JUDGMENT OF THE COURT

9 September 2003 *

In Case C-285/01,

REFERENCE to the Court under Article 234 EC by the Cour administrative d'appel de Douai (France) for a preliminary ruling in the proceedings pending before that court between

Isabel Burbaud

and

Ministère de l'Emploi et de la Solidarité,

on the interpretation of Article 48 of the EC Treaty (now, after amendment, Article 39 EC) and of Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (OJ 1989 L 19, p. 16),

* Language of the case: French.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.-P. Puissochet, M. Wathelet, R. Schintgen and C.W.A. Timmermans (Rapporteur) (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola, P. Jann, V. Skouris, F. Macken, N. Colneric, S. von Bahr, J.N. Cunha Rodrigues and A. Rosas, Judges,

Advocate General: C. Stix-Hackl,

Registrar: L. Hewlett, Principal Administrator, subsequently H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— the French Government, by C. Bergeot-Nunes and G. de Bergues, acting as Agents;

— the Italian Government, by U. Leanza, acting as Agent, and M. Massella Ducci Tieri, avvocato dello Stato;

— the Swedish Government, by A. Kruse, acting as Agent;

— the Commission of the European Communities, by M. Patakia, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Ms Burbaud, of the French Government, represented by C. Bergeot-Nunes and G. de Bergues, and of the Commission, represented by M. Patakia and D. Martin, acting as Agent, at the hearing on 26 June 2002,

after hearing the Opinion of the Advocate General at the sitting on 12 September 2002,

having regard to the order of 19 November 2002 reopening the oral procedure,

after hearing the oral observations of Ms Burbaud, of the French Government, represented by G. de Bergues and R. Abraham, acting as Agent, of the Swedish Government, represented by A. Kruse, and of the Commission, represented by M. Patakia and D. Martin, at the hearing on 7 January 2003,

after hearing the Opinion of the Advocate General at the sitting on 11 February 2003,

gives the following

Judgment

1 By decision of 12 July 2001, received at the Court on 18 July 2001, the Cour administrative d'appel de Douai (Administrative Court of Appeal, Douai) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Article 48 of the EC Treaty (now, after amendment, Article 39 EC) and Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (OJ 1989 L 19, p. 16; 'the Directive').

2 Those questions were raised in proceedings between Ms Burbaud and the Ministère de l'Emploi et de la Solidarité (Ministry of Employment and Solidarity) concerning Ms Burbaud's application for admission to the corps of hospital managers in the French public service on the basis of qualifications that she had obtained in Portugal.

Legal background

Community legislation

3 The Directive was adopted on the basis of, *inter alia*, Article 49 of the EEC Treaty (now, after amendment, Article 49 of the EC Treaty, which is now, after

amendment, Article 40 EC). According to the 12th recital in its preamble, 'the general system for the recognition of higher-education diplomas is entirely without prejudice to the application of Article 48(4)... of the Treaty'.

4 Article 1(a) to (d) of the Directive provides:

'For the purposes of this Directive the following definitions shall apply:

(a) diploma: any diploma, certificate or other evidence of formal qualifications or any set of such diplomas, certificates or other evidence:

— which has been awarded by a competent authority in a Member State, designated in accordance with its own laws, regulations or administrative provisions,

— which shows that the holder has successfully completed a post-secondary course of at least three years' duration, or of an equivalent duration part-time, at a university or establishment of higher education or another establishment of similar level and, where appropriate, that he has successfully completed the professional training required in addition to the post-secondary course, and

— which shows that the holder has the professional qualifications required for the taking up or pursuit of a regulated profession in that Member State,

provided that the education and training attested by the diploma, certificate or other evidence of formal qualifications were received mainly in the Community, or the holder thereof has three years' professional experience certified by the Member State which recognised a third-country diploma, certificate or other evidence of formal qualifications.

The following shall be treated in the same way as a diploma, within the meaning of the first subparagraph: any diploma, certificate or other evidence of formal qualifications or any set of such diplomas, certificates or other evidence awarded by a competent authority in a Member State if it is awarded on the successful completion of education and training received in the Community and recognised by a competent authority in that Member State as being of an equivalent level and if it confers the same rights in respect of the taking up and pursuit of a regulated profession in that Member State;

...

(c) a regulated profession: the regulated professional activity or range of activities which constitute this profession in a Member State;

(d) regulated professional activity: a professional activity, in so far as the taking up or pursuit of such activity or one of its modes of pursuit in a Member State is subject, directly or indirectly by virtue of laws, regulations or administrative provisions, to the possession of a diploma....

...'

5 Article 2 of the Directive states:

'This Directive shall apply to any national of a Member State wishing to pursue a regulated profession in a host Member State in a self-employed capacity or as an employed person.

This Directive shall not apply to professions which are the subject of a separate Directive establishing arrangements for the mutual recognition of diplomas by Member States.'

6 Point (a) of the first paragraph of Article 3 of the Directive provides:

'Where, in a host Member State, the taking up or pursuit of a regulated profession is subject to possession of a diploma, the competent authority may not, on the grounds of inadequate qualifications, refuse to authorise a national of a Member State to take up or pursue that profession on the same conditions as apply to its own nationals:

(a) if the applicant holds the diploma required in another Member State for the taking up or pursuit of the profession in question in its territory, such diploma having been awarded in a Member State;...'

