OPINION OF ADVOCATE GENERAL STIX-HACKL

delivered on 12 September 2002 [1]

I — Introductory remarks

1. The present case concerns admission to the profession of hospital administrator in France, and in particular the compatibility of French admission requirements with 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 (hereinafter: the 'Directive'). [2]

II — Legal framework

A — *Community law*

2. In addition to the exception laid down in Article 39(4) EC regarding employment in the public service, the rules contained in the aforementioned directive are also relevant to these proceedings.

3. Article 1 of Directive 89/48/EEC provides *inter alia* that: '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

1 — Original language: German.

2 — OJ 1989 L 19, p. 16.

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. The following in particular shall constitute a mode of pursuit of a regulated professional activity:

— pursuit of an activity under a professional title, in so far as the use of such a title is reserved to the holders of a diploma governed by laws, regulations or administrative provisions;

— pursuit of a professional activity relating to health, in so far as remuneration and/or reimbursement for such an activity is subject by virtue of national social security arrangements to the possession of a diploma....'

4. Article 2 reads in part as follows:

'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'.

5. Article 3 provides *inter alia* that:

'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; or...'.

6. Under Article 4, the host State may require the applicant to implement certain compensatory measures, such as the provision of evidence of professional experience, the completion of an adaptation period or the taking of an aptitude test.

B — *National legislation*

7. The central legislation in the main proceedings is Decree No 88-163 of 19 February 1988 providing special public service rules on the grades and posts of management staff in hospital establishments. [3] That decree implements Law No 86-33, the general statute for public servants, Chapter IV of which governs hospital public service. [4]

8. Article 29 of Law No 86-33 essentially provides that a 'fonctionnaire' is to be appointed by means of a competition. Article 37 states *inter alia* that public

3 — 'Décret 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 86-33 du 9 janvier 1986' (JORF, 20 February 1988, p. 2390). That decree has since been amended (Decree No 2000-232 of 13 March 2000, JORF, 14 March 2000, p. 3971).

4 — JORF, 11 January 1986, p. 535.

servants are to be established ('titularisation') after successful completion of a 'stage'.

9. It follows from Article 5 of Decree No 88-163 that, in principle, recruitment to the hospital managers' corps of the French public service is by way of a 'concours', that is to say a selection procedure in the form of a competition. That competition is the requirement for admission to a course of training organised by the National School of Public Health, Rennes (École Nationale de la Santé Publique de Rennes, hereinafter: the 'ENSP'). The training course consists of theoretical and practical elements and lasts 24 to 27 months. Individual subjects are graded for assessment purposes, with an assessment committee grading the candidates ('classement') at the end of the training. Candidates who have successfully completed the training course are established in the public service.

10. Decree No 93-703 of 27 March 1993 relating to the ENSP [5] stipulates *inter alia* that the ENSP is to award diplomas.

11. Decree No 2000-232 of 13 March 2000 [6] stipulates that candidates who have successfully completed training of an equivalent level within the EEA may be exempted from all or part of the training course.

5 — JORF, 28 March 1993.
6 — JORF, 14 March 2000.

III — Facts and main proceedings

12. It is clear from the documents before the Court that Ms Burbaud, a former Portuguese national who was later granted French nationality, obtained a degree in law from the University of Lisbon in 1981. Her assertion that in 1983 she obtained the hospital administrator's diploma from the National School of Public Health, Lisbon, and worked as a hospital administrator in the Portuguese public service from 1 September 1983 to 20 November 1989 has not been disputed. She was then granted leave for the purposes of further training in order to pursue doctoral studies in France. 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. By letter of 20 August 1993 the Minister rejected her application, essentially on the ground that admission to the French public service was subject to the candidate passing a competition.

13. Ms Burbaud then lodged an application with the Tribunal Administratif de Lille (Administrative Court, Lille) for the annulment of the decision of the Minister responsible for Health. On 8 July 1997 the Tribunal Administratif de Lille dismissed that application. On 2 October 1997 Ms Burbaud brought an action against that judgment before the Cour Administrative d'Appel de Nancy (Administrative Court of Appeal, Nancy), which referred the case to the Cour Administrative d'Appel de Douai (Administrative Court of Appeal, Douai) on 30 August 1999.

