activities of institutions (from Germany in particular) which become established in Austria and intensively advertise 'Heilpraktiker' [lay health practitioner] training in that country, as that activity is unlawful under Austrian law. The notes point out that the legislature was required to take urgent action particularly for the purposes of consumer protection.

9. According to Paragraph 2(2) of the Law on doctors, the exercise of the profession of doctor encompasses all activities based on medico-scientific knowledge practised directly on human beings or indirectly for human beings, particularly the diagnosis and treatment of illness or physical or psychological ailments.

10. Paragraph 3(1) and (4) of the Law on doctors provides that any person other than a doctor is prohibited from exercising that profession.

11. *In Germany*, the profession of Heilpraktiker is regulated by the Heilpraktikergesetz (Law on lay health practitioners, hereinafter the 'HPrG') of 17 February 1939 (RGBl. I, p. 251), as amended by the Law of 2 March 1974.

12. By virtue of Paragraph 1(1) of the HPrG, any person not qualified as a doctor of medicine who wishes to practice as a Heilpraktiker is obliged to seek authorisation. According to Paragraph 1(2) of the HPrG, the activity of Heilpraktiker is the professional or commercial activity of diagnosing, treating or alleviating human illness, pain or physical injury.

13. Pursuant to the relevant provisions of the text implementing the HPrG (implementing decision of 18 February 1939, RGBl. I, p. 259), authorisation to exercise the profession of Heilpraktiker will be granted to the person making such request unless one of the restrictions referred to therein applies. In particular, authorisation will be refused where that person has not reached the age of 25, where he is unable to provide proof of having successfully completed primary education, or where a test of

the person's knowledge and aptitude conducted by the health services reveals that it would constitute a danger to public health if the person concerned were to exercise the profession of Heilpraktiker.

II — Facts and procedure in the main proceedings

14. Deutsche Paracelsus Schulen für Naturheilverfahren GmbH (hereinafter 'Deutsche Paracelsus Schulen') is a German company which has for about 20 years offered training courses for the profession of Heilpraktiker. It is also established in Austria, where it has been providing courses for some 10 years. Finding persons to enrol on courses offered is achieved, inter alia, by placing advertisements in newspapers.

15. On the basis of such an advertisement, Mr Gräbner, an Austrian national resident in Austria, contacted Deutsche Paracelsus Schulen in January 1996. Information was subsequently sent to him, together with a copy of the application form. This form contains applications for admission to two levels of training (I and II) as a Heilpraktiker. Information is provided on the content of the training given at each level, together with information on a video training programme which is also offered. In particular, this form contains the following warning: 'We draw your attention to the fact that the profession of Heilpraktiker may not be practised in Austria... The official examination for qualification as a Heilpraktiker must be taken in Germany'.

16. On 20 February 1996, Mr Gräbner signed a contract for Levels I and II and ordered the videos for the practical lessons. The total cost, including the registration fees, amounted to ATS 90 390, of which ATS 18 000 was for the video training programme.

17. Mr Gräbner had no further contact with Deutsche Paracelsus Schulen. He did not exercise his right to withdraw his application within the prescribed time-limit of one week and he never gave notice in writing to terminate the commitments into which he had entered.

18. Before the Austrian courts, Deutsche Paracelsus Schulen sought payment of ATS 90 390 on the basis of the contract concluded with Mr Gräbner for training as a Heilpraktiker. It contended that it ought to be possible to advertise training for professions which were not permitted to be exercised in Austria and that, despite the Law on training, training as a lay health practitioner ought to be authorised in that Member State. In particular, it maintained that any other interpretation of that law would infringe Community law, particularly the right to freedom to provide services.

19. Mr Gräbner contended inter alia before the Austrian courts that the contract in

question was void because it was in breach of the Law on training.

20. At first instance, the Bezirksgericht (District Court) Linz-Land, by judgment of 29 January 1999, ordered Mr Gräbner to pay the sum of ATS 90 390.

21. On appeal, the Landesgericht (Regional Court) Linz, by judgment of 26 May 1999, confirmed the judgment, while allowing an appeal on a point of law to the Oberster Gerichtshof.

22. In its order for reference, the Oberster Gerichtshof states that under its case-law a contract which infringes a statutory prohibition is regarded as void, not only if that legal consequence is expressly laid down, but also if the purpose of the prohibition necessarily requires that it be invalidated. It considers, in particular, that the legislative purpose of the Law on training requires the contract at issue in the main proceedings to be held void. However, it questions whether the Austrian legislation at issue is compatible with Community law.