7 Article 4 of the Directive provides:

'1. Notwithstanding Article 3, the host Member State may also require the applicant:

(a) to provide evidence of professional experience, where the duration of the education and training adduced in support of his application, as laid down in Article 3(a) and (b), is at least one year less than that required in the host Member State....

...

(b) to complete an adaptation period not exceeding three years or take an aptitude test:

— where the matters covered by the education and training he has received as laid down in Article 3(a) and (b), differ substantially from those covered by the diploma required in the host Member State, or

...

Should the host Member State make use of this possibility, it must give the applicant the right to choose between an adaptation period and an aptitude test.

...

2. However, the host Member State may not apply the provisions of paragraph 1(a) and (b) cumulatively.'

National legislation

8 Article 29 of Loi no 86-33, du 9 janvier 1986, portant dispositions statutaires relatives à la fonction publique hospitalière (Law No 86-33 of 9 January 1986 laying down special rules for the hospital public service) (JORF of 11 January 1986, p. 535) provides:

'Public servants are recruited by way of competitions organised in accordance with one or both of the following procedures:

...'

9 The first paragraph of Article 37 of Law No 86-33 states:

'Public servants appointed under the conditions laid down in Article 29... are declared permanently appointed to the public service at the end of a *stage* [probationary training period] whose duration is fixed by the relevant special rules.'

10 Article 5 of Décret no 88-163, du 19 février 1988, portant statut particulier des grades et emplois des personnels de direction des établissements mentionnés à

l'article 2 (1, 2 et 3) de la loi no 86-33 du 9 janvier 1986 portant dispositions statutaires relatives à la fonction publique hospitalière (Decree No 88-163 of 19 February 1988 laying down special rules on the grades and posts of management staff in the establishments referred to in Article 2(1), (2) and (3) of Law No 86-33 of 9 January 1986 laying down special rules for the hospital public service (JORF of 20 February 1988, p. 2390) states:

'Management trainees... who have followed a theoretical and practical training course with a duration of between 24 and 27 months organised by the École nationale de la santé publique [National School of Public Health], in place of the *stage* [probationary training period] provided for in Article 37 of the Law of 9 January 1986, cited above, and have passed the final examination of that course are to be granted access to posts.

...'

11 Decree No 88-163 was repealed and replaced by Décret no 2000-232, du 13 mars 2000, portant statut particulier des grades et emplois des personnels de direction des établissements mentionnés à l'article 2 (1, 2 et 3) de la loi no 86-33 du 9 janvier 1986 modifiée portant dispositions statutaires relatives à la fonction publique hospitalière (Decree No 2000-232 of 13 March 2000 laying down special rules on the grades and posts of management staff in the establishments referred to in Article 2(1), (2) and (3) of Law No 86-33 of 9 January 1986, as amended, laying down special rules for the hospital public service) (JORF of 14 March 2000, p. 3970), of which Article 4-I essentially reproduces the provisions of Article 5, repealed, of Decree No 88-163, and of which Article 5, second paragraph, states:

'Candidates admitted to a competition who have completed training in a Member State of the European Union or a State within the European Economic Area other than France, which is of an equivalent level to the training course referred to in Article 4, above, may, following an opinion of the committee also referred to in Article 4, be exempted from all or part of the training course by the Minister responsible for health.'

12 Article 3 of Décret no 93-703, du 27 mars 1993, relatif à l'École nationale de la santé publique (Decree No 93-703 of 27 March 1993 concerning the National School of Public Health) (JORF of 28 March 1993) states:

'The School awards diplomas as determined by regulations of the Ministers concerned on successful completion of the training which it provides in accordance with Article 2, or participates in the award of such diplomas.'

13 The first paragraph of Article 1 of Décret no 97-487, du 12 mai 1997, fixant les dispositions communes applicables aux agents stagiaires de la fonction publique hospitalière (Decree No 97-487 of 12 May 1997 laying down the common provisions applicable to trainee public servants in the hospital public service) (JORF of 17 May 1997, p. 7461) provides:

'This decree applies to persons which have completed one of the recruitment procedures set out in the provisions of the abovementioned Law of 9 January 1986 and who are entitled to permanent appointment to the public service after completion of the probationary or training period required under the special rules applicable to the corps to which they have been recruited.'

The facts in the main proceedings and the questions referred

14 In 1981, Ms Burbaud, who was at that time a Portuguese national, obtained a degree in law from the University of Lisbon (Portugal). In 1983, she was awarded

the qualification of hospital administrator by the National School of Public Health, Lisbon ('the NSPH'). From 1 September 1983 to 20 November 1989 she worked as a hospital administrator in the Portuguese public service. She later completed a French doctorate in law, in the course of leave for training purposes, and acquired French nationality.

15 On 2 July 1993, Ms Burbaud applied to the French Minister responsible for health for admission to the hospital managers' corps of the French public service, relying on the qualifications that she had obtained in Portugal.

16 By decision of 20 August 1993, the Minister rejected her application, essentially on the ground that to be admitted to that corps it was first necessary to pass the entrance examination of the École nationale de la santé publique (National School of Public Health; 'the ENSP') in Rennes (France).