14. Ms Burbaud submits that, pursuant to the Directive, the diploma from the National School of Public Health, Lisbon, should have been recognised by France as a diploma to be treated in the same way as completion of the course at the ENSP and that the Portuguese diploma which she holds should therefore have entitled her to admission to the management staff corps without sitting the entrance examination for the ENSP.

IV — Questions referred for a preliminary ruling

15. The Cour Administrative d'Appel de Douai has stayed proceedings and has referred the following questions to the Court:

1. Is a training course in a practical training school for public servants, such as the ENSP (École Nationale de la Santé Publique; National School of Public Health), leading to establishment in 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?

V — The first question

A — *Submissions of the parties*

16. Ms Burbaud pointed out at the hearing that the French system infringes Article 39 EC and the general requirement of equal treatment in that it gives rise to — not only indirect — discrimination. In that regard, she focused on the rules contained in Article 5 of Decree No 88-163 under which successful completion of the course at the ENSP was a requirement for admission to the profession and the selection system did not permit knowledge acquired in another Member State to be taken into consideration, which deterred precisely those candidates who were more highly qualified. She added that France does not provide any justification for that system.

17. Moreover, Ms Burbaud expressed the view that the training at issue was covered

by the Directive because it concerned a regulated profession and a diploma within the meaning of Article 1 of the Directive. Furthermore, she maintained that the requirements laid down in Article 3 of the Directive were met. Finally, Ms Burbaud pointed out the parallels between the training she completed at the School for Public Health in Lisbon and that at the ENSP.

18. The French Government disputes that the training at the ENSP which, upon successful completion, leads to establishment in the public service in hospital administration, falls within the scope of the Directive. Moreover, it maintains that the employment which is the subject-matter of these proceedings is part of the national public service, even if, on the basis of the Court's case-law, the exception contained in Article 48(4) of the EC Treaty (now Article 39(4) EC) is not applicable to the main proceedings. Owing to the peculiarities of the French public service, the Directive did not apply to such employment or to the statute which governs employees in the public service.

19. It points out that a student at the ENSP serves a probationary period in the public service as a paid 'agent stagiaire' immediately after passing the entrance examination and that successful completion of the training at the ENSP coincides with establishment in the public service, which is, in fact, the main objective of the training.

20. Thus, the French Government takes the view that, without prejudice to its classification as a diploma within the meaning of Decree No 93-703, the certificate which is awarded for such a 'stage' at the ENSP cannot be regarded as a diploma within the meaning of Article 1 of the Directive. The sole purpose of awarding that certificate was establishment in the hospital management corps of the public service. The certificate was not awarded for completion of academic training because students at the ENSP were already members of the public service.

21. It also submits that the statute for public servants and in particular the overriding interest of the public service would not permit employment under that statute to be regarded as a regulated profession within the meaning of the Directive. The Directive was created for professions which may be pursued independently of a particular field of activity and therefore not for those in the field of activity of the public service.

22. Finally, the French Government submits that a decree from the year 2000 provides for the possibility of exempting from the training at the ENSP, in full or in part, those candidates who have been admitted to the 'concours' and have received equivalent training in a Member State other than France or in one of the States parties to the EEA. However, that

decree was not designed to implement the Directive but to make it easier for the French authorities to admit EU nationals to the management corps of the hospital public service by way of a 'concours'.

23. The *Italian Government* points out that the French system for recruitment to the hospital public service serves a dual function: training in hospital management and selection of a limited number of the students. Clearly, those two functions had to be considered separately, the first falling within the scope of the Directive. Thus, as far as professional training was concerned, the ENSP diploma was to be treated in the same way as a diploma awarded in another Member State. The equivalence had to be examined in the light of the requirements of the Directive.

24. The *Swedish Government* assumes that the profession of hospital administrator is to be classified as a regulated professional activity within the meaning of Article 1(d) of the Directive because admission to that profession presupposes successful completion of an examination for entry to the ENSP, training, and success in the final examination there. It considers that, provided that the other criteria laid down by the Directive are also met, the diploma is thus a diploma within the meaning of the Directive. It made no difference that a post in the public service was connected with it. Whether the diploma awarded to Ms Burbaud was equivalent to that awarded by the ENSP was for the national court to examine.

