OPINION of ADVOCATE GENERAL F.G. JACOBS delivered on 25 March 1992 *

My Lords,

1. In these proceedings under Article 169 of the EEC Treaty, the Commission asks the Court to declare that the Grand Duchy of Luxembourg is in breach of Articles 48 and 52 of the Treaty. The alleged breach consists in the failure, on the part of Luxembourg, to ensure that its rules governing the exercise of the professions of doctor, dentist and veterinary surgeon permit Community nationals established or employed in another Member State to practise in Luxembourg on an employed or a self-employed basis.

2. The rules in question are to be found in the Law of 29 April 1983 concerning the exercise of the professions of doctor, dentist and veterinary surgeon. Article 16 of the Law provides that a doctor or a dentist may have only one surgery ("cabinet médical"). The same article permits the Minister of Health to give authorization to a doctor or dentist established in Luxembourg to have a second surgery there, but only in special circumstances. The circumstances in question are where there is no other doctor practising the same discipline in the region concerned, or, as the case may be, no other dentist, and where the medical cover in the region is insufficient. Another limited derogation is provided by Article 2(2) and Article 9, which provide for a doctor or a dentist established in another Member State to be given authorization to practise as a substitute for a doctor or dentist established in Luxembourg. Article 29 provides that a veterinary surgeon may have only one place of establishment ('lieu d'établissement professionnel'). The only derogation from that principle is provided by Article 22(2), which again allows authorization to be given to practise as a substitute. In contrast, by Articles 4, 11 and 25 of the Law, a doctor, dentist or veterinary surgeon who is a Community national and who is established in another Member State may provide services in Luxembourg.

3. The Luxembourg Government does not dispute that the above provisions apply to practice in an employed as well as in a self-employed capacity. Thus, a doctor, dentist or veterinary surgeon is in principle not permitted to combine employment or establishment in Luxembourg with employment or establishment in another Member State.

4. In Case 107/83 *Ordre des Avocats au Barreau de Paris* v *Klopp* [1984] ECR 2971, in the context of freedom of establishment for lawyers, the Court rejected the view that the legislation of a Member State may require a practitioner to have only one establishment throughout the territory of the Community

* Original language: English.

(see paragraph 18 of the judgment). As the Court stated at paragraph 19:

'That freedom of establishment is not confined to the right to create a single establishment within the Community is confirmed by the very words of Article 52 of the Treaty, according to which the progressive abolition of the restrictions on freedom of establishment applies to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of another Member State. That rule must be regarded as a specific statement of a general principle, applicable equally to the liberal professions, according to which the right of establishment includes freedom to set up and maintain, subject to observance of the professional rules of conduct, more than one place of work within the Community.'

The Court went on to observe that a Member State still had the right to require the members of the legal profession to practise in such a way as to maintain sufficient contact with their clients and the judicial authorities, and abide by the rules of the profession. Such requirements must not however prevent the proper exercise of the right of establishment guaranteed by the Treaty.

5. Although the *Klopp* case concerned the legal profession, the principle stated by the Court is a general one. Thus, any restriction on the right to practise from a professional establishment in more than one Member State requires justification in terms of the general interest. It must be shown, for example, that such requirements as the need to maintain sufficient contact with clients, or patients, as well as with the relevant national authorities, cannot be served by a less continuous presence in the regulating Member State. The general interest considerations applicable to the medical professions may of course justify different restrictions from those applicable to lawyers. In each case, however, the restrictions imposed must not go beyond what is necessary to protect the interest in question.

6. The Court applied those principles to the medical professions in Case 96/85 *Commission* v *France* [1986] ECR 1475, which concerned restrictions on the practice in France of doctors and dentists who practise in another Member State. At paragraph 10 of the judgment, the Court observed that:

'It must first be pointed out that nationals of a Member State who pursue their occupation in another Member State are obliged to comply with the rules which govern the pursuit of the occupation in question in that Member State. ... [In] the case of the medical and dental professions those rules reflect in particular a concern to ensure that individuals enjoy the most effective and complete health protection possible.'

