OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 6 March 1990 *

Mr President,
Members of the Court,

1. The question submitted for a preliminary ruling by the Cour d'appel (Appeal Court), Aix-en-Provence, by judgment of 23 January 1989 relates to the criminal proceedings commenced before the French courts against a French national, Marc Bouchoucha, on the basis of the national provisions which penalize the unlawful practice of medicine, on the ground that he has practised osteopathy in Nice since 1981 although not qualified as a doctor of medicine. Mr Bouchoucha has both a State diploma as a masseur-kinesitherapist issued in France and a diploma in osteopathy issued on 1 October 1979 by the European School of Osteopathy, Maidstone, Great Britain. In so far as it is by virtue of a diploma awarded in another Member State that he practises osteopathy professionally in France, Mr Bouchoucha considered that the provisions of the EEC Treaty on freedom of establishment precluded his being prohibited from practising osteopathy in France. That defence submission was what prompted the national court to seek a preliminary ruling.

2. Before going any further, I should point out that the situation on which the Court is now called on to give a ruling cannot, I think, be classified as 'purely internal' in the sense which I have attributed to that expression in my Opinion delivered today in the cases of *Nino, Prandina and Goti* and *Pierini.* [1] The fact that the practice of osteopathy was carried on by virtue of a diploma issued in another Member State may under certain conditions, according to previous decisions of this Court, in particular its judgment in *Knoors,* [2] constitute a factor establishing a connection with Community law. I shall not therefore propose, as I have done in those cases, that the Court rule that Community law does not apply to a situation such as that of Mr Bouchoucha because of its 'purely internal' nature — that is not the case here.

3. Does that mean that Community law, and more particularly the provisions of the Treaty concerning freedom of establishment, entitles a person in circumstances such as those of Mr Bouchoucha to practise osteopathy professionally and therefore precludes the application of national legislation which prohibits him from practising in that capacity? I do not think so. It seems to me that the previous decisions of this Court, in particular the judgment in Case 221/85, [3] clearly support a negative answer.

4. Let us first consider the essential features of the legal context of Mr Bouchoucha's situation. There are no Community rules on the practice of osteopathy. Under French legislation, its practice is regulated, so that it

* Original language: French.

1 — Respectively Cases C-54/88, C-91/88 and C-14/89, [1990] ECR I-3537, at p. I-3543.

2 — Case 115/78 [1979] ECR 399.

3 — Case 221/85 *Commission* v *Belgium* [1987] ECR 719.

may be practised only by doctors of medicine, as is apparent from Article L 372 of the Code de la santé publique and from Article 2 of a Ministerial Order of 6 January 1962. In France, therefore, one cannot be an osteopath without being a doctor.

5. In Case 221/85 *Commission* v *Belgium*, cited earlier, the Court examined, in the light of the requirements of freedom of establishment, a national legal provision which displayed marked similarities with the one just described. The issue was whether, by adopting a royal decree which precluded reimbursement by the social security authorities for clinical biology services carried out by laboratories operated by a legal person governed by private law not all of whose members, partners or directors were natural persons authorized to carry out medical analyses, that is to say doctors or pharmacists, the Kingdom of Belgium had failed to fulfil its obligations under Article 52 of the EEC Treaty.

6. In giving judgment, the Court stated first that

'freedom of establishment includes the right to take up and pursue activities as self-employed persons under the conditions laid down by the legislation of the country of establishment for its own nationals'

and that it was clear from Article 52 and its context that

'provided that such equality of treatment is respected, each Member State is, in the absence of Community rules in this area, free to lay down rules for its own territory governing the activities of laboratories providing clinical biology services'.[4]

The Court also pointed out that Article 52 was intended

'to ensure that all nationals of Member States who establish themselves in another Member State . . . for the purpose of pursuing activities there as self-employed persons receive the same treatment as nationals of that State and it prohibits, as a restriction on freedom of establishment, any discrimination on grounds of nationality'.[5]

The Court then stated that the Belgian law did not

'prevent doctors or pharmacists who are nationals of other Member States from establishing themselves in Belgium and operating there a laboratory to carry out clinical analyses qualifying for reimbursement under the social security system';[6]

it thus held that the legislation

'applies without distinction to Belgian nationals and those of other Member States, and its provisions and objectives do not permit the conclusion that it was adopted

4 — Case 221/85, paragraph 9.
5 — Case 221/85, paragraph 10.
6 — Case 221/85, paragraph 11.

for discriminatory purposes or that it produces discriminatory effects',[6]

and concluded that Belgium had not failed to fulfil its obligations.