25. The *Commission* takes the view that the hospital administrator's diploma at issue is a diploma within the meaning of Article 1 of the Directive. It was awarded by the competent authority of a Member State for completion of a three-year training course after which the holder was qualified to pursue the profession of hospital administrator in the public service.

26. The diploma attested to the fact that a training course had been undertaken consisting of practical and theoretical training lasting 24 to 27 months and that it had been necessary to pass a competition in order to be awarded a place on that course.

27. Pursuant to Article 3 of the Directive, the French authorities in the main proceedings were obliged to recognise Ms Burbaud's diploma because it permitted admission to the same profession in the Member State where it was obtained. If there were differences between the two types of training, France could require that compensatory measures be implemented as provided for in Article 4(1) of the Directive.

B — *Assessment*

1. Classification of training courses at schools such as the ENSP

28. To answer the first question referred, it must first of all be determined whether employment in the public health sector, that is to say, in the public service, is covered by the Directive at all. Then, it must be examined whether the hospital administrator's diploma can be classified as a diploma within the meaning of the Directive, and in particular whether the profession of hospital administrator in France constitutes a regulated profession within the meaning of the Directive.

29. This preliminary ruling procedure shows that the Directive has legal and practical significance not only for EU nationals outside a host State but also for the nationals of a host State, in this case French nationals. That is because, although the latter themselves fulfil the nationality requirement necessary in many professions in the public service, they may be faced with another obstacle to admission to the profession, that is to say the requirement that they obtain a diploma in the host State. The Directive provides for recognition of diplomas obtained in another Member State, *inter alia*, whether by persons who had always been nationals of the host State or who, like Ms Burbaud, became nationals of that State only after they had obtained a diploma in another Member State.

(a) Application of the Directive to professions in the public service

30. First of all, an examination should be made of the French Government's submissions, according to which the Directive does not apply to professions in the public sector.

31. In that regard, reference is made to a judgment of the Court [7] in which the Directive was applied to a profession in the public service.

32. Moreover, the provisions relating to the scope of the Directive should be taken as the starting point. Article 2(1) plainly states that the Directive 'shall apply to any national of a Member State wishing to pursue a regulated profession... in a self-employed capacity or as an employed person'. It follows from that article that, in principle, the Directive covers all self-employed and employed persons in regulated professions. If the Directive did not also apply to professions in the public service, the Community legislature would have provided for an exception to that effect. Thus, Article 2 of the Directive provides for an exception for professions which are the subject-matter of a separate Directive.

7 — Case C-234/97 *Fernández de Bobadilla* [1999] ECR I-4773.

33. However, the Directive does not provide for an express exception for professions in the public service. Nevertheless, the 12th recital contains the following reference to the exceptions laid down in primary legislation for employment in the public service and for activities involving the exercise of public authority in a Member State:

'Whereas the general system for the recognition of higher-education diplomas is entirely without prejudice to the application of Article 48(4) and Article 55 of the Treaty;'.

34. However, that reference merely has a declaratory significance because the exceptions provided for in Article 48(4) of the EC Treaty (now Article 39(4) EC) and Article 55 of the EC Treaty (now Article 45 EC) cannot be revoked by the Directive, that is to say by secondary legislation. [8]

35. Thus, exceptions laid down in primary legislation also have the effect of exceptions from the Directive. However, that does not automatically mean that, as a result, the whole of the public sector falls outside the scope of the Directive.

36. Rather, to determine the extent of such an exception under primary legislation, reference should be made to the (narrow) interpretation of Article 48(4) of the EC Treaty (now Article 39(4) EC), the provision at issue in this case.

37. The French Government has not advanced any arguments to demonstrate that the conditions for application of that exception are met in this case. It has merely stated that although certain appointments in the public service do not fall within the scope of the exception laid down in Article 39(4) EC, they are none the less part of the French public service. However, in the present proceedings it is precisely the extent of the exception under Community law which is the decisive factor. That is because the relevant framework when making a legal assessment in the light of Community law is, of course, Community law, not national law.

38. Consequently, there may be professions or at least activities which, although part of the public service of the Member State concerned, do not fall within the scope of the exception enshrined in primary legislation and of significance to the Directive.

8 — Cf. Pertek, 'Une dynamique de la reconnaissance des diplômes à des fins professionnelles et à des fins académiques: réalisations et nouvelles réflexions, 119' (p. 191 et seq.), in Pertek, *La reconnaissance des qualifications dans un espace européen des formations et des professions*, 1998.