The Court went on however to declare incompatible with Articles 48, 52 and 59 of the Treaty the requirement that doctors and dentists established in another Member State must cancel their enrolment or registration in that other State in order to be able to practise their profession in France. The restrictions were held to be contrary to the Treaty for two reasons. First, the rule forbidding practice from more than one professional establishment discriminated against practitioners from other Member States, in that derogations from it were possible for doctors and dentists practising solely in France, but not for other practitioners: see paragraph 12 of the judgment. Secondly the general rule prohibiting doctors and dentists established in another Member State from practising in France was itself unduly restrictive: see paragraph 13 of the judgment. Thus, quite apart from the limited and discriminatory derogation in favour of practitioners established solely in France, the rule limiting practitioners to a single practice, even to the extent that it applied without distinction to all practitioners, raised obstacles to the free movement of workers and the right of establishment which went beyond what was necessary in order to achieve its intended goals: see paragraph 11 of the judgment.

7. It should be noted that in the present case, no infringement is alleged of the freedom to provide services laid down by Article 59 of the Treaty. Article 4(1) of the Law of 29 April 1983 does in fact expressly permit doctors established in another Member State to provide services in Luxembourg, under conditions laid down by Grand Ducal regulation (see Article 4(3)). Article 11 contains identical provisions in respect of dentists, and Article 25 in respect of veterinary surgeons. The same practitioners who, pursuant to those provisions, may provide services in Luxembourg from a place of establishment in another Member State, are however prevented from practising from an establishment or place of employment in Luxembourg while maintaining a place of establishment or employment in another Member State. I shall refer to that restriction as the "single practice rule".

8. In its defence to the Commission's application, the Luxembourg Government attempts to distinguish the national legislation at issue in Case 96/85 *Commission* v *France* from the legislation at issue in the present proceedings. In the alternative, the Luxembourg Government argues, in effect, that Case 96/85 was wrongly decided. I am unable to agree with either of those submissions.

9. As far as the right of establishment and the free movement of workers is concerned, it does not seem to me that any distinction can be drawn between the Law of 29 April 1983 and the national legislation at issue in Case 96/85 *Commission* v *France*. Leaving aside the freedom to provide services, which is in principle protected by the Luxembourg legislation, both sets of provisions appear to discriminate against practitioners from other Member States in closely similar ways. Thus, in each case, derogations from the single practice rule are available exclusively in respect of a second practice in the regulating Member State. As the Court observed in paragraph 12 of its judgment in Case 96/85 *Commission* v *France*:

'... the principle that a practitioner may have only one practice, put forward by the French Government as indispensable to the continuity of medical care, is applied more strictly with regard to practitioners from other Member States than practitioners established in France. Although, according to the documents before the Court and the information provided by the parties, the Councils of the ordre des médecins authorize doctors established in France to open a second practice only at a short distance from their main practice, doctors established in another Member State, even close to the frontier, are never permitted to open a second practice in France.'

In the same way, as we have seen, Article 16 of the Law of 29 April 1983 permits the Minister of Health, in certain circumstances, to authorize a doctor or a dentist to have a second surgery in Luxembourg, but does not appear to permit the same authorization to be given where the first surgery is in another Member State. Although the Luxembourg Government indicates in its defence that the derogation can be extended to surgeries in other Member States by Ministerial decision in individual cases, it does not seem to me that such ad hoc authorizations are sufficient to place the two categories of practitioner on an equal footing. A practitioner from another Member State would certainly not be made aware of such a possibility by reading the text of Article 16, which refers exclusively to practitioners established in Luxembourg. It is to be noted that the creation of such a state of uncertainty, in which national law does not adequately reflect the right to equal treatment accorded by Community law, is itself contrary to the Treaty: see Case 167/73 *Commission* v *France* [1974] ECR 359, at paragraph 41 of the judgment. Furthermore, it will in any case be recalled that in Case 96/85 *Commission* v *France*, cited above in paragraph 6, the Court condemned the general rule prohibiting practitioners established in another Member State from establishing a second practice in France, even in the absence of any discrimination in favour of practitioners already established in France.

