OPINION OF ADVOCATE GENERAL TESAURO
delivered on 14 September 1994 *

Mr President,
Members of the Court,

1. In the present action the Commission is asking the Court to declare that, by not providing remuneration for the periods of training necessary to obtain formal qualifications in the medical specialties listed in the third paragraph of the Annex to Royal Decree No 127/1984 of 11 January 1984, [1] the Kingdom of Spain has failed to fulfil its obligations under the EEC Treaty.

More specifically, the Commission alleges that, with respect to remuneration for periods of training for certain medical specialties, Spain has not properly implemented either Council Directive 75/362/EEC 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 [2] (hereafter 'the *recognition* directive') or Council Directive 75/363/EEC concerning the coordination of provisions laid down by law, regulation or administrative action in respect of activities of doctors [3] (hereafter 'the *coordination* directive') of 16 June 1975, both as amended by Directive 82/76/EEC of 26 January 1982. [4]

2. A very brief recapitulation of the relevant provisions of the two directives in question [5] and the disputed national legislation is necessary for a proper understanding of the Commission's allegations and the arguments put forward by the defendant.

With a view to mutual recognition of diplomas, certificates and other evidence of formal qualifications in specialized medicine, the *coordination* directive provides for some coordination of the requirements for training and access to the various medical specialties. Article 2 in particular requires minimum standards to be observed, concerning *inter alia* the right to take up specialized training, the method by which training is given and the place where it is to be carried out and also the supervision to which it should be

* Original language: Italian.

1 — *Boletín Oficial del Estado*, 31 January 1984, p. 2524.

2 — OJ 1975 L 167, p. 1.

3 — OJ 1975 L 167, p. 14.

4 — OJ 1982 L 43, p. 21.

5 — It must be borne in mind here that 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 (OJ 1993 L 165, p. 1) provided for those directives to be consolidated into a single text.

subject. For the purposes of this case it should be noted in particular that specialist training 'shall be a full-time course supervised by the competent authorities or bodies pursuant to point 1 of the Annex hereto' (Article 2(1)(c)). That Annex, added to the *coordination* directive by Article 13 of Directive 82/76/EEC and concerning the 'characteristics of full-time and part-time training of specialists', provides *inter alia* that training should be *appropriately remunerated*, in order to ensure that the trainee specialist devotes all his professional activity to it. [6]

The *coordination* directive prescribes, in addition, the minimum length of the specialized training courses common to all the Member States (Article 4) and of those common to two or more Member States (Article 5).

3. The *recognition* directive, for its part, draws a distinction between the diplomas, certificates and other formal qualifications in specialized medicine common to all Member States (Chapter III) and those peculiar to two or more Member States (Chapter IV).

With regard to the first group, listed in Article 5(2), Article 4 provides for full recognition so long as the conditions of training meet the minimum requirements of the *coordination* directive. With respect to those peculiar to two or more Member States listed in Article 7, Article 6 provides that they are to be recognized — always provided that they meet the requirements of the *coordination* directive — by those States only.

A third situation, envisaged by Article 8 (also to be found in Chapter IV), concerns those diplomas, certificates and other formal qualifications which do not fall within the abovementioned categories or which, although listed in Article 7, are not awarded in the Member State of origin or the Member State from which the foreign national comes. Article 8 provides that the host Member State may require nationals of other Member States wishing to acquire one of the diplomas or certificates in question 'to fulfil the conditions of training laid down in respect of the specialty by its own law, regulation or administrative action' (Article 8(1)). The host Member State is, however, to take into account, in whole or in part, the training periods completed by the nationals concerned where those periods correspond to those required by the host Member State for the specialized training in question (Article 8(2)) and, where that is the case, to require additional training only (Article 8(3)).

Finally, in the event of justified doubts, Article 22 of that directive authorizes the host Member State to require of the competent authorities of another Member State 'confir-

6 — I think it may be helpful to set out in full point 1 of the Annex concerned, according to which:
'Full-time training of specialists ... shall be carried out in specific posts recognized by the competent authority. It shall involve participation in all the medical activities of the department where the training is carried out, including on-call duties, so that the trainee specialist devotes to this practical and theoretical training all his professional activity throughout the duration of the standard working week and throughout the year according to provisions agreed by the competent authorities. Accordingly these posts shall be subject to appropriate remuneration.
Training may be interrupted for reasons such as military service, secondment, pregnancy or sickness. The total duration of the training shall not be reduced by reason of any interruption.'

mation of the authenticity of the diplomas, certificates and other evidence of formal qualifications issued in that other Member State and referred to in Chapters II to V, and also confirmation of the fact that the person concerned has fulfilled all the training requirements laid down' in the *coordination* directive.