39. As far as professions in the health sector are concerned, it can of course be said that in principle they do not satisfy the condition developed in case-law and therefore they do not fall within the scope of the exception provided for by Article 48(4) of the EC Treaty (now Article 39(4) EC). That is because that condition presupposes posts 'which actually involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interest of the State or of other public authorities'. [9]

40. Finally, an examination must also be made of the arguments advanced by the French Government concerning the peculiarities of the 'écoles d'administration' in France, one of which is the ENSP.

41. The Court has held that for the exception provided for by Article 48(4) of the EC Treaty (now Article 39(4) EC) to apply, it makes no difference whether a person is a public servant ('Beamter') or a salaried employee ('Angestellter'). [10] Thus, the fact that participants on the ENSP training course are subject to special regulations, that is to say they are regarded as 'agents stagiaires', and that they are appointed public servants upon successful completion of the training, is also irrelevant.

42. It can therefore be concluded that, in principle, the Directive is also applicable to employment in the public service. [11]

(b) Is a hospital administrator's diploma a diploma within the meaning of the Directive?

43. In order for the hospital administrator's diploma to be regarded as a diploma within the meaning of Article 1(a) of the Directive, it must meet the requirements laid down in that provision, in particular that it has been awarded by a competent authority in a Member State, designated in accordance with its own laws, regulations or administrative provisions and that it qualifies the holder to take up a regulated profession.

44. There is no doubt that the ENSP diploma meets the requirement of being awarded by a competent authority in a Member State, designated in accordance with its own laws, regulations or administrative provisions. With regard to the other requirements, the only serious question is whether the profession at issue, for the

9 — In particular, see, for example, Case C-473/93 *Commission* v *Luxembourg* [1996] ECR I-3207, paragraph 48, and Case 307/84 *Commission* v *France* [1986] ECR 1725, which concern nurses.

10 — Case 307/84 (cited in footnote 9, paragraph 11) and Case 152/73 *Sotgiu* [1974] ECR 153, paragraph 5.

11 — Pertek, 'La reconnaissance mutuelle des diplômes d'enseignement supérieur', *Revue trimestrielle de droit européen*, 1989, 623 (p. 633 et seq.); Scordamaglia, 'La direttiva Cee sul riconoscimento dei diplomi', in Tizzano (ed.), *Problematica del diritto delle Comunità europee*, 1992, 266 (p. 284); Schneider, *Die Anerkennung von Diplomen in der Europäischen Gemeinschaft*, 1995, p. 184 et seq.

taking up of which the ENSP diploma is required, is a regulated profession.

45. According to the legal definition in Article 1(c) of the Directive, a regulated profession is a profession which consists of one or more regulated professional activities.

46. From Article 1(d) of the Directive, it also follows that a regulated professional activity is 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.

47. The following interpretation of that provision was given by the Court in *Aranitis*:

'Access to, or pursuit of, a profession must be regarded as directly governed by legal provisions where the laws, regulations or administrative provisions of the host Member State create a system under which that professional activity is expressly reserved to those who fulfil certain conditions and access to it is prohibited to those who do not fulfil them'. [12]

48. Those conditions are fulfilled in the present case. That is apparent from the provisions contained in Law No 86-33, in Decree No 88-163 and in the statute governing hospital administrators. It follows from Article 5 of Decree No 88-163 that, in principle, recruitment to posts in the hospital public service is by way of a competition, which is a requirement for access to a course of training organised by the ENSP. Successful graduates are established in the public service.

49. It follows from the above that in order to pursue the profession of hospital administrator, it is necessary to complete the training course successfully. Thus, a 'professional monopoly' exists.

50. The fact that the ENSP diploma is also the document which records appointment as a public servant is as irrelevant as the fact that candidates have already been admitted to the public service during their training course. Those two aspects merely demonstrate the different functions of the diploma and testify to its dual nature as evidence of the successful completion of the course and as an instrument of appointment.

12 — Case C-164/94 *Aranitis* [1996] ECR I-135, paragraph 19.

