OPINION OF ADVOCATE GENERAL COSMAS

delivered on 26 March 1998 *

I — Introduction

In this case the Court is asked to give a preliminary ruling on three questions referred to it by the Cour d'Arbitrage (Court of Arbitration), Belgium relating to the interpretation of 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 (hereinafter 'the Directive'). [1]

II — Facts

1. The plaintiff in the main proceedings, namely the Fédération Belge des Chambres Syndicales de Médecins ASBL (hereinafter 'the Fédération'), which was set up to represent the interests of medical practitioners in Belgium, lodged an application with the referring court for the annulment of Article 4(2) of the Decree of the Flemish Community of 5 April 1995 concerning the organisation of specific training in general medical practice. In order to settle that issue, the Cour d'Arbitrage considered it expedient to refer to the Court of Justice for a preliminary ruling three questions relating to the interpretation of the Community provisions on the organisation of training in general medical practice.

III — Legal Context

2. In the Flemish Community of Belgium, training in general medical practice is given in accordance with the provisions of the Decree of the Flemish Community of 5 April 1995 whose partial annulment is sought by the plaintiff in the main proceedings. [2]

Article 2 of the decree provides:

'The specific training in general medical practice is academic training which follows the academic training for a doctor. It results in the award of an academic degree in general medical practice.'

* Original language: Greek.

1 — OJ 1993 L 165, p. 1.

2 — That decree amended the Decree of the Flemish Community of 12 June 1991 relating to universities in the Flemish Community (*Moniteur Belge* of 4 July 1991).

In addition, Article 3 states:

'The common teaching programme for the first course of training for becoming a doctor and for the first three years' study of the second course of such training must satisfy the requirements laid down by ... Directive 93/16/EEC of 5 April 1993 ... The university authorities shall issue to students who have passed the annual examination for the third year of study in the second course a certificate attesting that they have successfully completed the training course referred to in Article 23 of the abovementioned directive ...'.

Finally, Article 4(2) provides:

'The total extent of training in general medical practice comprises three years' study, that is to say the fourth year of study in the second course of training for becoming a doctor and the two years' training in general medical practice.'

3. In summary, medical training in the Flemish Community of Belgium is as follows. On the one hand, academic training in medicine leading to a university degree is divided into two courses extending over a total of seven years. The first course lasts three years and the second course four years. At the end of the third year of the second course of study, that is to say on the completion of six years' training, the student is issued with a certificate attesting that he has completed six years of study (the intention of the legislature being to comply with the Directive in that way) and that certificate is required in order for the student to follow the fourth year of the second course of study. On the other hand, training in general medical practice lasts three years. However, it does not start when the second course of study is completed and a university degree is awarded; instead, it begins with the fourth and final year of the second course of academic study and continues for a further two years. That is to say the fourth year of the second course of study leading to a university degree in medicine is, in Belgium, at the same time also the first of three years' specific training in general medical practice. In the Flemish Community of Belgium, therefore, studies for general medical practice last nine years, namely six years of academic study, one year in which the academic study leading to the university degree in medicine is completed and in parallel specific training in general medical practice is begun, and finally two years consisting purely of training in general medical practice.

4. In Community law, the elements which must feature in the national systems governing specialisation in general medical practice are laid down in Directive 93/16/EEC, which consolidates Council Directives

75/362/EEC [3] and 75/363/EEC [4] of 16 June 1975 and also incorporates Council Directive 86/457/EEC of 15 September 1986. [5]

Article 23(1) of the Directive provides:

'The Member States shall require persons wishing to take up and pursue a medical profession to hold a diploma, certificate or other evidence of formal qualifications in medicine referred to in Article 3 ...'. [6]

Article 23(2) states:

'A complete period of medical training of this kind shall comprise at least a six-year course or 5 500 hours of theoretical and practical instruction given in a university or under the supervision of a university.'

Article 24 provides:

'Member States shall ensure that the training leading to a diploma, certificate or other evidence of formal qualifications in specialised medicine, meets the following requirements at least:

(a) it shall entail the successful completion of six years' study within the framework of the training course referred to in Article 23 ...;

(b) it shall comprise theoretical and practical instruction;

...

