OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 17 May 1990 *

Mr President,
Members of the Court,

1. These proceedings brought by the Commission against the French Republic are for a declaration that by failing to adopt the measures needed to allow nationals of other Member States in possession of the requisite French qualifications to establish themselves or provide services as doctors, general nurses, midwives, dentists or veterinary surgeons in French Polynesia or as veterinary surgeons in New Caledonia and its dependencies, that Member State has failed to fulfil its obligations under Article 137 of Council Decision 80/1186/EEC of 16 December 1980 [1] and Article 176 of Council Decision 86/283/EEC of 30 June 1986, [2] on the association of the overseas countries and territories with the European Economic Community. Those provisions state in identical terms:

'As regards the arrangements that may be applied in matters of establishment and provision of services, the relevant authorities of the countries and territories shall treat nationals and companies or firms of Member States on a non-discriminatory basis. However, if, for a given activity, a Member State is unable to provide similar treatment to nationals or companies or firms of the Kingdom of Denmark, the French Republic, the Kingdom of the Netherlands or the United Kingdom of Great Britain and Northern Ireland, established in a country or territory, or for companies or firms subject to the laws of the country or territory concerned and established therein, the relevant authorities of that country or territory shall not be bound to accord such treatment.'

2. According to the Commission, that condition of reciprocity has been fulfilled in any event, at least from the date of implementation of Directives 75/362/EEC, 77/452/EEC, 80/154/EEC, 78/686/EEC and 78/1026/EEC concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in medicine, general nursing, midwifery, dentistry and veterinary medicine. By virtue of those directives, the other Member States are bound, according to the substantive and formal conditions provided for in the matter, to recognize French diplomas, and also those issued by another Member State, in medicine, general nursing, midwifery, dentistry and veterinary medicine, held by a national of the French Republic without being able to attach to them any condition as regards the place of establishment of the said national.

3. For its part, the French Government accepts that those directives necessarily establish a presumption of reciprocity since a French national subject to Polynesian rules and holding a diploma from another Member State should be able to establish himself in that Member State. It is therefore

* Original language: French.
1 — OJ 1980 L 361, p. 1.
2 — OJ 1986 L 175, p. 1.

only where the Member State from which a national who wishes to establish himself in an overseas territory originates does not grant such reciprocity that the freedom of establishment for a national of that Member State is not automatically conferred.

4. In other words, for the French Government, it is the general prohibition which is contrary to Community law. In its view, the Community directives on the mutual recognition of diplomas, which do not apply as a whole to the overseas countries and territories (which is, moreover, also the opinion of the Commission), do not imply reciprocity within the meaning of Article 176. They simply render a general nationality clause illegal under Community law. The French Government is endeavouring to remove that prohibition wherever it exists. Since the commencement of the proceedings, the legislation applying in New Caledonia has already been brought into conformity with Community law. That is, moreover, accepted by the Commission.

5. The French Government admits that, as far as Polynesia is concerned, the question has not yet been resolved. The difficulty of the matter relates to the particular nature of the territorial organization in the territory in question and the fact that the laws to be passed affect the respective powers of the central and local authorities. The context and procedures to be followed mean that it will take some time to achieve the conformity sought.

6. Those positions of the two parties lead me to make four observations.

7. (a) All the directives cited by the Commission are also applicable to nationals of the Member States who exercise or will exercise the activities in question as employees. It follows from Article 135 of the EEC Treaty that:

'freedom of movement within Member States for workers from the countries and territories, and within the countries and territories for workers from Member States, shall be governed by agreements to be concluded subsequently with the unanimous approval of Member States'.

Since no agreement of that type has been concluded, the proceedings by the Commission cannot be concerned with the exercise of the activities in question in the capacity of employee. That follows, moreover, from the wording itself of the application, where it is only a question of establishment and provision of services, which, in the language of the Treaty, means the independent professions.

8. (b) As regards the difficulties described by the French Government concerning French Polynesia, it must be observed that those circumstances cannot prevent the Court from upholding the Commission's request. It follows from the consistent case-law of the Court that a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to observe the obligations and time-limits laid down by Community law (see, in particular, the judgment in Case 254/83 *Commission* v *Italy* [1984] ECR 3395).