51. The function of the document issued by the ENSP other than purely as a qualification is merely a feature peculiar to the system of recruitment to the French public service. That additional function arises from national legislation and makes no difference whatsoever to the classification of the diploma as a diploma within the meaning of Article 1 of the Directive. It is irrelevant for the purposes of the Directive that national legislation confers on such a diploma other functions which extend beyond the scope of the Directive.

2. Equivalence of the certificate from the National School of Public Health, Lisbon and the diploma from the ENSP

52. The second part of the first question referred concerns the equivalence of the certificate from the National School of Public Health, Lisbon, and the diploma from the ENSP.

53. Proceeding from Article 3 of the Directive, which is the central provision in that regard, it should be examined whether the applicant, Ms Burbaud, possesses a diploma which is required in another Member State, in this case Portugal, for the taking up and pursuit of the profession of hospital administrator in Portugal. It should therefore be examined whether the certificate from the National School of Public Health, Lisbon, is required for the taking up and pursuit of that profession in Portugal.

54. In particular, the duration and/or content of the training should also be determined, or it should be examined whether the regulated profession in France includes activities which are not a component of the corresponding regulated profession in Portugal; in other words, a comparison should be made of the content of the respective activities, not of the professions themselves, since there would otherwise be a danger of deciding the case simply on the basis that they have the same designation. [13]

55. However, as the Swedish Government correctly observes, such an examination is a matter for the competent national authorities. Whilst it is for the Court of Justice to give the national court guidance as to the interpretation required to decide the case, it is for the national court to assess the facts at issue in the light of the criteria adopted by the Court of Justice. That applies in particular in view of the nature of the analysis to be carried out. [14] That is because the application of Community legislation and its implementing provisions to a particular case is a matter for the national court.

13 — With regard to this danger of nominalism, see Scordamaglia (cited in footnote 11), p. 276.

14 — Case C-446/98 *Fazenda Pública* [2000] ECR I-11435, paragraph 23.

VI — The second question

56. The second question referred concerns whether specific conditions for admission to the public service are permissible, in particular a specific form of entrance examination. Moreover, that question relates only to the situation where the persons concerned have already sat a competition in their country of origin and rely on an equivalent diploma.

A — *Submissions of the parties*

57. The French Government suggests that the answer to the second question should be that a Member State (host State) may stipulate that a national of another Member State who has already sat a competition in his country of origin must pass a further examination in the host State to be admitted to the public service.

58. The competition which is the subject-matter of these proceedings could not be regarded as a diploma within the meaning of Article 1 of the Directive because it concerned a particular form of recruitment and did not confirm that a person who had passed the competition had successfully completed a particular course of study. Moreover, admission to the public service of the Community was also by way of a competition. Finally, the competition was the most objective way of implementing the principle of equal access to the public service.

59. It therefore followed that a competition could not in any way be regarded as a diploma within the meaning of Article 1 of the Directive and thus Member States were not obliged to recognise any equivalence between competitions organised by them and those organised in another Member State.

60. Furthermore, Member States remained responsible for establishing the conditions for recruitment and the rules for the functioning of their public service, provided that they complied with Articles 12 and 39(2) EC. In this regard, the French Government submits that the organisation of a single competition for all candidates, regardless of nationality, wishing to be admitted to the public service of a Member State, is consistent with the principle of equal treatment. It adds that the Commission expresses the same view in its reasoned opinion of 13 March 2000.

61. The *Italian Government* takes the view that the second question concerns neither the freedom of movement for workers within the Community nor the recognition of higher-education diplomas under the Directive, but, rather, the equivalence between national selection procedures for the pursuit of management functions in the public service.

62. However, such subject-matter fell within the competence of the Member State concerned, which should be free to choose the recruitment procedure which best suited its own system and its own requirements. Nevertheless, such freedom was not unlimited since there were restrictions derived from any applicable Community legislation and the prohibition of discrimination against workers.

63. Proceeding from its observations on the first question, the *Swedish Government* submits that Ms Burbaud satisfies the training requirements laid down for hospital administrators in France. Thus, she should not be required to sit the entrance examination for the ENSP.

64. The French system was such that recruitment to the public service was made after a basic education at university level but before professional specialisation. A recruitment system which requires professionally qualified workers to sit an admission examination which must also be sat by non-qualified persons was contrary to the rules on the freedom of movement for workers. Such rules prohibited not only discrimination on grounds of nationality but also all obstacles to access to professions in another Member State. The existing recruitment system fell within the scope of freedom of movement for workers (which, clearly, is directly applicable) even if it was applied without discrimination to nationals of the host State and nationals of other Member States.