(e) it shall involve the personal participation of the doctor training to be a specialist in the activity and in the responsibilities of the establishments concerned.'

3 — 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 (OJ 1975 L 167, p. 1).

4 — Council Directive 75/363/EEC concerning the coordination of provisions laid down by law, regulation or administrative action in respect of activities of doctors (OJ 1975 L 167, p. 14).

5 — Council Directive 86/457/EEC on specific training in general medical practice (OJ 1986 L 267, p. 26).

6 — For Belgium the relevant diploma referred to in Article 3 is the 'diplôme légal de docteur en médecine, chirurgie et accouchements/Wettelijk diploma van doctor in de genees-, heel- en verloskunde' (diploma of doctor of medicine, surgery and obstetrics required by law) awarded by the university faculties of medicine, the Central Examining Board or the State University Education Examining Board.

The requirements to be met by specific training in general medical practice are laid down in Articles 31 and 32 of the Directive. Article 31(1), on which the outcome of this case turns, provides:

'The specific training in general medical practice referred to in Article 30 must meet the following minimum requirements:

(a) entry shall be conditional upon the successful completion of at least six years' study within the framework of the training course referred to in Article 23;

(b) it shall be a full-time course lasting at least two years, and shall be supervised by the competent authorities or bodies;

(c) it shall be practically rather than theoretically based; the practical instruction shall be given, on the one hand, for at least six months in an approved hospital or clinic with suitable equipment and services and, on the other hand, for at least six months in an approved general medical practice or in an approved centre where doctors provide primary care; it shall be carried out in contact with other health establishments or structures concerned with general medical practice; however, without prejudice to the aforesaid minimum periods, the practical instruction may be given for a maximum period of six months in other approved health establishments or structures concerned with general medical practice;

(d) it shall entail the personal participation of the trainee in the professional activities and responsibilities of the persons with whom he works.'

IV — Questions referred for a preliminary ruling

5. The questions referred by the Cour d'Arbitrage to the Court of Justice for a preliminary ruling relate exclusively to the point whether, on a correct interpretation of the Directive, a trainee must merely have obtained a certificate attesting that he has completed six years' study in order to begin specific training in general medical practice, or whether he must first also obtain the medical qualification referred to in Article 3 of the Directive. Specifically, the three questions are as follows:

'1. Must Article 31(1)(a) of 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, in conjunction with Articles 3 and 23 and with the other provisions of Title IV of that directive, be interpreted as meaning that the specific training in general medical practice cannot begin until after the person concerned has obtained, after at least six years' study, the diploma referred to in Article 3?

2. Must Article 31(1)(d) of that directive be interpreted as meaning that the "personal participation of the trainee in the professional activities and responsibilities of the persons with whom he works" requires the trainee to pursue the activities of a doctor which are reserved to holders of the diplomas required by Articles 2 and 3 of the directive?

3. If so, must that same provision be interpreted as meaning that the trainee should pursue the activities of a doctor from the beginning of the specific training in general medical practice, whether that training is the full-time training provided for by Article 31 of the directive or the part-time training provided for by Article 34?'

V — My views on the questions

6. First of all, I consider it helpful to point out that the problem of interpretation raised by the referring court is due chiefly to the unhappy wording of certain provisions of the Directive. That is a fault frequently found in legislation which consolidates and incorporates the previous legislation. As the Belgian Government correctly states, the Community legislature appears at certain points to contradict itself and to rely on provisions which cancel each other out. The objective of the person interpreting and implementing the above rules can therefore only be to seek the correct meaning of the disputed provisions of the Directive, which must form part of a logical system for the organisation of training in general medical practice and be mutually coherent, not inconsistent. The best way of giving a useful reply to the questions referred for a preliminary ruling is to ascertain the true will of the Community legislature in relation to the mechanism for providing specific training in general medical practice.

