Nos 78/1026 and 78/1027 of 18 December 1978, the nationals of a Member State cannot rely on that provision with a view to practising the profession of veterinary surgeon in that Member State on any conditions other than those laid down by national legislation.

Kutscher Mertens de Wilmars Mackenzie Stuart Donner Pescatore

Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 7 February 1979.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 12 DECEMBER 1978

My Lords,

This case comes to the Court by way of a reference for a preliminary ruling by the Cour d'Appel of Colmar. It raises important questions of interpretation of Article 52 *et seq.* of the EEC Treaty relating to freedom of establishment.

Dr Vincent Auer, the Appellant before the Cour d'Appel, was born in Austria in 1924. His nationality was originally Austrian. After the war he embarked on veterinary studies at the University of Vienna, but was, so it is said on his behalf, prevented by financial difficulties from completing them. Subsequently he obtained scholarships to study successively at the École Nationale Vétérinaire of Lyon and at the University of Parma. At the latter he obtained, on 1 December 1956, the degree of Doctor of Veterinary Medicine and, on 11 March 1957, a provisional practising certificate ("certificato di abilitazione provvisoria"). An Italian statute of 8 December 1956 (No 1378) which instituted a State examination for veterinary surgeons enacted, by way of transitional provision, that a Doctor of Veterinary Medicine of Italian nationality who had obtained his degree before 21 December 1956 could, on pres-

entation of such a provisional practising certificate, obtain a definitive one. Thus Dr Auer, had he been Italian, could, it appears, have rendered himself entitled to practise as a veterinary surgeon in Italy.

In 1958 Dr Auer, whose wife was from Mulhouse, took up residence there. He has, ever since, practised as a veterinary surgeon in Mulhouse. He did so at first as an assistant to French veterinary surgeons. Latterly he has done so on his own account. On 4 October 1961 he became, by naturalization, a French citizen.

On 27 November 1962 there was promulgated a French ministerial decree (No 62-1481) on practice in France "by veterinary surgeons who have acquired or reacquired French nationality".

Article 1 of that decree provides:

"Authorization to undertake the medical and surgical treatment of animals may be granted by order of the Minister of Agriculture to veterinary surgeons who have acquired or reacquired French nationality and who do not hold the State doctorate referred to in Article 340 of the Code Rural.

A Committee to be convened by the Minister of Agriculture shall examine the qualifications of applicants and shall advise as to their professional competence and their probity."

Article 3 provides that no such authorization may be granted to a person unless he holds one of a specified number of French degrees or "a veterinary degree awarded abroad of which the equivalence to a French degree shall have been recognized by the Examining Committee established under Article 1 above."

Beginning in December 1962, Dr Auer has made numerous applications for authorization, under the decree, to practise in France. All of them have been rejected. Detailed allegations are made on Dr Auer's behalf about those applications and the reasons for their rejection. Those allegations are not accepted in their entirety on behalf of the French Government. It is of course for the French Courts, not for this Court, to consider the issues of fact thus raised. One thing, however, is common ground, and crucial. It is that among the reasons for the rejection of Dr Auer's applications is the fact that his Italian degree is not recognized by the Examining Committee as equivalent to a French degree.

As to that the French Government says in particular that parasitology and microbiology are optional subjects in Italy and that pharmacy is not even taught there. It adds that one of the reasons for the delay in the adoption by the Council of a Directive for the mutual recognition of evidence of veterinary qualifications has been the need for the level of teaching in Italy to be raised. To that it is retorted on Dr Auer's behalf that he read, and passed in, parasitology at Lyon; that he read microbiology and pharmacology (though not, it seems, pharmacy) at Parma; that the validity of his Italian degree, and hence its "academic recognition", has been accepted by the Examining Committee; and that, in any case, his many years of experience in actual practice in Mulhouse should be taken into account. In the latter connexion he produces evidence to show that he has many satisfied clients, evidence that Counsel

for Dr Auer described as his "Livre d'Or". There again the determination of the issues of fact thus raised (in so far as they are relevant) can only be for the French Courts. In particular it is for them to say what may be the significance in France, in the circumstances of this case, of the "academic recognition" of Dr Auer's Italian degree: consider paragraphs 21 and 22 of the Judgment of this Court in Case 71/76, the *Thieffry* case [1977] ECR 765.

