

JUDGMENT OF THE COURT

23 May 1985 *

In Case 29/84

Commission of the European Communities, represented by I. Pernice and C. Bail, both members of its Legal Department, acting as Agents, with an address for service in Luxembourg at the office of G. Kremlis, also a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

applicant,

v

Federal Republic of Germany, represented by J. Sedemund, of Deringer, Tessin, Herrmann & Sedemund, Cologne, acting as Agent, with an address for service in Luxembourg at the German Embassy, 20-22 Avenue Émile-Reuter,

defendant,

APPLICATION for a declaration that, by failing to adopt the laws, regulations or administrative provisions needed to comply with Council Directive No 77/452/EEC of 27 June 1977 concerning the mutual recognition of diplomas, certificates and other evidence of the formal qualifications of nurses responsible for general care, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services, and Council Directive No 77/453/EEC of 27 June 1977 concerning the coordination of provisions laid down by law, regulation or administrative action in respect of the activities of nurses responsible for general care (Official Journal 1977, L 176, pp. 1 and 8), the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty,

* Language of the Case: German.

THE COURT

composed of: Lord Mackenzie Stuart, President, G. Bosco and O. Due, (Presidents of Chambers), P. Pescatore, T. Koopmans, U. Everling, K. Bahlmann, Y. Galmot and R. Joliet, Judges,

Advocate General: Sir Gordon Slynn

Registrar: P. Heim

after hearing the Opinion of the Advocate General delivered at the sitting on 27 March 1985,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

- 1 By an application lodged at the Court Registry on 30 January 1984 the Commission of the European Communities brought an action before the Court under Article 169 of the EEC Treaty for a declaration that, by failing to adopt, within the prescribed period, the measures needed to implement Council Directive No 77/452/EEC of 27 June 1977 concerning the mutual recognition of diplomas, certificates and other evidence of the formal qualifications of nurses responsible for general care, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services, and Council Directive No 77/453/EEC of 27 June 1977 concerning the coordination of provisions laid down by law, regulation or administrative action in respect of the activities of nurses responsible for general care (Official Journal 1977, L 176, pp. 1 and 8), the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty.
- 2 Directive No 77/452 concerns the rights of nationals of other Member States to take up and pursue the activities referred to above, whilst Directive No 77/453 concerns the training and examinations required in order to obtain the diplomas whose recognition is provided for in the first directive.

- 3 According to Article 2 of Directive No 77/452, each Member State must recognize the diplomas, certificates and other evidence of formal qualifications awarded to nationals of Member States by other Member States and must give such qualifications the same effect in its territory as those which the Member State itself awards. Article 3 lists the diplomas and other qualifications which must be recognized by the other Member States and for the award of which the Member State concerned must require the training and examinations provided for in Directive No 77/453.
- 4 Article 4 is intended to accord similar rights to Community nationals whose diplomas were awarded before the implementation of Directive No 77/453 and do not satisfy all the requirements laid down therein, but who have exercised the activities in question for a minimum period.
- 5 Article 5 provides for the right to use the academic title obtained in the State of origin. Articles 6 to 9 concern requirements as to proof of the good character or good repute and the physical or mental health of the person concerned and Article 10 lays down a time-limit for the procedure for authorizing the person concerned to take up an activity in the host State.
- 6 Articles 11 and 12 contain provisions exempting Community nationals from requirements regarding authorization or membership of, or registration with, a professional body; that exemption applies solely in the case of the provision of services.
- 7 Article 15 provides that the Member States are to take the necessary measures to enable the persons concerned to obtain information, *inter alia*, on the health and social security laws of the host State and Article 17 stipulates that the other Member States and the Commission must be informed of the authorities and bodies designated by the State in question to issue and receive diplomas and certificates or to provide the information referred to in the directive.