4. The *recognition* and *coordination* directives were transposed into Spanish law by Royal Decree No 1691/89 of 29 December 1989 [7] which does not, however, contain any provision concerning remuneration for doctors during the periods devoted to specialized training. That aspect is in any event governed by the abovementioned Decree No 127/1984, adopted prior to Spain's accession to the Communities, on the training of specialist doctors and the award of the relevant diplomas.

The decree in question provides for two separate categories of training, as a junior doctor and as a student. The latter category includes the six specialties listed in the third paragraph of the annex to that decree: stomatology, hydrology, space medicine, sports and physical education medicine, forensic medicine and occupational medicine. Such specialties, which do not require hospital training, are subject to the 'student' system, with the result that not only are the training periods not remunerated but also fees must be paid to register for the courses involved.

5. The Commission's complaints centre precisely on the difference in treatment under the Spanish legislation at issue for specialties in respect of which that legislation does not require hospital training. The Commission claims that failure to pay doctors during the periods of training for those specialties is contrary to Article 2(1)(c) of the *coordination* directive which, among other minimum standards for specialized training, provides by reference to point 1 of the Annex for training to be subject to 'appropriate remuneration'.

The alleged failure by Spain to fulfil its obligations, while based also on the *recognition* directive, consequently and essentially concerns the *coordination* directive alone, as amended by Directive 82/76/EEC. In the Commission's opinion, Article 2 of the *coordination* directive applies to all diplomas and certificates in the various Member States, irrespective of whether or not they are listed in the *recognition* directive, precisely because the conditions concerned are an inherent feature of the formal qualification in question and thus constitute minimum standards in the absence of which (partial) recognition within the meaning of Article 8 would not

7 — *Boletín Oficial del Estado* of 15 January 1990, p. 126.

even be possible; I would remind the Court that Article 8 concerns those specialties which are not listed in either Article 5 or Article 7 of the *recognition* directive.

6. The Spanish Government, on the other hand, maintains that the *coordination* directive, far from pursuing any independent objective, should be construed on the basis of the objective of the *recognition* directive, with the result that the Member States are required to comply with its provisions only with regard to those specialties expressly listed in the *recognition* directive, either as recognized in all Member States or as common to two or more Member States and, in the latter case, only in so far as they are recognized by the Member States in which they exist.

Since only stomatology of the six specialties under discussion is included in the *recognition* directive among those common to two or more Member States, of which Spain is one, the Spanish Government acknowledges failure to fulfil its obligations in relation only to specialization in stomatology. Instead, it challenges the alleged requirement to remunerate periods of training for the five other specialties, because occupational medicine, while it is listed among the specialties common to two or more Member States (Article 7), is not included with reference to Spain, and the other four specialties (forensic medicine, sports and physical education medicine, space medicine, hydrology) do not appear at all in the directive.

7. The dispute between the Commission and the Spanish Government as to the five remaining specialties is, in short, a matter of different interpretations of the scope of the *coordination* directive, more specifically of Article 2(1). Do the minimum standards which it lays down apply to all specialties existing (and regulated) in the various Member States or only to those in respect of which automatic recognition is provided for, at least as between two Member States, and only in relation to those Member States which mutually recognize the relevant diplomas or certificates?

That is the question which the Court is called upon to settle in order to establish whether or not Spain is required to remunerate the periods of training necessary for the specialties at issue; it is a question which plainly opposes two different and conflicting conceptions as to the overall reasoning behind the system established by the two directives in question in order to facilitate freedom of movement for doctors.

