

# The Recognition of Diplomas and the Free Movement of Professionals in the European Union: Fifty Years of Experiences

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## 1. INTRODUCTION

This year we celebrate in Europe the 50<sup>th</sup> anniversary of the entering into force of the Treaty of Rome establishing the European Economic Community. After half a century of European integration it is an appropriate moment to look back on the achievements realized in this period. This paper wants to address specifically the issues of professional mobility, qualification recognition and the developments towards a European Space of Education. Special attention will be given to the increasing international mobility of the legal profession and the consequences of this development for the legal education on academic as well as professional level in the Member States of the European Union.

One of the main goals of the E(E)C Treaty from its very beginning has been the creation a common market for all economic activities. This includes the free movement of professionals. National rules which had the effect of preventing persons from providing cross border professional services or establishing themselves in another Member State had to be progressively abolished. Barriers to mobility, such as the requirement of a national diploma or language requirements, can as much constitute obstacles to the completion of the internal market as e.g. the use of different safety standards for technical goods. As there is no common educational system in Europe and the routes to professional and trade activities vary significantly between the Member States these differences can cause serious barriers to the free movement of persons. Throughout the last five decades, the European institutions have sought to counter these hindrances. The original EEC Treaty already recognized the problem regarding professional qualifications and provided for the adoption of general programmes supported by directives based on Article 47 (former Article 57) in order to remove barriers to the right of establishment and the freedom to provide services before the end of the transitional period in 1970.

It was not until the mid 1970s, however, that the European Court of Justice took its first two landmark decisions in the cases *Reyners* and *Van Binsbergen*,<sup>1</sup> which opened the European market for the regulated professions by abolishing certain nationality and domicile requirements. These decisions were of specific importance for the legal profession as they both showed clearly that contrary to the view taken by some Member States that lawyers (advocates) do fall fully in the scope of the EC Treaty and therefore can rely on the freedom to provide services and the freedom to establishment in another Member State guaranteed by the Treaty. It was also in these years that the European legislator became active in this field, leading to the adoption of the first directives concerning the recognition of diplomas.

This article intends to give a concise overview of the various relevant developments. The interplay between the case law of the European Court of Justice<sup>2</sup> and the elaborate system of secondary legislation will be at the centre of our attention. The several legislative approaches towards diploma recognition that the Community has adopted in the course of the years shall be discussed, including the new Directive 2005/36/EC on the recognition of professional qualifications which had to be implemented by the Member States until October 2007.<sup>3</sup> This Directive constitutes the first comprehensive modernisation of the recognition system since it was conceived more than forty years ago. This Directive replaced fifteen existing directives in the field of recognition of professional qualifications. It aims to achieve a more uniform and transparent regime by consolidating the various systems, thereby including the case law of the European Court of Justice. For a good understanding of this case law we will nevertheless discuss the old recognition directives quite extensively in this article as well as all of the existing case law that has been based on these directives. Furthermore, we will address the so-called Bologna-process, the Council of Europe Convention on the Recognition of Qualifications Concerning Higher Education in the European Region<sup>4</sup> and the inter-linkage with the European Community instruments on recognition of professional qualifications. Lastly, light will be shed in this article on the consequences of the ECJ's most recent case law regarding academic qualifications. Possible consequences of this case law for the Bologna process, the educational systems of the Member States as well as the mobility of students and

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1 Case 2/74, *Reyners v. Belgium* [1974] ECR 631 and case 33/74, *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299.

2 For example, Case C-340/89, *Vlassopoulou v. Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg* [1991] ECR I-2357; Case C-19/92, *Dieter Kraus v. Land Baden-Württemberg* [1993] ECR I-1663 and Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-1465.

3 Proposal of a Directive of the European Parliament and of the Council on the Recognition of Professional Qualifications, COM (2002) 119 final; Common position adopted by the Council 22 December 2004; last Communication of the Commission COM (2004) 853 final, 6 January 2005.

4 CETS no. 165.

professionals will be discussed. Finally, we will consider possible consequences of these European developments specifically for the national legal education systems in the Member States.

## 2. FROM DISCRIMINATORY TO NON-DISCRIMINATORY RESTRICTIONS IN THE AREA OF FREE MOVEMENT OF PERSONS

During the past decades, many obstacles have been removed through the interpretation of European Community law by the European Court of Justice. This has been the case in particular where the restrictions were based on nationality. The first landmark decision of the European Court of Justice in this area for lawyers was *Reyners v. Belgium*.<sup>5</sup> This case concerned a Dutch national, resident in Belgium, who, after having qualified in Belgium as a lawyer, was refused admission to the Belgium Bar on the grounds of his nationality. The next important decision of the ECJ in the same year was the *Van Binsbergen* ruling.<sup>6</sup> This case concerned a lawyer of Dutch nationality, resident in Belgium, seeking to practise before the Dutch courts. He was refused permission to do so on account of a Dutch legal requirement of national residence.

In both cases one of the issues was the direct effect of an EC Treaty provision. Already in 1963 the Court had ruled in the case *Van Gend & Loos* on the possible direct effect of Treaty provisions.<sup>7</sup> In the *Reyners* case the court held that Article 52 (now 43) of the EC-Treaty had direct effect from the end of the transitional period.<sup>8</sup> Furthermore, the Court stated that the Article 55 (now 45) EC Treaty exception referring to the exercise of official authority did not apply to the profession of lawyers (advocates) even though its members might occasionally perform functions concerned with such an exercise of official authority. Accordingly, if a national of a Member State was otherwise fully qualified for the admission to the legal profession in the host Member State, he could not be refused on the basis of lacking the nationality of that State. Consequently, the nationality requirement for advocates had to be abolished in all Member States.<sup>9</sup>

In the *Van Binsbergen* judgment the court held that Article 59 (now 49) of the EC-Treaty had direct effect. The Netherlands could, therefore, not require permanent residence on the

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5 Case 2/74, *Reyners v. Belgium* [1974] ECR 631. For nationality requirements see also Case C-147/86, *Commission v. Greece* [1988] ECR 1637.

6 Case 33/74, *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor Metaalnijverheid* [1974] ECR 1299.

7 Case 26/62, *Van Gend & Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.

8 The transitional period ended on the 31 December 1969.

9 At that moment a nationality requirement existed next to Belgium also in France, Luxembourg, the Netherlands, Italy and de facto in Germany. See also H. Adamson, *Free Movement of Lawyers*, (2<sup>nd</sup> edition, London, Butterworth, 1998), 35 with some comments regarding the notarial professions and the application of Article 55 (now 45) of the EC Treaty.

part of a lawyer providing services in that State. With respect to the freedom to provide services, the Court of Justice has since that decision in 1974,<sup>10</sup> developed a justification test similar to the *Cassis de Dijon* 'rule of reason' in the freedom of goods context.<sup>11</sup> In a subsequent case *Webb*, the Court elaborated further on the requirement of 'objective justification of restrictive rules'.<sup>12</sup> In *Säger*, the Court ruled that Article 59 (now 49) EC Treaty required the:

abolition of any restriction, even if it applies without distinction to national provider of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.<sup>13</sup>

Doctrinally, it has been heavily argued and discussed after the decision in the case *Säger* whether the same principles also apply to the freedom of establishment.<sup>14</sup> This question was finally decided by the ECJ in the affirmative in two cases concerning lawyers in the 1990s.<sup>15</sup> Chronologically, however, the next important decision for professionals was *Thieffry* decided in 1977.<sup>16</sup> This case concerned the refusal by the Paris Bar to recognise, for admission to the profession of advocate, a Belgium law degree which had previously been recognised for academic purposes by the University of Paris as a diploma equivalent to a French law degree. The Court held that in these circumstances the Paris Bar was obliged to consider the Belgium degree as equivalent to the French and accept admission to the Bar.

Although we agree with the final result of the decision of the Court of Justice, the reasoning of the Court is quite surprising, in fact it is even misleading, as it seems that the Court did not consider any difference between the recognition of a diploma for professional purposes and the recognition of a diploma for academic means. This distinction is, or at least was at the moment of the Court's ruling, of great relevance as the recognition of diplomas purely for

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10 Case 33/74, *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metallnijverheid* [1974] ECR 1299.

11 Case 120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

12 Case 279/80, *Criminal Proceedings against Webb* [1981] ECR 3305; see also the Cases 110-111/78, *Ministere Public and 'Chambre syndicale des agents artistiques et impresarii de Begique ASBL v. Willy van Wesmael and Others* [1979] ECR 35.

13 Case C-76/90, *Säger v. Dennemeyer Co. Ltd.*, [1991] ECR I-4421, see also Case 275/92, *Her Majesty's Customs and Excise v. Schindler* [1994] ECR I-1039.

14 H. Schneider, *Die Anerkennung von Diplomen in der Europäischen Gemeinschaft*, (Antwerp, Intersentia, 1995), 43.

15 Case C-19/92, *Dieter Kraus v. Land Baden-Württemberg* [1993] ECR I-1663 and Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-1465. See also S. O'Leary, 'The Free Movement of Persons and Services', in P. Craig & G. de Burca (eds.), *The Evolution of EU Law*, (Oxford, Oxford University Press, 1999), 377 (401), L. Daniele, 'Non-Discriminatory restrictions in the Free Movement of Persons', *ELR*, 1997, 191-200.

16 Case 71/76, *Thieffry v. Conseil de l'ordre des avocats à la Cour de Paris* [1977] ECR 765. See for a similar case regarding an architect: Case 11/77, *Richard Hugh Patrick v. Minister für kulturelle Angelegenheiten* [1977] ECR 1199.

academic purposes falls in principle outside the European Community competences. The difference between professional and academic recognition can be explained as follows: If a Dutch university, for example, recognises a foreign law degree for the sole purpose that the holder of the diploma can start a postgraduate Masters programme; this form of recognition has in principle no direct consequences for the admission of the candidate to the Dutch Bar. In such a case we speak of academic recognition. Regulating this form of recognition belongs until now to the competences of the Member States. If, however, the migrating legal professional wants to get access to the Bar of another Member State the recognition of his legal qualifications is considered to be a so-called professional recognition. Only with regard to the last form of professional recognition the European Community has legislative competence. In how far, however, this distinction between academic and professional recognition is still valid or will diminish quite soon with an increasing student and professional mobility, one has to see.<sup>17</sup> The Thieffry case has as such lost practical relevance in so far that the admission of a lawyer like Thieffry would today be considered under the relevant secondary legislation.<sup>18</sup> The case might, however, still be important as first landmark decision on the way to academic recognition of qualifications in a European Community context.