9. (c) As regards the bringing into conformity of the legislation applying in New Caledonia on establishment and the provision of services in medicine and

veterinary surgery, which occurred in 1989, it may observed that, in particular in its judgment in Case C-287/87 *Commission* v *Hellenic Republic* [1990] ECR I-125, the Court recalled that:

'The object of an action under Article 169 is established by the Commission's reasoned opinion and, even when the default has been remedied subsequently, there is still an interest in pursuing the action in order to establish the basis of liability which a Member State may incur as a result of its default as regards other Member States, the Community or private parties.'

The Commission's application should therefore also be upheld in so far as it concerns New Caledonia.

10. (d) There remains the question whether, as the French Government affirms, the directives in question establish only a presumption of reciprocity and whether it is still necessary to ascertain whether in each particular case the authorities of the Member States from which a national wishes to establish himself in an overseas country or territory effectively grants 'similar treatment' to 'nationals of the French Republic . . . established in a country or territory' (see the wording of Articles 137 and 176 of the two Council decisions).

11. In my view, this 'similar treatment' could only be refused by a Member State at the price of contravening the Community rules applying to the matter. I shall explain.

12. Article 132(5) of the EEC Treaty states that:

'In relations between Member States and the countries and territories the right of establishment of nationals and companies or firms shall be regulated in accordance with the provisions and procedures laid down in the Chapter relating to the right of establishment and on a non-discriminatory basis, subject to any special provisions laid down pursuant to Article 136'.

13. The special provisions which have been implemented under Article 136 concern only the situation of a national of a Member State wishing to establish himself in an overseas country or territory. The provisions involved are Articles 137 and 176 at issue in the present case. It follows that, as regards persons originating from a country or territory who wish to establish themselves in Europe, it is necessary to refer to the provisions and procedures of the chapter concerning freedom of establishment and the principle of non-discrimination.

14. It must be emphasized in this context, that, unlike Article 135 of the Treaty, which uses the words 'freedom of movement . . . for workers . . . *shall be* governed by agreements', Article 132(5) provides that 'the right of establishment . . . *shall be* regulated *in accordance with* the provisions . . . '.

15. Since the present proceedings are concerned with professions for which have been adopted directives on the mutual recognition of diplomas containing measures intended to facilitate the effective exercise of the right of establishment and the free provision of services, it is necessary to refer to those directives in order to

examine whether they leave Member States any discretion as regards the admission or non-admission of persons established prior thereto in an overseas country or territory.

16. It appears that the directives in question do not leave Member States any such discretion, since they all provide in their Article 2, that:

'Each Member State shall recognize the diplomas, certificates and other evidence of formal qualifications awarded to nationals of Member States by the other Member States . . . by giving such qualifications, as far as the right to take up and pursue the self-employed activities (of a doctor) is concerned, the same effect in its territory as those which the Member State itself awards'. [3]

17. Since those directives do not therefore make a distinction between the nationals of the Member States according to whether they were established in the European territory of a Member State or in an overseas country or territory, it must be concluded that the persons coming from those countries or territories enjoy all the advantages conferred by the directives without restriction.

18. It may also be said that there is more than reciprocity since a French Polynesian holding a French diploma may, according to those directives, establish himself in Germany, whereas a German cannot establish himself in Polynesia if he only possesses a German diploma; he must be able to provide evidence of a French diploma.

19. I therefore propose that the Court declare that by failing to adopt the measures needed to allow nationals of other Member States in possession of the requisite French qualifications to establish themselves or provide services as doctors, general nurses, midwives, dentists or veterinary surgeons in the overseas territory of French Polynesia or as veterinary surgeons in New Caledonia and its dependencies, the French Republic has failed to fulfil its obligations under Article 137 of Council Decision 80/1186 of 16 December 1980 and Article 176 of Council Decision 86/283 of 30 June 1986 on the association of the overseas countries and territories with the European Economic Community.

20. It follows that the French Republic must bear the costs of the proceedings.

3 — Council Directive 75/362/EEC of 16 June 1975 . . . 'doctors' . . . (OJ 1975 L 167, p. 1); Council Directive 77/452/EEC of 27 June 1977 . . . 'nurses responsible for general care' . . . (OJ 1977 L 176, p. 1); Council Directive 78/686/EEC of 25 July 1978 . . . 'practitioners of dentistry' . . . (OJ 1978 L 233, p. 1); Council Directive 78/1026/EEC of 18 December 1978 . . . 'veterinary medicine' . . . (OJ 1978 L 362, p. 1); Council Directive 80/154/EEC of 21 January 1980 . . . 'midwifery' . . . (OJ 1980 L 33, p. 1).