8. In support of its own point of view, the Spanish Government refers to the wording

of the second recital in the preamble to the *coordination* directive, according to which 'with a view to mutual recognition of diplomas, certificates and other evidence of formal qualifications in specialized medicine (...), some coordination of the requirements for training in specialized medicine seems necessary; (...) certain minimum criteria should be laid down for this purpose (...); (...) *these criteria only concern the specialties common to all the Member States or to two or more Member States*'. [8]

The Commission's view is that the recital in question, as revealed by consideration of the *travaux préparatoires*, is the result of the lawyer-linguists' merging of two different recitals and refers only to the minimum length of training courses and not to the criteria mentioned in Article 2 also. The Commission relies furthermore on the fact that there is nothing in Article 2 to restrict the applicability of its provisions to the specialties common to all the Member States or, at least, to two or more Member States, but claims that Article 2 is of general application and therefore relates to the award of all diplomas, certificates and other formal qualifications in specialized medicine. The recital in question cannot therefore replace that provision, giving rise to the conclusion reached by the Spanish Government.

9. Clearly the explanation supplied by the Commission with regard to the *travaux préparatoires* [9] is of no relevance in a case such as this, in which account is rather to be taken of the fact that the measure was approved with the reasons stated therein. Moreover, the recent directive consolidating in a single text the directives under discussion here has retained the old wording of the recital in question. [10]

In addition, while it is true that Article 2 does not expressly restrict the applicability of its provisions to those specialties listed in the *recognition* directive, neither does it expressly state that it is intended to apply to all the various specialties in existence in the various Member States, including those peculiar to a single Member State.

8 — Emphasis added.

9 — The relevant documents, as produced in the Court by the Commission, merely reveal that: (a) the Commission's proposal and the text of 27 November 1974 in the form produced by the endeavours of the Council's 'economic questions' committee contained two recitals, one concerning the minimum length of specialist training and the second concerning other minimum standards; (b) only in the recital relating to the minimum length of training was it stated that the reference was solely to those specialties common to all the Member States or two or more Member States; (c) the version of 17 December 1974, as revised by the lawyer-linguists, contained a second 'recital' all but identical to that in the version subsequently adopted; (d) on 17 January 1975 that last version was sent by the members of COREPER to the Council, together with a note on the state of progress and on the remaining disagreements and reservations expressed by certain delegations, with a view to the continuation of the *travaux* and the subsequent adoption of the measure which took place on 16 June 1975.

10 — See the fourteenth recital in the preamble to Directive 93/16/EEC, previously cited. A further point, although this is not a decisive argument, is that Council Directive 78/687/EEC of 25 July 1978 concerning the coordination of provisions laid down by law, regulation or administrative action in respect of the activities of dental practitioners (OJ 1978 L 233, p. 10) which lays down, in Article 2(1), minimum criteria for training as a practitioner of specialized dentistry, also contains a second recital similar to the one under consideration.

10. In that connection, I would point out that Article 5 of the *coordination* directive, which sets the various minimum periods for training in the specialties common to two or more Member States, does not confine the requirement of compliance therewith to those States which mutually recognize the specialties in question. On the contrary, that provision expressly states that it applies to all Member States 'which have laid down provisions by law, regulation or administrative action in this field', that is to say, to all States in which the abovementioned specialties exist and are regulated. Yet the Commission accepts that the minimum periods so fixed are to apply only to those States which mutually recognize the specialties in question and not to all the specialties listed in the relevant provision which are known to and 'recognized' in the various Member States. [11]

In the same way, in providing that the host Member State may, for the purposes of acquiring formal qualifications in specialties not listed in Articles 5 or 7 of that directive, require nationals of other Member States to fulfil 'the conditions of training laid down in respect of the specialty by its own law, regulation or administrative action', Article 8 of the *recognition* directive does not (at least not expressly) make any reservation as to the application of Article 2 of the *coordination* directive.

11. To sum up, it does not seem to me that I can endorse the conclusions drawn by the Commission from the actual wording of Article 2, having regard in particular to the absolute clarity of the second recital in the preamble to the *coordination* directive. The overall rationale behind the system set up by the two directives in question must therefore be taken into consideration.

In my view, there is no escaping the fact that the *coordination* directive does not pursue an independent objective, but is logically structured in terms of the recognition of diplomas and certificates. That is borne out by reading the two directives in conjunction with one another, from which it appears that (automatic) mutual recognition is required where the minimum standards laid down in the *coordination* directive are complied with; it is borne out both by the statement of reasons on which the *recognition* directive is based ('certain coordinating provisions intended to enable Member States to proceed with the mutual recognition of diplomas, certificates and other evidence of formal qualifications should be laid down') and also by the reasons for the *coordination* directive ('whereas with a view to achieving the mutual recognition ...').