The next important case concerned a German lawyer named Klopp who had not only the necessary German qualifications but also fulfilled all requirements for admission to the Paris Bar.<sup>19</sup> In fact he was dually qualified in Germany and in France. Nevertheless, his admission to the French Bar was refused on the ground that he wanted to retain professional residence in Germany as well as establish himself in Paris. This double residency was considered contrary to the French rule of *unicité de cabinet*, requiring an advocate to have only one professional residence. The Court held that to maintain this rule in a transfrontier context would prevent lawyers from other Member States from exercising their right of establishment by integrating in the legal profession of another Member State. Having and retaining a professional residence in Germany could not be a reason for refusing the applicant's admission to the Paris Bar. Furthermore, the Court declared that the existence of a second professional residence in

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17 See below the discussion concerning the cases *Kraus* and *Morgenbesser*. Case C-19/92, *Dieter Kraus v. Land Baden-Württemberg*, [1993] ECR I-1663; Case C-313/01, *Christine Morgenbesser v. Consiglio dell'Ordine degli avvocati di Genova*, 13 November 2003. See also the case *Lubina v. Land Nordrhein Westfalen* before the national German Administrative court in Düsseldorf.

18 See the Diplomas Directive 89/48/EEC and the Establishment Directive 98/5/EC.

19 Case 107/83, *Ordre des Avocats au Barreau de Paris v. Klopp* [1984] ECR 2971. Note also Case 96/85, *Commission of the European Communities v. French Republic* [1986] ECR 1475, Case C-106/91, *Ramrath* [1992] ECR I-3351, Case C-351/90, *Commission of the European Communities v. Grand Duchy of Luxembourg* [1992] ECR I-3945 and *Case C-145/99, Commission v. Italy* [2002] ECR I-2235. See further L. Gormley, 'Freedom to practice at the Bar of more than one Member State', ELR 1984, 439-441.

another Member State did not present any obstacle to the application of rules of professional conduct in the host Member State.

This decision of the Court was not only important for lawyers with dual qualification who wanted to establish themselves in two Member States. Indirectly, it also had influence on the internal application of the one office requirement, *unicité de cabinet*, which not only existed in France but also in other Member States. After the Court's ruling it seemed to be quite anomalous to prohibit a national lawyer from having two offices on national territory while he might be allowed to have two offices in two different Member States provided that he fulfilled the professional qualification requirements. Such a form of reverse discrimination seemed not to be acceptable anymore. Most Member States have therefore abolished this requirement.

Until the end of the 1980s, in the majority of cases with regard to the freedom of establishment, the national restrictions in question were in some way classifiable as directly or indirectly discriminatory.<sup>20</sup> The Court was either not faced with a case of a purely non-discriminatory nature or at least tried to avoid a clear and definite answer.<sup>21</sup> National requirements concerning qualifications and diplomas may, however, have the effect of hindering nationals of other Member States in the exercise of their rights of establishment or to provide services guaranteed to them by Articles 43 and 49 ECT (formally Articles 52 and 59 ECT) without being directly or indirectly discriminatory on grounds of nationality or residence.

In *Vlassopoulou v. Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg*,<sup>22</sup> the Court was confronted with this problem. Irene Vlassopoulou was a Greek lawyer registered at the Athens Bar. In addition to her Greek diplomas she had a German doctorate in law.<sup>23</sup> Furthermore, she had been working at a German law firm and received permission to deal with foreign legal affairs concerning Greek law and Community law in accordance with the German Rechtsberatergesetz in 1984. She practised German law under

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20 Case 2/74, *Reyners v. Belgium* [1974] ECR 631; Case 71/76, *Thieffry v. Conseil de l'Ordre des avocats a la cour de Paris* [1977] ECR 765; Case 11/77, *Patrick v. Ministre des affaires culturelles* [1977] ECR 1199; Case 107/83, *Ordre des avocats au Barreau de Paris v. Klopp* [1984] ECR 1971.

21 Note for example Case 182/83, *Robert Fearon v. Irish Land Commission* [1984] ECR 3677 and Case 221/85, *Commission v. Belgium (Clinical Biology Services)* [1987] ECR 719.

22 Case C-340/89, *Vlassopoulou v. Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg* [1991] ECR I-2357. For a pre-*Vlassopoulou* case, in which it was decided that a decision refusing to recognise the equivalence of a diploma must be able to be subject of judicial proceedings, see Case 222/86, *Union nationale des entraîneurs et cadres techniques professionnels du football v. Georges Heylens and Others* [1987] ECR 4097. For a post-*Vlassopoulou* case see Case C-104/91, *Collegio Official de Agentes de la Propiedad Inmobiliaria v. Jose Luis Aguirre Borrell and Others* [1992] ECR I-3003. With regard to the obligation incumbent on Member States to take into account the length of employment in the civil service of another Member State note Case C-419/92, *Scholz v. Opera Universitaria di Cagliari and Cinzia Porcedda* [1994] ECR I-505 and Case C-15/96, *Kalliope Schöning-Kougebetopoulou v. Freie und Hansestadt Hamburg* [1998] ECR I-47.

23 In the *Vlassopoulou* case the ECJ did not consider the relevance of the academic recognition of the Greek academic qualification by a German university accepting Irene Vlassopoulou's doctorate thesis.

the responsibility of one of her German colleagues. In May 1988, Mrs. Vlassopoulou applied to the Ministry for admission to the German Bar as *Rechtsanwältin*. Her application was refused on the ground that she did not have the necessary German qualifications, laid down in the *Bundesrechtsanwaltsordnung*. Basically, those qualifications were acquired by studying law at a German university, passing the First State examination, completing a preparatory training period (called *Referendarzeit*) and then passing the Second State examination. The German Ministry clearly stated that Article 52 (now 43) of the EC Treaty did not give the right to exercise her profession in Germany with a Greek qualification. Furthermore, when Mrs. Vlassopoulou made her application in May 1988, no directive on the mutual recognition of diplomas giving access to the profession of lawyers had yet been adopted. This directive only came into existence in December of the same year.<sup>24</sup> The Court, however, was in the moment of its decision fully aware of the existence and the content of Directive 89/48/EEC.

The German and Italian government therefore claimed before the European Court of Justice that, in absence of Community rules for coordinating conditions of access to the profession of lawyers and mutual recognition of legal diplomas, a Member State was still entitled to make admission to the Bar dependent on the fulfilment of non-discriminatory conditions laid down by national law. The Court, however, did not follow this line. In the *Vlassopoulou* judgment the Court ruled that Member States were required to consider any education and training received by the migrant. The Member State must, in case of equivalence, recognize the qualification obtained in another Member State and take into account relevant practical professional experience of the migrating professional. The *Vlassopoulou* decision is clearly influenced by the so-called horizontal approach to the recognition of diplomas, an approach favoured by the Commission since the mid 1980s and finally codified in Directive 89/48/EEC on the mutual recognition of diplomas.<sup>25</sup>

The final and very important steps towards a general prohibition of any restriction, whether of discriminatory or non-discriminatory nature, were taken in the *Kraus* and *Gebhard* decisions.<sup>26</sup> In the *Kraus* case, a restriction based on the compulsory authorization of the use of a foreign academic title, namely the LL.M. degree of the University of Edinburgh, was to be decided upon. Kraus was a German lawyer who had followed a postgraduate programme in Edinburgh and received there the title Master of Laws (LL.M.). Returning to Germany he informed the competent authorities there about the acquired title and its nature but refused to apply for the then still compulsory authorization to use it. The national authority decided that

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24 The Council adopted the Directive on a General System for the Recognition of Higher Education Diplomas on 21 December 1988, Council Directive 89/48/EEC O.J. L19, 24.1.1989, p. 16.

25 Council Directive 89/48/EEC O.J. L 19, 24.1. 89, p. 16.

26 Case C-19/92, *Kraus v. Land Baden-Württemberg* [1993] ECR I-1663 and Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.

the individual authorization was still absolutely necessary for the lawful use of the foreign title in Germany. Penalties could otherwise be due. Kraus appealed against this decision and a preliminary ruling was requested by the national administrative Court.

In its judgment of 13 March 1993,<sup>27</sup> the Court held that national measures liable to hinder or make less attractive the exercise of fundamental freedoms could only be justified if the Member State is able to demonstrate an objective justification and comply with the principle of proportionality. The Court accepted principally in this case that the protection of the public for the abuse of academic titles could be considered as a legitimate interest justifying certain restrictions.

The Court, however, made it very clear that the authorization procedure has to fulfil a proportionality test. This means the authorization procedure must in the first place be intended solely to verify whether the postgraduate academic title obtained in another Member State was properly awarded, following a course of studies which was actually completed, in an establishment of higher education which was competent to award it. Next, the authorization procedure must be easily accessible to interested parties, and should not, in particular, be dependent on the payment of excessive administration fees.<sup>28</sup>

Although the importance of the facts of this case, the use of a foreign academic title with or without national authorization,<sup>29</sup> can to some extent be questioned, there is no doubt of the fundamental character of this ruling for the further development of Community law in general.<sup>30</sup> Furthermore, it has to be stressed that a postgraduate title is compulsory in some Member States for entering the civil service on a certain level or to be accepted to a doctorate programme.<sup>31</sup> In such a situation the hindering effect of a compulsory authorization of a foreign academic title and a burdensome procedure becomes obvious. Furthermore, the recognition of academic titles will certainly gain practical relevance when, in the light of the Bologna process,<sup>32</sup> an increasing number of students shall receive a Masters degree from a foreign university. In this regard, the strict distinction between academic and professional recognition shall more and more be questionable.

The case *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*<sup>33</sup> raised very important questions about the difference between cross-border legal service and establishment. Reinhard Gebhard was a German national qualified only as German

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27 Case C-19/92, *Kraus v. Land Baden-Württemberg* [1993] ECR I-1663, para. 32.

28 Case C-19/92, *Kraus v. Land Baden-Württemberg* [1993] ECR I-1663, para. 38 and 39.

29 For example on a business card.

30 See also E. Johnson and D. O'Keefe, 'From discrimination to obstacles of free movement: recent developments concerning the free movement of workers', *CMLRev.* 1994, 1313.

31 This is e.g. the case in Greece.

32 See chapter 5 below.

33 Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.

*Rechtsanwalt*. He had been admitted to the German bar and had maintained his registration there. In fact, however, he has been resident in Italy and had practised law there for several years. After having practised for more than ten years in association with an Italian law firm, he started his own business. At that moment a complaint was made by some Italian professionals to the Milan Bar Council, including those with whom he had previously worked. In this complaint it was stated that he had used the title *avvocato* on his letter-heading, had appeared under the title *avvocato* before the local courts and had practised from a law firm established under his own name. The Milan Bar Council imposed on Gebhard the sanction of suspension from pursuing his professional activity for six months. Gebhard appealed against this decision to the *Consiglio Nazionale Forense* and argued, in particular, that the Lawyers' Service Directive 77/249/EEC of 22 March 1977<sup>34</sup> entitled him to pursue his professional activities from his own chambers in Milan.