17 Ms Burbaud brought an action before the Tribunal administratif de Lille (Administrative Court, Lille) (France) for annulment of that decision. By judgment of 8 July 1997, that court dismissed her application. Ms Burbaud appealed against that judgment to the national court which has made this reference, seeking to have the judgment set aside and the decision of 20 August 1993 annulled.

18 In those circumstances, the Cour administrative d'appel de Douai decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Is a training course in a practical training school for public servants, such as the ENSP, leading to permanent appointment to the public service, to be treated in the same way as a diploma within the meaning of Council Directive 89/48/EEC of 21 December 1988 and, if so, how was the equivalence of the diplomas from the National School of Public Health, Lisbon, and the National School of Public Health, Rennes, to be assessed?

(2) If the answer to the first question is in the affirmative, may the competent authority make admission to the public service of public servants from another Member State who rely on an equivalent diploma subject to conditions, and in particular subject to passing the School's entrance examination, even for those who have sat a similar competition in their country of origin?'

The questions referred for a preliminary ruling

The first question

19 By its first question, the national court is asking essentially whether confirmation of passing the final examination of the ENSP course, which leads to permanent appointment to the French hospital public service, must be regarded as a 'diploma' within the meaning of the Directive and, if so, how the equivalence between that diploma and a qualification obtained in another Member State by a Member State national, such as the one awarded by the NSPH to the applicant in the main proceedings, is to be assessed.

Observations submitted to the Court

20 Ms Burbaud submits that in both France and Portugal the profession of hospital administrator is a regulated profession within the meaning of the Directive. For France, that follows from Article 5 of Decree No 88-163. The qualifications awarded by the ENSP and the NSPH must be regarded as diplomas within the meaning of the Directive. Moreover, those qualifications are equivalent. The French authorities are accordingly obliged to recognise the qualification awarded to Ms Burbaud by the NSPH.

21 The French Government acknowledges that Article 48(4) of the Treaty, which provides for a derogation from the other provisions of that article for 'employment in the public service', is not applicable to the case in the main proceedings because Ms Burbaud has acquired French nationality and because, in the light of the Court's case-law, the post that she is seeking does not come within the definition of employment in the public service within the meaning of that paragraph.

22 That Government observes however that the employment at issue in the main proceedings falls within the French public service. Given the particularities of employment in the public service, the status of persons so employed, and the specific features of its organisation, the Directive does not apply to such employment.

23 In that regard, the French Government first of all submits that it is necessary to bear in mind the specific features of the French *écoles d'administrations* (training colleges for public servants). Training at the ENSP, which is provided after recruitment by competition into the corps of hospital managers, is classified as a *stage* (probationary training period) in French law, namely in Article 37 of Law No 86-33 and Article 1 of Decree No 97-487. That training corresponds to a

period of apprenticeship in which candidates for the position of hospital manager receive practical training in the tasks that they will be required to perform. After their recruitment and for the entire duration of the *stage*, they are members of the public service, with the status of paid *agents stagiares* (trainee public servants). The end of the *stage* is marked by their permanent appointment to the hospital public service.

24 Relying on those considerations, the French Government submits that, notwithstanding the fact that it is referred to as a diploma in Article 3 of Decree No 93-703, the document awarded on passing the final examination of the ENSP course does not fall within the ambit of Article 1 of the Directive. It does not meet any of the criteria set out in that provision since its sole purpose is to 'symbolise' the permanent appointment of the trainee public servants to the corps of hospital managers. The diploma cannot attest to the successful completion of an academic education or training since the trainees on the course have already been recruited into the public service. Moreover, at the hearing on 26 June 2002, the French Government stated that the ENSP does not award any 'diploma' in the sense of an official document. That is the case for only one other type of employment in the hospital public service in addition to the one at issue in the main proceedings and can be explained by the purpose of training at the ENSP, namely the permanent appointment of the trainee public servant.

25 The French Government further submits that the special rules governing public servants, which apply to people who have taken up employment in the public service, and, in particular, the higher-ranking interest of the public service and the consequences that flow from it do not allow that status to be equated to a regulated profession within the meaning of that directive.

26 Finally, the French Government claims that the second paragraph of Article 5 of Decree No 2000-232 is intended to facilitate the integration of Member State nationals into the corps of public hospital managers, to which they have been admitted by way of a competition.

27 In those circumstances, the French Government maintains that, on a proper construction of the Directive, the general system of recognition of diplomas that it establishes is not applicable, *inter alia*, to training courses at the ENSP that lead to permanent appointment to the hospital public service.

28 The Italian Government submits that the French system for recruiting management staff to the hospital public service, as described in the order for reference, appears to be intended to serve a dual function. It serves, first, to train candidates for the position of hospital manager and, second, to allow for selection from those candidates, in order to admit a limited number of participants.

29 According to that Government, those two functions are clearly separate in the French system, and while the first appears to fall within the ambit of the Directive, the second definitely does not come within its scope.

30 The Italian Government concludes by stating, first, that a diploma obtained in one Member State can be treated as equivalent to a qualification awarded by an institution in another Member State where it plays a role in professional training and, second, that the equivalence between the two qualifications must be assessed on the basis of the principles and the provisions of the Directive.