Dr Auer has been repeatedly prosecuted in France for unlawfully practising there as a veterinary surgeon and for cognate offences. The present reference arises out of the latest of those prosecutions.

The case came at first instance before the Tribunal de Grande Instance of Mulhouse, where interventions as "parties civiles" were admitted on the part of the Ordre National des Vétérinaires de France and the Syndicat National des Vétérinaires praticiens. There are indications that, in truth, the prosecution had been instituted at their instance.

Before the Tribunal at Mulhouse Dr Auer was convicted and sentenced to four months' imprisonment, suspended. He was also ordered to pay FF 10 000 to each of the parties civiles and to pay all the costs. The Tribunal declined to refer the case to this Court, on the ground that Dr Auer was not a national of another Member State of the Community seeking to establish himself in France, but a French national seeking to practise in France a profession for which he did not have the qualifications required by French law of French nationals. Being a French national with a foreign degree he was subject to the provisions of the decree of 27 November 1962 and the Tribunal could not substitute its own judgment for that of the Examining Committee instituted by that decree.

Dr Auer having appealed to the Cour d'Appel of Colmar, the parties civiles cross-appealed, claiming that the Tribunal ought to have gone further and to have ordered the closure of his surgery and the confiscation of his professional equipment and stock of vaccines.

The Cour d'Appel, in its Order for Reference, observes that, in order to assess the merits of the contentions put forward on Dr Auer's behalf, it is important to know whether, by virtue of the principles of freedom of movement for persons and of freedom of establishment within the Common Market, Dr Auer is entitled to claim in France the right to practise as a veterinary surgeon "that he acquired in Italy". It also observes that the Tribunal of Mulhouse "seems to have lost sight", first, of the fact that Dr Auer acquired French nationality after he had obtained the qualifications on which he relies and, second, that it is conceivable that a citizen may be entitled to rely on the provisions of the Treaty against obstacles placed in the way of his establishment in his own country.

Such are the circumstances in which the Cour d'Appel has referred to this Court the following question:

"Does not the fact that a person who has acquired the right to practise the profession of veterinary surgeon in a Member State of the European Community and who, after acquiring that right, has adopted the nationality of another Member State is forbidden to practise the said profession in the latter Member State constitute a restriction on the freedom of establishment provided

for by Article 52 of the Treaty of Rome and, as regards the taking up of activities as a self-employed person, by Article 57 of that Treaty?"

Thus the first question raised by this case is whether the provisions of the Treaty relating to freedom of establishment can operate in favour of a citizen of the very Member State in which he seeks establishment. That question arises in an acute form in Case 115/78 the *Knoors* case, in which Your Lordships have just heard the Opinion of Mr Advocate General Reischl. I entirely agree with the view expressed by Mr Advocate General Reischl on it and with his reasoning. To what he has said I would add only this. The first paragraph of Article 7 of the Treaty forbids, as the Court held in Case 1/78 *Kenny* v *Insurance Officer* [1978] ECR 1489, discrimination by a Member State against its own nationals as much as discrimination by a Member State against nationals of another Member State. That being so, it is difficult to see how the terms of Article 52, providing for the abolition of restrictions that discriminate in a Member State against nationals of another Member State, can be interpreted as preserving a right for a Member State to discriminate against its own nationals in the one field of freedom of establishment.

In the present case no-one has argued that they can. Indeed the French Government, contrary to the Dutch Government in the *Knoors* case, has taken pains to emphasize its opinion that the very purpose of Articles 7, 52 and 57 of the Treaty is to confer the same rights on the citizens of all Member States, and that the problem posed in this case is the same as it would have been if Dr Auer had been a citizen of another Member State.