The *Consiglio Nazionale Forense* stayed the proceedings and referred two questions on the interpretation of Directive 77/249 to the ECJ for a preliminary ruling. Unfortunately, the national court did not ask any questions regarding the applicability and possible direct effect of certain provisions of the First General System Directive 89/48/EEC which Italy had failed to implement in time,<sup>35</sup> although Gebhard had already applied to the Italian authorities for the recognition of his diploma under that directive.<sup>36</sup>

The Court finally held that

the concept of establishment within the meaning of the Treaty is a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit there from, so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons.<sup>37</sup>

In contrast, where the provider of services moves to another Member State, the Treaty provisions on services, in particular the third paragraph of Article 50, envisage that he is to pursue his activity on a temporary basis.<sup>38</sup> The temporary nature of the activities in question has to be determined in the light, not only of the duration of the provision of the service, but also of its regularity, periodicity or continuity. The Court further elaborated that the fact that

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34 The Lawyers' Service Directive (1977) O.J. L78, 17. For an early case concerning this Directive see Case 292/86, *Claude Gullung v. Conseil de l'ordre des avocats du barreau de Colmar et de Saverne* [1988] ECR 111.

35 The Directive had to be implemented until the 4 January 1991. For a case establishing the failure of France to implement in time this Directive, and Directive 92/51/EEC, see Judgment of the Court of 20 January 2005 in Case C-198/04, *Commission of the European Communities v. French Republic* [2005] ECR I-nyp. See also the Case *Beutenmüller*.

36 The issue of the possible direct effect of Directive 89/48/EEC was under scrutiny in case C-141/04 *Michail Peros v. Techniko Epimelitirio Ellados* [2005] ECR I-7163.

37 Case C-55/94, *Gebhard*, para. 25.

38 Case C-55/94, *Gebhard*, para. 26.

the provision of service is temporary does not mean that the provider of services within the meaning of the Treaty may not equip himself with some form of infrastructure in the host Member State (including an office, chambers or consulting rooms) in so far as such infrastructure is necessary for the purposes of performing the services in question.<sup>39</sup>

The Court came to the conclusion that Gebhard who, as a national of a Member State, pursued a professional activity on a stable and continuous basis in another Member State did not fall under the provisions relating to the freedom to provide of services but under the chapter relating to the right of establishment.<sup>40</sup> The Court held, however, that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner, they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.<sup>41</sup>

The Court definitely accepted with the Gebhard decision that in an internal market, non-discriminatory national restrictions fall under the scope of the establishment provisions and can only be justified by overriding requirements in the general interest as long as these national provisions fulfil the proportionality test. With this judgment the development towards the prohibition of non-discriminatory restrictions in case of freedom of establishment came to a final conclusion. The Gebhard formula has been used since consistently in various contexts.<sup>42</sup>

A more recent case concerning the recognition of diplomas which the Court decided on the basis of the Gebhard formula was the case of *Neri*.<sup>43</sup> The case dealt with Ms. Neri who had registered for a four-year University course leading to a diploma in international political sciences at Nottingham Trent University (NTU). NTU is a registered and recognised University in the United Kingdom. The actual courses are delegated to the European School of Economics (ESE), a British private company, which has seats in many Member States. Diplomas were conferred by the NTU. In order to avoid high costs associated with staying in the United Kingdom, Ms. Neri decided to follow the courses at the ESE in Genova. Only after her registration and payment of the fee to the ESE, the Italian authorities informed Ms. Neri that the ESE was not allowed to organise University courses in Italy. Diplomas conferred by the ESE, although recognised in the United Kingdom, would not be accepted if they were

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39 Case C-55/94, *Gebhard*, para. 27.

40 Case C-55/94, *Gebhard*, para. 28.

41 Case C-55/94, *Gebhard*, para. 37.

42 In the Case C-212/97, *Centros v. Erhvervs-og Selskabsstyrelsen* [1999] ECR I-1459 the Court had employed that formula for the first time in the context of the establishment of companies.

43 Case C-153/02, *Valentina Neri v. European School of Economics (ESE Insight World Education System Ltd.)*, [2003] ECR I-13555.

granted after a period of study in Italy. In other words, Ms. Neri would not encounter any problems if she followed the courses in the United Kingdom, whereas in case of studies in Italy neither the courses nor her diploma would be recognised.

After being informed of the implications of the Italian rules, Ms. Neri requested her money back from ESE. In the ensuing court case the *Giudice di Pace di Genova* referred preliminary questions to the European Court of Justice, inquiring after the possible violation of the rights derived from the free movement of persons, the freedom of establishment and the free movement of services, the Diploma Directive 89/48/EEC and Decision 63/266, which lays down principles with regard to vocational training.<sup>44</sup>

Although the *Giudice* posed three very detailed questions, the Court decided to answer only the first one. The Court of Justice ruled that the problem as it was put before the national court had to be examined from the ESE's perspective. Consequently, the case had to be dealt with under the freedom of establishment provisions. After reiterating that according to article 43 all obstacles to the freedom of establishment should be removed, the Court ruled that as Italian nationals were not able to have their foreign credentials recognised when conferred after a study period in Italy; this constitutes a substantial hindrance to ESE's activities in Italy. Italy argued that its practice was objectively justified by the need to assure high quality education. In its view it would be impossible to exercise quality control by allowing the aforementioned scheme. Although the Court did not explicitly accept quality control as defence in principle, it declared this defence not applicable in this case considering the hindrance was not proportionate. The proportionality test failed for several reasons: Firstly, Italy did recognise the same courses when followed abroad, and secondly, no form of diploma recognition was available to those Italians following courses at the ESE in Italy. These facts led the Court to the conclusion that the hindrance could not be objectively justified and that the Italian practice was therefore in violation of article 43 EC. Further questions of the national court with regard to Directive 89/48/EEC and Decision 63/221 were left unanswered.

### 3. LANGUAGE REQUIREMENTS

Before elaborating on the European secondary legislation regarding the recognition of professional qualification another issue very often closely linked to migrating professionals and their recognition of diplomas shall be addressed, namely linguistic competence in the host Member State. When migrating from one Member State to another, or from outside the European Union to a Member State, one of the difficult obstacles to overcome is often not

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44 Decision 63/266 states that the Community policy with regard to vocational training should be aimed towards avoidance of any adversary disruption of general education and vocational training.

only the recognition of a certain qualification but the problem of linguistic competence. Employers, and Member States for that matter, prefer migrants to have at least some basic knowledge of the language(s) spoken in that specific Member State. Language requirements might, however, be regarded as indirectly discriminatory restrictions to the free movement of persons and consequently require objective justification, as was decided in the *Gebhard* case.<sup>45</sup> Relevant in this context is Article 3(1) of Regulation 1612/68/EEC<sup>46</sup>. It embodies the principle of equal treatment and touches as well on the problematic issue of linguistic competence. Art. 3 (1) reads as follows:

(1) Under the Regulation, provisions laid down by law regulation or administrative action or administrative practice of a Member State shall not apply:

-where they limit application for or offers of employment, or the right of foreign nationals to take up and pursue employment or subject these to conditions not applicable in respect to their own nationals; or

- where, though applicable irrespective of nationality, their exclusive or principal aim or effect is to keep nationals of other Member States away from the employment offered.

This provision shall not apply to conditions relating to linguistic knowledge required by reason of the nature of the post to be filled.

The linguistic knowledge proviso in Article 3 of Regulation 1612/68/EEC was considered by the Court of Justice in the *Groener* case.<sup>47</sup> Anita Groener was a Dutch national who was working part-time as a teacher in Dublin. Ms. Groener sought employment as a full time teacher. A full-time appointment was denied because she failed an Irish (Gaelic) language test that was required for the post. She asked for an exemption from the requirement to hold a certificate of proficiency in the Irish language. This, however, was denied. Groener challenged the application of the language requirement in Ireland. Ms. Groener argued that the test was contrary to article 39 and article 3(1) Regulation 1612/68/EEC since all teaching lessons were conducted in English and the requirement was therefore not necessary to fulfil the post. The requirement was imposed as part of national policy to maintain and promote the use of Irish as a means of expressing national identity and culture. According to Article 8 of the Irish

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45 Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-1465.

46 The new Directive 2004/38/EC<sup>46</sup> on European Union Citizens' Free Movement Rights does not bring about any changes with regard to the content of article 3 of Regulation 1612/68/EEC. Therefore, the implementation of this Directive does not bring any changes with regard to language requirements upon access to employment.

47 Case 379/87, *Anita Groener v. Minister for Education and the City of Dublin Vocational Educational Committee*, [1989] ECR 3967.

Constitution Irish is the national language and the first official language, and English is recognized as the second official language.

The ECJ stated that it was not contrary to the Treaty to employ a policy of protecting a minority language. The Court responded explicitly:

(20) The importance of education for the implementation of such a policy must be recognized. Teachers have an essential role to play, not only through the teaching which they provide but also by their participation in the daily life of the school and the privileged relationship which they have with their pupils. In those circumstances, it is not unreasonable to require them to have some knowledge of the first national language.

(21) it follows that the requirement imposed on teachers to have adequate knowledge of such a language must, provided the knowledge is not disproportionate in relation to the objective pursued, be regarded as a condition corresponding to the knowledge required by reason of the nature of the post to be filled within the meaning of the last subparagraph of Art. 3 (1) of Regulation No 1612/68/EEC.

The implementation of such a policy should, according to the Court, not lead to an encroachment upon the free movement of workers. The language requirement should therefore not be discriminatory and it should be proportional in relation to the aim pursued. In effect the ECJ elaborated a proportionality test to the exemption of article 3 Regulation 1612/68/EEC, long before it introduced a similar test for any restriction on the free movement of persons in the *Gebhard*-case. The Court added that Ms. Groener could not be required to gain her linguistic abilities in Ireland, a rule that was confirmed in the *Angonese*-case.<sup>48</sup>

The Court dealt with a restriction on the basis of language requirements again in the *Haim* case,<sup>49</sup> this time in the scope of the freedom of establishment. Mr. Haim, an Italian national who had a diploma in dentistry from a Turkish University wanted to practice in Germany as a dentist under a social security scheme, after he worked as an independent dentist in Germany and as a dentist under a social security scheme in Belgium. The rules for admittance to such a scheme in Germany raised questions with regard to language requirements. This case followed an earlier case of Haim regarding the recognition of third country diplomas.<sup>50</sup> Mr. Haim argued that it could not be distilled from the rules on admittance that the social security scheme could demand that he had the linguistic knowledge they wanted him to have. The Court ruled that a Member State may impose a language requirement in this case, as long as it fulfils the test laid down in the *Gebhard*-case. The Court explicitly stated:

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48 Case C-281/98, *Roman Angonese v. Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139.

