REPORT FOR THE HEARING
in Case C-313/89 *

I — The legislation applicable and background to the dispute

A — *The legislation applicable*

1. The Community legislation

(a) The activity of midwives is the subject of two Council Directives of 21 January 1980: Directive 80/154/EEC concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in midwifery and including measures to facilitate the effective exercise of the right of establishment and freedom to provide services (Official Journal 1980 L 33, p. 1), and Directive 80/155/EEC concerning the coordination of provisions laid down by law, regulation or administrative action relating to the taking up and pursuit of the activities of midwives (Official Journal 1980 L 33, p. 8).

(b) Article 1 of Directive 80/155/EEC of 21 January 1980 lays down:

'1. Member States shall make the taking up and pursuit of midwifery activities under the titles referred to in Article 1 of Directive 80/154/EEC conditional on the possession of a diploma, certificate or other evidence of formal qualifications in midwifery as listed in Article 3 of the said Directive, guaranteeing that the person concerned has acquired during the total duration of training:

(a) adequate knowledge of the sciences on which the activities of midwives are based, particularly obstetrics and gynaecology;

(b) adequate knowledge of the ethics of the profession and the professional legislation;

(c) detailed knowledge of biological functions, anatomy and physiology in the field of obstetrics and of the newly born, and also a knowledge of the relationship between the state of health and the physical and social environment of the human being, and of his behaviour;

(d) adequate clinical experience gained in approved institutions under the supervision of staff qualified in midwifery and obstetrics;

(e) adequate understanding of the training of health personnel and experience of working with such personnel.

2. The training referred to in paragraph 1 shall comprise:

— either a full-time course in midwifery comprising at least three years of

* Language of the case: Spanish.

practical and theoretical studies, admission to which is subject to completion of at least the first 10 years of general school education,

— or a full-time course in midwifery lasting at least 18 months, admission to which is subject to possession of a diploma, certificate or other evidence of formal qualifications of nurses responsible for general care referred to in Article 3 of Directive 77/452/EEC.

3. The course in midwifery provided for in the first indent of paragraph 2 shall cover at least the subjects of the training programme set out in the Annex.

The course provided for in the second indent of paragraph 2 shall cover at least the subjects of the training programme set out in the Annex which did not form part of an equivalent course in the training of nurses.

. . . ,

Article 1(4) defines the clinical training and the conditions in which this training is to be coordinated with theoretical training.

(c) With regard to the conditions in which Directive 80/155/EEC of 21 January 1980 must be applied in Spain, Article 392 of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the amendments to the Treaties (Official Journal 1985 L 302, p. 23) stipulates:

'Upon accession, the new Member States shall be considered as being addressees of and as having received notification of Directives and Decisions within the meaning of Article 189 of the EEC Treaty and of Article 161 of the Euratom Treaty, and of recommendations and decisions within the meaning of Article 14 of the ECSC Treaty, provided that those directives, recommendations and decisions have been notified to all the present Member States.'

In accordance with Article 395 of the same Act:

'The new Member States shall put into effect the measures necessary for them to comply, from the date of accession, with the provisions of Directives and Decisions within the meaning of Article 189 of the EEC Treaty and of Article 161 of the Euratom Treaty, and with recommendations and decisions within the meaning of Article 14 of the ECSC Treaty, unless a time-limit is provided for in the list of Annex XXXVI or in any other provisions of this Act.'

(d) Article 24 of Council Directive 89/594/EEC of 30 October 1989 amending Directives 75/362/EEC, 77/452/EEC, 78/686/EEC, 78/1026/EEC and 80/154/EEC relating to the mutual recognition of diplomas, certificates and other evidence of formal qualifications as doctors, nurses responsible for general care, dental practitioners, veterinary surgeons and midwives, together with Directives

75/363/EEC, 78/1027/EEC and 80/155/EEC concerning the coordination of provisions laid down by law, regulation or administrative action relating to the activities of doctors, veterinary surgeons and midwives (Official Journal 1989 L 341, p. 19) added a sixth paragraph to Article 1 of Directive 80/155/EEC of 21 January 1980, whereby:

'As a transitional measure and notwithstanding paragraphs 1 and 4, Spain, whose provisions laid down by law, regulation or administrative action provided for training which did not comply with this Directive when Directive 80/154/EEC and this Directive took effect, may continue to apply those provisions to persons who commenced their specific midwifery training not later than 31 December 1985'.