A — *Question 1*

7. In my view, this question does not present particular difficulties; for that reason, moreover, the three Governments as well as

the Commission appear, in the observations which they have lodged, to agree on the interpretation to be adopted. In particular, it must be accepted that it is not necessary for a trainee to obtain the university qualification referred to in Article 3 of the Directive in order to begin specific training in general medical practice. That is to say, in order for a trainee to begin specialising in general medical practice in Flanders, he does not first have to hold the 'diplôme légal de docteur en médecine, chirurgie et accouchements/ Wettelijk diploma van doctor in de genees-, heel- en verloskunde' which, as stated above, is obtained after seven years' successful study.

8. That conclusion follows, first of all, from the wording of Article 31(1) of the Directive, which provides that entry to specific training in general medical practice is to be 'conditional upon the successful completion of at least six years' study within the framework of the training course referred to in Article 23'. Had the authors of the Directive wished the beginning of specific training to be conditional upon first obtaining a qualification in medicine, they would have stipulated that as an express requirement. It should also be noted that Article 24(1)(a), which relates to training leading to formal qualifications in specialised medicine (other than in general medical practice), requires the successful completion of six years' study before the training begins, but does not expressly state that it is necessary first to graduate from a medical faculty. Furthermore, the Community legislature expressed its will clearly in the preamble to the Directive, where it is stated that 'it is immaterial whether this training in general medical practice is received as part of, or separately from, basic medical training as laid down nationally'. More generally, however, where the Directive refers to the persons wishing to begin specific training in general medical practice, it uses the term 'trainee' and not 'doctor'.

9. The Fédération states in response to that line of argument that, while Article 31 of the Directive may not expressly require a university degree in medicine to be obtained before specialisation in general medical practice begins, it nevertheless imposes that requirement indirectly, but clearly, because it refers to Article 23 of the Directive. Specifically, the Community legislature refers in Article 31(1) to six years' successful study '... within the framework of the training course referred to in Article 23'. Furthermore, Article 23 lays down, first, the features required of medical training, that is to say suitable scientific knowledge, clinical experience and so forth and, secondly, the minimum duration of that training. In the view of the Fédération, it is important that Article 23 describes the '*complete* period of medical training' [7] and does not merely provide that medical studies must last at least six years. Thus, the only logical and reliable interpretation is that, since Article 23 requires a complete period of medical training, it also presupposes that the university degree ensuring the 'completeness' of that training is

7 — Emphasis added by the Fédération.

obtained. Therefore, the Fédération maintains, since Article 31, upon which this case turns, refers to Article 23 and Article 23 requires that a university degree first be obtained, it logically follows that specialisation in general medical practice cannot begin until the trainee has graduated from a medical faculty.

10. I consider that the approach adopted by the Fédération is faulty in its final conclusion. I certainly agree that Article 31, with its reference to Article 23, requires a 'complete period of medical training' before specialisation in general medical practice begins. I also accept that the most reliable means of 'attesting' that a student has successfully completed that stage is for him to have obtained the university degree referred to in Article 3 of the Directive. However, I do not think that it is a legal requirement that he must have graduated first, at least as regards Article 31(1)(a) of the Directive. If the universities in the Flemish Community of Belgium meet, in the first six years of study, the criteria laid down by Article 23, I can see nothing to preclude the application of the provision in question, under which trainees who have successfully completed those six years' study may begin to specialise in general medical practice even if they have not yet graduated.

11. It accordingly appears, at least when answering the first question referred for a preliminary ruling, that the Community legislature preferred to leave the Member States free to choose between a system in which specific training in general medical practice begins only after a university degree has been obtained and a system in which that training begins after six years' successful study of medicine but before a university degree has been obtained.

The first question must therefore be answered in the negative.

B — *Questions 2 and 3*

12. However, the answer to the first question referred for a preliminary ruling is only the tip of the iceberg. The issue as to whether students must complete their basic medical studies by obtaining a university degree before they begin specialising in general medical practice is raised again, indirectly and perhaps more intractably, in the second and third questions. In particular, the referring court justifiably wonders whether Article 31(1)(d) of the Directive, which is concerned with the matters to be covered by training in general medical practice and requires the trainee to participate personally 'in the professional activities and responsibilities of the persons with whom he works',

means that that trainee must first (and from the beginning of the specific training) hold the qualification referred to in Article 3 of the Directive.