49 Case C-424/97, *Salomone Haim v. Kassenzahnärztliche Vereinigung Nordrhein* [2000] ECR I-5123.

50 See Case C-319/92, *Haim v. Kassenzahnärztliche Vereinigung Nordrhein* [1994] ECR I-2357.

(59)...the reliability of a dental practitioner's communication with his patient and with the administrative authorities and professional bodies constitutes an overriding reason of general interest such as to justify making the appointment as a dental practitioner under a social security scheme subject to language requirements. Dialogue with patients, compliance with rules of professional conduct and law specific to dentistry in the Member State of establishment and performance of administrative tasks require appropriate knowledge of the language of that State.

(60) However it is important that language requirements designed to ensure that the dental practitioner will be able to communicate effectively with his patients, whose mother tongue is that of the Member State concerned, and with the administrative authorities and the professional bodies of that State do not go beyond what is necessary to attain that objective. In this respect, it is in the interest of patients whose mother tongue is not the national language that there exist certain numbers of dental practitioners who are capable of communicating with such persons in their own language.

Language requirements can therefore be justified under the case law of the Court even if they are not rooted in secondary legislation, as was the case regarding workers according to article 3 (1) of Regulation 1612/68/EEC.

It is, however, important to notice that the Court considered Mr. Haim's knowledge of the Turkish language which enabled him to communicate especially with patients from the Turkish community as a relevant fact to take into account by applying the proportionality test regarding linguistic competence. This part of the ruling might gain even more importance when the recognition of diploma provisions as well as the establishment provisions in general have to be applied to long-term residents according to Directive 2003/109/EC.<sup>51</sup> Article 11 (3) of Directive 2003/109/EC<sup>52</sup> regarding third country nationals who are long-term residents of Member States, regulates that restrictions allowed for nationals upon entering employment may also be applied to third country nationals. That means that Article 3 of Regulation 1612/68/EEC and the case law based thereon will also be applied to long-term residents. Contrary to the existing secondary legislation concerning the recognition of diplomas the new Directive 2005/36/EC on the recognition of professional qualifications<sup>53</sup> includes a specific provision concerning language requirements Article 53 that allows for the competent bodies to test the language capacities of a candidate who seeks entrance in a regulated profession in another Member State.<sup>54</sup> The draft version of the Directive<sup>55</sup> included also a specific reference to proportionality and stated that systematic examination of that knowledge will be regarded

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51 Directive 2003/109 O.J. L16/44.

52 Directive 2003/109 O.J. L16/44.

53 COM 2002/119 O.J. C118E/183.

54 See below

55 COM 2004/317/final.

as disproportionate. This change has, however, not been accepted in the final version of Article 53.

In conclusion, language requirements can occur in three specific situations. First with regard to access to employment, either relying directly or indirectly on Article 3 (1) of Regulation 1612/68/EEC, secondly as a general restriction to the free movement of persons, not rooted specifically in secondary legislation, and, thirdly when adopted, as possible language test laid down in the new Directive on the recognition of professional qualifications. In all three occurrences the legal test for justification seems to be similar, as the language requirement must be proportional to the aim pursued.

#### 4. SECONDARY COMMUNITY LEGISLATION AND THE RECOGNITION OF DIPLOMAS

##### *4.1. The Transitional and the Vertical Approach*

Not only the European Court of Justice but also the European legislator has contributed to the mutual recognition of qualifications. Through the years the Community has followed different strategies with regard to the recognition of diplomas.<sup>56</sup> Back in the 1960s the European Community chose to follow a so-called transitional approach to the recognition of professional qualifications. Initially, several such directives – relating in particular, to occupations and sectors in commerce, industry and small craft industries – were adopted in order to facilitate access to specific occupations by guaranteeing, subject to certain conditions, recognition in the host Member State of work experience gained in the home Member State.<sup>57</sup> This type of directive has been called ‘*transitional measures*’ because of pending harmonisation of the mutual recognition of diplomas. Although their status was originally intended to be of transitional nature they remained for quite a period of time.<sup>58</sup> Only in the late nineties a considerable consolidation of these thirty-five transitional directives was achieved through the so-called Third General System Directive 1999/42/EC.<sup>59</sup> No directives, however, had been

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56 See H. Schneider, *supra* note 14.

57 For case law concerning Directive 64/427/EEC (now Directive 1999/42/CE) see Case 115/78, *J. Knoors v. Secretary of State for Economic Affairs* [1979] ECR 399, Case 130/88, *C.C. van de Bijl v. Staatssecretaris van Economische Zaken* [1989] ECR 3039 and Case C-58/98, *Jozef Corsten* [2000] ECR I-7919. For case law concerning Directive 86/653/EEC (now Directive 1999/42/EC) see Case C-104/95, *Georgios Kontogeorgas v. Kartonpak AE* [1996] ECR I-6643. For case law concerning Directive 67/43/EEC (now Directive 1999/42/EC) see Joined Cases C-330/90 and C-331/90, *Criminal proceedings against Angel Lopez Brea and M. Carlos Hidalgo Palacios* [1992] ECR I-323, Case C-147/91, *Criminal proceedings against Michele Ferrer Laderer* [1992] ECR I-4097.

58 P.M. Storm and R.H. Hooghoudt, ‘Doorwerking in Nederland van het vrije verkeer van personen en diensten’, *RM Themis*, 1980, p. 473.

59 European Parliament and Council Directive establishing a mechanism for the recognition of qualifications in respect of professional activities covered by the Directives on liberalization and transitional measures and supplementing the general systems for recognition of qualifications, COM(96) 22 final of 8 February 1996. [1999] O.J. L 201/77.

adopted until the mid-seventies dealing with the traditional regulated ‘liberal professions’, e.g. lawyers, accountants, engineers, doctors or architects.

In the 1970s, the Community’s approach to the problem of recognition of diplomas for the traditional regulated professions became vertical: that is to say, recognition was provided individually, profession by profession, with a minimum harmonization or co-ordination of the education and training required for each profession in the Member States. The principal procedure was to pass two directives simultaneously, one based on Article 57 (1) (now 47 (1)) of the EC Treaty regulating the recognition of the diplomas and a second directive based on Article 57 (2) (now 47 (2)) concerning the co-ordination of education. The first sectoral directives dealing with a traditional profession concerned doctors (1975).<sup>60</sup> These directives set the pattern for subsequent directives dealing with other ‘medical, allied and pharmaceutical professions’: nurses (1977),<sup>61</sup> dentists (1978),<sup>62</sup> veterinary surgeons (1978),<sup>63</sup> midwives (1980)<sup>64</sup> and pharmacists (1985).<sup>65</sup>

For each profession there are two directives: the Mutual Recognition Directive and the Co-ordination Directive. The Mutual Recognition Directive specifies the general and specialist

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60 For case law on the profession of doctor and the Doctors Directive see Case 246/80, *C. Broekmeulen v. Huisarts Registratie Commissie* [1981] ECR 2311, Case 96/85, *Commission of the European Communities v. French Republic* [1986] ECR 1475, Case C-61/89, *Criminal proceedings against Marc Gaston Bouchoucha* [1990] ECR I-3551, Case C-351/90, *Commission of the European Communities v. Grand Duchy of Luxembourg* [1992] ECR I-3945, Case C-227/93, *Commission of the European Communities v. Kingdom of Spain* [1994] ECR I-5515, Joined Cases C-69/96 to 79/96, *Garofalo* [1997] ECR I-5603, Case C-108/96, *Criminal Proceedings against Mac Quen and Others* [2001] ECR I-837, Case C-93/97, *Fédération Belge des Chambres Syndicales de Médecins ASBL v. Flemish Government, Government of the French Community, Council of Minister* [1998] ECR I-4837, Case C-131/97, *Annalisa Carbonari and Others v. Università degli studi di Bologna, Ministero della Sanità, Ministero dell'Università e della Ricerca Scientifica and Ministero del Tesoro* [1999] ECR I-1103, Case C-371/97, *Cinzia Gozza and Others v. Università degli Studi di Padova and Others* [2000] ECR I-7881, Case C-238/98, *Hugo Fernando Hocsmán v. Ministre de l'Emploi et de la Solidarité* [2000] ECR I-6623, Case C-16/99, *Ministre de la Santé v. Jeff Erpelding* [2000] ECR I-6821, Case C-294/00, *Deutsche Paracelsus Schulen für Naturheilverfahren GmbH v. Kurt Gräbner* [2002] ECR I-6515, Case C-110/01, *Malika Tennah-Durez v. Conseil national de l'ordre des médecins* [2003] ECR I- 6239, Case C-25/02, *Katharina Rinke v. Ärztekammer Hamburg* [2003] ECR I- 8349 and Judgment of the Court of 18 November 2004 in Joined Cases C-10/02 and C-11/02, *Anna Fascicolo and Others, Enzo De Benedictis and Others v. Regione Puglia and Grazia Bernardi and Others, Lucia Vaira and Others v. Azienda Unità Sanitaria Locale BA/4 and Others* [2004] ECR I-nyp.

61 Directive 77/452/EEC, [1977] O.J., L176, p. 1.

62 Directive 78/686/EEC, [1978] O.J. L233, p. 1. For case law on the dental profession and the Dentist Directive see Case 96/85, *Commission of the European Communities v. French Republic* [1986] ECR 1475, Case C-319/92, *Salomone Haim v. Kassenzahnärztliche Vereinigung Nordrhein* [1994] ECR I-425, Case C-154/93, *Abdullah Tawil-Albertini v. Ministre des Affaires Sociales* [1994] ECR I-451, Case C-40/93, *Commission of the European Communities v. Italian Republic* [1995] ECR I-1319, Case C-424/97, *Salomone Haim v. Kassenzahnärztliche Vereinigung Nordrhein* [2000] ECR I-5123, Case C-162/99, *Commission of the European Communities v. Italian Republic* [2001] ECR I-541, Case C-202/99, *Commission of the European Communities v. Italian Republic* [2001] ECR I-9319.

63 Directive 78/1026/EEC, [1978] O.J. L362, p. 1. For case law on the veterinarian profession and the Veterinary Surgeons Directive see Case 136/78, *Criminal proceedings against Vincent Auer* [1979] ECR 437, Case 271/82, *Vincent Rodolphe Auer v. Ministère public* [1983] ECR 2727, Case 5/83, *Criminal proceedings against H.G. Rienks* [1983] ECR 4233.