2. The national provisions

(a) The Decree of 18 January 1957 (Ministry of National Education, BOE of 12 February 1957) created, in its first article, a specialization of assistance in obstetrics (midwifery) for female technical health assistants.

Article 2 of the Decree provides that access to specialized courses in midwifery is to be conditional on the possession of formal qualifications as a technical health assistant.

Article 5 of the Decree defines the course of study. It provides as follows:

'Courses in midwifery may only be followed on a residential basis and shall be conducted in maternity hospitals. They shall be of one year's duration, beginning on 1 October and ending on 30 September of the following year. During this period, eight months shall be spent on theoretical and practical studies and a further four months shall be devoted entirely to practice.'

(b) A Decree of 28 February 1963 (Ministry of National Education, BOE of 9 March 1963) authorized holders of nursing qualifications to follow the specialized training in midwifery provided for in the Decree of 18 January 1957.

Article 2 of the Decree of 28 February 1963 states that, in order to be eligible for such training, nurses must first 'pass an entrance examination covering the following subjects: mathematics, physics, chemistry, bacteriology, hygiene or, in the absence thereof, successfully complete a six-month preparatory course in the basic speciality disciplines covered in the curriculum of technical health assistants'.

(c) Royal Decree 992/1987 of 3 July 1987 regulating the acquisition of the formal qualification of specialist nurse (BOE of 1 August 1987, No 183, p. 23642) established a formal qualification of specialist nurse, which comprises seven specialities, including that of 'nurse in obstetrics and gynaecology (midwife)'.

Under Article 3 of the Royal Decree:

'1 — The Ministry of Education and Science shall issue, upon a report from the

Universities Council and from the Ministry of Health and Consumption, the general directives with which the training programmes in nursing specialities must comply, which must, in any case, conform to the provisions of Directive 80/155 of 21 January 1980 of the European Economic Community and with those that shall be adopted subsequently.

2 — These programmes shall specify the qualitative and quantitative objectives that candidates for the qualification must attain during the specified training periods.

3 — The programmes shall be proposed by the National Council of Nursing Specializations and approved by the Ministry of Education and Science upon a report from the Ministry of Health and Consumption.'

This Decree repealed the contrary provisions of the Decree of 18 January 1957.

(d) Royal Decree 992/1987 of 3 July 1987 also laid down the following transitional provisions:

'*First provision*

When this Royal Decree enters into force and notwithstanding the provisions of Article 1, holders of the nursing diploma as well as technical health assistants who have practised professionally in the specialization in question for four years during the last ten years may obtain once only a single qualification as a specialist nurse corresponding to their experience provided that they receive a favourable assessment for a research paper on the said speciality or pass the tests which shall be held and which shall relate to the training programmes of this speciality in the form and within the time-limits laid down by regulation. Candidates may present themselves at two sittings for this purpose.

Second provision

Teachers at university colleges who upon the entry into force of this Royal Decree have performed their teaching functions for three years without interruption may obtain the qualification of specialist in the speciality corresponding to their field of knowledge or in a related speciality after having passed a test or presented a research paper on questions of training and nursing care in relation to the speciality and proved that they have the professional experience required in the said speciality in the manner laid down by regulation.

In any case, the minimum qualification they shall be required to possess shall be the nursing diploma.

Third provision

1. Students who upon the entry into force of this Royal Decree have commenced studies leading to one of the specialities as technical health assistant and nurse for which existing legislation provides shall continue their studies in accordance with the courses and arrangements in force at the time of their enrolment.

2. Students who complete their studies in the cases envisaged in the preceding paragraph shall obtain the diploma of specialist in accordance with the previous legislation without prejudice to the first transitional provision.

3. In any event, as from publication of this Royal Decree no new enrolment may take place in the specialities for which the previous regulations provide.

Fourth provision

Pending the establishment of the National Council for Nursing Specializations for which Article 9 of this Royal Decree provides, the Ministry of Education and Science shall be authorized to lay down provisionally, subject to receiving a favourable report from the Ministry of Health and Consumption, the training courses for the nursing specialities foreseen in this Decree and to adopt the measures necessary for their implementation during 1987.'