- 8 By virtue of Article 18 of Directive No 77/452 and Article 3 of Directive No 77/453, the two directives also apply to nationals of the Member States who are pursuing the activities in question as employed persons.
- 9 Article 19 of Directive No 77/452 and Article 4 of Directive No 77/453 provide that the Member States must bring into force the measures necessary to comply with the directives within two years of their notification and must inform the Commission thereof. As the directives were notified on 29 June 1977, the prescribed periods expired on 29 June 1979.
- 10 The only measures notified to the Commission by the Federal Republic of Germany were those taken in connection with Articles 15 and 17 of Directive No 77/452. Therefore, by a letter of 2 July 1980, the Commission invited the Federal Republic of Germany to submit its observations, pursuant to Article 169 of the EEC Treaty.
- 11 By a letter of 30 July 1980 the German Government informed the Commission that legislation to implement the directives was in preparation, but that in practice the main provisions of the directives were already being applied, although they had not yet been formally transposed into national law.
- 12 On 25 November 1981 the Commission addressed a reasoned opinion to the Federal Republic of Germany.
- 13 On 13 April 1982 the German Government informed the Commission that provisions formally transposing the directives into German law had been included in a bill intended to reform the whole field of health care, that the passage of that bill had been delayed, but that *de facto* the directives were already being applied in their entirety in the Federal Republic of Germany.
- 14 In September and November 1983 the German Government informed the Commission of certain additional delays in the legislative process and it was following that information that the Commission brought the present action.

The implementation of directives in general

- 15 The German Government concedes that the transposition of the two directives into German law will only be effected with the imminent completion of the general reform of the legislation on health care. However, it maintains that the delay in the legislative process does not constitute a breach of its Community obligations. Although the legislation now in force in the Federal Republic of Germany does not formally accord with the provisions of the directives, it in no way precludes their application by the German authorities and the administrative practice has in fact been to apply them fully.
- 16 According to the German Government, the third paragraph of Article 189 of the Treaty requires only that the advantages provided for in directives are guaranteed under national law and that private individuals have a legally protected right to those advantages. The manner in which that right is secured under national law is left to the discretion of each Member State. Community law in no way requires legislation to be adopted for that purpose.
- 17 The German Government does not deny that mere administrative practices, which by their nature can be modified as and when the administration pleases and which are not publicized widely enough, cannot be regarded as a proper fulfilment of the obligation imposed on the Member States by Article 189 of the Treaty, as the Court has consistently held. However, the government claims that that principle cannot be applied in this instance because the administrative practice in question cannot be changed as and when the administration pleases and it has been given sufficient publicity.
- 18 The practice of applying the directives which the German authorities have consistently followed since they took effect is, according to the German Government, an expression of the only interpretation of the existing legislation open to them by virtue of superior principles of national law. In that respect the Government cites: (i) the general principle of equal treatment which is enshrined in the German constitution and which prohibits any difference of treatment not justified on objective grounds, (ii) the principle that there can be no discrimination against the nationals of other Member States, which is a Community principle but is directly applicable in German law, and (iii) the principle of German administrative law that such a consistent practice estops the administration from departing therefrom unless there are compelling objective grounds for so doing. In

this case there could be no such grounds, in the first place because of the first two principles referred to above and secondly because the German legislature had clearly demonstrated, in the bill on health care and in the legislation already enacted in relation to other professions in the health sector, its intention to incorporate the directives into domestic law and thus provide statutory confirmation of that administrative practice. The government concludes that German law already fully guarantees the continuous application of the provisions of the two directives.

- 19 As regards the publicity given to the application of those provisions, the German Government points out that, in accordance with Article 17 of Directive No 77/452, Germany informed the other Member States and the Commission of the bodies designated to furnish the information provided for in Article 15. According to the German Government, the beneficiaries of the directives can obtain all the necessary information with regard to their legal situation under national law from those bodies. The directives make no provision for any further publicity. Nor are such measures required under Article 189, as it has been interpreted by the Court, since the administrative practice of applying the directives is in no way contrary to the wording of the existing legislation.
- 20 The Commission stresses that the aim of the directives is to facilitate the effective exercise of the right of establishment and freedom to provide services, *inter alia* by the unrestricted recognition of various national diplomas and by the introduction of certain procedural guarantees. That aim will not be achieved until national provisions which do not accord with the directives have been formally amended or supplemented. Moreover, the German Government has by implication recognized that fact by including the necessary provisions in the bill on health care. The delay in the adoption of that bill cannot be excused on the ground that the administrative practice has been amended in order to satisfy the requirements of the directives pending the completion of the legislative process.
- 21 Even if it is conceded that the administration is bound by its own practice to the extent indicated by the German Government, the Commission denies that that is sufficient to provide the legal certainty, clarity and transparency sought by the directives. In particular a Member State cannot rely on the direct effect of the principle of non-discrimination on grounds of nationality in order to evade the obligation to incorporate into domestic law a directive which is intended precisely