64 Directive 80/154/EEC, [1980] O.J. L33, p. 1.

65 Directive 85/433/EEC, [1985] O.J. L253, 37. See Case C-307/94, *Commission of the European Communities v. Italian Republic* [1996] ECR I-1011.

diplomas awarded in each Member State, which must be recognised by the other Member States. It contains special provisions for those who have already been licensed to practise without possessing one of the specified diplomas. Furthermore, the Directive deals with matters such as the use of academic and professional titles, certificates of good character, criminal and disciplinary offences, certificates of personal health and the wording of professional oaths. In addition, the Directive includes special provisions with regard to trans-frontier medical services. The Co-ordination Directive lays down the minimum education and training required for the award of a mutually recognised diploma. The original Doctors' Directives were accompanied by Council Decisions setting up an Advisory Committee on Medical Training and a Committee of Senior Officials on Public Health. The advantage of this vertical recognition system is that a professional who has acquired a certain diploma listed in one of the directives can establish himself freely through the whole Community without any further educational requirements. Both directives guarantee together the automatic recognition of such a diploma. Apart from directives for the medical professions sectoral directives were adopted for lawyers (1977)<sup>66</sup> and architects (1985).<sup>67</sup> In March 2005, the Commission has decided to send to Portugal a reasoned opinion over its recognition procedure concerning architecture qualifications acquired in another Member State. The issue is precisely the automatically and unconditionally recognition of these diplomas in so far as Portugal requires an entrance examination before admitting architects with a foreign qualification to the Portuguese Institute of Architects. This national implementation of the Architects Directive 85/384/EEC might lead again to an infringement decision against a Member State.

In contrast to the other directives for the medical professions, neither the Architects Directive nor the Lawyers' Service Directive has coordinated the educational system by a second directive. The Lawyers' Service Directive neither deals with harmonization of the legal educational systems, nor with permanent establishment in the host Member State but only with transfrontier 'legal services'. The Directive was as such designed as a very limited measure to cover only the temporary provision of services. This includes general advisory work in the host Member State as well as the right for visiting lawyers to represent clients before the courts. At first sight, this right to represent clients before the courts of the host

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66 The Lawyers' Service Directive, [1977] O.J. L78.

67 Directive 85/384/EEC, [1985] O.J. L223, p. 15. For case law on architects and the Architect Directive see Case 11/77, *Richard Hugh Patrick vs. Minister für kulturelle Angelegenheiten* [1977] ECR 1199, Case 38/87, *Commission of the European Communities v. Hellenic Republic* [1988] ECR 4415, Case C-310/90, *Nationale Raad van de Orde van Architecten v. Ulrich Egle* [1992] ECR I-177, Case C-447/93, *Nicolas Dreessen v. Conseil National de l'Ordre des Architectes* [1994] ECR I-4087, Case C-421/98, *Commission of the European Communities v. Kingdom of Spain* [2000] ECR I-10375, Case C-31/00, *Conseil national de l'ordre des architectes v. Nicolas Dreessen* [2002] ECR I-663, Case C-298/99, *Commission of the European Communities v. Italian Republic* [2002] ECR I-3129 and Judgment of the Court of 9 September 2004 in Case C-417/02, *Commission of the European Communities v. Hellenic Republic* [2004] ECR I-nyp.

Member State even seems to be considerably limited by Article 5 of the Lawyers' Service Directive. This provision requires the service-providing lawyer to act in conjunction with a host State lawyer while representing his clients before courts. The Court of Justice, however, has ruled in the Commission's case against Germany that this requirement does not apply in all cases where the assistance of a lawyer is not a mandatory requirement under domestic legislation and where, consequently, a party would be entitled to defend his own interest or even to entrust that task to a person who is not a lawyer.<sup>68</sup> The Court confirmed this interpretation of Article 5 of the Lawyers' Service Directive again in a case against France.<sup>69</sup>

#### *4.2. The horizontal approach: The Three General System Directives 89/48/EEC, 92/51/EEC and 99/42/EC*

##### *4.2.1. Introduction*

Experience has shown that the process of drafting, agreeing upon and implementing sectoral directives is long and laborious. In some cases, e.g. the directives for architects and pharmacists, it took more than eighteen years to pass the directives in the Council. In some cases, regarding for example, engineers, the Council could not come to an agreement at all. Furthermore, it has been proven that the already existing sectoral directives could only with great difficulties be adapted to new developments. The sectoral harmonization method was, therefore, abandoned by the Commission in the mid 1980s. Instead, a new strategy of mutual recognition without prior harmonization for the mutual recognition of diplomas was introduced with Directive 89/48/EEC. The principle of mutual recognition derived from the Court's rulings in *Cassis de Dijon*<sup>70</sup> and *Vlassopoulou*.<sup>71</sup>

The roots of Directive 89/48/EEC can be traced back to the European Council on 25 and 26 June 1984 in Fontainebleau. There it was noted that the Community, in spite of its high ideals did not mean very much to the people of Europe. Urgent action was needed to make a reality of a 'Europe without frontiers'. The Heads of State and Government deeming it indispensable to respond to the expectation of the peoples of Europe called upon the Communities institutions to introduce a 'general system for ensuring the equivalence of university diplomas in order to bring about the effective freedom of establishment within the Community'. The Commission responded to this appeal with a proposal for a directive submitted to the Council on 9 July 1985, which subsequently became Directive 89/48/EEC. Directive 89/48/EEC is a manifestation of the 'europhoria' that followed the Single European Act and the prospect of

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68 Case 427/85, *Commission of the European Communities v. Germany* [1988] ECR 1123.

69 Case 294/89, *Commission of the European Communities v. France* [1991] ECR I-3591.

70 Case 120/78, *Rewe-Zentral v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

71 Case C-340/89, *Vlassopoulou v. Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg* [1991] ECR I-2357

the completion of the internal market by the end of 1992. This goal was initially set out in the Commission's White Paper on Completing the Internal Market.<sup>72</sup> The White Paper proclaimed the need to eliminate legal and economic barriers among the Member States in order to create a single integrated market. The new strategy was a broader shift towards mutual recognition without prior harmonization as a means of eliminating barriers to the establishment of the internal market. The aim of the Directive was to speed up the process of giving effect to the freedom of establishment for the professions in the European Community. The basic philosophy underlying the Directive was the principle of mutual trust in the quality of the educational systems and the professional training in the other Member States.

In addition to Directive 89/48/EEC, the Council adopted Directive 92/51/EC as Second General System Directive, which follows the same horizontal approach.<sup>73</sup> It covers the recognition of diplomas of post-secondary courses of less than three years and vocational training certificates. It parallels the provisions of the first general system directive. In 1999 the Council finally has adopted a Third General System Directive based on the horizontal approach.<sup>74</sup> One of the aims of this Directive was to clarify and simplify Community legislation in the area of the so-called 'transitional measures' relating in particular to commerce, industry and small craft industries. It relates to a very large variety of occupations ranging from mining to hairdressing, whether pursued in an employed or self-employed capacity. The third general system directive entered into force on 31 July 2001.<sup>75</sup> The directive differentiates between three schemes of recognition: recognition of formal qualifications, recognition of professional qualifications, and recognition of "other professional qualifications" acquired in another Member State<sup>76</sup>. All of these directives with the exception of the two sectoral Lawyers Directives on Services (Directive 77/249/EEC) and Establishment

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72 COM(85) 310, June 1985.

73 [1992] O.J. L 209/25, as amended by Directive 2001/19/EC, [2001] O.J. L 206/1; Infringement proceedings were started by the Commission against France and Italy for failure to implement the directive. See also Case C-294/00, *Gräbner* [2002] ECR I-6515 and Case C-102/02, *Ingeborg Beuttenmüller v. Land Baden-Württemberg*, [2004], ECR I-5405.

74 European Parliament and Council Directive establishing a mechanism for the recognition of qualifications in respect of professional activities covered by the Directives on liberalization and transitional measures and supplementing the general systems for recognition of qualifications, COM(96) 22 final of 8 February 1996. [1999] O.J. L201/77.

75 Many Member States were late with its implementation and the Commission had to start infringement proceedings against Austria, Finland, Germany, Greece, Ireland, Italy, The Netherlands, Portugal, Spain and the United Kingdom.

76 See generally to these directives Robin C.A. White, *Workers, Establishment and Services in the European Union*, Oxford University Press 2004, chapter 4; Jacques Pertek, *General Recognition of Diplomas and Free Movement of Professionals*, Maastricht 1992; Catherine Barnard, *The Substantive Law of the EU*, Oxford University Press, 2<sup>nd</sup> edition 2007,

under Home Title (Directive 98/5/EC)<sup>77</sup> have become now part of the new consolidation Directive 2005/36/EC.

#### 4.2.2. *The recognition procedure according Directive 89/48/EEC*

The recognition system according to the general system shall be explained here on the basis of the First General System Directive 89/48/EEC.<sup>78</sup> The horizontal approach is based on the assumption that any professional who is fully qualified in one Member State possesses the qualifications needed to practice the same profession in another Member State. A diploma is defined according to article 1 (a) of the directive as a certificate or other formal qualification which:

has been awarded by a competent authority in a Member State;

shows that the holder has successfully completed a post-secondary course of at least three years' duration, or equivalent part-time, at a university or establishment of higher education, and where appropriate, has successfully completed the professional training required in addition to the post-secondary course,<sup>79</sup>

and shows that the holder has the qualifications required to take up or pursue a regulated profession in that Member State.<sup>80</sup>

The diploma of such a professional has to be recognized according to Article 3 of Directive 89/48/EEC. The basic philosophy should be mutual trust in the quality of other Member States' professional trainings and education. Only where the duration of training undergone or its content differs substantially from that required by the host Member State, the latter may require the shortfalls to make up. Therefore, Article 4 of Directive 89/48/EEC contains the so-called compensation mechanisms. The compensatory instruments chosen for substantial differences in the content of the training are either an aptitude test or an adaptation period (Article 4(1) (b) of the Directive). Differences in duration of training can be compensated with evidence of professional experience (Article 4 (1) (a)). The host Member State can impose additional requirements on the applicant on the grounds of difference in the length of

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<sup>77</sup> The content of this Directive 98/5/EC shall be elaborated further below.

<sup>78</sup> Later in this article we shall explain the changes to this system caused by the new Directive 2005/36/EC.

<sup>79</sup> The question how a case should be solved when a migrant is not fully qualified in the home Member State but has only received the academic education and wants to attend the professional training in another Member State will be addressed below discussing the Case C-313/01, *Christine Morgenbesser v. Consiglio dell'Ordine degli avvocati di Genova*, [2003] ECR I-13467.