B — *Background to the dispute*

By a letter dated 3 May 1988, the Commission drew the attention of the Kingdom of Spain to its obligation to transpose Directive 80/155/EEC of 21 January 1980 (hereinafter referred to as 'the Directive') into national law.

In the letter the Commission claimed that after its accession to the European Communities Spain had continued to award midwifery diplomas in accordance with the provisions of the Decree of 18 January 1957, which did not meet the requirements of the Directive.

With regard to Royal Decree 992/1987 of 3 July 1987, the Commission considered that the said Decree determined neither the duration nor the content of midwifery training and that as a consequence it could not be considered that the Spanish authorities had taken the measures necessary to transpose the Directive.

The Commission also stated that the Royal Decree did not indicate the manner in which the Spanish authorities would bring midwifery diplomas awarded since accession into conformity with the Directive.

Finally, the Commission observed that the arrangements for the award of diplomas set out in the first and second transitional provisions of the Royal Decree did not comply with the Directive.

The Spanish Government did not respond to this letter.

In accordance with the first paragraph of Article 169 of the EEC Treaty, the Commission delivered a reasoned opinion on 19 April 1989 reiterating the arguments contained in its letter of 3 May 1988.

Since the reasoned opinion produced no reaction, the Commission lodged the present application for a declaration of

failure to fulfil obligations at the Court Registry on 11 October 1989.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preliminary inquiry.

II — Conclusions of the parties

The *Commission* claims that the Court should:

(i) declare that by not taking within the period prescribed the measures necessary to comply with Council Directive 80/155/EEC of 21 January 1980 concerning the coordination of provisions laid down by law, regulation or administrative action relating to the taking up and pursuit of the activities of midwives the Kingdom of Spain has failed to fulfil its obligations under the EEC Treaty;

(ii) order the defendant to pay the costs.

The *Kingdom of Spain* contends that the Court should:

(i) dismiss the application;

(ii) order the Commission to pay the costs.

III — Summary of the submissions and arguments of the parties

A — *The obligations of the Kingdom of Spain*

(1) As regards the date by which the Directive should have been incorporated into national law

The *Commission* recalls the abovementioned provisions of Articles 392 and 395 of the Act concerning the Conditions of Accession. It maintains that, since the Directive is not mentioned in the list contained in Annex XXXVI of that Act, the Spanish authorities had to take all the measures required to transpose it into national legislation by 1 January 1986 at the latest.

Member States must comply with the time-limits laid down for the incorporation of Directives into national law (judgment in Case 102/79 *Commission* v *Belgium* [1980] ECR 1473) by taking all the provisions necessary to implement them correctly before expiry of the prescribed period (judgments in Case 361/85 *Commission* v *Italy* [1987] ECR 479 and in Cases 124/86 *Commission* v *Italy* [1987] ECR 4661 and 125/86 *Commission* v *Italy* [1987] ECR 4669).

The Spanish authorities, who participated in the accession negotiations, were in a position to formulate within the prescribed period the provisions necessary for the implementation of the directives (judgments in Cases 136/81 *Commission* v *Italy* [1982] ECR 3547, at paragraph 5, 148/81 *Commission* v *Italy* [1982] ECR 3555 at paragraph 5 and 151/81 *Commission* v *Ireland* [1982] ECR 3573 at paragraph 5).

Finally, the Court has consistently held that a Member State cannot rely upon domestic difficulties for the purpose of justifying a failure to comply with obligations resulting from Community directives (judgment in Case 100/77 *Commission* v *Italy* [1978] ECR 879, at paragraph 21).

The *Kingdom of Spain* does not deny the existence of such an obligation to transpose the Directive by the date of accession at the latest.

However, it contends that this requirement was neither the most appropriate nor fair.

It was not the most appropriate, given the particular complexity of the Directive, which involves various professional, scientific and academic fields and different administrative bodies. Moreover, the Member States which had participated in drawing up the Directive had given themselves a time-limit of three years from its notification for its implementation.

Nor was the requirement the most just in that it did not guarantee that persons who had commenced their midwifery training before accession could obtain the qualification on the conditions laid down in the legislation in force at the time of their enrolment. In that respect, it violated the principles of legal certainty and respect for subjective rights and prejudiced the legitimate expectations of citizens, which are recognized and protected in the legal orders of all the Member States.

