

JUDGMENT OF THE COURT (Second Chamber)

8 May 2008*

In Case C-39/07,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 1 February 2007,

Commission of the European Communities, represented by H. Støvlbæk and R. Vidal Puig, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Spain, represented by M. Muñoz Pérez, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: Spanish.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, L. Bay Larsen, P. Kūris, J.-C. Bonichot and C. Toader (Rapporteur), Judges,

Advocate General: M. Poiares Maduro,
Registrar: R. Grass,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 By its application, the Commission of the European Communities asks the Court to declare that, by failing to adopt all the measures necessary to transpose Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (OJ 1989 L 19, p. 16), as far as the profession of hospital pharmacist is concerned, the Kingdom of Spain has failed to fulfil its obligations under that directive.

Legal context

Community legislation

Directives 85/432/EEC and 85/433/EEC

² On 16 September 1985, the Council adopted Directive 85/432/EEC concerning the coordination of provisions laid down by law, regulation or administrative action in respect of certain activities in the field of pharmacy (OJ 1985 L 253, p. 34).

³ Under Article 1(1) of Directive 85/432:

‘Member States shall ensure that holders of a diploma, certificate or other university or equivalent qualification in pharmacy which meets the conditions laid down in Article 2 shall be entitled at least to access to the activities mentioned in paragraph 2 and to pursue such activities subject, where appropriate, to the requirement of additional professional experience.’

⁴ Article 3 of Directive 85/432 provides:

‘Not more than three years after the expiry of the time-limit laid down in Article 5, the Commission shall submit to the Council appropriate proposals on specialisations in pharmacy and in particular hospital pharmacy. The Council shall examine these proposals within one year.’

5 On 16 September 1985, the Council adopted Directive 85/433/EEC concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in pharmacy, including measures to facilitate the effective exercise of the right of establishment relating to certain activities in the field of pharmacy (OJ 1985 L 253, p. 37).

6 Article 2(1) of Directive 85/433, as amended by Directive 2001/19/EC of the European Parliament and of the Council of 14 May 2001 (OJ 2001 L 206, p. 1), provides:

‘Each Member State shall recognise the diplomas, certificates and other formal qualifications listed in the Annex awarded to nationals of Member States by other Member States in accordance with Article 2 of Directive 85/432 ... by giving such qualifications, as regards the right of access to and pursuit of the activities referred to in Article 1, the same effect in its territory as those diplomas, certificates and other formal qualifications, listed in the Annex, which it itself awards.’

7 The Spanish diploma referred to in that annex is that of degree in pharmacy (‘Título de licenciado en farmacia’).

Directive 89/48

8 Article 1 of Directive 89/48, as amended by Directive 2001/19, provides:

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

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

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

— which shows that the holder has successfully completed a post-secondary course of at least three years’ duration, or of an equivalent duration part-time, at a university or establishment of higher education or another establishment of equivalent 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.

...

(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,

...'

9 Article 2 of Directive 89/48 provides:

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

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

10 Article 4 of Directive 89/48 provides:

‘1. Notwithstanding Article 3 [on the right of nationals of another Member State to take up a regulated profession], the host Member State may also require the applicant:

...

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

...'

National legislation

The legislation on specialisations in pharmacy

- 11 The legislation relating to specialisations in pharmacy is Royal Decree 2708/1982 regulating specialist studies for and the award of the qualification of specialist pharmacist (Real Decreto 2708/1982, por el que se regulan los estudios de especialización y la obtención del título de farmacéutico especialista), of 15 October 1982 (BOE No 261 of 30 October 1982, p. 29994).
- 12 Article 1 of that royal decree is worded as follows:

‘Subject to the rights granted to those holding a degree in pharmacy, only the holders of the diploma of specialist pharmacist [‘farmacéutico especialista’] issued by the Minister for Education and Science can hold the title of specialist pharmacist, can pursue the profession as a specialist or occupy with that title a post in a public or private body.’