65. However, the Swedish Government considers that the existing system could be compatible with Community law if it pursued an objective which was in the general interest and it did not go beyond what was necessary to achieve that objective. However, that was a matter for the national court. The fact that Ms Burbaud had already sat a competition in Portugal was irrelevant in view of the objective of the French competition.

66. The existing system compelled a hospital administrator qualified in another Member State to take an entrance examination for a training course which was designed for the very purpose of training hospital administrators. Therefore, that examination was not designed to test professional experience or the knowledge required to pursue the profession in France but was geared to newcomers to the profession.

67. Thus, since the entrance examination did not recognise professional experience, it

placed the highest qualified workers at a disadvantage because their qualifications could not be taken into account. Consequently, the existing system acted as a deterrent. It was even discriminatory because there was a majority of foreign workers among the group of those placed at a disadvantage, since candidates from France had not yet had the opportunity to gather comparable professional experience.

68. The *Commission* submits that the competition is part of the recruitment system and must be regarded separately from the recognition of diplomas. The recognition of diplomas did not confer any right to employment. Instead, the recruitment systems in existence on the relevant labour market applied. Thus, the French authorities were able to stipulate that a competition should be sat even by those persons who had already sat a comparable competition in their country of origin. However, this had to ensure access to the profession and not only access to a training course.

69. At the hearing, the Commission concentrated on assessing the French system in the light of Article 39 EC and in so doing took the view that access to the profession was restricted because the same conditions applied, even to qualified foreigners. The Commission pointed out that France had not presented any justification for that restriction.

B — *Assessment*

70. The second question concerns the peculiarities of the French system of recruitment to hospital public administration. The present case relates to a system which provides for an assessment both before and after a training course, that is to say a selection competition and an assessment as to whether the course has been completed successfully.

71. It must be noted first of all that the question referred concerns not only the entrance examination ('concours d'entrée') but also the assessment as to whether the course has been completed successfully, because admission to the ENSP is presented only as one of the conditions for entry to the public service.

72. As regards the French Government's submission that the Member States are free to determine the rules for recruitment to the public service, it must be observed that there are restrictions under Community law also in that regard, as the Italian Government rightly points out.

73. It is apparent from its wording and its link with the first question that the second question also refers to the Directive. Neither the second nor the first question mentions any other provision of Community law. It is not for the Court of Justice to determine what Community rules are relevant, but to interpret the provisions cited by the national court, in this case, the Directive.

74. However, even in the context of the Directive, it remains a fundamental obligation on the part of Member States, both when transposing and actually applying it, to observe the principles established by the Court in its case-law on the recognition of diplomas. [15]

75. As the Commission correctly points out, a selection mechanism for admission to the public service is permissible in principle. As already stated when addressing the first question, the system chosen by France combines training and admission as well as quantitative and qualitative elements in its selection procedure. That applies both to the entrance examination and to the assessment at the end of the course; the participants on the training course are, in fact, already members of the public service in their capacity as 'agents stagiaires' and become established public servants upon the assessment of their training to that effect at the ENSP.

76. The generalisation cannot be made, as will be shown below, that the existing rules implement the principle of equality only where admission to posts in the public service is concerned, which is the French Government's argument. It is just as difficult to support the argument that Article 39(2) EC, a requirement under primary legislation, is satisfied. Even reliance on the requirement of equal treatment does not appear to be relevant since, under the French system, applicants who have qualified in another Member State are subject to the same rules as unqualified applicants; in particular they must undergo the same training.

77. As the Swedish Government and the Commission correctly point out, not only newcomers to the profession but also qualified applicants are subject to the French system. In particular, that applies to the requirement to pass an entrance examination for a place on the training course.

15 — This essentially concerns the principles contained in Case C-340/89 *Vlassopoulou* [1991] ECR I-2357. Cf. Case C-238/98 *Hocsman* [2000] ECR I-6623, paragraphs 23 et seq. and 31 et seq., and Case C-31/00 *Dreessen* [2002] ECR I-663, paragraph 24 et seq.