III — The questions referred

23. Accordingly, the national court decided, by order of 13 July 2000, to stay the proceedings and to refer to the Court for a preliminary ruling the following two questions:

'1. May a Member State continue, in particular after the adoption of [Directive 92/51/EEC], to restrict the exercise of an activity allied to medicine, such as that of a Heilpraktiker within the meaning of the German Law on lay health practitioners (RGBl. I, 251/1939, in the version currently in force), to holders of a doctor's qualification, or does that now run counter to, in particular, Article 43 EC on freedom of establishment and Article 50 EC on freedom to provide services?

2. Do the abovementioned provisions of Community law preclude national rules which reserve training for professions regulated by health legislation to the institutions designated for that purpose and which prohibit other persons or institutions from offering or

procuring such training or advertising therefor even if such training concerns only certain areas of medical practice?'

IV — Analysis

On the first question

24. By its first question, the national court essentially asks whether national legislation effectively restricting exercise of the activity of Heilpraktiker to qualified doctors is compatible with Community law.

25. The national court states that it is familiar with the judgment of 3 October 1990 in *Bouchoucha*.[4] That ruling concerned a problem practically identical to the problem in the instant case in the sense that it also concerned a profession allied to medicine. The Court held that 'in so far as there is no Community definition of medical acts, the definition of acts restricted to the medical profession is, in principle, a matter for the Member States. It follows that in the absence of Community legislation on the professional practice of osteopathy *each Member State is free to regulate the exercise of that activity within its territory, without discriminating*[5] between its own nationals and those of the other Member States'.[6]

26. In the operative part of the judgment, the Court concluded that 'in the absence of harmonisation at Community level regarding activities which fall solely within the scope of the practice of medicine, Article 52 of the EEC Treaty does not preclude a Member State from restricting an activity ancillary to medicine such as, in particular, osteopathy exclusively to persons holding the qualification of doctor of medicine'.

27. In support of that reasoning, based on the wording of Article 52 of the EC Treaty (now, after amendment, Article 43 EC), Article 46(1) EC may also be cited, which provides that the provisions of the Chapter on the right of establishment and measures taken in pursuance thereof '*shall not prejudice*[7] the applicability of provisions laid down by law, regulation or administrative action providing for *special treatment for foreign nationals on grounds of... public health*'.[8]

28. In my opinion, it may be concluded from that provision that, conversely, legis-

4 — Case C-61/89 [1990] ECR I-3551.

5 — Emphasis added.

6 — Paragraph 12.

7 — Emphasis added.

8 — Emphasis added.

lation adopted for the purpose of protecting public health and applying equally to all persons established or wishing to become established within a Member State does not require justification. This does not, of course, prejudice the right of a claimant to broach the question of the justification for legislation in seeking to show that the legislation at issue constitutes convert discrimination because its real purpose is to make it impossible or extremely difficult for foreign nationals to become established. However, it is not clear how such an argument could succeed in a case such as the present one where nationals are also prohibited from exercising the same activity.

29. Moreover, it should also be noted that Article 47(3) EC, even though not cited expressly by the Court, underpins its whole reasoning in *Bouchoucha*. According to that provision, 'in the case of the medical and allied and pharmaceutical professions, the progressive abolition of restrictions shall be dependent upon coordination of the conditions for their exercise in the various Member States'.

30. It follows that the progressive abolition of restrictions in the medical and allied and pharmaceutical professions is subject to a condition which does not exist in other professional fields.

31. Consequently, I consider that the abovementioned judgment in *Bouchoucha* is a valid point of reference for resolving the problem at issue.

32. However, the national court questions whether Directive 92/51/EEC, which was adopted only after the judgment in *Bouchoucha*, or any other rule of Community law, has not modified the legal position in this area.

33. In that respect, Deutsche Paracelsus Schulen considers that Directive 92/51 applies to the profession of Heilpraktiker. It follows, so it contends, that a Heilpraktiker authorised to practise in one Member State must also be authorised to do so in all the other Member States.

34. However, along with Mr Gräbner, the Austrian and United Kingdom Governments and the Commission, I take the view that, on a careful reading of Directive 92/51, that directive is not relevant to the outcome of the dispute in the main proceedings.

