

OPINION OF MR ADVOCATE GENERAL LENZ

delivered on 2 December 1986 *

*Mr President,
Members of the Court,*

A — 1. In the proceedings in which I am giving my opinion today, the applicant, the Commission of the European Communities, complains that the defendant, the Kingdom of Belgium, by adopting Royal Decree No 143 of 30 December 1982 on the reimbursement of costs by the Belgian national sickness insurance scheme in respect of services provided in the field of clinical biology (hereinafter referred to as 'laboratory services'), has failed to fulfil its obligations under Article 52 of the EEC Treaty and has thus infringed the principle of the freedom of establishment.

2. The decree renders more difficult the establishment of laboratories from other Member States by providing that their costs will not be reimbursed by the Belgian national sickness insurance scheme. The Commission contests in particular the provision of the decree which prescribes the organizational form in which laboratories must be operated if their costs are to be covered by the sickness insurance scheme.

3. The provisions of Article 3 (3) and (4), which are relevant in the present proceedings, provide that the laboratories must be operated either:

'3. by one or more persons entitled to provide services in the field of clinical biology who do in fact carry out analyses in the laboratory and who are not prescribing doctors; or

4. by a legal person governed by private law, except such non-profit-making legal persons as fall within paragraph (7) below, whose members, partners or directors, as the case may be, are exclusively persons falling within paragraph (3) above ...'.

4. If a laboratory does not comply with these requirements, the laboratory services carried out by it are not reimbursed by the national sickness insurance scheme.

5. Article 7 of the decree provides that if the owner of the business premises or the equipment is not the person by whom the laboratory is operated, the amount payable by the latter may only be a lump sum equal to the normal amount payable for the hire, depreciation or leasing on the basis of the value of the capital investments.

6. A number of foreign firms requested a Brussels court to suspend the operation of the decree. When their application was refused, they brought an action for the annulment of the decree before the Conseil d'Etat, which has not yet given its decision. Finally, they contacted the Commission which, in 1983, initiated a procedure against Belgium for failure to fulfil its obligations under the Treaty.

7. As originally drafted, Article 11 of the decree provided that the conditions laid down in Article 3 were to be fulfilled at the latest within seven months of the publication of the decree in the Belgian Official Journal. That time-limit has been extended on several occasions. Under Article 21 of Law No 85/101 of 22 January 1985, the

* Translated from the German.

Government is now authorized to fix the time-limit, but has not yet exercised that power.

Conclusions of the parties

8. The *applicant* claims that the Court should:

1. Declare that, by providing that reimbursement may be made in respect of services in the field of clinical biology carried out in laboratories operated by a legal person governed by private law only if the members, partners or directors thereof are natural persons authorized to carry out medical analyses, the Kingdom of Belgium has failed to fulfil its obligations under the EEC Treaty, in particular Article 52 thereof;

2. Order the Kingdom of Belgium to pay the costs.

9. The *defendant* contends that the Court should:

1. Declare the application inadmissible, and, in the alternative, unfounded;

2. Order the Commission to pay the costs.

10. The observations of the parties are set out, so far as is necessary, in the framework of the examination of the substance. For the remainder, reference is made to the Report for the Hearing.

B — My view on these proceedings is as follows:

I — Admissibility

11. No grounds on which the application could be inadmissible have been raised or are otherwise apparent.

II — The substance

12. At the beginning of my examination of the content of the Belgian rules at issue, I wish once again to set out those rules and their scope as they appear from the decree itself and from the explanations provided by the parties.

13. Royal Decree No 143 of 30 December 1982 does not govern the activities and organizational form of clinical biology laboratories in general; their establishment and activities are not affected by the decree.

14. The rules laid down by the contested decree apply only if the services carried out by such laboratories are to be reimbursed by the Belgian social security scheme. However, those are the most important laboratory services, since the observations of the parties in this respect concur that laboratories whose services are not reimbursed by the sickness insurance scheme are not economically viable.

15. Nor does the contested decree regulate the ownership of the premises and equipment used by laboratories. Thus the laboratories may be owned by natural or legal persons who do not fulfil the conditions laid down in Article 3 of the decree. However, the economic exploitation of the laboratory equipment is restricted by Article 7 of the decree: if the person operating the laboratory is not the same as the owner thereof, the amount payable to the owner may only be a lump sum which corresponds to an appropriate amount payable for hire, depreciation or leasing. That rules out in particular an amount calculated by reference to profit or turnover.

16. So far as is relevant in the present proceedings, the rules laid down in the decree relate exclusively to the person operating the laboratory. A laboratory must be operated either by one or more persons who are entitled to provide services in the

field of clinical biology — that is to say, doctors or pharmacists — or, in the case of a legal person governed by private law, a legal person whose members, partners or directors are exclusively persons who are entitled to provide services in the field of clinical biology and are thus also doctors or pharmacists.

17. Thus all natural and legal persons who are not doctors or pharmacists are excluded from 'operating' a laboratory. The rules are of general application and thus apply to Belgian nationals and nationals of other States and to legal persons established in Belgium or in another State.