13. Both the Belgian Government and the plaintiff in the main proceedings maintain that the second question should be answered in the affirmative. For the Belgian Government, the mere fact that a trainee specialist in general medical practice is required to participate in 'professional activities' is sufficient for it to follow as a matter of construction that he must hold the university degree referred to in Article 3 of the Directive. In particular, it is inconceivable that a person who is not a doctor may participate in the professional activities of a doctor; in addition, it would be particularly dangerous to accept that persons who do not themselves hold a degree in medicine may participate personally 'in the ... responsibilities' of a doctor. The Belgian Government acknowledges that the answer which it suggests for the second question referred for a preliminary ruling is inconsistent with its assertions relating to the first question. However, that inconsistency must, in its view, be ascribed to the wording of the Directive, which contains provisions from previous directives, namely Council Directive 86/457/EEC on specific training in general medical practice and Council Directive 75/362/EEC of 16 June 1975, which was intended to facilitate the effective exercise of the right of establishment and freedom to provide services for the medical professions.

14. The plaintiff in the main proceedings relies on two arguments which it derives from the wording of the Directive. First, it refers to Article 32, which makes provision for the case of specific training in general medical practice by means of experience acquired by 'the medical practitioner in his own surgery under the supervision of an authorised training supervisor'. In its view, the use of the term 'medical practitioner' leaves no doubt that a trainee specialist in general medical practice must hold a university degree in medicine. Also, the objective of Article 30 et seq. of the Directive, which are concerned with specific training in general medical practice, is to provide 'adequate preparation for the effective exercise of general medical practice', as is expressly stated in the third indent of Article 34(1). In that light, it is clearly more compatible with the above objective for Article 31(1)(c) and (d) of the Directive to be given a strict interpretation, under which the trainee's practical preparation and his participation in the activities and responsibilities needed for a complete training in general medical practice require him to hold a qualification in medicine.

15. The Commission and the Governments of the two Belgian Communities do not agree with the reasoning of the other parties set out above. They maintain that the second question referred for a preliminary ruling must also be answered in the negative. First of all, they refer to the argument expanded by them in relation to the first question, according to which it is clear from the wording of the applicable provisions that the Community legislature did not intend training in general medical practice to be dependent upon the prior award of a university degree. Furthermore, in the view of the Governments of the two Belgian Communities

the fact that Article 31 refers to 'trainee' specialists in general medical practice and not to 'medical practitioners' specialising in that field supports that view. The Government of the Flemish Community adds that the use of the term 'medical practitioner' in Article 32 cannot undermine the assertions made in relation to the interpretation of Article 31: Article 32 governs the specific case of medical practitioners who are trained in general medical practice while practising autonomously in their own surgeries and the interpretation to be given to that article therefore cannot be extended to the general system under Article 31, which lays down provisions relating to dependent, that is to say non-autonomous, specialisation in general medical practice.

16. The same reasoning is followed by the Commission, which points out the need to distinguish between, first, the fundamental importance, for the grounding of specialists, of practical training in general medical practice and, secondly, the independent pursuit of the medical profession. According to the Commission, when the authors of the Directive refer to training which is to be 'practically rather than theoretically based' and is to entail 'the personal participation of the trainee in the professional activities and responsibilities of the persons with whom he works', their aim is not to acknowledge that medicine may be practised independently but to organise training which, moreover, as Article 31(1)(b) expressly provides, is to be 'supervised by the competent authorities or bodies'. Also, Article 31(1)(d) does not state that the trainee fully assumes the responsibilities of a doctor, but that he participates in the responsibilities of other persons with whom he works who, it goes without saying, are doctors.