35. As provided for in Article 2 of Directive 92/51, that directive 'shall apply to any national of a Member State wishing to

pursue *a regulated profession*[9] in a host Member State in a self-employed capacity or as an employed person'. However, as the abovementioned parties indicate, the profession of Heilpraktiker is not a regulated profession in Austria, which is the host Member State. It is quite simply prohibited. Thus, Directive 92/51 is not applicable to the problem at issue.

36. Nevertheless, Deutsche Paracelsus Schulen contends that Community law does not recognise the concept of a 'prohibited profession', but recognises only regulated professions and non-regulated professions. Given that in Austria the profession of Heilpraktiker is regulated, albeit by a regulation in the form of a prohibition, that profession should be regarded as a regulated profession within the meaning of Directive 92/51.

37. I cannot accept that argument.

38. The concept of 'regulated profession' is defined in Article 1(e) of Directive 92/51 as 'the regulated professional activity or range of activities which constitute this profession in a Member State'.

39. The concept of 'regulated professional activity' is in turn defined in Article 1(f) of Directive 92/51 as 'a professional activity the taking up or pursuit of which, or one of its modes of pursuit in a Member State, is subject, directly or indirectly by virtue of laws, regulations or administrative provisions, to the possession of evidence of education and training or an attestation of competence...'.

40. Further, in interpreting practically identical provisions in Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration,[10] the Court has already held that '... where the conditions for taking up or pursuing a professional activity are directly or indirectly governed by legal provisions, whether laws, regulations or administrative provisions, that activity constitutes a regulated profession'[11].

41. It follows from those definitions that a regulated profession is a profession which is permitted a priori but subject, for the purposes of accessing and exercising it, to conditions laid down by the authorities of

9 — Emphasis added.

10 — OJ 1989 L 19, p. 16.

11 — Case C-234/97 *Fernández de Bobadilla* [1999] ECR I-4773, paragraph 16. See also Case C-164/94 *Aranitis* [1996] ECR I-135, paragraph 18.

the Member States. A prohibited profession is therefore not a regulated profession within the meaning of Directive 92/51.

42. Moreover, the conclusion which Deutsche Paracelsus Schulen draws from the fact that, as it contends, Directive 92/51 applies to the profession of Heilpraktiker and according to which a Heilpraktiker authorised to practise in one Member State must also be authorised to do so in the other Member States, appears to me to defeat the purpose of the Community rules on the mutual recognition of diplomas, certificates and other qualifications contained in Directive 92/51.

43. The purpose of those rules is that a Member State should recognise qualifications issued by another Member State as equivalent to the qualifications issued by itself. That is shown, for example, by the second recital of Directive 92/51 whereby '... any host Member State in which a profession is regulated is required to take account of qualifications acquired in another Member State and to determine whether those qualifications correspond to the qualifications which the Member State concerned requires'.

44. Thus, inherent in the Community rules on mutual recognition is the fact that qualifications issued by Member States are respected, whilst requiring similar respect, in the form of recognition for *equivalent* qualifications, from one Member State towards the other. However, that a Member State should be obliged to permit an activity to be exercised within its territory despite the fact that the State concerned has deemed it necessary to prohibit that activity appears to me to be totally at odds with the notion of respect contained in the rules on mutual recognition.

45. For the purposes of clarification, I would also add that were — hypothetically — the profession of Heilpraktiker in Germany to be regarded as 'regulated' in Austria in the sense that, in the latter Member State, activities of this type come within the activities of the profession of doctor, Directive 92/51 would nevertheless still not be applicable.

46. The mutual recognition of diplomas, certificates and other qualifications of doctors is governed by 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 qualifications. [12] Accordingly, that matter falls outside the scope of application of Directive 92/51 by virtue of the second paragraph of Article 2, whereby Directive 92/51 'shall [not] apply to... professions which are the subject of a specific directive establishing arrangements for the mutual recognition of diplomas by Member States'.

12 — OJ 1993 L 165, p. 1.

47. In the light of all the above, it therefore follows that Directive 92/51 is not applicable to the problem at issue.

48. I also take the view that there are no other rules of Community law, introduced since the adoption of that judgment, which could affect this conclusion. Only Directive 93/16 could be invoked to that end. However, it should be noted, as the Commission points out, that this case is not concerned with the recognition of a diploma of doctor. Thus, that directive does not enter into the discussion.