78. In accordance with the requirements of the Directive, Member States must provide for a test of the equivalence of diplomas. If such a test shows that a diploma obtained in another Member State is 'equivalen[t]' to that from the ENSP (and the second question is raised only where this is the case), applicants should not even be required to attend the training course.

79. To impose such a requirement would otherwise mean that no account was taken of the professional experience or qualifications gained in another Member State, which would be a classic case of covert discrimination.

80. Since the assessment at the end of the training course constitutes more than simply a quantitative selection but also includes an assessment of knowledge and/or practical experience, even the possibility of only sitting the final assessment [16] (which is not an option), that is to say of having direct access to this type of examination, could constitute an infringement of the Directive where those already qualified in the profession are concerned.

81. Therefore, the system applied in the main proceedings is inconsistent with Community law in that it does not permit previously obtained qualifications to be taken into account. However, the obligation to recognise 'end products', [17] that is to say to recognise an equivalent diploma obtained in another Member State, constitutes one of the basic principles of the Directive.

82. It should be pointed out that the French Government's argument that there is no obligation to recognise competitions is correct in so far as there can be no automatic recognition as such. What must be examined, however, is whether and to what extent a foreign entrance competition is equivalent to a competition in the host State.

83. On the one hand, the fact that a Member State organises a competition cannot be an obstacle to applying the recognition obligation provided for in the Directive. [18] On the other hand, however, Community law does not require the complete abolition of competitions either. The Directive does not govern quantitative but

16 — Cf. Favret, 'Le système général de reconnaissance des diplômes et des formations professionnelles en droit communautaire: L'esprit et la méthode', *Revue trimestrielle de droit européen*, 1995, p. 259 (265).

17 — See Schneider with regard to selection competitions for teacher training (cited in footnote 11, page 377).

18 — Case C-419/92 *Scholz* [1994] ECR I-505.

qualitative admission restrictions, [19] that is to say the recognition of diplomas.

84. Thus, an obligation (possibly) to adapt recruitment systems can at least be derived from the Directive. This means that, within the context of competition procedures, provision must be made for the possibility of taking into account qualifications acquired in another Member State. [20] Thus, in certain circumstances, the Directive also requires a closed monopoly to be transformed into an open monopoly. [21]

85. It is true that, as already stated above, Article 4 of the Directive permits Member States to require compensatory measures to be implemented and such measures may also be incorporated into a (modified) selection procedure. [22]

86. Therefore, in principle, provision could also still be made for tests in such a modified selection procedure. However, such tests must be differentiated from the tests at issue which are the same for qualified and unqualified applicants, that is to say tests which do not permit previous qualifications to be taken into account at all.

87. The necessary adaptations of national law may in themselves require legal changes to be made to existing recruitment systems, for example to the special provisions for the hospital public service in the general statute or to the respective decrees concerning 'agents stagiaires' or the 'ENSP'. [23] This could be achieved, for instance, by extending exceptions that already exist to cases concerning the recognition of diplomas. In that connection reference need only be made to the existing exceptions for cases of 'mutation' (transfer) [24] or 'tour extérieur' (fast stream career progression).

88. Thus, the answer to the second question should be that the competent authority may not make admission to the public service in the host State of public servants from another Member State who rely on an equivalent diploma subject to conditions, and in particular subject to passing an examination such as that in the main proceedings.

19 — As regards this distinction, see my Opinion in Case C-232/99 *Commission* v *Spain* [2002] ECR I-4235, point 41 et seq.

20 — Cf. Pertek (cited in footnote 11), p. 634, with regard to the education and training sector.

21 — See Pertek (cited in footnote 8), p. 153 and p. 162, regarding the two forms.

22 — See Favret (cited in footnote 16), p. 265, regarding this possibility.

23 — Cf. Decree No 2000-232 of 13 March 2000 (JORF, 14 March 2000, p. 3971).

24 — Schneider (cited in footnote 11), p. 392.

VII — Conclusion

89. In the light of the foregoing, I propose that the Court should answer the questions referred as follows:

(1) A training course in a practical training school for public servants, such as the ENSP (École Nationale de la Santé Publique; National School of Public Health), leading to establishment in the public service, leads to 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.

(2) The competent authority may not make admission to the public service of the host State of public servants from another Member State who rely on an equivalent diploma within the meaning of the Directive subject to conditions, and in particular subject to passing an examination such as that in the main proceedings.