The Cour d'Appel of Colmar thought that it might be material that Dr Auer obtained his Italian degree before he became a French citizen. I do not think it is. What matters is that Dr Auer is a French citizen and therefore a Community citizen. His erstwhile Austrian citizenship could neither help nor hinder him in asserting a right under Community law.

A second and more difficult question is as to the effect if any in this case of Article 57 (3) of the Treaty, which provides:

"In the case of the medical and allied and pharmaceutical professions, the progressive abolition of restrictions shall be dependent upon coordination of the conditions for their exercise in the various Member States."

The question arises because, admittedly, there is as yet no directive coordinating the conditions for the exercise of the veterinary profession.

Two points have been argued:

(1) Whether the veterinary profession is among those to which Article 57 (3) applies; and

(2) Whether Article 57 (3) can apply after the end of the transitional period.

On the first point the French Government and the parties civiles contend that the veterinary profession is within the description "medical and allied, and pharmaceutical professions".

The Commission contends that it is not. Arguments have been placed before us based on dictionary definitions in a number of languages, on the form and structure of relevant legislation in various Member States and on the writings of some learned authors I agree with the Commission that none of them point to any clear conclusion and that the solution must lie in seeking to discern the purpose behind Article 57 (3). There again I agree with the Commission that the professions mentioned in that provision must have been singled out for exceptional treatment because they are directly concerned with human life and health. The French Government points out, and rightly, that veterinary surgeons too have responsibilities for preventing human disease, inasmuch as certain diseases of animals are communicable to man. It gives as examples tuberculosis and brucellosis. It might have added a reference to rabies, for one of the charges against Dr Auer is that he issued, without authority, a certificate that two dogs which had bitten a certain lady were free of rabies. But it seems to me that, in that respect, the veterinary profession is no different from many other professions, trades and vocations lack of skill or of care on whose part may endanger human life or health. The crux seems to me to be that in the case of none of them is there direct action on the human body. True it is that tuberculosis may be communicated to man through infected meat, or rabies through the bite of an infected pet, but it is also true that cholera comes from bad drains. Yet no-one would suggest that municipal engineers are within Article 57 (3). I conclude that that provision does not extend to the veterinary profession.

On the second point the Commission contends that the reference in Article 57 (3) to "the progressive abolition of restrictions" is a reference to a process that was, under the Treaty, to have taken place wholly within the transitional period. There too I have come to the conclusion that the Commission is right.

The structure ... ne relevant Articles of the Treaty is t...

Article 52 st... the general principle that restrict... on the freedom of establishmen... nationals of Member States in Co... nity territory "shall be abolished b... rogressive stages in the course of th... transitional period", with the consequence of course that such restrictions have in general been unlawful since the end of the transitional period — see Case 2/74 the *Reyners* case [1974] ECR 631, the *Thieffry* case (already cited) and Case 11/77 the *Patrick* case [1977] ECR 1199.

Article 53 was the "standstill" provision, precluding the introduction by Member States of new restrictions. It has, since the end of the transitional period, been superseded by the general rule flowing from Article 52.

Article 54 prescribed in elaborate detail the procedure to be followed "for the abolition of existing restrictions on freedom of establishment within the Community". That was to be achieved, activity by activity, by means of a General Programme and of Council directives. Having regard to the effect of

the general rule flowing from Article 52, directives designed for that purpose have been inappropriate since the end of the transitional period.

Articles 55 and 56 contain exceptions to the general rule for activities concerned with the exercise of official authority and for cases involving, in relation to foreign nationals, matters of public policy, public security or public health.

Then comes Article 57.

Paragraph 1 of that Article provides:

"In order to make it easier for persons to take up and pursue activities as self-employed persons, the Council shall ... issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications."

As to that two observations may be made. The first is that the power (coupled with a duty) thereby conferred on the Council is not limited in any way to the transitional period. The second is that the expressed purpose of that power is not the abolition of restrictions but "to make it easier for persons to take up and pursue activities as self-employed persons".