49. In the alternative, Deutsche Paracelsus Schulen nevertheless also contends that 'supposing the circumstances underpinning the judgment in *Bouchoucha* still obtain (namely, "the absence of harmonisation at Community level regarding activities which fall solely within the scope of the practice of medicine"), it must at least be conceded that the free movement of services cannot be hindered or rendered impossible by Member States quite simply by reserving to doctors certain activities which, in another Member State, may be carried out lawfully by a person who is not a doctor'.

50. More specifically, referring to the judgment of 9 March 1999 in *Centros*, [13] Deutsche Paracelsus Schulen contends that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the EC Treaty are unlawful unless they fulfil four conditions: they must be applied in a non-discriminatory manner, they must be justified by imperative requirements in the general interest, they must be suitable for securing the attainment of the objective pursued and they must not go beyond what is necessary in order to attain it.

51. What is to be made of this argument?

52. On this point, the abovementioned judgment in *Centros* merely reiterated the Court's case-law established initially by the judgments of 31 March 1993 in *Kraus*, [14] 30 November 1995 in *Gebhard*, [15] and 4 July 2000 in *Haim*. [16] Those judgments came after the judgment in *Bouchoucha*.

53. Further, those four conditions were restated in the judgment of 1 February 2001 in *Mac Quen and Others*, [17] concerning national legislation reserving certain optical examinations for ophthalmologists

13 — Case C-212/97 [1999] ECR I-1459.

14 — Case C-19/92 [1993] ECR I-1663, paragraph 32.
15 — Case C-55/94 [1995] ECR I-4165, paragraph 37.
16 — Case C-424/97 [2000] ECR I-5123, paragraph 57.
17 — Case C-108/96 [2001] ECR I-837.

and prohibiting opticians from carrying out those examinations. Thus, the situation in that case is quite similar to that in *Bouchoucha* and in the present case. In the judgment in *Mac Quen*, the Court first pointed out that one of the parties to the dispute in the main proceedings had relied, in support of its argument, on the fact that in *Bouchoucha* the Court had recognised that, in the absence of Community legislation governing the activity of osteopaths, each Member State was free to regulate the exercise of that activity within its territory, on condition only that it did not discriminate between its own nationals and those of the other Member States, and that the same considerations should obtain in the main proceedings.

54. The Court went on to say:

'While it is true that, in the absence of harmonisation of the activities at issue in the main proceedings, Member States remain, in principle, competent to define the exercise of those activities, they must none the less, when exercising their powers in this area, respect the basic freedoms guaranteed by the Treaty (see Joined Cases C-193/97 and C-194/97 *De Castro Freitas and Escallier* [1998] ECR I-6747, paragraph 23, and... Case C-58/98 *Corsten* [2000] ECR I-7919, paragraph 31).

The second paragraph of Article 52 of the Treaty provides that freedom of establishment is to be exercised under the conditions which the legislation of the country of establishment lays down for its own nationals. It follows that, where the taking up or pursuit of a specific activity is subject to such conditions in the host Member State, a national of another Member State intending to pursue that activity must in principle comply with those conditions (Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 36).

According to the Court's case-law, however, national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty may be justified only if they fulfil four conditions...'. [18]

55. This reasoning leads me to make the following observations. It is, of course, indisputable that Member States, in exercising their powers in the area of medical activities, must respect the basic freedoms guaranteed by the Treaty, but that applies only as regards fundamental freedoms effectively guaranteed as such by the Treaty.

56. The Treaty provides that freedom of establishment shall be exercised 'under the

18 — Paragraphs 24 to 26.

conditions laid down for its own nationals by the law of the country where such establishment is effected'. Moreover, according to Article 47(3) EC, in the case of the medical and allied and pharmaceutical professions, the progressive abolition of restrictions is to be dependent upon coordination of the conditions for their exercise in the various Member States.

57. Thus, above and beyond the provisions which provide a substantive definition of the content and scope of the fundamental freedom referred to as 'freedom of establishment', *which the Treaty aims to guarantee*, no unwritten rule can exist in the medical and allied fields that all national legislation which contains provisions not provided for by the legislation of the Member State from where the individual who wishes to move originates creates ipso facto a 'restriction' that can be allowed only if it can be justified by 'imperative requirements in the general interest'. Thus, such justification cannot be a requirement. Accordingly, I concur with those who consider that Article 43 EC is a clause prohibiting direct or indirect discrimination, and not a clause prohibiting, in principle, any Member State from having legislation stricter than that of one of the other Member States, thereby requiring it to justify such 'restriction'.[19] Moreover, the same legislation could prove to be more liberal than the legislation of this or that Member State and, if such reasoning were to be followed through to its conclusion, only the legislation which was the most liberal would be compatible with the Treaty. However, Article 47(3) EC certainly does not envisage that type of automatic harmonisation based on the lowest common denominator.