Indeed, this last circumstance was the justification for the amendment to Article 1 of Directive 80/155 by means of Directive 89/594 of 30 October 1989, the purpose of which is to protect at Community level the rights acquired by the holders of qualifications awarded before the Directive came into force.

(2) The obligations deriving from the Directive

Citing the first recital of the preamble of the Directive, the *Commission* contends that the purpose of the Directive is to set minimum standards for the training of midwives while leaving Member States the maximum freedom in the organization of courses. The aim of the Directive is therefore to achieve a common definition of the field of activity and training of midwives within the Community.

The minimum standards set by the Directive are the following:

— the taking up and pursuit of midwifery activities must be conditional on the possession of a midwifery diploma issued in accordance with the Directive;

— the diploma must guarantee that the person concerned has acquired specific training in the subject;

— the duration, content and organization of the training must conform to the

provisions of Article 1(2), (3) and (4) of the Directive;

— the training must guarantee that the person concerned has acquired the knowledge, experience and understanding required by Article 1(1) of the Directive.

Consequently, a Member State infringes the provisions of the Directive if, having failed to take the necessary implementing measures, it awards midwifery diplomas to persons who have not undergone the minimum training required by those provisions.

The *Kingdom of Spain* does not contest this analysis of its obligations.

B — *The failure to transpose the Directive within the prescribed period*

(1) The failure to transpose the Directive by the date of accession

The *Commission* emphasizes that the Kingdom of Spain does not contest the absence of measures to transpose the Directive by the date of accession. In its view, this fact alone is sufficient to establish that the application is well founded.

It points out that the Directive requires midwives to receive specific training lasting at least 18 months and covering at least the subjects of the training programme set out in the Annex of the Directive which did not form part of an equivalent course in their previous training as a nurse.

The training of midwives as regulated at the date of accession by the aforementioned provisions of the Decree of 18 January 1957 did not meet these requirements. The midwifery diploma was awarded to holders of the qualification of technical health assistant after only one year of studies in obstetrics.

The fact adduced by the defendant that, under a Decree of 28 February 1963, in order to be admitted to training as a midwife, holders of nursing qualifications had to pass an entrance examination or follow a six-month preparatory course covering the disciplines of the speciality covered in the curricula for technical health assistants is of no relevance in assessing whether the training of midwives conforms to the provisions of the Directive.

Without contesting the absence of national measures to transpose the Directive at the date of accession, the *Kingdom of Spain* nevertheless claims that the training of midwives at that date, while being different from that laid down by the Directive, was not of an inferior quality.

Under the regulations then in force, consisting of the Decrees of 18 January 1957 and 28 February 1963, midwifery training proper was preceded by university studies lasting three years. At the end of those studies, students wishing to train as midwives had to sit an entrance examination for the speciality or follow a six-month preparatory course.

(2) The effect of the adoption of Royal Decree 992/1987 of 3 July 1987 on the alleged infringement

The *Commission* submits the following arguments on this point.

(a) Royal Decree 992/1987 does not ensure transposition of the Directive. Under Article 189 of the Treaty, the transposition of a directive entails an obligation for the Member State to act. Although the Member State is free to choose the form and methods of implementing the provisions of the directive, it must take all the measures required to implement the directive within the prescribed period.

In the instant case, Royal Decree 992/1987 repeals the national provisions under which midwifery qualifications had previously been awarded and the last paragraph of the third transitional provision prohibits new enrolments in any of the specialities covered by the repealed regulations.

The Royal Decree does not, however, lay down the arrangements and courses for new midwifery training. It merely states in Article 3 that the implementing regulations which will subsequently be taken on the basis of the Decree must conform to the requirements of the Directive.

The Royal Decree thus confines itself to terminating the previous arrangements while stating that future courses must comply with the Directive. Such provisions are manifestly inadequate to ensure complete transposition of the Directive.

The Commission also points out that the Decree does not state the conditions on which the Spanish authorities are to ensure that midwifery qualifications awarded since Spain's accession conform to the prescriptions of the Directive.

(b) In addition, certain provisions of the Royal Decree still fail to comply with the objectives of the Directive.

The Commission submits this line of argument is presented only in the alternative, as it considers that it is of an ancillary nature in relation to the formal claims alleging a failure to transpose the Directive within the prescribed period.