13 Article 2 of that royal decree provides:

‘To be awarded the diploma of specialist pharmacist, the person concerned must have satisfied the following conditions:

- (a) hold the diploma evidencing a degree in pharmacy;
- (b) have followed in full the corresponding specialised training course in accordance with the established study plans and programmes;
- (c) have passed the relevant assessment exams.’

14 Under Article 3 of Royal Decree 2708/1982:

‘The following specialisations shall be recognised as specialisations in pharmacy:

First group. — Specialisations requiring primarily hospital training:

...

— Hospital pharmacy

...'

The legislation transposing Directives 85/432, 85/433 and 89/48

15 Directives 85/432 and 85/433 were transposed into national law by Royal Decree 1667/1989 of 22 December 1989 (BOE No 4 of 4 January 1990, p. 217).

16 Article 1 of that royal decree provides:

'The diplomas, certificates and other evidence of formal qualifications set out in Annex I to this royal decree and awarded to nationals of a Member State of the European Economic Community fulfilling the criteria set out in Annex II shall be recognised in Spain, for the purposes of access to the profession of pharmacist, as being equivalent to the official university diploma evidencing a degree in pharmacy.'

17 The Spanish diploma referred to in Annex I to that royal decree is the same as that listed in the annex to Directive 85/433.

18 Directive 89/48 was transposed into Spanish law by Royal Decree 1665/1991 of 25 October 1991 (BOE No 280 of 22 November 1991, p. 37916).

19 Article 2(1) of that royal decree provides:

‘The rules set out in this royal decree apply to nationals of a Member State of the European Union who, as holders of a diploma awarded in a State of that Union, wish to pursue in Spain, in a self-employed capacity or as an employed person, a regulated profession the pursuit of which requires higher education of at least three years’ duration.’

20 Article 3(a) of that royal decree provides that the ‘regulated professions’ are all the professions listed in Annex I to that decree. That annex does not refer to the profession of hospital pharmacist.

Pre-litigation procedure

21 On 19 December 2005, the Commission sent to the Kingdom of Spain a letter of formal notice concerning that Member State’s failure to transpose Directive 89/48 as regards the profession of specialist pharmacist.

22 In its reply of 17 March 2006, the Kingdom of Spain submitted that Directive 89/48 was not applicable to the profession of hospital pharmacist, that being a specialisation

of the profession of pharmacist which is specifically regulated by Directives 85/432 and 85/433, which were transposed into Spanish law by Royal Decree 1667/1989.

- 23 On 4 July 2006, having taken the view that that reply was unsatisfactory, the Commission sent the Kingdom of Spain a reasoned opinion, to which that Member State replied on 12 January 2007, that is to say, after the date of expiry of the period laid down by the Commission in that reasoned opinion, repeating its arguments to the effect that Directive 89/48 was not applicable to specialist qualifications in the area of pharmacy.
- 24 Since it did not find those arguments convincing, the Commission brought the present action.

The action

Arguments of the parties

- 25 The Commission claims that, in so far as Article 1 of Royal Decree 2708/1982 precludes holders of a diploma awarded in a Member State and recognised as an equivalent qualification under Article 2 of Directive 85/433 from holding the title of specialist pharmacist and, consequently, pursuing the profession of hospital pharmacist, the defendant Member State has failed to transpose the directive as regards that profession.

26 The Commission claims, first, that that title should be treated as a ‘diploma’ within the meaning of Article 1(a) of Directive 89/48, in so far as it is awarded by the designated competent authority, provides evidence of post-secondary training of more than three years and proves that its holder has the qualifications required to pursue the profession of hospital pharmacist in Spain. Secondly, the profession reserved to holders of a specialist pharmacist’s diploma is a regulated profession within the meaning of Article 1(c) of Directive 89/48. That profession consists in the practice of a regulated activity within the meaning of Article 1(d) of that directive, in so far as access to it is subject to the possession of a diploma.