18. Thus, as the applicant itself concedes, the national treatment prescribed by the second paragraph of Article 52 of the EEC Treaty for the freedom of establishment, that is to say the right to take up and pursue activities as self-employed persons and to set up and manage undertakings *under the conditions laid down for its own nationals by the law of the country where such establishment is effected*, is guaranteed.

19. The applicant, however, takes the view that the restrictions prohibited by Article 52 of the EEC Treaty must be considered to include not only discriminatory measures but also measures which are applied without distinction to a Member State's own nationals and foreigners, if they constitute an unjustified burden on the latter. Lastly, it states that the right of establishment also includes the right to set up agencies, branches or subsidiaries.

20. Instead of putting forward grounds for that view, the applicant merely refers in its

examination of the law (which in all takes up four pages in its pleadings) to two judgments of the Court of Justice: the judgment of 12 July 1984 in Case 107/83¹ and the judgment of 10 July 1986 in Case 79/85.²

21. The judgment of 12 July 1984 in Case 107/83 related to a German lawyer who applied to be registered at the Bar in Paris. His application was refused because he had indicated that he planned to remain a member of the Bar in Germany and to retain his residence and chambers there; that was stated to be contrary to the internal rules of the Paris Bar, which provided that an *avocat* should maintain chambers in one place only.

22. In its judgment the Court of Justice held that Article 52 *et seq.* of the EEC Treaty prevented the competent authorities of a Member State from denying, on the basis of the national legislation and the rules of professional conduct which were in force in that State, to a national of another Member State the right to enter and to exercise the legal profession solely on the ground that he maintained chambers simultaneously in another Member State. In the grounds of its decision the Court of Justice stated that the fact that freedom of establishment was not confined to the right to create a single establishment within the Community was confirmed by the very words of Article 52 of the Treaty, according to which the progressive abolition of the restrictions on freedom of establishment applied to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of another Member State.

1 — Judgment of 12 July 1984 in Case 107/83 *Ordre des avocats du barreau de Paris v Onno Klopp* [1984] ECR 2971.

2 — Judgment of 10 July 1986 in Case 79/85 *D. H. M. Segers v Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen Groothandel en Vrije Beroepen* [1986] ECR 2375.

That rule had to be regarded as a specific statement of a general principle, applicable equally to the liberal professions, that the right of establishment included the freedom to set up and maintain, subject to observance of the professional rules of conduct, more than one place of work within the Community.

23. The Court reached that conclusion on the basis of the consideration that the legislation of a Member State might not require a lawyer to have only one establishment throughout the Community territory. Thus in the Court's view a Member State was prevented from applying its legislation to situations which were in existence outside its territory, if a lawyer who was already established in a particular Member State would otherwise be able to enjoy the freedom under the Treaty to establish himself in another Member State only at the price of abandoning the establishment he already had.

24. In principle, however, the Court recognized that under the second paragraph of Article 52 freedom of establishment included access to and the pursuit of the activities of self-employed persons 'under the conditions laid down for its own nationals by the law of the country where such establishment is effected'.

25. It must therefore be concluded that there is nothing in the aforesaid judgment of the Court of Justice to prevent a Member State from adopting rules governing the exercise of a particular profession in its territory or from applying such rules to nationals of other Member States 'under the conditions laid down for its own nationals by the law of the country where such establishment is effected'. The Court of Justice merely refused to recognize that such rules could be applied by that Member State

outside its territory, since it did not have the power in its national legislation to adopt rules applying throughout the territory of the Community.

26. It is also clear from the judgment of the Court of Justice of 10 July 1986 in Case 79/85, to which the applicant referred at the hearing, that the freedom of establishment of nationals of one Member State in the territory of another Member State depends on the conditions laid down for its own nationals by the law of the country where such establishment is effected.

27. That was reiterated in the judgment of the Court of Justice of 6 November 1984 in Case 182/83,³ to which the applicant referred at the hearing. The proceedings in that case concerned the question whether, having regard to the rules laid down in the Treaty, nationals of other Member States who have exercised their right of establishment in Ireland under Article 52 of the Treaty by participating in the formation of a company within the meaning of Article 58 of the Treaty can be required to meet a residence requirement. The Court of Justice held that they could, if such a residence requirement was imposed by a Member State both on its own nationals and those of the other Member States and was applied to them equally. It held that a residence requirement so delimited did not in fact amount to discrimination contrary to Article 52 of the Treaty.

28. In short it should at this point be stated that in the aforesaid decisions of the Court of Justice there is nothing which could support the applicant's view that even measures which are applied without distinction to a Member State's own

³ — Judgment of 6 November 1984 in Case 182/83 *Robert Fearon & Company Limited v Irish Land Commission* [1984] ECR 3677, at p. 3685 *et seq.*

nationals and those of other Member States could be regarded as unjustified restrictions on the right of establishment. In any event those judgments of the Court of Justice do not provide any answer to the question in which cases the simple principle that nationals of another Member State should be treated in the same way as the country's own nationals is no longer sufficient to ensure the effectiveness in practice of the fundamental freedom of the right of establishment, guaranteed by the EEC Treaty. In particular, there appears to be no basis for arguing that national rules on the exercise of a profession which are applied without distinction to a State's own nationals and those of another Member State could be tested by reference to the principle of proportionality even if the scope of the freedom of establishment governed by Community law is not affected.