31 The Swedish Government takes the view that the profession of hospital administrator at issue in the main proceedings is a regulated professional activity within the meaning of Article 1(d) of the Directive, since access to that profession is subject to the successful completion of training at the ENSP. The certificate of competence issued at the end of that training constitutes a diploma within the meaning of the Directive. According to that Government, that analysis is not in any way affected by the fact that the completion of such training also guarantees an offer of employment.

32 That Government submits that the Portuguese and French training courses in question are *per se* comparable. In any event, it is for the national court, not the Court of Justice, to determine whether they are equivalent in the case in the main proceedings.

33 The Commission submits that the Directive provides essentially that where a profession is regulated in a Member State and the requisite diploma is awarded on completion of post-secondary education of at least three years' duration, the competent authorities of that Member State have an obligation to examine requests for recognition of diplomas from other Member States in accordance with the rules of the Directive if the diploma whose recognition is sought is awarded on completion of post-secondary education of at least three years' duration.

34 It submits that the diploma of hospital administrator in the French public service, at issue in the main proceedings, does indeed constitute a diploma within the meaning of Article 1(a) of the Directive.

35 The Commission also points out that the qualification held by the applicant in the main proceedings is also awarded on completion of post-secondary education of at least three years' duration.

36 According to the Commission, it follows that under Article 3 of the Directive the French authorities were obliged to recognise Ms Burbaud's qualification in the case at issue, since it grants her access to the same profession in the Member State where she obtained it.

37 The Commission adds, however, that if there are differences between the training undergone by the applicant in the main proceedings and that required in France,

the French authorities are entitled to require her, in the particular circumstances provided for in the Directive, to provide evidence of professional experience in accordance with Article 4(1)(a) of the Directive, or to complete an adaption period or an aptitude test within the meaning of Article 4(1)(b) of the Directive.

Reply of the Court

38 First of all, the Court must examine the French Government's argument that public service employment which is governed by special public service rules, such as the position of manager in the hospital public service which is at issue here, does not come within the scope of the Directive since such employment cannot be regarded as a 'profession' within the meaning of Article 2 of the Directive.

39 The Directive does not allow for such a broad exemption from its field of application. It follows from the legal basis of the Directive, from the 12th recital in its preamble, and from the second paragraph of Article 2 of the Directive that employment in the public service falls in principle within the scope of the Directive, except where it is covered by Article 48(4) of the Treaty or by a separate directive establishing arrangements for the mutual recognition of diplomas by Member States.

40 As the French Government accepts, employment as a manager in the hospital public service is not covered by the exemption set out in Article 48(4) of the Treaty. Such employment does not involve direct or indirect participation in the exercise of public authority or in duties whose object is the protection of the general interests of the State or of other public authorities (see, in particular, Case C-290/94 *Commission* v *Greece* [1996] ECR I-3285, paragraph 34). Moreover, there is no separate directive, within the meaning of the second paragraph of Article 2 of the Directive, which is applicable to such employment.

41 Furthermore, the Court has already held that public bodies are required to comply with the provisions of the Directive (see Case C-234/97 *Fernández de Bobadilla* [1999] ECR I-4773, paragraphs 12 and 27)

42 In addition, the fact that under national law a particular post in the public service is governed by special public service rules is not relevant for the purposes of determining whether that post is a regulated profession within the meaning of the Directive.

43 The definition of a regulated profession is a matter of Community law (see *Fernández de Bobadilla*, cited above, paragraph 14), whereas the national legal classifications of worker, employee and public servant or, moreover, of employment governed by public law or by private law can be varied freely by national legislatures and cannot therefore provide an appropriate criterion for interpretation (see, by analogy, as regards Article 48(4) of the Treaty, Case 152/73 *Sotgiu* [1974] ECR 153, paragraph 5).

44 Second, the Court must consider whether the profession of manager in the French hospital public service at issue in the main proceedings can be regarded as a regulated profession within the meaning of the Directive and, accordingly, whether that directive applies, pursuant to Article 2 thereof, where a Member State national wishes to pursue that profession.

45 The effect of Article 1(c) and (d) of the Directive is that where the conditions for taking up or pursuing a professional activity are directly or indirectly governed by laws, regulations or administrative provisions requiring possession of a diploma, that activity constitutes a regulated profession.

46 Article 5 of Decree No 88-163 provides that access to employment as a manager in the French hospital public service is reserved to persons who have completed the ENSP course and have passed the final examination.

47 It is therefore necessary to ascertain whether the requirement to which that provision subjects access to employment as a manager in the French hospital public service can be regarded as a requirement relating to the possession of a diploma within the meaning of Article 1(a) of the Directive.

48 In that regard, it is common ground that confirmation of passing the final examination of the ENSP course is evidence of completion of education and training of at least three years' duration, at the end of which the candidate holds the necessary qualifications to pursue the profession of manager in the hospital public service.

49 First, it is clear from the case-file that the training concerned constitutes post-secondary education of at least three years' duration and that it is composed of both education leading to the academic qualification which is necessary for participation in the ENSP's entrance examination and a course at the ENSP lasting from 24 to 27 months which follows that examination and concludes with the final examination of the course.

50 Second, according to the information in the case-file, the aim of that final examination is to determine, on the basis of a written test, a dissertation, an evaluation report for the *stage* and the work completed in seminars, and a continuous assessment, whether the person concerned has the necessary theoretical and practical knowledge to work in hospital management. The French rules also require a minimum total score as well as a minimum score for each part of the examination.