58. However, it appears in any case that even if the abovementioned four conditions are applied in this case one is bound to conclude that Austria may legitimately reserve to doctors the activities associated with the profession of Heilpraktiker in Germany.

59. First of all, none of the parties denies that the rule that only doctors may exercise the activities at issue applies irrespective of the nationality and the Member State of establishment of the persons to which it is addressed.

60. As regards the second and third conditions, that rule appears to me justified by imperative requirements in the general interest in so far as it deals with the protection of public health. It is also appropriate for achieving that aim. In that regard, reference may be made to the following analysis in *Mac Quen*, which,

19 — As regards the debate surrounding this question, see in particular Troberg, P., in: Groeben-Thiesing-Ehlermann, *Kommentar zum EU-EG-Vertrag*, Nomos, 5th edition, volume 1, p. 1331 et seq.

in my opinion, is transposable in its entirety to the problem at issue:

'Next, with regard to the question whether there are overriding reasons based on the general interest which may justify the restriction on freedom of establishment resulting from the prohibition under challenge, it must be remembered that the protection of health is one of the reasons which may, under Article 56(1) of the EC Treaty (now, after amendment, Article 46(1) EC), justify restrictions resulting from special treatment for foreign nationals. Protection of public health is therefore, in principle, also capable of justifying national measures which apply indiscriminately, such as those in this case.

The importance of protecting public health is also emphasised by the fact that Article 3(o) of the EC Treaty (now, after amendment, Article 3(1)(p) EC) provides that the activities of the Community are to include, as provided in the Treaty and in accordance with the timetable set out therein, a contribution to the attainment of a high level of health protection.

The choice of a Member State to reserve to a category of professionals holding specific qualifications, such as ophthalmologists, the right to carry out objective eyesight examinations on their patients using sophisticated instruments that make it possible to asses internal eye pressure, determine the field of vision or analyse the condition of the retina, may be regarded as an appropriate means by which to ensure attainment of a high level of health protection'. [20]

61. That is also necessarily the case where a Member State reserves to doctors the activities carried out in other Member States by Heilpraktiker.

62. Finally, as regards the fourth condition, the Austrian rule in question also seems to me not to go beyond what is necessary for the attainment of the objective pursued, namely the protection of public health.

63. The sole fact that Germany recognises the profession of Heilpraktiker does not prove that the Austrian rule is disproportionate. As the Court also held in *Mac Quen*, '... it should be borne in mind that... the fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate and hence incompatible with Community law (Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraph 51, and Case C-3/95 *Reisebüro Broede* [1996] ECR I-6511, paragraph 42).

20 — *Mac Quen*, paragraphs 28 to 30.

The mere fact that a Member State has chosen a system of protection different from that adopted by another Member State cannot affect the appraisal as to the need for and proportionality of the provisions adopted (Case C-67/98 *Zenatti* [1999] ECR I-7289, paragraph 34)'. [21]

64. Consequently, the fact that, according to Deutsche Paracelsus Schulen, Austrian law allows, on the basis merely of a declaration, several activities embracing health in the widest sense to be exercised (for example, physical or fitness training 'assistance' or 'life counselling' services), also does not prove that the Austrian rule is disproportionate. It has not been shown that those activities come within the profession of doctor in Austria and would be, in that sense, comparable to the activities exercised by a Heilpraktiker.

65. Further, the argument of Deutsche Paracelsus Schulen that the disproportionate nature is proven by the fact that a considerable number of patients from Austrian provinces along the border with Germany have access to Heilpraktiker services in Bavaria, without that having any negative influence on health in those provinces compared to the rest of Austria, cannot be accepted.

66. Irrespective of the fact that the allegation made by Deutsche Paracelsus Schulen is unsupported by any evidence or even substantive information, a measure cannot be regarded as proportionate to the objective of health protection only if it protects the population from danger or negative influences on health. A measure may also be proportionate if it makes a positive contribution to the protection of the population's health such as, for example, providing an additional health guarantee, like that in this case, as a result of the requirement that certain activities may not be carried out except by persons who have received more extensive training than that received by a Heilpraktiker.