29. That conclusion is supported by the consistent decisions of the Court of Justice on freedom of establishment. Even in the Court's leading judgment of 21 June 1974 in Case 2/74,⁴ in which it held that after the end of the transitional period Article 52 of the EEC Treaty was directly applicable, Article 52 was regarded as a particular instance of the general prohibition of discrimination contained in Article 7 of the EEC Treaty. The Court held that Article 52 expressed the guiding principle in the matter by providing that freedom of establishment should include the right to take up and pursue activities as self-employed persons 'under the conditions laid down for its own nationals by the law of the country where such establishment is effected'. It stated that the rule that a State should treat nationals of other Member States in the same way as its own nationals was one of the fundamental legal provisions of the Community. As a reference to a set of legislative provisions effectively applied by the country of establishment to its own nationals, that

rule was, by its essence, capable of being directly invoked by nationals of all the other Member States.

30. It is also clear from the judgments of the Court of Justice of 28 April 1977 in Case 71/76⁵ and of 28 June 1977 in Case 11/77⁶ that in the application of Article 52 of the EEC Treaty the principle that a Member State must treat nationals of other Member States in the same way as its own nationals is of primary importance. That was recently confirmed by the Court of Justice in its judgment of 28 January 1986 in Case 270/83,⁷ in which it stated that Article 52 embodied one of the fundamental principles of the Community and has been directly applicable in the Member States since the end of the transitional period. Article 52 was intended to ensure that all nationals of Member States established in another Member State received the same treatment as nationals of that State and prohibited any discrimination on grounds of nationality.

31. As the contested royal decree is applicable without distinction, discrimination against nationals of other Member States could only arise if its consequences for them were more far-reaching than for the State's own nationals. However, it is not necessary in the present proceedings to reach a final conclusion on the question whether disguised discrimination of that kind should be recognized in the field of freedom of establishment. In fact, the applicant has not adduced any evidence to show that the implications of the contested rules for nationals or undertakings of other Member States were greater than their implications for the State's own nationals.

4 — Judgment of 21 June 1974 in Case 2/74 *Jean Reyniers v Belgian State* [1974] ECR 631.

5 — Judgment of 28 April 1977 in Case 71/76 *Jean Thieffry v Conseil de l'ordre des avocats auprès de la cour d'appel de Paris* [1977] ECR 765.

6 — Judgment of 28 June 1977 in Case 11/77 *Richard Hugb Patrick v Ministre des affaires culturelles* [1977] ECR 1199.

7 — Judgment of 28 January 1986 in Case 270/83 *Commission of the European Communities v French Republic* [1986] ECR 273.

32. Thus if the right to set up and manage agencies, branches or subsidiaries is limited by the conditions laid down for its own nationals by the law of the country where establishment is effected, the points set out below should be noted:

33. The contested royal decree 'decommercializes' an economic activity, namely the operation of clinical biology laboratories, in so far as their services are reimbursed through the social security system, by removing it from the general economic sphere and reserving it to members of particular professions, namely pharmacists and doctors. By so doing, it undoubtedly interferes with the activities which may be undertaken by business enterprises and in particular by legal persons. However, such interference is not prohibited by Community law. Since the Court has already held in its judgment of 6 November 1984 in Case 182/83, on Article 222 of the EEC Treaty, that the Treaty in no way prejudices the rules in Member States governing the system of property ownership and does not call in question the Member States' right to establish a system of compulsory acquisition by public bodies, a Member State must also be entitled to remove a particular activity from the general economic sphere and transfer it to persons in particular occupations. As the Court explained in relation to the problem of compulsory acquisition, such an action is then to be judged by reference to the fundamental rule of non-discrimination, which underlies the

chapter of the Treaty relating to the right of establishment. Provided that the measure in question is applied indiscriminately to the nationals of all Member States, it is not necessary to consider whether it is appropriate or proportionate from the point of view of Community law.

34. However, if the Court were to conclude, from the fact that only foreign firms had challenged the royal decree before the Belgian courts and lodged complaints with the Commission, that discrimination did exist, the question whether the principle of proportionality has been infringed would of course also have to be examined and answered in the affirmative.

35. In order to attain the objective pursued by the adoption of the decree — that is to say to keep costs down and to make it easier to prosecute abuses — it would have been sufficient merely to make the person operating a laboratory subject to the special professional obligations required of doctors or pharmacists. If a laboratory was operated by a legal person, it would therefore undoubtedly have been sufficient merely to subject its supervisory bodies or its managers to the special professional obligations. However, to extend those obligations to those who are merely members of the legal person and who are not engaged in operating the laboratory would have to be regarded as disproportionate and unnecessary.

C — 36. In view of the foregoing considerations, I propose that the Court dismiss the application and order the applicant to pay the costs.