51 The French Government submits, however, that success in the final examination of the ENSP course leads to the permanent appointment of the trainee public servant to the hospital public service and is not evidenced by a diploma or any other document. Accordingly, that training does not lead to a diploma within the meaning of the Directive.

52 In that regard, it need only be noted that confirmation of passing the final examination of the ENSP course may be regarded as a diploma within the meaning of Article 1(a) of the Directive in view of its essential function, namely to confirm that the person concerned has successfully completed a post-secondary course of at least three years' duration which confers the professional qualifications required for the taking up of a regulated profession. That conclusion is not affected by the fact that the diploma does not take the form of a formal document.

53 The fact that, after passing the entrance examination for the ENSP, the students are members of the public service for the duration of their training and that passing the final examination also results in their permanent appointment as public servants does not prevent confirmation of passing the final examination from constituting a diploma within the meaning of the Directive.

54 As regards that part of the first question which relates to the equivalence of the ENSP diploma and a qualification such as the one awarded by the NSPH and held by Ms Burbaud, the Court notes that for the purposes of applying point (a) of the first paragraph of Article 3 of the Directive, it is for the national court to determine whether the qualification held by Ms Burbaud can be regarded as a diploma within the meaning of that provision and, if so, to determine the extent to which the two training courses at issue in the main proceedings are similar with regard to their duration and the matters which they cover.

55 If the national court finds that the qualification held by Ms Burbaud constitutes a diploma within the meaning of the Directive but that there are differences

between the duration of the two training courses at issue or between the matters which they cover, the French authorities will be entitled to require the applicant in the main proceedings to comply with the measures provided for in Article 4(1) of the Directive.

56 In that case, the first indent of the first paragraph of point (b) of Article 4(1) of the Directive would appear to be relevant. That provision essentially states that if the matters covered by the relevant training courses differ substantially, the host Member State may require the individual concerned to complete an adaptation period or take an aptitude test, the individual being entitled to choose between those two options.

57 However, if the national court finds that both qualifications constitute diplomas within the meaning of the Directive and that those diplomas are awarded on the completion of equivalent education or training, it follows from point (a) of the first paragraph of Article 3 of the Directive that the French authorities cannot make Ms Burbaud's admission to the profession of manager in the French hospital public service subject to the condition that she complete the ENSP course and pass the final examination at the end of that training.

58 In the light of all the foregoing considerations, the answer to the first question must be that confirmation of passing the final examination of the ENSP course, which leads to permanent appointment to the French hospital public service, must be regarded as a 'diploma' within the meaning of the Directive. It is for the national court to determine, for the purposes of applying point (a) of the first paragraph of Article 3 of the Directive, whether a qualification obtained in another Member State by a national of a Member State wishing to pursue a regulated profession in the host Member State can be regarded as a diploma within the meaning of that provision and, if so, to determine the extent to which the training courses whose successful completion leads to the award of those diplomas are similar with regard to both their duration and the matters covered. If it is apparent from that court's examination that both qualifications constitute

diplomas within the meaning of the Directive and that those diplomas are awarded on the completion of equivalent education or training, the Directive precludes the authorities of the host Member State from making access by that national of a Member State to the profession of manager in the hospital public service subject to the condition that he complete the ENSP course and pass the final examination at the end of that training.

The second question

59 By its second question, the national court is essentially asking whether, where a national of a Member State holds a diploma obtained in a Member State which is equivalent to the diploma required in another Member State in order to take up employment in the hospital public service, Community law precludes the authorities of the second Member State from making that national's access to the employment in question subject to his passing a competition such as the ENSP entrance examination.

Observations submitted to the Court

60 Ms Burbaud submits that requiring a national of a Member State who already has the necessary qualifications as a result of training in another Member State to pass the ENSP entrance examination constitutes (i) an infringement of point (a) of the first paragraph of Article 3 of the Directive, (ii) direct or indirect discrimination prohibited by Community law, and (iii) an obstacle to the freedom of movement of workers which cannot be justified by an overriding reason in the general interest.

61 The French Government submits that the ENSP entrance examination is a form of recruitment and success in the examination does not ever confirm that the

individual concerned has successfully completed a secondary course of studies. Moreover, the aim of the entrance examination is to ensure that the principle of equal treatment is observed in the selection of candidates applying for the same position. It is considered to be the fairest and most objective way of implementing the principle of equal access to employment in the public service.

62 Consequently, that examination cannot be regarded as leading to a diploma within the meaning of Article 1 of the Directive and, therefore, a Member State is not obliged to recognise equivalence between such examinations organised by it and the competitions set by the other Member States.

63 The French Government adds that the Member States remain competent to determine the recruitment procedures for, and the rules governing the operation of, their public service. That competence is to be exercised in accordance with Article 6 of the EC Treaty (now, after amendment, Article 12 EC), which lays down a principle of non-discrimination, and Article 48(2) of the Treaty which provides that the free movement of workers 'shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment'.

64 The French Government submits that requiring all candidates who wish to take up employment in the public service of a Member State to take the same competition, regardless of their nationality, is in strict accordance with the principle of equal treatment. Moreover, that opinion was also expressed by the Commission in a reasoned opinion sent to the French Republic on 13 March 2000 under Article 226 EC.