17. Accordingly, the plaintiff in the main proceedings and the Belgian Government suggest that the second question referred for a preliminary ruling should be answered in the affirmative, while the Commission and the Governments of the two Belgian Communities propose that it be answered in the negative. The differences in the views put forward by the parties in relation to the answer to the third question referred for a preliminary ruling are, in my view, indicative of the lack of clarity which is a feature of the Directive. The Government of the Flemish Community considers that the Court is not to answer that question if, as it suggests, the Court ultimately answers the second question in the negative. The Government of the French Community considers it preferable for a negative answer to be given in which it is pointed out that the Directive does not require persons receiving training in general medical practice to pursue all the activities of a doctor from the beginning of that training. The Belgian Government also answers the third question in the negative; it adds that, on a correct interpretation of the Directive, a national system may, but does not have to, provide that trainees in general medical practice are to be qualified doctors from the beginning of that training. That is to say, it regards as compatible with the Directive a national system under which, in the first year of specialisation, theoretical training only is given and the trainee is not required to be a doctor. The diametrically opposite view is

held by the plaintiff in the main proceedings, which maintains that pursuit of the activities of a doctor from the beginning of specific training in general medical practice is inextricably linked with that training and with the need for the trainee to be provided with 'adequate preparation for the effective exercise of general medical practice'. Finally, the Commission appears not to follow the same reasoning throughout when giving its views on the third question referred for a preliminary ruling. First it puts forward the view that that question must be answered in the affirmative. Then, however, it maintains that in reality the Member States have a discretion as to whether trainees in general medical practice must pursue the practical activities of a doctor within the limits laid down by Article 31(1)(d) from the beginning of their specialisation. [8]

18. Before addressing the more specific issues raised by this case, I consider it essential to point out that the case is directly concerned with the protection of health within the Community, inasmuch as it relates to the quality of the training provided to those directly serving health, that is to say the servants of Hippocrates. Therefore, in my view at least, the Directive must necessarily contribute 'to the attainment of a *high* level of health protection'. When the Directive was adopted, the Maastricht Treaty, which added to Part One of the EC Treaty that the Community must make a 'contribution to the attainment of a high level of health protection', had not yet been ratified. [9] However, I consider that that provision cannot be immaterial to the outcome of this case and that, in the event of doubt, the solution which corresponds more closely to the concept of seeking a *high* level of health protection is to be preferred.

19. To that comment of a legal nature should be added the following practical one. In the field of health and of medical training, specialisation in general medical practice has, as experience has taught us, become one of the most difficult and demanding specialisations; furthermore, the harmonisation at European level of specialisation in general medical practice presents the greatest practical difficulties. For those reasons, moreover, the Directive distinguishes, in the field which it regulates, between specialisation in general medical practice and all other specialisations.

8 — The Commission thus appears to assert, first, that under the Directive trainees must pursue the activities of a doctor from the beginning of their specialisation, secondly, that the Member States simply have a discretion as to whether to impose that obligation and, thirdly, that the Member States may choose the time at which not the pursuit of medical activities but the practical training described in Article 31(1)(d) of the Directive commences. According to the rules of logic, only one of those solutions is tenable. In any case, those contradictions are due rather to a misunderstanding of the third question. As is apparent from the observations which it submitted to the Court, the Commission considers that the referring court has asked whether, under the Directive, a trainee *may* pursue the activities of a doctor from the beginning of his specific training and not whether he is required to pursue those activities.

9 — See Article 3(o) of the EC Treaty, as amended by the Maastricht Treaty. Following the signing of the Treaty of Amsterdam, which has not yet been ratified, that provision has, without amendment, become Article 3(p).

20. By way of definition of the matter at issue, the central problem of interpretation which is raised by the second and third questions referred for a preliminary ruling is concerned with the meaning of Article 31(1)(d) of the Directive, that is to say the provision under which a requirement of specific training in general medical practice is 'the personal participation of the trainee in the professional activities and responsibilities of the persons with whom he works'.

21. I consider it beyond argument that when the authors of the Directive laid down the requirements for the organisation of training in general medical practice they did not, ostensibly at least, have in mind imposing a mandatory requirement that a trainee must hold the university degree referred to in Article 3 of the Directive before the beginning of that training. [10] On the other hand, however, they do not fail to stress the importance of the practical character of that training, and for that reason they end up expressly requiring the personal participation of trainees in certain activities of a doctor. Furthermore, they clearly provide that persons wishing to take up and pursue a medical profession are required, without exception, to hold a diploma, certificate or other evidence of formal qualifications. In short, it cannot be automatically ruled out that, while the Community legislature does not directly require that a medical qualification be obtained first, it may nevertheless so require indirectly. It is for the Court to seek the true meaning of the provisions at issue.