11 — A literal interpretation of Article 5 would, by contrast, have had to lead for instance to the inclusion of occupational medicine in the *recognition* directive in relation to Spain as well, since it is a specialty which is expressly mentioned in Article 5 and which exists and is regulated in that State as in other Member States. Case C-306/84 *Commission* v *Belgium* [1987] ECR 675, in which the Court was called upon to declare that by not complying with Article 5 of the *coordination* directive with respect to the minimum period of specialized training in tropical medicine, Belgium was in breach of the directive, is similarly instructive in that regard. While the Court found against Belgium because a period of one year rather than four, as required by the directive, was provided for, it is none the less true that Belgium requested, and was granted, a dispensation as regards tropical medicine from the *recognition* directive, which in turn authorized that State not to comply with Article 5 of the *coordination* directive even though tropical medicine exists and is recognized in Belgium.

12. However, the fact, which is moreover self-evident, that coordination depends on recognition is not in itself sufficient to make it clear whether the conditions laid down in the *coordination* directive apply to all the various existing medical specialties or only to those listed in the *recognition* directive.

The purpose of recognition might in fact require all existing specialties to meet the minimum conditions, on the assumption that coordination of minimum conditions merely represents a first step towards recognition and is in any event essential with a view to ensuring the effectiveness of Article 8 of the *recognition* directive concerning specialties not expressly referred to therein. That is, moreover, the Commission's opinion.

From that point of view, what must be ascertained is whether a construction of the *coordination* directive of the kind advocated by the Spanish Government is compatible with the essential objectives and distinctive features of the system considered as a whole or whether, as the Commission maintains, it renders that system wholly ineffective.

13. The actual wording of the second recital of the *coordination* directive is unambiguous: all specialties existing in at least two Member States are subject to the conditions of training laid down in that directive and therefore to automatic recognition. Conversely, the Member States are free to regulate access to, and the conditions of, specialist training themselves only when the specialty involved does not exist (and is not regulated) in any other Member State, that is, only when the relevant diploma, certificate or other formal qualification is not awarded in any other Member State.

This is the only interpretation which is consistent not only with the letter but also with the spirit of the directives in question, as is confirmed both by Article 5 of the *coordination* directive [12] and by the seventh recital [13] and Article 8 of the *recognition* directive. Far from establishing a different form of recognition for those formal qualifications which are not expressly referred to in Articles 5 and 7 of the *recognition* directive, Article 8 con-

12 — As already pointed out in point 10, the provisions of that article apply to all those Member States 'which have laid down provisions by law, regulation and administrative action in this field' and not only to those which mutually recognize the specialties concerned for the purposes of the *recognition* directive. Moreover, while Article 7(2) of the *recognition* directive lists the specialties common to two or more Member States and identifies those States, Article 7(1) states that the qualifications and diplomas referred to are those which correspond for the purposes of the specialized training in question to the designations listed in Article 7(2) *in respect of those Member States which give such training.*

13 — This recital is worded as follows: 'Whereas the coordination referred to above was not intended to harmonize all the provisions of the Member States on the training of specialists and it is nevertheless appropriate to proceed with the mutual recognition of diplomas, certificates and other evidence of formal qualifications as a specialist which are not common to all the Member State, without however excluding the possibility of subsequent harmonization in this field; whereas it was considered in this connection that recognition of diplomas, certificates and other evidence of formal qualifications as a specialist must be restricted to those Member States where such specialization is known.' This plainly means that the diplomas and certificates existing in at least two Member States are subject to mutual recognition and therefore, conversely, that the only diplomas or certificates remaining outside the ambit of the two directives are those awarded in one Member State alone.

cerns the situation where diplomas or certificates are *acquired* which are not *awarded* in the Member State of origin or the Member State from which the foreign national comes. [14]

14. The rationale underlying the system established by the directives at issue is thus abundantly clear and logical: all specialties existing in at least two Member States are subject to mutual recognition and, as a preliminary matter therefore, to the provisions of the *coordination* directive; all specialties existing and regulated in a single Member State are not subject to mutual recognition (by definition, I would add), with the result that the application of the *coordination* directive to them, while desirable in view of likely developments in this field, [15] cannot be held to be mandatory but merely optional.