65 In reply to a question put by the Court, the French Government explained at the hearings that the ENSP entrance examination is a form of recruitment to the public service. Since passing a competition or undergoing another form of

recruitment is always a precondition for access to employment, that examination does not constitute an obstacle to the freedom of movement of workers.

66 In the alternative, the French Government submits that if the Court were nevertheless to find that that examination constitutes such an obstacle, it would in any event be justified by an overriding reason in the general interest, namely the need to select the best candidates in the most objective conditions possible. Moreover, the examination is carried out in a manner which is non-discriminatory, appropriate to achieving the objective pursued, and proportionate to that objective.

67 As regards, in particular, the last of those conditions, the French Government submits that the fact that Ms Burbaud has already passed a competition for admission to the hospital public service in Portugal does not imply that it is disproportionate to require her to pass the ENSP entrance examination. Recruitment by one employer cannot exempt someone applying for a position offered by another employer from participating in the selection procedure determined by that latter employer. In addition, requiring Ms Burbaud to pass the ENSP entrance examination does not deprive her of the benefit of her qualifications, since they can be taken into account after she has passed that examination, by a total or partial exemption from the ENSP course.

68 The Italian Government takes the view that the second question concerns neither the freedom of movement of workers in the Community within the meaning of Article 48 of the Treaty, nor the recognition of higher-education diplomas awarded on completion of professional education and training within the meaning of the Directive but, rather, the equivalence between procedures for selecting individuals to carry out management functions in the public service.

69 According to the Italian Government, that matter appears to fall within the competence and discretion of each Member State, which should be free to choose

the procedure best suited to its own system and requirements. That discretion should clearly not be regarded as unfettered since it is subject to certain limits, such as those resulting from the prohibition on discrimination between workers.

70 The Italian Government submits that, where those limits are not exceeded, possession of a qualification granting the right to hold a managerial post in the public service of a Member State does not seem to be a necessary and sufficient condition for a right to hold a comparable post in all the other Member States. Moreover, that Government contends that it is inconceivable that a worker who has engaged in a professional activity in one Member State, as a member of the public service, should bypass, for that reason alone, the public selection procedures laid down for the exercise of the same, or a comparable, profession in another Member State.

71 The Swedish Government submits that it is contrary to the Treaty provisions relating to the freedom of movement of workers to apply a recruitment system which requires workers who are fully qualified to take an entrance examination designed for the selection of persons who have not yet obtained the necessary level of qualification to pursue the profession concerned.

72 That Government submits that, according to the case-law of the Court, if it is found that a recruitment system obstructs the freedom of movement of workers, that system comes within the scope of Article 48 of the Treaty, even if it is applied in the same way to nationals of the Member State concerned and those of other Member States. Rules which obstruct the freedom of movement of workers are permissible only if they pursue a legitimate objective compatible with the Treaty and are justified by overriding reasons in the general interest. Moreover, those rules must be applied in such a way as to ensure achievement of the aim in question, and must not go beyond what is necessary for that purpose.

73 According to the Swedish Government, a competition designed to recruit individuals to the public service must not be designed in such a way as to discriminate unjustifiably against migrant workers in favour of national workers or to cause an unjustified obstacle to the freedom of movement of workers. That Government takes the view that, as far as it is possible to judge from the information provided in the order for reference, the examination at issue in the main proceedings infringes those principles.

74 In the system at issue in the main proceedings, a hospital administrator who has been trained in a Member State other than France is reduced to having to pass an entrance examination intended to select persons for admission to a course of study intended precisely to train such hospital administrators.

75 Such an examination is not designed in such a way as to take account of professional experience in the field concerned or of the skills which are acquired during training and are necessary for pursuit of that profession in France. The persons whom the entrance examination is intended to select clearly cannot be expected to have acquired that experience and those skills.

76 The Swedish Government submits that an entrance examination of that kind which does not assess professional experience places more qualified workers at a disadvantage by not giving them credit for that experience. A fully qualified worker with appropriate professional experience will certainly be less inclined to apply for a job if he knows in advance that, when his application is evaluated, no account will be taken of his higher level of skills. The fact that skills which can be assessed objectively and which are clearly relevant to the employment concerned are not taken into account in recruitment must in principle be regarded as an obstacle to the freedom of movement of workers.

77 Furthermore, the class of workers who are most qualified and whose experience is not taken into account by the ENSP entrance examination is necessarily primarily composed of migrant workers and not of persons who have received their training in France or who have worked there.

78 According to the Swedish Government, the case-file does not disclose any overriding reasons in the general interest capable of justifying such an obstacle.

79 In its written observations, the Commission submitted that recognition of a diploma gives the holder of that diploma the right to pursue a given profession on the national territory but does not guarantee that he will be employed. Once the diploma has been recognised, its holder is subject to the rules governing the labour market and, *a fortiori*, to the recruitment procedures applied on the market.

80 The Commission therefore maintained that the French authorities are entitled to make admission to the public service of nationals from other Member States who hold a diploma equivalent to the diploma required in France conditional upon passing a competition, such as the ENSP entrance examination, even if they have passed a similar competition in their Member State of origin.

81 However, at the hearings, the Commission altered its opinion as follows. As well as constituting a form of recruitment, the ENSP entrance examination governs access to the training provided by that institution. That examination does not take account of qualifications of nationals of Member States which have been obtained in other Member States, such as those held by Ms Burbaud. It therefore infringes the Directive with regard to already qualified persons.