22. Before analysing Article 31(1)(d), I consider it necessary to point out that, in my view, the answer to the second and third questions cannot be sought in the wording of Articles 32 and 34. Those articles admittedly relate to qualified doctors, but they govern special procedures for training in general medical practice which fall outside the general system under Article 31. It could of course be argued *a contrario* that the Community legislature refers to trainee general practitioners in Article 31, but to doctors who specialise in general medical practice in Article 32, because it wishes to exempt the former from the requirement of first holding a university degree in medicine.

23. I also think that it is necessary to reject the intermediate solution which both the Belgian Government and the Commission appear to put forward in their observations, according to which a national system such as that in Belgium satisfies the requirements of Article 31 of the Directive inasmuch as, for two years at least (the second and third years), trainees in general medical practice participate in the specific training as qualified doctors. First of all, it is not clear from the documents in the case whether a medical student in Belgium who, having successfully

10 — That is shown sufficiently clearly by the preamble to the Directive, where it is stated that 'it is immaterial whether this training in general medical practice is received as part of, or separately from, basic medical training as laid down nationally'.

completed the first six years of medicine, has enrolled for the seventh year of basic studies and, in parallel, for the first year of specific training in general medical practice, may continue with the second and third years of that training without having first obtained a degree in medicine. [11] If something similar were possible, there could be cases where students are not qualified doctors for all three years of their special training in general medical practice. Of course, under Article 31(3) the issue of certificates, diplomas or other evidence of formal qualifications awarded after specific training in general medical practice is conditional upon the trainee's 'holding one of the diplomas, certificates or other evidence of formal qualifications referred to in Article 3', so that the trainee will, at least, have to hold a qualification in medicine in order to become a general practitioner. However, in order for it to be possible for trainees to complete their specific training in general medical practice without having first obtained the university degree in medicine, Article 31(1)(d) must be interpreted as not requiring such trainees to be qualified doctors throughout the duration of that training, within the framework of which they participate in the 'professional activities' and 'responsibilities' of the persons with whom they work. That, however, is the issue to be resolved.

24. It could be stated in response to the above reasoning that it relates to a hypothesis which is, in reality, implausible or even mistaken if ultimately, in practice, trainees in general medical practice have already obtained a degree in medicine when they begin the second year of specific training or if the national system itself requires them to have obtained that degree in order for them to be admitted to the second year of training. In such a case, they undergo their training as qualified doctors in the second and third years of specialisation. However, even then, the requirements laid down by Article 31 are not necessarily met. In particular, the combined effect of Article 31(1)(a), (b) and (c) is as follows: on the one hand, specific training in general medical practice must be 'a full-time course lasting at least two years'; on the other hand, that specific training must, *throughout its duration*, 'entail the personal participation of the trainee in the professional activities and responsibilities of the persons with whom he works'. In other words, the requirement laid down by Article 31(1)(d) relates to the entire duration of the specific training in general medical practice and not to the minimum duration of two years laid down in Article 31(1)(b); accordingly, if under a national system the specific training extends over three or more years, that requirement must apply to all those years. In particular, with regard to the Flemish system which is of direct interest in this case, the obligation in Article 31(1)(d) *also* applies for the first year of specific training in general medical practice, and therefore *also* for a period during which trainees certainly do not hold a university degree in medicine. We thus return to the starting point for the problem which has been set out above: the Court is asked to give a ruling on whether the personal participation of the trainee general practitioner in the professional activities and responsibilities of the persons with whom he works, as required by Article 31(1)(d), means that he must first

11 — That possibility may arise if the trainee passes the examination included in the first year of the specific training but fails the seventh year of the basic training. That example may of course be hypothetical or even mistaken if the national system provides that a trainee cannot progress to the second year of the specific training unless he has passed both the examinations leading to a university degree and those specifically relating to general medical practice, or if the syllabus for the seventh year of medicine and the first year of specific training in general medical practice is the same. Of course, in the latter case I am unable to understand why that national system allows a trainee to begin specialising in general medical practice before he has obtained the university degree.

have obtained the university degree referred to in Article 3 of the Directive.