27 The Commission points out, in this connection, that Directive 89/48 does not exclude any regulated profession from its scope, with the exception of those which are already the subject of a specific directive on mutual recognition. In particular, Directive 89/48 does not include any provision which can be interpreted as excluding from its scope the pharmaceutical professions or, more generally, the health professions. Including such professions in the general system for the recognition of diplomas is not contrary to Article 47(3) EC, which states that the progressive abolition of restrictions on the right of establishment must be preceded or accompanied by a correlating coordination of the conditions for the exercise of those professions. The objective of that directive is not to establish a system for the automatic recognition of diplomas, but to establish a general method to facilitate the recognition of diplomas.

28 In addition, Directives 85/432 and 85/433 are not applicable to the profession of hospital pharmacist, since they concern only the diploma evidencing a degree in

pharmacy. Directive 85/432, which coordinates the training requirements for the award of the diploma evidencing a degree in pharmacy, to which the regime for recognition laid down in Directive 85/433 applies, is not directed at specialisations in pharmacy, within the meaning of Article 3 thereof, and in particular the hospital pharmacy specialisation. Secondly, the diploma evidencing a degree in pharmacy is the only diploma listed in the annex to Directive 85/433 with regard to the Kingdom of Spain.

29 In reply, the Kingdom of Spain contends that the profession of hospital pharmacist, as a specialisation of the profession of pharmacist, does not fall within the scope of Directive 89/48. That profession, it argues, can be governed only by specific legislation, since Article 47(3) EC inserts an express proviso relating to, *inter alia*, the abolition of restrictions on the exercise of the pharmaceutical professions. Such an abolition of restrictions cannot, as a result, be achieved through the general system for the recognition of diplomas laid down by Directive 89/48.

30 That interpretation, it submits further, is borne out by Directives 85/432 and 85/433, which meet the requirement that special rules be laid down for the coordination of legislation relating to certain pharmaceutical activities for the purpose of allowing mutual recognition of qualifications and diplomas in pharmacy. By contrast, Directive 89/48, in which the sole condition laid down for the recognition of diplomas is a minimum duration of studies, is insufficient to ensure compliance with the obligation to provide specific rules laid down in Article 47(3) EC. It follows that, in the absence of any specific legislation adopted in that matter pursuant to Article 3 of Directive 85/432, the Commission cannot rely on Directive 89/48 for the purpose of challenging the failure of the national legislation to comply with the general system for the recognition of diplomas.

Findings of the Court

31 The two parties to the proceedings accept that Directives 85/432 and 85/433 do not apply to the diploma of specialist pharmacist giving access to the profession of hospital pharmacist. However, they draw two different conclusions from that interpretation. The Commission submits that the absence of a specific directive means that that diploma falls within the scope of Directive 89/48, whereas the Kingdom of Spain submits that, in the absence of such a directive, recognition of that diploma must be regarded as being governed neither by Directive 89/48 nor by any other measure of secondary legislation.

32 In this connection, it should be noted at the outset that the scope of Directive 89/48 is not restricted according to the field or type of the diplomas concerned. It is apparent from Article 1(a) thereof that that directive applies to, inter alia, any diploma of higher education awarded on completion of a post-secondary course of at least three years' duration and allowing its holder to take up a regulated profession.

33 In addition, according to settled case-law, a profession is deemed regulated, for the purpose of Directive 89/48, where access to the professional activity constituting that profession or its exercise is governed by laws, regulations or administrative provisions creating 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 (see, to that effect, inter alia, Case C-164/94 *Aranitis* [1996] ECR I-135, paragraphs 18 and 19, and Case C-285/01 *Burbaud* [2003] ECR I-8219, paragraph 45).

34 In the present case, it must be noted that, on the basis of the relevant national legislation, the diploma of specialist pharmacist is a diploma of higher studies giving access to a regulated profession, namely that of hospital pharmacist.