67. For the same reason, I am of the opinion that one cannot require, as Deutsche Paracelsus Schulen contends, that a Member State, in this case Austria, should take into account in its decisions favourable assessments made in another Member State, in this case Germany, as to Heilpraktiker activities. The question is not whether Heilpraktiker services deliver good or bad results, but whether it is disproportionate for a Member State to require that, in the interests of public health, the exercise of certain activities should be reserved to persons who have completed medical studies.

68. Framed in this manner, the question calls for, in my opinion, the reply proposed

21 — *Mac Quen*, paragraphs 33 and 34.

by the Commission that 'where no proof of the existence of a measure less radical than a general prohibition to exercise has been adduced, that prohibition should be construed as a measure necessary to attain the desired objective. The principle of proportionality is thus respected'.

69. I therefore take the view that the prohibition on the exercise of the profession of Heilpraktiker is compatible with Article 43 EC on the freedom of establishment. Moreover, there is no reason why the analysis should differ with regard to Article 49 EC on the freedom to provide services.

70. Consequently, I propose that the reply to the national court should be that Articles 43 EC and 49 EC do not preclude a Member State from reserving the exercise of an activity allied to medicine, such as that of a lay health practitioner ('Heilpraktiker') within the meaning of the German Law on lay health practitioners (RGBl. I 251/1939), to holders of a doctor's qualification.

On the second question

71. By its second question, the national court asks whether Community law permits a Member State to reserve training for professions regulated by legal provisions in the field of health to the institutions designated for that purpose and prohibit the offering or procuring of such training by other persons or institutions and advertising therefor, even if that training relates only to certain branches of medical activity. The national court therefore essentially asks whether a Member State may legitimately prohibit within its territory Heilpraktiker training and publicity for such training.

72. Deutsche Paracelsus Schulen considers that such a prohibition is contrary to Community law, whereas Mr Gräbner and the Austrian and United Kingdom Governments contend the opposite. According to the Commission, a distinction must be drawn between freedom of establishment and freedom to provide services. It contends that while the prohibition is compatible with Article 43 EC, it is not compatible with Article 49 EC.

73. Having regard to the manner in which this question has been framed by the national court, I consider it useful to draw a distinction between the prohibition on Heilpraktiker training in Austria and the prohibition on advertising for such training.

The prohibition on Heilpraktiker training in Austria

74. According to Paragraph 1 of the Austrian Law on training, 'training for the

professions regulated... by the Federal Law... laying down the conditions for the exercise and representation of the medical profession... shall be exclusively provided by the institutions designated for that purpose by these federal laws. Other persons or organisations shall be prohibited from offering or procuring such training... .'

75. It follows from the wording of that article that the prohibition on Heilpraktiker training is a general prohibition in Austria and that it must therefore be regarded as applying equally both to training provided by an institute or body situated in a Member State other than Austria wishing to *become established in Austria* and to training provided by a body seated in another Member State wishing to *offer a service in Austria* for the purpose of providing such training. It would therefore appear useful, as the Commission proposes, to analyse the question referred by the national court from the perspective of both the freedom of establishment and the freedom to provide services.

76. As regards *freedom of establishment*, it is worth repeating that it follows from Article 43 EC that such freedom '... shall include the right to take up and pursue activities as self-employed persons... under the conditions laid down for its own nationals by the law of the country where such establishment is effected...', and that pursuant to Article 46(1) EC a Member State is obliged to justify its legislation only if it applies special treatment for foreign nationals. Furthermore, an individual may attempt to prove that a rule applicable without distinction constitutes covert discrimination.

77. Moreover, as the present case is concerned with vocational training or education, reference should be made to Article 149(1) EC and 150(1) EC, which provide respectively that 'the Community shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, *while fully respecting the responsibility of the Member States for the content of teaching and the organisation of the education system* [22]...' and that 'the Community shall implement a vocational training policy which shall support and supplement the action of the Member States, *while fully respecting the responsibility of the Member States for the content and organisation of vocational training* [23] '.

78. In each article, paragraph 4 adds, respectively, that '... the Council shall adopt incentive measures, *excluding any harmonisation of the laws and regulations of the Member States*' [24] and that 'the Council... shall adopt measures to contribute to the achievement of the objectives

22 — Emphasis added.
23 — Emphasis added.
24 — Emphasis added.

referred to in this article, *excluding any harmonisation of the laws and regulations of the Member States*'. [25]

79. The Community institutions therefore cannot adopt any measure the direct aim of which is to harmonise the content of vocational training or education provided in a Member State, or to harmonise the organisation of their educational systems in general or of vocational training in particular.