25. The key provision for answering the above question is none other than Article 23(1) of the Directive, according to which 'the Member States shall require persons wishing to take up and pursue a medical profession ["*activités de médecin*"] to hold a diploma, certificate or other evidence of formal qualifications in medicine referred to in Article 3 ...'. That provision is, in my opinion, the cornerstone of the regulatory structure which the Directive seeks to establish for the medical profession; it is, furthermore, the most important limit for interpreting Article 31(1)(d) of the Directive correctly. The problem may be put as follows: is 'the personal participation of the trainee in the professional activities and responsibilities of the persons with whom he works' tantamount to the taking up and pursuit of a medical profession, for which it is necessary to hold a qualification in accordance with Article 23? [12]

26. A number of weighty arguments support a negative answer to that question. First of all, the Community legislature chose not to formulate Article 31(1)(d) in the same terms as Article 23(1). As the Commission correctly states, a distinction may be drawn, theoretically at least, between the independent pursuit of a medical profession, which is directly linked to being qualified, and personal participation in the professional activities and responsibilities of one's superiors. In the latter case, the person concerned cannot act independently, but is subject to the supervision of those training him. Moreover, specific training in general medical practice directly involves continuous supervision, as is clearly stated in Article 31(1)(b).

27. If the subject-matter of the questions referred for a preliminary ruling were other than that at issue, I consider that further analysis would not be required in order to answer them. However, certain specific and by no means insignificant factors complicate the problem. The basic objection to the possibility of drawing a clear distinction between the 'pursuit' of a medical profession and 'personal participation' in activities and responsibilities of another person who is a specialist medical practitioner stems from the very nature of medical practice.

28. The Community legislature requires the trainee specialist to participate personally in

12 — If that question is answered in the affirmative, the Flemish training system infringes Community law. That finding is not upset by the fact that the university authorities issue trainee general practitioners with a certificate attesting that they have already successfully completed six years' basic medical study, which meet the requirements as to quality and duration laid down by the Directive. If specific training in general medical practice involves the pursuit of a medical profession for the purposes of Article 23 of the Directive, the trainees must hold the specific university qualification which is referred to in Article 3 and a mere certificate is not sufficient.

the activities of the doctor training him and not merely to assist. However, how far does 'personal participation' extend in the areas of diagnosis, treatment and clinical aftercare of patients, that is to say in relation to important and, at the same time, sensitive areas of human health which fall within the responsibilities of a doctor? It should be noted that I do not base that doubt only on everyday experience and the perception which I may have of that issue as a lawyer, that is to say not as a specialist in medical matters. I rely, first, on the fact that none of those who have asserted in this case that a clear distinction may be drawn between the independent pursuit of a medical profession and personal participation in such activity has adduced evidence in that regard. Secondly — and, in my view, more importantly — the concept of the activity of a doctor has not yet acquired a clear and certain meaning in Community law.

29. It is worth referring at this point to the view taken by the Court in *Bouchoucha*. [13] The case concerned a person who held a diploma in osteopathy and practised as an osteopath in France without also being qualified as a doctor, as required by French law. For that reason criminal proceedings were brought against him. 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 ... exclusively to persons holding the qualification of doctor of medicine'. I consider that two important conclusions may be drawn from that view taken by the Court. First, there is no clear or commonly accepted definition of the concept of a medical profession as found in Article 23 of the Directive. [14] Secondly, because the scope of such activities of a doctor is not clearly delimited the Court appears to accept a wide interpretation thereof (which, in the final analysis, is that given by the Member States) even though in that way activities which are not purely medical in nature may wrongly be covered. [15]

30. As regards this case, the following comments must be made. The fact that 'medical profession' within the meaning of Article 23(1) of the Directive cannot be given an interpretation which is clear and not subject to dispute makes it risky, if not dangerous, to attempt to distinguish between the 'independent pursuit' of a medical profession and 'personal participation' in the activities of a doctor and the responsibilities which they entail. In other words, whether acts will be

13 — Case C-61/89 *Bouchoucha* [1990] ECR I-3551.