to give that principle practical effect by facilitating the effective exercise of freedoms proclaimed in the Treaty. In addition the Commission does not see how the principles of law relied upon by the German Government can serve to implement those provisions of the directives which govern specific administrative procedures or provide for the coordination of national training programmes, since those provisions do not create any right that may be invoked by individuals.

- 22 Faced with those conflicting views, the Court considers it necessary to recall the wording of the third paragraph of Article 189 of the Treaty, according to which a directive is binding, as to the result to be achieved upon each Member State to which it is addressed, but leaves to the national authorities the choice of form and methods.
- 23 It follows from that provision that the implementation of a directive does not necessarily require legislative action in each Member State. In particular the existence of general principles of constitutional or administrative law may render implementation by specific legislation superfluous, provided however that those principles guarantee that the national authorities will in fact apply the directive fully and that, where the directive is intended to create rights for individuals, the legal position arising from those principles is sufficiently precise and clear and the persons concerned are made fully aware of their rights and, where appropriate, afforded the possibility of relying on them before the national courts. That last condition is of particular importance where the directive in question is intended to accord rights to nationals of other Member States because those nationals are not normally aware of such principles.
- 24 In the light of the foregoing it is therefore necessary to consider whether the legal analysis relied on by the German Government satisfies those conditions. In that respect the two directives must be treated separately.

Directive No 77/452

- 25 The argument between the parties in relation to Directive No 77/452 was concentrated on the recognition of diplomas from other Member States obtained by nationals of those States.

- 26 The German Government contends that such recognition is already guaranteed under Article 2 of the *Krankenpflegegesetz* [Law on Health Care], as promulgated on 20 September 1965 (*Bundesgesetzblatt* I, p. 443). That provision accords persons who have completed the training provided for by that law and have passed the prescribed examination a right to be authorized to pursue the activities in question. It also accords the same right to German nationals and stateless persons who have undergone a complete course of training in another country, provided that the training is of an equivalent level. Finally it is provided that 'the authorization may be granted to other persons if those conditions are satisfied'.
- 27 According to the German Government, it would be contrary to the general principle of equal treatment, enshrined in the German constitution, to refuse to recognize foreign training, unless such a refusal were justified on objective grounds. In relation to the training referred to in the two directives there could be no such grounds because the mere fact that Germany had assented to those directives within the Council showed that it recognized the equivalence of such training. Since therefore the administration is under an obligation to accept that equivalence for German nationals, it would be contrary to the Community principle of non-discrimination on the ground of nationality, which is directly applicable in German law, to deny similar treatment to nationals of other Member States. By consistently acting in accordance with that interpretation the competent authorities have created an irreversible situation whereby they are estopped from abandoning their established practice and the discretion which Article 2 of the existing law appears to confer on them is reduced to nil. The beneficiaries of the directive are thus in possession of a right which may be enforced in the courts.
- 28 That argument cannot be accepted. Article 2 of the *Krankenpflegegesetz* empowers the competent German authorities to assess the equivalence of training in individual cases; it does not accord nationals of other Member States the right to pursue the profession concerned solely on the basis of a diploma obtained in one of those States, even if that diploma is listed in Article 3 of Directive No 77/452. In view of the terms of that provision, the legal analysis relied on by the German Government is not such as to create a situation which is sufficiently precise, clear and transparent as to enable nationals of other Member States to discover their rights and to rely on them. That situation is not altered by the mere fact that the bodies designated by the German authorities for the purpose of providing the

persons concerned with information on the health and social security laws in accordance with Article 15 of the directive are aware of the practice followed by the German administration.