<sup>80</sup> The Court has already several times to decide upon the issue whether a certain professional activity can be qualified as 'regulated' in the meaning of the Directive 89/48/EEC. See below Case C-164/94, *Aranitis v. Land Berlin* [1996] ECR I-135, Case C-234/97, *Teresa Fernández de Bodadilla v. Museo Nacional del Prado* [1999] ECR I-4773 and Case C-313/01, *Christine Morgenbesser v. Consiglio del' Ordine degli avvocati di Genova*, [2003] ECR I-13467.

education only where the difference exceeds one year or more. If a host Member State chooses for the professional experience to compensate for a shortfall in training duration, the Member State cannot require from the applicant an aptitude test or an adaptation period in addition. Article 4 (1) (a) and 4 (1) (b) may not be applied cumulatively. Generally, Member States have chosen for the adaptation period or the aptitude test when implementing the directive and not for compensation through proof of professional experience.

Definitions of the terms ‘adaptation period’ and ‘aptitude test’ are given in Article 1 of the Directive. In principal the applicant can choose between adaptation period and aptitude test. Only as far as the profession requires knowledge of the national law of the host Member State it is up to the Member State to choose between aptitude test and adaptation period.

Unlike under the so-called transitional directives, recognition of professional experience gained in the home Member State does not, in itself, entitle the migrant to immediate authorization to take up and pursue the same profession in the host Member State. His professional experience, however, has to be taken into account by the competent authorities in the host Member State when determining what further training has to be completed or what form of aptitude test has to be passed in order to compensate for any substantial differences between the education and training undergone by the migrant and that required in order to practice in the host Member State.

In this regard, the ruling of the Court of Justice in the *Vlassopoulou* decision can be considered as an interpretation standard of the principles laid down in Directive 89/48/EEC, even if the *Vlassopoulou* ruling was given without a direct reference to this Directive.<sup>81</sup> Meanwhile the ‘*Vlassopoulou* principle’ is repeated consistently by the Court in various judgments extending its application to the recognition of third country diplomas<sup>82</sup> and to professional activities which do not fall under the definition of a ‘regulated profession’ in the meaning of Article 1 (c) Directive 89/48/EEC. Finally the *Vlassopoulou* doctrine was even codified in Directive 2001/19/EC on professional recognition.<sup>83</sup>

Consequence of a successful recognition procedure applying Article 3 of the Directive directly or after having passed one of the required compensatory instruments is the following: the

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81 Case C-340/89, *Irene Vlassopoulou v. Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg*, ECR [1991], I-2357.

82 See Cases C-319/92, *Haim v. Kassenärztliche Vereinigung Nordrhein* [1994] ECR I-2357 and C-238/98, *Hocsman v. Ministre de l'Emploi et de la Solidarité*, ECR [2000] and below under 3.

83 Directive 2001/19/EC of the European Parliament and of the Council of 14 May 2001 amending Council Directives 89/48/EEC on the general system of professional qualifications and Council Directives 77/452/EEC, 77/453/EEC, 78/686/EEC, 78/687/EEC, 78/1026/EEC, 78/1027/EEC, 80/154/EEC, 80/155/EEC, 85/384/EEC, 85/385/EEC, 85/432/EEC, 85/433/EEC and 93/16/EEC concerning the professions of nurse responsible for general care, dental practitioner, veterinary surgeon, midwife, architect, pharmacist and doctor (SLIM Directive), [2001] O.J. L 206, p. 1.

applicant can establish him/herself as a professional in the host Member State and he/she is allowed to use the professional title of the host Member State (Article 7 of the Directive). From the moment of recognition onward the professional migrant can therefore fully integrate in the economic life of the host Member State. Possible future clients and employers will no longer be able to distinguish the migrant on the basis of the professional title used from a nationally trained colleague<sup>84</sup>.

#### 4.2.3. Implementation of Directive 89/48/EEC

Directive 89/48/EEC required Member States to implement it by 4 January 1991.<sup>85</sup> The majority of the Member States were late passing the necessary measures.<sup>86</sup> Ireland, Denmark and the United Kingdom were the first to pass general legislative acts. Two contrasting methods of implementation were adopted. Some of the Member States implemented the Directive by one general act of legislation, completed, in some cases, by detailed regulations for specific professions. This was done in Denmark,<sup>87</sup> Ireland,<sup>88</sup> Italy,<sup>89</sup> the Netherlands,<sup>90</sup> Portugal,<sup>91</sup> Spain<sup>92</sup> and the United Kingdom.<sup>93</sup> Other Member States used a sectoral implementation approach, implementing the Directive with different acts for each profession involved. This method was used by Germany,<sup>94</sup> France,<sup>95</sup> Luxembourg<sup>96</sup> as well by Belgium and Greece.<sup>97</sup> The Netherlands also passed some sectoral measures.<sup>98</sup> In the case of Belgium and Greece, however, the Court of Justice has established their failure to implement the Directive in time. Both Member States had passed only a very limited number of sectoral

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84 The importance of the use of the host state's title for individual migrants can be concluded from the facts in the Case C-164/94, *Aranitis v. Land Berlin* [1996] ECR I-135.

85 Article 12 of Directive 89/48/EEC.

86 Of the then 12 Member States only Ireland had adopted the necessary measures by 4 January 1991.

87 Act concerning access to pursue certain professions in Denmark for nationals of the European Communities and the Nordic countries, No 291 from 8 May 1991, see further H. Schneider, *supra* note 14, 219 *et seq.*

88 Statutory Instrument S. No. 1 of 1991, see further H. Schneider, *supra* note 14, 222.

89 Legge comunitaria per il 1990, *Gazzetta Ufficiale* from 12 January 1991, see further H. Schneider, *supra* note 14, 224.

90 Algemene Wet erkenning EG-hoger-onderwijsdiploma's from 19 January 1994, *Stb.* 1994, 29 and 30, see further H. Schneider, *supra* note 14, 229.

91 Decreto-Lei no. 289/91 from 10 August 1991, *Diario da Republica* no. 183, see further H. Schneider, *supra* note 14, 230.

92 Real Decreto 1665/1991 from 25 October 1991, *BOE* 280 from 22 November 1991, see further H. Schneider, *supra* note 14, 232.

93 Statutory Instrument 1991 No. 824 Professional Qualifications, The European Communities (Recognition of Professional Qualifications) Regulation 1991, see further H. Schneider, *supra* note 14, 233.

94 Gesetz über die Eignungsprüfung für die Zulassung zur Rechtsanwaltschaft, *BGBI* 1990, Teil I, 1349 und Verordnung für die Zulassung zur Rechtsanwaltschaft *BGBI* 1990, Teil I, 2881, see further H. Schneider, *supra* note 14, 291.

95 Loi No. 90-1259 from 31 December 1990, see further H. Schneider, *supra* note 14, p. 324.

96 Loi du 10 août 1991, *Mémorial* No. 58 from 27 August 1991, see further H. Schneider, *supra* note 14, 332.

97 See H. Schneider, *supra* note 14, 208.

98 For the legal profession exist next to the general law (Algemene Wet erkenning EG hoge onderwijsdiploma's, *Stb.* 1994, 29) also two instruments passed by the Dutch Bar, *Verordening op de Proeve van Bekwaamheid* from 13 September 1996, *Stcrt.* 1996, 197 and *Regelement des Nederlands Orde van Advocaten* from 14 October 1996, *Advocatenblad* 22 November 1996, 1112.

implementation measures in an appropriate time.<sup>99</sup> A case against the Netherlands was dropped after the Dutch implementation law was finally published. Nevertheless, the Netherlands can be considered as being very late with the implementation of the first General System Directive. This was especially true for the Dutch implementation for the legal profession.<sup>100</sup>

The Member States that joined the Community in 1995, on the contrary, had finished their task with great success. These three Member States had all adopted implementing measures by the date of accession. Austria and Sweden have implemented the Directive in the sectoral way, while Finland has passed a general law and a corresponding regulation.<sup>101</sup> The twelve new Member States have had to implement all sectoral and general Directives at the moment of accession on the 1<sup>st</sup> of May 2004 and on the 1<sup>st</sup> of January 2007 respectively.<sup>102</sup>

#### *4.2.4. Problematic Issues since Implementation of the General System Directives.*

The majority of the cases the Court of Justice had to deal with since the implementation of the Directive, concerned violations of Member States such as late implementation or wrongful application of the directives.<sup>103</sup> Most of these cases were brought up by the Commission as infringement procedures according to article 226 EC. There were, however, several very interesting cases concerning fundamental definition and application questions.

##### *4.2.4.1. Case law concerning the definition 'diploma' and 'third-country diploma'*

An interesting case concerning implementation requirements and correct application of the concept of "diploma" was the *Beutenmüller* case,<sup>104</sup> which concerned Ms. Beutenmüller, an Austrian national working as a teacher in Baden-Württemberg. In the 1980s Ms. Beutenmüller had obtained a diploma in primary school teaching in Austria, awarded after a two-year course. In the following years the law in Austria changed and a diploma in primary school teaching is now awarded only after three-year training.

Since 1991 Ms. Beutenmüller had been teaching in Baden-Württemberg, first in a church-maintained institution and after December 1993 in state-run schools. In 1998 she applied for

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99 Case C-365/93, *Commission v. Greece* [1995] ECR I-499 and Case C-216/94, *Commission v. Belgium* [1995] ECR I-2155.

100 This late implementation has been repeated in the case of the Establishment Directive 98/5. Again infringement procedures of the Commission before the ECJ were been started, but the implementation was completed before a conviction took place.

101 See H. Schneider, *supra* note 14, p. 293.

102 The nurses and midwives directives have been amended by the Treaty of Accession 2003 with Poland. See document of the Commission from 6 April 2005.

103 There are numerous examples of these cases, for the most recent example see Case C-198/04, *Commission of the European Communities v. French Republic* [2005] ECR I-nyp.

104 Case C-102/02, *Ingeborg Beutenmüller v. Land Baden-Württemberg*, [2004], ECR I-5405..

recognition of her Austrian diploma for primary school teaching in order to be promoted to a higher salary scale, namely the scale available to those who had a diploma in primary school teaching awarded in Baden-Württemberg.

The authorities denied her application on the ground that she did not have a diploma awarded after three years' higher education. There were no exceptions possible to this requirement. It must be noted at this point that in principle Directive 89/48/EEC is only applicable to diplomas awarded after three years' duration. Its accompanying Directive 92/51/EEC, dealing with recognition of diplomas awarded after a period shorter than three years, was not implemented in Baden-Württemberg at that time, although the implementation period had already expired. Ms. Beutenmüller went to court, which led to the reference of six preliminary questions to the European Court of Justice by the *Verwaltungsgericht Stuttgart* which centred around two main issues. The first issue was whether the Diploma Directive 89/48 was applicable to this situation since under the new legislation the Austrian diploma for primary school teaching was awarded after three years, instead of two and Article 1(a) second subsection of Directive 89/48/EEC provided for such an exception. If the Directive 89/48/EEC were applicable, the remaining question was whether Ms. Beutenmüller could rely directly on its provisions as Baden-Württemberg's implementation legislation only took diplomas into account that were awarded after three years' duration. The second issue questioned the direct applicability of Directive 92/51/EEC in the light of Baden-Württemberg's failure to implement this Directive altogether.