Moreover, taking account of the fact that coordination in this area has only in part been achieved and of the aims of coordination, the Commission's argument would make sense only if the Member States were required to satisfy all the minimum conditions laid down by the *coordination* directive, including therefore those relating to the minimum training periods for individual specialties. [16] Only then would the result be near-automatic recognition, by virtue of compliance with all the minimum criteria established by the *coordination* directive, even of those diplomas and certificates which are not (yet) listed in the *recognition* directive (at least not listed with respect to some States), either because they became common to at least two Member States only after the directives in question were adopted or because they have not yet been listed with respect to a Member State in which the relevant specialty was regulated only after the directives were adopted. [17]

15. Nevertheless, it became apparent at the hearing that it is for the Member States to ask for a given specialty to be included in the *recognition* directive and that, if the argu-

14 — The host Member State's obligation under Article 8(2) and (3) to take into account the training periods completed in the Member State of origin or the Member State from which the foreign national comes, provided that such periods correspond to those required in the host State, is, therefore, clearly to be interpreted as meaning that the said State must take such training periods into consideration, even where they relate to a different specialty, provided that the training required to obtain the relevant diploma or certificate corresponds in part to that required by the host Member State in order to obtain a diploma or certificate which is not awarded in the Member State of origin or the Member State from which the foreign national comes.

15 — It will be sufficient in this context to consider that originally there were 47 specialties referred to in the directives and that now there are 50. Consequently, the potential creation of new specialties, and the possibility that specialties existing in one Member State alone may later be created and regulated in other Member States as well, clearly reveal the advantages of a common basis from which to start for the purposes of including and recognizing the specialties concerned within the scope of those directives.

16 — In this regard it is difficult to understand, even from the point of view of pure logic, how a difference in the length of the training period, for the purposes of obtaining the specialty concerned, is less important than the failure to provide remuneration, taking into consideration the effects that each of those factors will inevitably produce on the content of such training.

17 — While it is may be assumed that the specialties common to some or all of the Member States fell within the ambit of the two directives at the time of their adoption (1975), it is equally clear that a problem arises with respect to those specialties which only subsequently became common (to two or more Member States), or were regulated and recognized in a given Member State, as a result of which they cannot be included in the ambit of those two directives except following an express amendment thereof, as for instance occurred in the case of Council Directive 89/594/EEC of 30 October 1989 (OJ 1989 L 341, p. 19).

ment of the Spanish Government were accepted, the applicability of the *coordination* directive rules would therefore be left essentially to the goodwill of the States. In other words, the Member States would thus be *authorized* to comply with the rules of the said directive only in so far as they *agree* to the mutual recognition of the diplomas or certificates concerned (which, moreover, is already unquestionably the case with regard to the minimum training periods for specialties common to two or more Member States [18]).

That fact, however, cannot alter the terms of the question. While it is clear that such a practice may give rise to consequences which are unacceptable and in any case contrary to the letter and spirit of the two directives concerned, it is likewise clear that it is for the Commission to ensure that, in accordance with the rationale of the system previously described, all the specialties regulated in at least two Member States are included within the ambit of the directives in question (and if necessary to put proposals before the Council to that effect). That is necessary, moreover, in order to maintain the effectiveness of the directives and to ensure that every (Community) medical specialist who wishes to avail himself of freedom of movement may rely on mutual recognition whenever the diploma, certificate or other formal qualification held by him is also awarded in the Member State in which he intends to practise his profession.

16. On the basis of the foregoing, therefore, I consider that the Spanish Government has failed to fulfil its obligations under both the *recognition* directive and the *coordination* directive solely in relation to specialized training in stomatology, in respect of which, as I have said, the Spanish Government does not deny being in default.

On the other hand, the Commission's allegations with regard to the five other specialties must be rejected, since occupational medicine is not expressly mentioned in the *recognition* directive with respect to the State in question and the other four specialties are not even included within the scope of the relevant directives, from which it should follow that those specialties are known and regulated only in Spain.

17. In the light of the foregoing considerations, I therefore propose that the Court should allow the application with regard to specialized training in stomatology and dismiss it with respect to the five other specialties.

Since each party has succeeded on some and failed on other heads, I propose that the parties should bear their own costs.

18 — See in this connection footnote 11.