- 29 Moreover, the German Government's argument is founded on the combined effect of the general principle of equal treatment, applicable solely to German nationals, and the Community principle of non-discrimination on grounds of nationality. As the Commission has pointed out, the direct effect of that Community principle may not be used in order to evade the obligation to implement a directive providing for specific measures to facilitate and secure the full application of that principle in the Member States.
- 30 As regards the other provisions of the directive, the German Government maintains that no provision of the existing legislation prevents their application by the competent authorities and that they too are covered by a binding administrative practice based on their acceptance by the Federal Republic and their incorporation in the bill on health care.
- 31 On that point the Court accepts the Commission's argument that reference to principles of law which are as general as those relied on by the German Government is not sufficient to establish that national law fully guarantees compliance with provisions of directives which are of such a precise and detailed nature.
- 32 It must therefore be concluded that the Federal Republic of Germany has failed to adopt, within the prescribed period, the measures needed to incorporate Directive No 77/452 into national law.

Directive No 77/453

- 33 The German Government concedes that the national provisions in force do not contain the same requirements with regard to training as the directive. However, the existing rules on training and examination (Order of 2 August 1966: *Bundesgesetzblatt* I, p. 462), lay down only the minimum requirements and therefore leave open the possibility of raising the requirements stipulated in the training programmes and examination criteria applied in the various authorized nursing schools.

- 34 According to the German Government, the administrative practice in that respect is in conformity with the European Agreement on the instruction and education of nurses concluded on 25 October 1967 under the aegis of the Council of Europe (European Treaty Series No 59, April 1968), the provisions of which are almost identical to those of the directive. That agreement was ratified by an enactment of 13 June 1972 (*Bundesgesetzblatt* II, p. 629), which, under German law, is sufficient to incorporate the agreement into national law.
- 35 The German Government claims that, on the basis of the rules on training and examination and the above-mentioned European Agreement, the health authorities in the various *Länder* had, by the end of June 1979 at the latest, already introduced training programmes which satisfied the requirements of that Agreement and of Directive No 77/453. In support of that assertion, the German Government submits the training programmes of the authorized school in Munich. It states that all the subjects listed in the annex to Directive No 77/453 are included, with the exception of certain subjects which do not require separate training courses, but which are comprised within other, wider headings.
- 36 The German Government maintains that, following its endorsement of Directive No 77/453, there can be no valid reasons for altering that consistent administrative practice and that, accordingly, an irreversible situation has arisen whereby the competent authorities are estopped from abandoning their established practice and the discretion which the existing German legislation conferred on them is reduced to nil. The German Government therefore contends that even without the above-mentioned European Agreement the full application of the directive is guaranteed in the Federal Republic of Germany.
- 37 The Commission points out that the European Agreement does not contain all the requirements laid down in the directive and that the training programme presented by way of example, which omits some of the subjects listed in the annex to Directive No 77/453, confirms its doubts as to whether the directive is in fact being applied.
- 38 On that point too the Court is unable to accept the German Government's argument. In the circumstances described above the incorporation of the European Agreement into national law cannot replace the proper implementation of the

Community directive. The existing federal legislation is not in conformity with that directive and it is clear from the argument before the Court that that lacuna has not been remedied by the administrative practice of the authorities of the *Länder* which have responsibility for approving the training programmes and examination criteria of nursing schools.

- 39 It follows from all the foregoing that the Federal Republic of Germany has failed to fulfil its obligations in respect of both Directive No 77/453 and Directive No 77/452.

Costs

- 40 Under Article 69 (2) of the Rules of Procedure the unsuccessful party must be ordered to pay the costs. Since the defendant has failed in its submissions it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

- (1) Declares that, by failing to adopt within the prescribed period the measures needed to comply with Council Directive No 77/452/EEC of 27 June 1977 concerning the mutual recognition of diplomas, certificates and other evidence of the formal qualifications of nurses responsible for general care, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services and Council Directive No 77/453/EEC of 27 June 1977 concerning the coordination of provisions laid down by law, regulation or administrative action in respect of the activities of nurses responsible for general care, the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty.

(2) Orders the Federal Republic of Germany to pay the costs.

Mackenzie Stuart

Bosco

Due

Pescatore

Koopmans

Everling

Bahlmann

Galmot

Joliet

Delivered in open court in Luxembourg on 23 May 1985.

P. Heim

Registrar

A. J. Mackenzie Stuart

President