With regard to the first issue the Court ruled that it could well be that the exception of article 1(a) second subparagraph of Directive 89/48/EEC was applicable. Considering the evidence produced in the proceedings Austria seemed to recognise the old two year course as being equivalent to the new three-year course. Consequently the Court concluded that Ms. Beutenmüller's diploma could fall under the exception laid down in article 1(a) second subsection, without ultimately deciding whether the diploma was equivalent to the new three-year course. It is noteworthy that while the Court did emphasise that Directive 89/48/EEC conferred the right to take up a profession, it did not touch upon the issue of remuneration. This is insofar important as the case before the *Verwaltungsgericht Stuttgart* revolved around Ms. Beutenmüller's claim for more salary. The Austrian government had informed Ms. Beutenmüller that although Austria recognised the old and new diplomas as equivalent, teachers who had the old style diploma were paid less than teachers who had taken the new course. This fact could have seriously undermined Ms. Beutenmüller's claim before the *Verwaltungsgericht Stuttgart*.

Having established that Ms. Beutenmüller's diploma could fall under Directive 89/48/EEC, the Court considered the implementation law of Baden-Württemberg to be contrary to article 3 of Directive 89/48/EEC as it did not leave any opening for recognition of diplomas awarded after less than three years' duration. The Court went on by saying that Ms. Beutenmüller was able to rely on the provisions of Directive 89/48 directly. A similar conclusion was reached with regard to the provisions of Directive 92/51/EEC, which the Land Baden-Württemberg had failed to implement altogether. The Court also reiterated that it is not open for a Member State to rely on any derogations laid down in a Directive if the Member State has failed to implement that Directive.<sup>105</sup> This is a very interesting conclusion as it more or less prevents Member States from relying on the compensatory instruments offered by the recognition directives (like aptitude test or adaptation period) if the implementation period has ended and the Member State in question has not implemented the directive in time.

The next case worth mentioning in this context is the *Burbaud* case.<sup>106</sup> This case concerned a French national desiring to become a hospital administrator in France. Ms. Burbaud was a former Portuguese national. She studied law in Portugal and was a fully qualified hospital administrator in Portugal. Subsequently, she completed a French doctorate in law and became a French national. As it is the case with many professions in the public sector in France, the profession of hospital administrator is only accessible for those who have completed training in a state-run school, in this case the *École Nationale de la Santé Publique* (ENSP). Completion of ENSP is an automatic guarantee for a job as a hospital administrator. Access to the ENSP is subject to a comparative exam, a so-called *concours*. Ms. Burbaud was denied access to the profession on the basis of the fact that she did not complete the ENSP. Ms. Burbaud challenged this decision and the French administrative judge referred questions to the European Court of Justice.

The questions posed by the French court dealt with two issues. Firstly, the court asked whether or not the completion of a state-run school in order to obtain a position in the public sector, in this case the ENSP, could be regarded as a diploma in the sense of Directive 89/48/EEC. Secondly, the court asked whether a Member State could require a person to fulfil certain criteria, in this case the comparative entry exam for the ENSP, in order to gain access to a certain profession, in this case the profession of hospital administrator.

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<sup>105</sup> The Land Baden-Württemberg argued that Ms. Beutenmüller's diploma did not fall under Directive 92/51/EEC because of a derogation listed in article 3 of that Directive. The Court stated that the Land could not rely on this exception since it had not implemented the Directive altogether.

<sup>106</sup> Case C-285/01, *Isabel Burbaud v. Ministère de l'Emploi et de la Solidarité*, [2003] ECR I-08219.

With regard to the first question the Court decided that the completion of the ENSP led to a diploma in the sense of Directive 89/48/EEC. Recognition of equivalence of foreign diplomas should, according to the Court, be based on that Directive. It is noteworthy that France argued that Directive 89/48/EEC was not applicable to professions in the public sector, although it recognised that the public service exception did not apply.<sup>107</sup> This argument was dismissed by the Court on the basis of previous case law, stating that the notion of ‘regulated profession’ was a Community concept, and that the profession concerned was regarded as a regulated profession since it was regulated by French law.<sup>108</sup>

The second question referred to the Court was even more challenging. Ms. Burbaud argued that the compulsory entrance exam constituted a violation of Article 3 of the Directive 89/48/EEC. The French government argued that the compulsory entrance exam fell outside the scope of the Directive 89/48/EEC, and that in any case it was indistinctly applied to both French nationals and nationals of other Member States. The Court agreed with France to the extent that the entrance exam to the ENSP was not regarded to fall within the scope of Directive 89/48/EEC.

The Court, however, did not stop with its reasoning at this point. It stated that the requirement of a compulsory entrance exam, without any possibility to assert previous experience and knowledge,<sup>109</sup> constitutes a hindrance to the free movement of workers as guaranteed by Article 39 EC. The Court continued that the hindrance concerned could not be objectively justified<sup>110</sup> because the system allowed French nationals to circumvent the entrance exam when they had gained prior experience while a comparable possibility was denied to foreign professionals. The compulsory entrance exam for the ENSP in its existing form therefore constituted a violation of the free movement of persons.

Although the Burbaud–case can perhaps not be regarded as ‘revolutionary’, at least it made clear, however, that in situations not fully covered by Directive 89/48/EEC, the Court is willing to fall back on the relevant Treaty provisions and the principles developed by case law. Consequently, these situations do not exclusively fall within the discretion of the Member State.

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107 For case law concerning the public service exception see Case 149/79, *Commission of the European Communities v. Kingdom of Belgium* [1980] ECR 3881, Case 263/86, *Belgian State v. René Humbel and Marie-Thérèse Edel* [1988] ECR 5365, Case C-4/91, *Bleis v. Ministère de l'Éducation Nationale* [1991] ECR I-5627.

108 See cases: C-164/94 *Arantis v. Land Berlin* [1996] ECR I-135 and C-234/97, *Teresa Fernández de Bobadilla v. Museo Nacional del Prado, Comité de Empresa del Museo Nacional del Prado, Ministerio Fiscal* [1999] ECR I-4773.

109 Compare Case C-340/89, *Vlassopoulou v. Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg* [1991] ECR I-2357.

110 Compare Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-1465.

A similar approach was taken by the Court when he was confronted with the recognition of a third country diploma in the cases *Haim*<sup>111</sup> and *Hocsman*<sup>112</sup>. In both cases the recognition of a diploma regulated in principle by vertical directive was at issue. Hocsman was of Argentine origin, acquired Spanish nationality and subsequently became a French citizen. He had qualified as a doctor in Argentina. His doctor's degree was recognized by Spain, where he also received specialist training in urology. When he wanted his diploma be recognized in France the authorization to practice was refused by the French authorities as he had not received his basic doctor's diploma in a Member State. Directive 93/16/EEC, the vertical directive for the recognition of doctor's degrees in force at that moment could not be applied in his case as, contrary to the General System Directives, recognition of third country diplomas is not regulated in the sectoral directives. This was already clearly confirmed by the Court in the *Tawil-Albertini* case<sup>113</sup>. The Court extending, however, in *Haim* and even more explicitly in *Hocsman* the application of the Vlassopoulou doctrine to third country qualifications. The Court stated in *Hocsman*:

“40) ...where, in a situation not regulated by a directive on mutual recognition of diplomas, a Community national applies for authorisation to practice a profession access to which depends, under national law, on the possession of a diploma or professional qualification, or a practical experience, the competent authorities of the Member States concerned must take into consideration all the diplomas, certificates and other evidence of formal qualifications of the person concerned and his relevant experience, by comparing the specialised knowledge and abilities certified by those diplomas and that experience with the knowledge and qualifications required by the national rules.”

With the *Hocsman* decision the competent authorities have to take into account not only the acquired diplomas and professional experiences inside the European Union the requirement is extended to outside the European Union received education and training. This case law has even greater importance in the light of Directive 2003/109/EC<sup>114</sup> regarding third country nationals who are long-term residents in a Member State. This Directive considers the recognition of diplomas for third country nationals in Article 11. Very often third country nationals will have acquired their qualifications outside the European Union. Until the entering into force of Directive 2003/109/EC their position was mostly very unsatisfactory. The same is true, when considering the position of third country national family members of

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<sup>111</sup> Case C-319/92 *Haim v Kassenärztliche Vereinigung Nordrhein* [1994] ECR I-425 concerning a dentist degree.

<sup>112</sup> C-238/98, *Hocsman v Minister de l'Emploi de la Solidarité* [2000], ECR I-6663

<sup>113</sup> See also Case C-154/93, *Tawil Albertini v. Ministre des Affaires Sociales* [1994] ECR I-451 concerning the directive in recognition of a dentist qualification. The application of this directives on third country diplomas was refused by the court.

<sup>114</sup> Directive 2003/109 O.J. L16/44.

migrants. Although the access of a Non-EU spouse to the European labour market is regulated in Article 23 and 24 of Directive 2004/38/EC (formally Article 11 of Regulation 1612/68/EEC), it is not settled whether the third country national spouse can also rely on the secondary recognition of diploma legislation. The wording of the all recognition of diploma Directives is referring to nationals of a Member State and therefore seem to deny the application to Non-European citizens. Although the Directive 2003/109/EC<sup>115</sup> does not apply to third country national family members of EU citizens as they fall under the more privileged provisions of Directive 2004/38/EC at least concerning the issue of diploma recognition these family members should be treated equally as long-term residents and their qualifications should be recognized. Only under this condition the position of Non-European citizens on the European labour market and their access to professional mobility improves considerable. Having the right to work and establishment as guaranteed by the Articles 23 and 24 of Directive 2004/38/EC without the guarantee that their qualification is recognized would harm the labour market position of Non-EU family members quite considerably.

4.2.4.2. *Cases concerning the definition 'regulated profession' and 'regulated professional activity'*

The definition of what constitutes a regulated profession or a regulated professional activity in the meaning of the Directive 89/48/EEC had to be considered by the Court in several cases following the implementation of Directive 89/48/EEC. One of the first cases was *Aranitis*.<sup>116</sup> This case concerned the recognition of a Greek qualification in geology as equivalent to a German qualification which entitled the holder to use the German title *Diplom Geologe*. The problem was that in Germany, employers almost always recruited only those holding this title *Diplom Geologe* although there were no state regulations in what ever form governing the taking up and pursuit of the profession. The question was whether the Directive 89/48/EEC was applicable in such a case. Unfortunately for *Aranitis* the Court ruled very clearly:

(23) That the profession cannot be considered to be regulated merely because it is only holders of specific higher-education diploma who seek employment in the host State. Whether or not a profession is regulated depends on the legal situation in the host Member State and not on the conditions prevailing on the employment market of that Member State.