10. Even if no distinction can be drawn between the national provisions condemned by the Court in Case 96/85 *Commission* v *France* and the corresponding provisions of the Law of 29 April 1983, the Luxembourg Government suggests that the Court went too far in that case when it declared such provisions to be contrary to Articles 48 and 52 of the Treaty. The Luxembourg Government argues that, notwithstanding the evolution of group practices, the relationship between medical practitioner and patient is inherently personal, and requires a continuity of patient care. Furthermore, according to the Luxembourg Government the examples cited by the Court in Case 96/85 *Commission* v *France* (namely, radiologist and surgeon) fail to take into account the organization of the hospital system in most of the Member States, where such practitioners are attached to a single hospital from which they provide care on a services basis. Moreover the Luxembourg Government does not consider that it would be feasible to distinguish between different classes of specialist in applying the single practice rule. Finally, it suggests that the

rational organization of the emergency services in Luxembourg depends upon practitioners having a single centre of activity.

11. It seems to me however that the legitimate concerns of the Luxembourg Government could equally well be met by less draconian restrictions than the ones currently in force. For instance, practitioners established in another Member State who sought to practise from a base in Luxembourg could be required to be present for a minimum number of hours (or days) a week in Luxembourg, and might also be required to ensure that a colleague was available in certain circumstances. Doctors or dentists practising in Luxembourg for less than the required minimum could then do so on a services basis, pursuant to Articles 4 or 11 of the Law of 29 April 1983. Alternatively, a requirement might be justified according to which practice from a base in Luxembourg for less than the minimum number of hours must be in association with other practitioners who have a permanent base there. Thus, whatever the force of the considerations relating to the continuity of care and contact with patients which are advanced by the Luxembourg Government, those considerations are not in my view sufficient to justify a blanket prohibition on practitioners established in another Member State from practising from a base in Luxembourg. That remains the case, even where the prohibition is subject to limited derogations in special circumstances, and even where such derogations are extended to practitioners established in another Member State.

12. As regards specialists, the Luxembourg Government's argument seems equally unconvincing. The starting point must be that doctors are entitled to practise across frontiers, in the absence of any compelling justification for restrictions. If restrictions are considered to be necessary for certain classes of specialist, the case for such exceptions must be made out. It is clear that even when such restrictions are made out, they cannot be extended, without further justification, to other categories of medical practitioner. In the event, however, the Luxembourg Government has not made out a case for its restrictions in relation to any category of practitioner.

13. As far as the rational organization of the emergency services is concerned, the Luxembourg Government did not provide any convincing explanation, either in the written procedure or at the hearing, of how the presence of practitioners who are also established in another Member State would make it impossible to organize those services. There was, in particular, no suggestion that emergency services in Luxembourg had to be provided by the patient's own doctor, rather than by doctors taking their turn in a rota of duty. While the requirements of the emergency services might justify certain restrictions, it is in any case impossible to accept that they could justify a global ban.

14. I conclude therefore that the single practice rule cannot, consistently with the Treaty, be applied to doctors or dentists who

are Community nationals established or employed in another Member State.

15. It remains to be considered whether the single practice rule can be justified in relation to veterinary surgeons, as opposed to doctors or dentists. In principle, however, the same considerations would seem to apply. The only new consideration advanced by the Luxembourg Government on this aspect of the case is that, in Luxembourg, group practices are still virtually non-existent among veterinary surgeons. As we have seen, the Luxembourg Government might be able to justify requirements which permitted practitioners established or employed in another Member State to establish themselves in practice in Luxembourg only in association with other practitioners. For the reasons already given, however, it seems to me that a blanket prohibition of the kind currently in force cannot be justified.

Conclusion

16. I am accordingly of the opinion that the Court should:

(1) Declare that, by preventing doctors, dentists and veterinary surgeons who are Community nationals established or employed in another Member State from practising from a place of establishment or employment in Luxembourg while maintaining their establishment or employment in that other Member State, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Articles 48 and 52 of the EEC Treaty;

(2) Order the Grand Duchy of Luxembourg to pay the costs.