7. At first sight it seems to me that, in the same way, in the absence of Community rules concerning the practice of osteopathy, each Member State is free to regulate the matter within its own territory and to decide that it should be restricted to doctors, provided of course that Community nationals are treated in the same way as nationals of the host State as regards access to that activity. Such treatment is ensured for the practice of osteopathy in France by the combined effect of Articles L 356 and L 356-2 of the Public Health Code. By virtue of those articles, which were adopted in compliance with Directives 75/362/EEC[7] and 75/363/EEC[8] of 16 June 1975, the French law enables any Community national qualified as a doctor in another Member State to establish himself in France and, if he wishes, to practise osteopathy there. I consider therefore that that law fulfils the requirements of the principle laid down in Article 52 with respect to an activity not regulated at Community level.

8. There is nothing in Article 57 of the Treaty, the third paragraph of which relates specifically to the medical and allied and pharmaceutical professions, to change that view in any way. As far as access to those professions is concerned, it provides that 'the progressive abolition of restrictions shall be dependent upon coordination of the conditions for their exercise in the various Member States'. In the absence of any coordination regarding the practice of osteopathy, Article 57(3) prompts the conclusion that the restrictions resulting from the legislation of a Member State which restricts the professional practice of osteopathy to doctors and consequently prohibits its practice by people who, although not doctors, are qualified to practise in other Member States, must be accepted. Provided that equal treatment is guaranteed for access to the profession of doctor — which, as we have seen, is the case — and that the prohibition on the practice of osteopathy applies without distinction to non-doctors from the country in question and those from other Member States, there is no infringement of the requirements of freedom of establishment.

9. On an intellectual level, of course, the possibility cannot be ruled out that a Member State may commit an abuse by artificially linking the practice of medicine with an activity alien to it. But it is clear that in an area such as the protection of human health a very circumspect approach must be taken in determining what does and what does not fall to be classified as a medical activity. In the absence of Community coordination, it is in my view a matter for the Member States alone to say which of the activities that come within the medical sphere in the broad sense are to be regarded as medical activities *strictu sensu* and which may be practised separately from the activity of a doctor. In that respect, the Court's statement in its judgment in Case 266/87[9] with respect to the free movement of goods seems to me to apply equally here. In the

6 — Case 221/85, paragraph 11.

7 — 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).

8 — 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).

9 — Case 266/87 *The Queen* v *Royal Pharmaceutical Society* [1989] ECR 1295

absence of Community rules, it is for the Member States

'to decide on the degree to which they wish to protect human health and life and how that degree of protection is to be achieved'. [10]

A Member State's decision that the practice of osteopathy falls within the scope of the practice of medicine seems to me to be a matter of deciding on the degree to which it wishes to protect health and does not therefore go beyond its powers under Community law.

10. The question of possible abuse would arise only in the case of the manifestly artificial inclusion within the medical sphere of an activity which is *incontestably* alien to it. The circumstances of this case concern an activity, osteopathy, which cannot be regarded as alien to the field of medicine and it therefore seems to me that the Court cannot even contemplate the possibility of any abuse.

11. I thus consider that the provisions of the Treaty on freedom of establishment do not, in the absence of Community rules on the professional practice of osteopathy, prevent a Member State from restricting the pursuit of that activity to doctors, provided that all Community nationals are treated in the same way as nationals of that State as regards access to the practice of medicine and that the prohibition whereby non-doctors may not practise osteopathy applies without distinction to the nationals of that State and those of the other Member States.

12. I therefore suggest that the Court rule as follows:

'The EEC Treaty, and in particular the provisions thereof on freedom of establishment, does not, in the absence of Community rules on the practice of osteopathy, preclude a Member State from restricting the pursuit of that activity exclusively to doctors, provided that all Community nationals are treated in the same way as nationals of that State as regards access to the practice of medicine and that the prohibition whereby non-doctors may not practise osteopathy applies without distinction to the nationals of that State and those of the other Member States.'

10 — Paragraph 21.