35 Even though it does not dispute such a classification of the diploma and profession at issue, the Kingdom of Spain takes the view that, since Directive 89/98 does not apply to diplomas of specialisations in pharmacy, it is not obliged to provide for the option for nationals of other Member States to take up the profession of hospital pharmacist.

36 Such an interpretation of the directive must be rejected.

37 First of all, the right to recognition of diplomas is guaranteed as an expression of the fundamental right to freedom of establishment by the second paragraph of Article 43 EC. Under settled case-law, it stems from that EC Treaty provision that a Member State to which an application has been made for authorisation to pursue a profession access to which depends, under national law, on the possession of a diploma or professional qualification must take into consideration the diplomas, certificates and other evidence of formal qualifications which the person concerned has acquired with the aim of pursuing that profession in another Member State by comparing the knowledge so certified with the knowledge and qualifications required by the national rules (see Case C-340/89 *Vlassopoulou* [1991] ECR I-2357, paragraph 16, and Case C-238/98 *Hocsman* [2000] ECR I-6623, paragraph 23).

38 Directive 89/48, as is apparent from the third recital in its preamble, lays down a ‘method of recognition’ of the diplomas which it covers. It establishes a general system for the recognition of higher-education diplomas enabling the holder to gain access to a regulated profession and thus to exercise a right enshrined in the Treaty.

39 Moreover, as the Commission has pointed out, Directive 89/48 does not establish a system of automatic recognition. Although it recognises the right of access to regulated professions, that directive, under Article 4(b) thereof, allows the host State to require an applicant who is a national of another Member State to complete an adaptation period or to take an aptitude test, in particular where the matters covered by the education and training he has received differ substantially from those covered by the diploma required in the host Member State, or where the profession regulated in the host Member State comprises one or more regulated professional activities which are not in the profession regulated in the Member State from which the applicant originates or comes and that difference between the professional activities in the two Member States concerned corresponds to different specific training.

40 The Kingdom of Spain submits that Article 47(3) EC precludes, in any event, a directive designed to implement a general system for the recognition of diplomas from being applied to the health professions, since that article expressly inserts a proviso concerning the medical and allied and pharmaceutical professions, restrictions on the access to which cannot be removed in the absence of a measure fixing the rules relating to the ‘coordination of the conditions for their exercise in the various Member States’.

41 That argument must be rejected. Such an interpretation of Article 47(3) EC would result, in fact, not only in a failure to apply Directive 89/48 but more generally in precluding the right of Community nationals to recognition of diplomas of specialisations in pharmacy, even though that right stems from the second paragraph of Article 43 EC.

42 On the contrary, the objective of Article 47(3) EC is not to restrict the scope of the right to recognition of diplomas, but to avoid the implementation of a system for the automatic recognition of diplomas giving access to the health professions in the absence of coordination of the provisions governing the exercise of those professions. That provision of the Treaty therefore concerns a system which must be designed in such a way as to correspond with the progressive harmonisation of the provisions on the exercise of those professions.

43 Accordingly, the recognition of diplomas giving access to the profession of hospital pharmacist falls within the scope of Directive 89/48 and the Member States must provide for a system allowing for that recognition, under the conditions laid down in that directive.

44 In the light of the foregoing, it must be held that, by failing to adopt all the measures necessary to transpose Directive 89/48, as far as the profession of hospital pharmacist is concerned, the Kingdom of Spain has failed to fulfil its obligations under that directive.

Costs

⁴⁵ Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for the Kingdom of Spain to be ordered to pay the costs and the latter has been unsuccessful, the Kingdom of Spain must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

- 1. Declares that, by failing to adopt all the measures necessary to transpose 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, as far as the profession of hospital pharmacist is concerned, the Kingdom of Spain has failed to fulfil its obligations under that directive;**
- 2. Orders the Kingdom of Spain to pay the costs.**

[Signatures]