The purpose of paragraph 2 is expressed, at the outset of that paragraph, to be the same. Paragraph 2 confers on the Council a power (also no doubt coupled with a duty) to issue directives "for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking up and pursuit of activities as self-employed persons". The Council was expressly required to exercise that power "before the end of the transitional period". By virtue of the second sentence of the paragraph the Council was required to be unanimous in three kinds of case: "on matters which are the subject of legislation in at least one Member State", on "measures concerned with the protection of savings" and on those concerned "with the conditions governing the exercise of the medical and allied, and pharmaceutical professions in the various Member States".

It seems to me to follow from the similarity of the language of the references in paragraphs 2 and 3 to the "conditions" for the exercise in the various Member States of the medical and allied, and pharmaceutical professions that they are references to the same thing, something of which, by virtue of paragraph 2, the coordination was to have taken place before the end of the transitional period. It also seems to me to follow, from the structure of Articles 52 to 57 taken as a whole, and from the contrast between the expression "abolition of existing restrictions" used in Article 54 and the way in which the purpose of paragraphs 1 and 2 of Article 57 is expressed, that the reference in paragraph 3 of Article 57 to "the progressive abolition of restrictions" is a reference to the process that was to be carried out under Article 54, i.e. a process that was to be completed by the end of the transitional period.

Such are the considerations that have led me to the conclusion that the Commission is right in saying that Article 57 (3) ceased to have effect at the end of the transitional period. I also draw comfort from the fact that the Council has accepted, so we were told on behalf of the Commission, that that is so.

I think I should add, in order to avoid any misunderstanding, that it does not follow that in my opinion the Council has been precluded since the end of the transitional period from exercising the power contained in Article 57 (2). Indeed the Court has expressly held that the Council may still exercise that power. My opinion is simply that the exercise of that power is no longer a pre-condition of the abolition of restrictions affecting the exercise of any profession.

So I turn to the last question that arises in this case, which is whether, as is submitted on behalf of the French Government and of the parties civiles, it is enough to exclude any right for Dr Auer to practise in France that the Examining Committee does not recognize the equivalence of his Italian degree with a French degree, or whether, as is submitted on behalf of Dr Auer and of the Commission, that right can only be excluded if, on examination of all Dr Auer's qualifications, including his experience, it appears that he is not as well qualified as would be the possessor of a French degree. I state the question in that way because no-one has gone so far as to contend that the mere fact that Dr Auer possesses an Italian degree of a kind sufficient to enable a holder of it (subject to the fulfilment of certain formal requirements) to practise in Italy is in itself enough to entitle him to practise in France. Nor do I think that such a contention could possibly be right.

As regards the answer to that question no guidance is to be obtained from the decisions of the Court in the *Reyners* and *Patrick* cases, because both were concerned with discrimination solely on the ground of nationality. Mr Reyners had a Belgian degree which was a sufficient qualification for call to the Belgian bar; the reason why he had been refused such call was that he was a Dutch national. Mr Patrick held a British qualification which had been specifically recognized by a French ministerial decree as equivalent to the certificate required for French architects; his difficulty was that he was a British national and that the relevant French legislation made the grant of authorization to such a national to practise in France discretionary and exceptional.

Nor, in my opinion, is much guidance to be obtained from the authorities on freedom to provide services (Articles 59 to 66 of the Treaty) for as the Court pointed out, at least impliedly, in Case 33/74 the *Van Binsbergen* case [1974] ECR 1299 (Paragraph 13 of the Judgment) the requirements that a Member State may impose on a person seeking establishment on its territory are not necessarily the same as those that it may impose on a person seeking to provide a service on its territory from an establishment in another Member State.

In the result I think that the only authority directly relevant is the *Thieffry* case. Indeed that case was the sheet-anchor of the arguments put forward on behalf of Dr Auer and of the Commission. The Judgment in Case 16/78 the *Choquet* case (not yet reported) is also of some relevance in so

far as it shows that it is unreasonable, and incompatible with the Treaty, to require a person to be qualified in any particular respect twice over.