80. However, it seems to me that the provisions concerning freedom of establishment cannot be interpreted in such a way as to render, indirectly, Articles 149 EC and 150 EC meaningless.

81. Such would be the case if Austria were obliged to permit within its territory establishments from another Member State providing Heilpraktiker training. It would as a result become very difficult for Austria to prohibit its own nationals from setting up establishments to provide similar training. In any event, the power which Austria retains by virtue of the abovementioned provisions to define freely the content and organisation of education provided within its territory would thus be jeopardised.

82. However, even if one were to disregard those considerations based on a textual analysis and thus examine the prohibition enacted by Austrian law solely in the light of the Court's case-law, according to which national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty, including thus the freedom of establishment, must fulfil the four conditions already referred to above, the prohibition on Heilpraktiker training, such as exists in Austria, must, in my opinion, be permitted.

83. Deutsche Paracelsus Schulen considers that those conditions are not fulfilled in this case. In particular, it contends that the prohibition on providing training cannot be regarded as justified for imperative requirements in the general interest except in the case of a profession so discreditable and (or) dangerous as to pose such a threat to public order that it seemed justified to 'cut out the evil at the root'.

84. I agree with Deutsche Paracelsus Schulen that a prohibition on Heilpraktiker training cannot be regarded as automatically justified merely by the fact that the exercise of the profession of Heilpraktiker is prohibited. It should in effect be established on the basis of the Court's case-law whether the prohibition on training is itself justified by imperative requirements in the general interest.

25 — Emphasis added.

85. Nevertheless, it appears to me that that is the situation in the present case. In effect, I support the Commission's position that 'having regard not only to preventive health considerations, but also to the concern for *legislative coherence towards the consumer and the population as a whole*,[26] the prohibition on the disputed training centres within Austrian territory seems justified'.

86. At the hearing, the Commission again stressed that freedom to train as a Heilpraktiker in Austria could encourage the unlawful exercise of that profession. I consider it fair in fact to state that, if Heilpraktiker training were openly provided more or less throughout Austria, whilst the exercise of the activity of Heilpraktiker is prohibited there, that would constitute a source of confusion liable to make the population less aware that the exercise of that profession is prohibited. The persons concerned would be led to say to themselves: 'If I am permitted to train for the profession, then it cannot be so serious if I practise it'.

87. Thus, I take the view that independent grounds do exist for prohibiting Heilpraktiker training in the sense that that prohibition serves to avoid the prohibition on the exercise of the profession of Heilpraktiker losing its credibility. In my opinion, that constitutes an imperative requirement in the general interest. In effect, if a prohibition, such as that on the exercise of the profession of Heilpraktiker, is valid, the Member State cannot be deprived of the possibility of imposing that prohibition in a coherent and credible manner.

88. Moreover, I share the Commission's opinion that no evidence of the existence of a measure less radical than a general prohibition on establishment has been adduced. In particular, the information provided by the training establishments indicating that the profession of Heilpraktiker may not be exercised in Austria would not, in my opinion, avoid confusion. Confusion would be created by the contradiction between, on the one hand, the prohibition on exercising the profession of Heilpraktiker and, on the other, the permission to undertake training in that profession. Far from avoiding such a conflict, the abovementioned information would merely highlight it.

89. I therefore take the view that freedom of establishment is not infringed by a prohibition on Heilpraktiker training, such as exists in Austria.

90. As regards the *freedom to provide services*, the Commission considers that 'prohibiting the provision of training as a lay health practitioner *abroad*[27] and prohibiting advertising therefor which informs

26 — Emphasis added.

27 — Emphasis added.

the consumer in advance that it is not possible to exercise the corresponding profession in Austria, does not appear to be a necessary measure, either in terms of public health or consumer protection: such a practice infringes the principle of proportionality and consequently may not be regarded as justified'.

91. Nevertheless, it follows from the above that the Commission, in the context of its argument on the freedom to provide services, is referring to the possibility of advertising in Austria for Heilpraktiker training provided abroad — a matter we shall deal with later —, rather than to the question of whether Community law precludes a Member State from prohibiting an establishment situated abroad from providing within its territory services associated with Heilpraktiker training.

92. However, that latter question should be dealt with having regard to the wording of the second question referred by the national court for a preliminary ruling, which calls for an analysis from the perspective of Articles 43 EC and 49 EC and in the light of the information received at the hearing that courses could be provided in Austria in the form of 'peripatetic' seminars.