82 If it were not possible to classify the type of employment at issue in the main proceedings as a regulated profession within the meaning of the Directive, the obligation to pass the ENSP entrance examination in a case such as the one at issue in the main proceedings would constitute an obstacle to the freedom of movement of workers inasmuch as passing that examination would not grant direct access to employment but to compulsory training of more than two years' duration.

83 According to the Commission, while it may be true that the obstacle presented by the requirement to pass an entrance examination may be justified by the overriding reason in the general interest relied on by the French Government, namely selection of the best candidates in the most objective conditions possible, the requirement of proportionality, as defined in the case-law of the Court, has not been observed in the case at issue in the main proceedings.

84 Requiring Ms Burbaud to take an examination, the purpose of which is, in particular, to govern access to a course of training from which she should certainly be exempted, and which does not take account of her qualifications, is not proportionate to the objective pursued.

Reply of the Court

85 It is clear from the case-file and the relevant French rules that the ENSP entrance examination has a dual purpose.

86 On the one hand, success in that examination grants access to the training provided by the ENSP, which is a practical training college for the French public

service. The aim of the examination is to confirm the qualifications which the candidates are supposed to possess as holders of university diplomas, but which do not relate specifically to hospital management.

87 On the other hand, candidates who pass that examination are recruited to the public service as paid trainees on a *stage*. It is therefore also a form of selection and recruitment chosen by the legislature for the purpose of granting access to employment in the public service.

88 While it is true that the individual is not definitively recruited until his permanent appointment to the public service after passing the final examination of the ENSP course, it is common ground that that examination is not a second selection process. It is clear from the case-file that the purpose of the ENSP entrance examination is to recruit a specific number of candidates, determined on the basis of forecasts as to the number of positions available in the hospital public service at the time of leaving the ENSP. That is also confirmed by the fact that it is very rare to fail the final examination of the course.

89 The ENSP entrance examination thus plays an essential role in the selection and recruitment procedure for the French hospital public service. The recruitment and selection aspect of the examination is not secondary to its role in granting access to the relevant training.

90 In that regard, the Court recalls that the specific subject of the second question was Ms Burbaud's claim to admission to the French public service, which she bases on the supposed equivalence of her qualifications and those obtained at the end of the ENSP training courses and on her success, in Portugal, in a competition purported to be similar to the ENSP entrance examination.

91 The Directive does not concern the choice of selection and recruitment procedures for filling positions and it cannot be relied on as the basis for a right actually to be recruited. The Directive does no more than require the recognition of qualifications obtained in one Member State in order to allow their holder to apply for a job in another Member State, in accordance with the selection and recruitment procedures which govern access to regulated professions in that Member State.

92 Accordingly, recognition of the equivalence of Ms Burbaud's diploma would mean, as is clear from the reply to the first question, that she must be exempted from the ENSP training and the final examination of that course, but it cannot of itself justify an exemption from the requirement to pass the ENSP entrance examination, since, as is clear from paragraphs 87 to 89 of this judgment, that examination plays an essential role in the selection and recruitment procedure for the hospital public service.

93 It also follows that the fact, in so far as it is indeed confirmed by the national court, that Ms Burbaud has already passed a similar recruitment competition in her Member State of origin is not in itself relevant to the answer which must be given to the second question in the light of the Directive.

94 Having regard to the wording of the second question and to the reference to Article 48 of the Treaty in the grounds of the order for reference, and in order to give a useful answer to the national court, the answer to that question should however be supplemented by an analysis of the Treaty provisions relating to the freedom of movement of workers.

95 According to settled case-law, any national measure which, although applicable without discrimination on grounds of nationality, is liable to hamper or to render

less attractive the exercise by a national of a Member State of the freedom of movement of workers, is an obstacle to that fundamental freedom guaranteed by the Treaty (see, to that effect, Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32).

96 The requirement of passing an examination in order to take up employment in the public service cannot in itself be regarded as an obstacle within the meaning of that case-law.

97 Inasmuch as all new jobs are, in principle, subject to the recruitment procedure provided for those jobs, the requirement of passing a recruitment competition in order to take up employment in the public service of a Member State cannot in itself be liable to dissuade candidates who have already sat a similar competition in another Member State from exercising their right to freedom of movement as workers.

98 Therefore, the fact, referred to by the national court, that Ms Burbaud has already passed a similar recruitment competition in her Member State of origin, in so far as that is indeed confirmed, is not in itself relevant to the answer which must be given to the second question in the light of the Treaty provisions relating to the freedom of movement of workers.

99 However, the specific features of the ENSP entrance examination do not allow for account to be taken of specific qualifications in the field of hospital management since, in the logic of the French recruitment system at issue in the main proceedings, the candidate is clearly not yet supposed to have such qualifications. The examination is intended to select between candidates who, by definition, are not yet trained to carry out that managerial role.

100 To require nationals of Member States who are already qualified in the field of hospital management in another Member State to pass such an examination is to deprive them of the possibility of having their specific qualifications in the field taken into account, thereby placing them at a disadvantage which is liable to dissuade them from exercising their rights, as workers, to freedom of movement for the purpose of seeking employment in that field in France.