14 — In *Bouchoucha* the Court relied, as regards the meaning of activities of a doctor, on the provisions of Directive 75/363/EEC, which, as stated above, was consolidated in Directive 93/16/EEC.

15 — That is, moreover, the consequence of the solution adopted in *Bouchoucha*. A profession ancillary to medicine is dealt with in the same way (as regards the conditions for pursuing it) as that of a doctor, that is to say it is necessary to hold a university degree in medicine.

considered to amount to the 'independent pursuit' of a medical profession or 'personal participation' in the practice and responsibilities of another doctor depends on whether a wide or a narrow definition is given to 'medical profession', for which there is no commonly accepted definition in Community law.

31. Consequently, the Court is faced with two logically tenable solutions. If it chooses a strict application of Article 31(1)(d) of the Directive and requires a trainee to obtain a qualification in medicine before he specialises in general medical practice, it will make access to that specialisation more difficult in a way which perhaps exceeds the apparent will of the authors of the Directive. If it interprets that provision in a less 'exacting' manner, accepting that a trainee may in fact specialise in general medical practice without first obtaining the medical qualification, the result may ultimately be that, because of the lack of clarity which I have referred to, the fundamental rule in Article 23 of the Directive, under which a person wishing to take up and pursue a medical profession is required to hold a medical qualification referred to in Article 3 of the Directive, is restricted or even indirectly circumvented.

32. The danger arising from the second interpretation is, in my view, more significant and the one which it is more important to avoid. Moreover, it appears that the Court recognised that danger in *Bouchoucha*, where it concluded that it was preferable for the Member States to be allowed to opt for a wide definition of the term 'medical acts' at the expense of related terms. [16] Adopting similar reasoning, I consider that it is sounder in this case to interpret Article 31(1)(d) of the Directive strictly, in order to safeguard the effect of Article 23(1), even if, at first sight, it does not appear to be necessary as a matter of logic to compare or even to equate 'personal participation' in the activities of a doctor with the 'independent' taking up and pursuit of that profession. Moreover, where there are doubts as to the correct interpretation as in this case, it is, in my view, appropriate for the balance to tilt towards the side of contributing 'to the attainment of a high level of health protection' as required by the relevant fundamental rule in Article 3 of the Treaty. [17]

33. The Community legislature of course has the power to amend the legislation in the

16 — In that case, the scope of the term 'activity ancillary to medicine' was at issue.

17 — For the use of Article 3 of the EC Treaty as a criterion when seeking to establish the correct meaning of the provisions of the Directive, see point 18 above. Furthermore, there is, in my opinion, no doubt that requiring a trainee to obtain a basic degree in medicine before he can begin to specialise in general medical practice promotes the more complete practice of medicine and better health protection generally. That opinion is confirmed by the statements of the Commission's representative regarding the views of the Advisory Committee on Medicine on that question. According to the submissions made at the hearing, an advisory committee on medicine has been set up at Community level, which gives its opinion on issues relating to medical practice and that opinion is taken into account by the Commission when elaborating draft legislation which it proposes to the Council. That committee has stated expressly and clearly *that specialisation in general medical practice must begin after basic medical studies have been completed.*

future in such a way that, while allowing specialisation in general medical practice without the qualification in medicine being obtained first, it creates a clear distinction between, on the one hand, the subject-matter of the practical part of the specific training and, on the other, medical activities which only a qualified doctor can pursue. It can also be checked whether that solution is compatible with the principle in Article 3 of the Treaty regarding the attainment of 'a high level' of health protection.

VI — Conclusion

34. In the light of the foregoing considerations, I suggest that the Court should reply to the questions referred for a preliminary ruling as follows:

Article 31(1) of Directive 93/16/EEC to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications, which lays down provisions relating to training in general medical practice, in conjunction with Articles 23 and 3 of the Directive, requires the qualification, diploma or certificate in medicine referred to in Article 3 of the Directive to be obtained before training in general medical practice may begin, by reason of the practical nature of that training.