The principles on which the decisions in those cases rested seem to me to be those laid down in paragraphs 15 to 18 of the Judgment in the *Thieffry* case, and to be susceptible of being summarized as follows. Freedom of establishment, subject to the observance of professional rules justified in the public interest, is one of the objectives of the Treaty. In so far as Community law makes no specific provision in that regard, Member States are bound, under Article 5 of the Treaty, to take all appropriate measures to attain that objective, and to abstain from any measure that could jeopardize its attainment. Consequently freedom of establishment may not be denied or made more difficult for a person solely on the ground that the Council has not yet adopted a directive appropriate to his case. It is incumbent upon the competent national authorities to ensure that national legislation and practice are applied consistently with the objectives of the Treaty.

In the subsequent paragraphs of the Judgment the Court applied those principles to the particular circumstances of the *Thieffry* case, which differed of course from those of Dr Auer's case. But there too relevant guidance is to be found, especially in paragraph 24, where the Court held that:

"Consequently, it is for the competent national authorities, taking account of the requirements of Community law set out above, to make such assessments of the facts as will enable them to judge whether a recognition granted by a university authority can, in addition to its academic effect, constitute valid evidence of a professional qualification."

From a consideration of that Judgment I deduce that the competent authorities of a Member State are not entitled, whatever the national legislation under which they operate may say, to deny a Community citizen's right of establishment on the short ground that the foreign diploma, certificate or other evidence of formal qualification that he proffers is not, in general, recognized by them as equivalent to that required of persons who have qualified in that State. They must go further and assess whether in fact the person concerned possesses qualifications that are equivalent, or at least substantially equivalent, to those so required.

It does not seem to me, however, that, in making that assessment the competent authorities can be called upon to take into account experience acquired from practice. Neither the Judgment in the *Thieffry* case, nor the Judgment in the *Choquet* case refers to experience. Article 57 (1) of the Treaty refers only to "diplomas, certificates and other evidence of formal qualifications".

No doubt the power conferred on the Council by Article 57 (2) is wide enough to enable it to provide for practical experience to be taken into account where appropriate. It did so in the Directive with which Your Lordships are concerned in the *Knoors* case. It has done so also in a number of Directives to which we were referred relating to the medical and allied professions: see Article 9 of Directive No 75/362/EEC of 16 June 1975 (medical profession), Article 4 of Directive No 77/452/EEC of 27 June 1977 (general nurses), and Article 7 of Directive No 78/686/EEC

(dentists). In none of those cases, however, are the authorities of a Member State required to assess themselves the value of experience gained by a person from practice. They are called upon only to recognize a certificate that the person concerned has ("effectively and lawfully" in the later Directives) been engaged in the activities in question for a specified period. Moreover, in the Directives relating to the medical and allied professions, the provisions enabling practical experience to be taken into account are only transitional. The proposal for a Directive relating to veterinary surgeons at present before the Council (Annex I to the Commission's Observations) envisages that the same shall be so in their case: see Article 4 thereof.

For the Court to hold that, in circumstances such as those of this case, experience should be taken into account would be, in my opinion, open to three objections. First it would be unwarranted by anything in the Treaty. Secondly, inasmuch as it would mean holding that the Treaty required the worth of the person concerned's experience to be assessed in each case, it would cast doubt on the validity of provisions in existing directives that are only transitional and prescribe arbitrary measures of length of experience. Thirdly, it would mean imposing on national authorities an unrealistic burden of fact-finding.

In the result I am of opinion that, in answer to the question referred to the Court by the Cour d'Appel of Colmar, Your Lordships should rule that, in the absence of any relevant directive under Article 57 of the EEC Treaty, it is incumbent on the competent authorities of a Member State so to administer their national rules that no citizen of any Member State who proffers, as a formal qualification to practise a particular profession, one obtained in another Member State should be precluded from practising that profession in the first-mentioned Member State unless, on an assessment of the facts as to his own qualifications, it appears that they are substantially less than equivalent to those required of persons who have qualified for that profession in that Member State.