93. Nevertheless, in my opinion, the four conditions, which apply in equal measure to the freedom to provide services, are fulfilled in respect of the prohibition on establishments situated outside Austria from providing Heilpraktiker training in Austria in the form of the provision of a service.

94. The conflict creating the confusion leading to reduced awareness of the prohibition on the exercise of the profession of Heilpraktiker would arise as soon as Heilpraktiker training was provided on Austrian territory. In that respect, it is irrelevant whether the training is provided by an establishment situated in Austria or by an establishment situated in another Member State offering the training in the form of a service on Austrian territory.

95. It therefore appears to me that a prohibition on Heilpraktiker training, such as exists in Austria, is also valid from the perspective of the freedom to provide services.

The prohibition on advertising for Heilpraktiker training

96. In its second question, the national court also asks whether Articles 43 EC and 49 EC preclude a prohibition, such as that

provided for by Austrian law, on advertising for Heilpraktiker training.

97. First, the scope of the prohibition on advertising for Heilpraktiker training should be examined.

98. If only advertising for Heilpraktiker training *provided in Austria* is prohibited, it seems to me that the prohibition cannot be criticised either in the light of Article 43 EC or in the light of Article 49 EC. Given that Heilpraktiker training is prohibited in Austria, it is only logical that advertising for such training should also be prohibited. Moreover, such advertising would not make any sense in so far as it would attract people for an event which cannot take place.

99. The question of whether Heilpraktiker training *provided abroad* is prohibited in Austria is, in my opinion, quite another matter. Questioned by the Court on this point, the Austrian Government replied that, in its opinion, the Austrian Law on training does not prohibit such advertising.

100. Whilst it is for the national court to interpret Austrian law in this respect, the Austrian Government's explanation appears to me to be convincing. Paragraph 1(2)[28] of the Law clearly prohibits advertising for the activity which it prohibits in Paragraph 1(1). However, it seems to me totally out of the question that the Austrian legislature could have intended to prohibit Heilpraktiker training provided abroad.

101. Thus, since it would appear that advertising for Heilpraktiker training provided abroad is not prohibited, no question of Community law is involved.

102. However, if — purely from a hypothetical point of view — the national court had nevertheless concluded that the Austrian law does prohibit advertising in Austria for Heilpraktiker training provided abroad, I would share the Commission's view that such a prohibition would be contrary to Article 49 EC.

103. Such publicity would not be liable either to pose a threat to the Austrian health system or, by reason of the fact that it originates from foreign establishments for training provided abroad, seriously

28 — That provision is worded as follows: 'An attempt to do so is an offence. Advertising is regarded as an attempt'.

create any confusion in the minds of the population with regard to the prohibition on the exercise of the profession of Heilpraktiker in Austria.

104. However, in the interests of consumers, the Member State would, in my opinion, be right to require that the advertising specify that the profession of Heilpraktiker cannot be exercised in its territory.

105. Consequently, I propose that the reply to the second question should be that Articles 43 EC and 49 EC do not preclude national rules which reserve training, provided in the Member State's territory, to professions regulated by a legal provision adopted in the field of health, to the institutions designated for that purpose and which prohibit other persons or institutions from offering or procuring such training and advertising therefor, even if that training relates only to certain branches of medical activity. On the other hand, Article 49 EC does preclude a Member State from prohibiting advertising for such training provided in another Member State, if the advertising in question informs the public of the prohibition on the exercise of the profession corresponding to the training in the territory of the Member State in which it is prohibited.

V — Conclusion

106. In the light of the above, I propose that the Court reply to the national court as follows:

— Articles 43 EC and 49 EC do not preclude a Member State from reserving the exercise of an activity allied to medicine, such as that of a lay health practitioner ('Heilpraktiker') within the meaning of the German Law on lay health practitioners (RGBl. I, 251/1939), to holders of a doctor's qualification.

— Articles 43 EC and 49 EC do not preclude national rules which reserve training, provided in the Member State's territory, to professions regulated by a legal provision adopted in the field of health, to the institutions designated for that purpose and which prohibit other persons or institutions offering or procuring such training and advertising therefore, even if that training relates only to certain branches of medical activity. On the other hand, Article 49 EC does preclude a Member State from prohibiting advertising for such training provided in another Member State, if the advertising in question informs the public of the prohibition on the exercise of the profession corresponding to the training within the territory of the Member State in which it is prohibited.