The provisions in question are the first and second transitional provisions, which permit certain nurses, technical health assistants and university teachers to acquire qualifications as specialist nurses. According to the Commission, these provisions may in particular apply to the speciality of midwifery, which is not expressly excluded from their field of application. They do not comply with the Directive in that they do not make the award of midwifery qualifications subject to a minimum period of training.

Secondly, paragraphs 1 and 2 of the third transitional provision on the rights of students who began their midwifery training before the Royal Decree came into force conform only partially to Article 1(6) of Directive 80/155, as amended by Directive 89/594.

Those provisions are subject to no time limitation. Consequently, contrary to what the new version of the Directive authorizes, students who began their midwifery training after 31 December 1985 under the national regulations then in force can obtain midwifery qualifications on the conditions set out in those regulations.

Finally, according to the Commission, the defendant's contention that the provisions of the Royal Decree necessitate implementing regulations does not prevent the conformity of these provisions with the Directive from being examined at this juncture.

The *Kingdom of Spain* submits the following arguments in support of its contention that it is not now in breach of its obligations owing to any incompatibility of Royal Decree 992/1987 with the Directive.

(a) The third transitional provision of the Royal Decree, the final paragraph of which prohibits new enrolments in any of the specialities covered by the repealed regulations, constitutes a means of partial execution of the Directive. This provision in fact makes it possible to avoid breaches of the Directive.

(b) Royal Decree 992/1987 is a 'framework' decree relating to seven nursing specialities, including midwifery. The Decree is not directly applicable and remains without legal effect for individuals. As expressly stipulated in Articles 3 and 14 and the first and second transitional provisions, implementing regulations are necessary.

The Decree delegates to the competent minister the power to adopt implementing measures. This delegation of regulatory power to the minister is justified by the fact that it renders the procedure for drafting regulations less complex, more flexible and more rapid.

In accordance with Article 3 of the Royal Decree, implementing regulations adopted by the minister will have to conform to the Directive. Moreover, contrary to usual practice, the obligation to comply with Community legislation is mentioned in the preamble to the Royal Decree.

An implementing regulation that disregarded the Directive would violate the delegation of powers contained in the Royal Decree and as a consequence would be void in national law.

(c) Contrary to the Commission's contentions, the first and second transitional provisions of the Royal Decree are not intended to create new means of obtaining midwifery qualifications. Those provisions are not applicable to that speciality and relate only to the other nursing specialities covered by the Royal Decree. To adopt any other interpretation would be to misconstrue Article 3 of the Royal Decree, which requires compliance with the Directive. Midwifery will therefore of necessity be excluded from the scope of the regulations that will be introduced on the basis of the transitional provisions.

(d) The amendment made to Article 1 of Directive 80/155 by Directive 89/594 confirmed the content of paragraphs 1 and

2 of the third transitional provision regarding the situation of students who had begun courses leading to qualifications in one of the specialities covered by the previous regulations before the Royal Decree came into force.

(e) As far as midwives are concerned, the provisions of Royal Decree 992/1987 have not been used to obstruct the right of establishment and freedom to provide services of nationals from other Member States, which Directives 80/154 and 80/155 aim to promote. Such nationals benefit from the better conditions in order to establish themselves on Spanish territory as well as to provide services relating to the speciality in question from outside Spain. Only Spanish nationals have been harmed by the failure to transpose the Directive, since midwifery schools have been closed in Spain since October 1987 and no midwifery qualifications have been awarded since that date.

(3) The national provisions in the course of preparation

The *Kingdom of Spain* contends, finally, that it was and remains resolved to incorporate the Directive into national law. In order not to delay transposition of the Directive, the Government has made use of the procedure laid down in the fourth transitional provision of the Decree. On that basis the Ministry of National Education has, after consulting a committee composed of representatives of academic, scientific and professional circles and in the light of the favourable opinion of the Ministry of Health and Consumption, drawn up a draft order, which has been put before the Court, defining the training courses for the nursing specialities to which Royal Decree 992/1987 relates.

This order should be published shortly. In the case of midwifery, the draft order provides for a two-year period of training. The organization and content of this training have been determined taking account of the provisions of the Directive. Moreover, the draft does not establish any access to midwifery qualifications in contravention of the Directive.

The *Commission* welcomes the draft order mentioned by the Kingdom of Spain and will examine whether it complies with the provisions of the Directive.

F. Grévisse
Judge-Rapporteur