101 In addition, such a requirement is clearly an obstacle affecting access to the employment concerned, since passing the examination is a precondition for being admitted to the ENSP's training course which is, in turn, a precondition for access to the employment concerned (see paragraph 46 of this judgment).

102 It must be considered, however, whether that obstacle to freedom of movement of workers may be justified in the light of the provisions of the Treaty.

103 In relation to the question whether there is an overriding reason in the general interest capable of justifying the obstacle in question, the French Government submits that the objective of the ENSP entrance examination is to select the best candidates in the most objective conditions possible.

104 While such an objective is indeed an overriding reason in the general interest capable of justifying the obstacle concerned, according to the case-law of the Court it is a further condition that, among other things, the restriction which that obstacle places on the freedom of movement of workers does not go beyond what is necessary to achieve the objective pursued (see, in particular, Case C-294/00 *Gräbner* [2002] ECR I-6515, paragraph 39, and the case-law cited therein).

105 Requiring nationals of Member States who are already qualified to pass the ENSP entrance examination, which is intended to recruit candidates who are not yet qualified, is not a measure necessary to achieve the objective of selecting the best candidates in the most objective conditions possible.

106 By that requirement, such nationals would be obliged to pass an examination whose purpose is, *inter alia*, to grant access to a course of training from which they should, however, be exempted on the basis of qualifications obtained in another Member State. It follows that, in those circumstances, requiring those nationals to pass that examination has the effect of downgrading them, which is not necessary to achieve the objective pursued.

107 Moreover, the French legislation provides, within the bounds of specific maximum percentages, for a scheme known as 'du tour extérieur' ('the external route') which allows certain public servants to be exempted from the ENSP entrance examination on the grounds of, *inter alia*, their experience in the public service. Those public servants must complete a *stage* of one year during which they are obliged to follow certain courses at the ENSP. At the end of the *stage*, and if they are considered suitably capable, they are permanently appointed to the public service.

108 Admittedly, that scheme could not apply to Community nationals such as Ms Burbaud without adjustments, particularly as to the subject-matter of the *stage*, since such nationals have specific qualifications in the field of hospital management. The scheme also presupposes that the candidate has already sat an earlier competition for admission to the French public service, which is not the case in a situation such as the one at issue in the main proceedings.

109 The existence of such a scheme shows, however, that it is possible to conceive of methods of recruitment, in the form of a competition or a different form, which are less restrictive than the ENSP entrance examination in order, in particular, to permit nationals of Member States such as Ms Burbaud to have their specific qualifications taken into account.

110 Consequently, requiring the candidate to take the ENSP entrance examination in a case such as the one at issue in the main proceedings must be regarded as going beyond what is necessary to achieve the objective of selecting the best candidates in the most objective conditions possible and cannot therefore be justified in the light of the Treaty provisions.

111 It is true that it is not for the Court to express a position on the design of another recruitment procedure which, in cases such as the one at issue in the main proceedings, would be proportionate to the stated objective. Such a procedure would, however, have to ensure, in particular, that after their recruitment, nationals of Member States qualified in other Member States are appropriately ranked on the list which determines the order in which the individuals concerned are entitled to choose their posting and which, for students trained at the ENSP, is drawn up on the basis of their results in the final examination.

112 In the light of all the foregoing considerations, the answer to the second question must be that where a national of a Member State holds a diploma obtained in one Member State which is equivalent to the diploma required in another Member State in order to take up employment in the hospital public service, Community law precludes the authorities of the second Member State from making that national's access to the employment in question subject to his passing a competition such as the ENSP entrance examination.

Costs

113 The costs incurred by the French, Italian and Swedish Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Cour administrative d'appel de Douai by decision of 12 July 2001, hereby rules:

1. Confirmation of passing the final examination of the École nationale de la santé publique, which leads to permanent appointment to the French hospital public service, must be regarded as a 'diploma' within the meaning of Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration. It is for the national court to determine, for the purposes of applying point (a) of the first paragraph of Article 3 of that directive, whether a qualification obtained in another Member State by a national of a Member State wishing to pursue a regulated profession in the host Member State can be regarded as a diploma within the meaning of that provision and, if so, to determine the extent to which the training courses whose successful completion leads to the award of those diplomas are similar with regard to both their duration and the matters covered. If it is apparent from that court's examination that both qualifications constitute diplomas within the meaning of that directive and that those diplomas are awarded on the completion of equivalent education or training, the directive precludes the authorities of the host Member State from making access by that national of a Member State to the profession of manager in the hospital public service subject to the condition that he complete the training given by the École nationale de la santé publique and pass the final examination at the end of that training.

2. **Where a national of a Member State holds a diploma obtained in one Member State which is equivalent to the diploma required in another Member State in order to take up employment in the hospital public service, Community law precludes the authorities of the second Member State from making that national's access to the employment in question subject to his passing a competition such as the entrance examination of the École nationale de la santé publique.**

Rodríguez Iglesias	Puissochet	Wathelet
Schintgen	Timmermans	Gulmann
Edward	La Pergola	Jann
Skouris	Macken	Colneric
von Bahr	Cunha Rodrigues	Rosas

Delivered in open court in Luxembourg on 9 September 2003.

R. Grass — Registrar

G.C. Rodríguez Iglesias — President