Consequently, *Aranitis* could not rely on the application of the directive securing the recognition of his Greek qualification in Germany. This also means that *Aranitis* can not use the German title *Diplom Geologe* for job applications as he can not rely on Article 7 of the

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115 Directive 2003/109 O.J. L16/44.

116 Case C-164/94, *Aranitis v. Land Berlin* [1996] ECR I-135.

directive that permits the use of the professional title of the host Member State after formal recognition according to article 3 of the directive. The fact that Aranitis had a clear disadvantage on the German labour market as he had to use his Greek title did not change the Court's interpretation of the meaning 'regulated profession'.

A similar problem arose when Teresa Fernández de Bodadilla tried to apply for the permanent post as restorer at the *Prado* in Madrid.<sup>117</sup> She held degrees in fine art from the United States and the United Kingdom and had worked for three years on a temporary contract as a restorer at the *Prado*. The *Prado* is an autonomous administrative body attached to the Ministry of Culture in Spain. The terms for appointment to a post at the *Prado* are set out in a collective agreement concluded between the *Prado* and staff representatives. That agreement reserved employment for restorer to those holding certain Spanish qualifications or those foreign qualifications recognized by the *Prado* as equivalent. Teresa Fernández de Bodadilla's application was refused. During the procedure at the Court of Justice the question arose as to whether the profession of art restorer was a regulated professional activity in Spain in the meaning of the Directives 89/48/EEC or 92/51/EEC. As the Court felt that it did not have sufficient information to determine whether the use of the collective agreement could constitute the basis for a regulated professional activity, the matter was left to the national court to decide upon. In both cases the Court made it very clear that even if Directive 89/48/EEC or Directive 92/51/EEC did not apply, there must be a prompt, good faith assessment of the equivalence of the qualifications followed by a reasoned decision which could be challenged in the national legal order. In so far the *Vlassopoulou* doctrine has again been extremely relevant when the professional activity is not regulated in the host Member State.<sup>118</sup>

One of the most interesting cases with regard to the recognition of diplomas decided in the last years, however, is a case concerning lawyers again. In the case *Morgenbesser* the Court gave a potentially revolutionary ruling.<sup>119</sup> This ruling as well as possible follow up decisions might change the legal academic and professional education in Europe considerably. Christine Morgenbesser, a French national had studied law in France and received her *Maîtrise en droit* in 1996. Thereafter she worked in a Paris law-firm for eight months. It must be noted at this point that she was not qualified as an *avocate* in France. In April of 1998 she moved to Italy and worked in a law firm in Genova. In October 1999 she filed a request with the Genova Bar

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117 Case C-234/97, *Teresa Fernández de Bodadilla v. Museo Nacional del Prado* [1999] ECR I-4773.

118 See also case C-238/98, *Hocsman v. Ministre de l'Emploi de la Solidarité* [2000] ECR I-6623, Case C-31/00, *Conseil national de l'ordre des architectes v. Dreessen* [2002] ECR I-663 and Case C-313/01, *Christine Morgenbesser v. Consiglio dell'Ordine degli avvocati di Genova* [2003] ECR I-13467.

119 Case C-313/01, *Christine Morgenbesser v. Consiglio dell'Ordine degli avvocati di Genova*, 13 November 2003, [2003] ECR I-13467.

Association in order to be registered in the register of *practicanti*. *Practicanti* are those lawyers who are in the process of qualifying as *avvocato* in Italy.

The Genova Bar Association denied her request on the grounds that she did not have a law degree conferred by an Italian University, a requirement that was compulsory for all those who sought registration as *practicanto*. Consequently, Ms. Morgenbesser asked the University of Genova to recognise her French law degree as equivalent to an Italian degree. The University of Genova informed Ms. Morgenbesser that her degree would be recognised upon following courses for two years, passing thirteen exams and writing a dissertation. Ms. Morgenbesser appealed against both decisions.

With regard to the decision of the Genova Bar Association the *Corte suprema di cassazione* referred a preliminary question to the European Court of Justice. The Italian Court wanted to know whether a diploma (in this case an academic diploma) should be automatically recognised for the purpose of registering a person in a register of trainee-lawyer. The Court reformulated the question and stated that the Corte basically wanted to know whether Community law precluded a Member State from refusing a person from registering in a register of trainee lawyers on the mere fact that the person's law degree was not conferred by a University of that specific Member State.

Ms. Morgenbesser argued in the first place that her situation fell under Directive 89/48/EEC since she regards the profession of *practicanto* to be a regulated profession. Subsidiary, she invoked the *Vlassopoulou* doctrine. The Court did not agree with her primary submission and came to the conclusion that activities as *practicante* were too closely intertwined with the profession of *avvocato*, constituting a necessary step in order to qualify as an *avvocato*, and that it could not be regarded as a separate profession. Accordingly, Directive 89/48/EEC was not applicable to the underlying situation.

The ruling did not end there though. Since Ms. Morgenbesser did not qualify as a *produit fini*, i.e. she was not fully qualified in any regulated legal profession, neither in her home Member State nor in Italy, the Court reverted to the general rules for diploma recognition that it had developed in previous years. The Court recalled the *Vlassopoulou* judgment according to which the free movement of persons is impaired when a national authority failed to take knowledge gained in another Member State into account, irrespective whether the situation concerned the free movement of workers or the freedom of establishment. Ms. Morgenbesser therefore had the right to have the knowledge she has gained in France, proven by her *Maîtrise en droit*, taken into account when applying for registration. The Court once more stipulated that when comparing the qualifications of the applicant and the qualifications required, the national authority was only allowed to look at the level of the qualification. With regard to

diplomas concerning national law a Member State is allowed to conduct a comparison taking into account established differences between the legal systems of the Member States. When the national authorities conclude that the diplomas do not concur, the host Member State may require proof that the candidate has gained the additional knowledge by means of practical experience or study.

The Court therefore concluded that the national authority was not allowed to refuse to register Ms. Morgenbesser in the register of praticanti on the sole ground that she did not have a diploma conferred, ratified or recognised by an Italian University.

In its judgment, the Court often referred to the *Vlassopoulou* ruling. The way in which the Court came to its reasoning in *Morgenbesser*, as well as the reasoning itself, was very similar to the *Vlassopoulou* judgment. The revolutionary potential of the *Morgenbesser* judgment lies not so much in the reasoning itself, but rather in the factual situation in which the already existing reasoning was applied. It is the first time the Court used the *Vlassopoulou* doctrine to a person who could not be considered to be a fully qualified professional. Had Ms. Morgenbesser been such a *produit fini* she could have relied as a lawyer on the Directives 89/48/EEC as well as the 98/5/EC directly.<sup>120</sup>

In previous case law, including more recent cases like *Burbaud* and *Beutenmüller*, the persons concerned were all fully qualified to pursue a regulated profession in their home Member State and encountered problems when they sought to exercise this profession in another Member State. Only the *Neri* case is somewhat different in that respect, since the Court avoided the question whether or not Ms. Neri's situation fell under Directive 89/48/EEC and looked at the case from the perspective of ESE, concluding that the Italian practice constituted an unjustified hindrance to ESE's freedom of establishment.

It must be noted that the Court has taken a very big step with this *Morgenbesser*-decision for the development of diploma recognition in European Community law. Consequently, the *Vlassopoulou* doctrine has to be applied in cases where the migrant is not yet fully qualified, which means that a purely academic qualification is at stake. The consequence might be that in future, anyone can at any stage in preparation for qualifying for a regulated profession go to another Member State and rely on the mechanism laid down by the *Vlassopoulou* principles and the *Morgenbesser* ruling in order to have prior home Member State qualifications recognised and continue training for a regulated profession in the host Member State. This is no longer dependant on a person's status as a *produit fini* in his/her home Member State. This means that every individual moving to another Member State has the right to have his/her

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120 See below the explanations to Directive 98/5/EC (The Lawyers' Establishment Directive).

qualifications evaluated and recognised, if equivalent to the qualifications of the host Member State, irrespective of whether that individual is professionally already fully qualified.

In a time when student mobility is encouraged by the Bologna process we can expect an increasing demand for recognition of qualifications at all different stages of the training. The very fundamental question whether the *Vlassopoulou* principles have to be applied to all forms of diploma recognition procedures including academic or quasi academic recognition will certainly be addressed more often before the national courts in the future.

A very interesting case with regard to the application of *Morgenbesser* came before the Administrative Court (*Verwaltungsgericht*) in Düsseldorf, Germany. The case *Katja Lubina v. Land Nordrhein-Westfalen*<sup>121</sup> can be seen as a follow up to the *Morgenbesser* decision.<sup>122</sup> The facts of the case are as follows: Katja Lubina is a German national who studied Law as well as Cultural Science Studies at the University of Maastricht, the Netherlands. She acquired the Dutch legal title '*meester in de rechten*', a degree that gives access to the professional Bar training in the Netherlands as it contains the so-called 'civil effect'. Furthermore, she received a Master in European Studies from the Humboldt University in Berlin. In April 2004 she applied on the basis of her Dutch law degree for admittance to the '*Referendardienst*' (court traineeship) at the Court of Appeal (*Oberlandesgericht*) Düsseldorf. Her application in Düsseldorf was rejected mainly on two grounds. Firstly, that she has not got the necessary qualification to enter the *Referendarzeit* in the form of the German First State examination. Secondly, that according to the German authorities the European Community rules on the free movement of persons were not applicable in this case as a *Referendar* (trainee lawyer) could not be considered to be a worker in the sense of Article 39 EC. Obviously, since the decision of the Court of Justice in the case *Kranemann*,<sup>123</sup> this second line of argument could certainly not be used anymore as the Court most clearly stated:

(18) Given that trainee lawyers carry out genuine and effective activity as an employed person they must be considered to be workers within the meaning of Article 48 (now 39) of the Treaty.

The fundamental question in the *Lubina* case is, however, whether the German legal *Referendardienst* qualifies as professional activity in the meaning of Article 1 of Directive 89/48/EEC. In our opinion, two possible lines of argumentation can be followed to solve this case. Firstly, this question can be answered affirmative. According to the definition appearing in Article 1 (d), a regulated professional activity is a professional activity, in so far as the

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121 *Katja Lubina v. Land Nordrhein-Westfalen*, Verwaltungsgericht Düsseldorf, Aktenzeichen 10 K 7279/04

122 Case C-313/01 *Christine Morgenbesser v. Consiglio dell'Ordine degli avvocati di Genova*, [2003] ECR I-13467.

123 Case C-109/04 *Karl Robert Kraneman v. Land Nordrhein-Westfalen*, [2005] ECR I-02421.

taking up or pursuit of such activity is subject directly or indirectly by virtue of law, regulations or administrative provisions, to the possession of a diploma. One can argue that this criterion is fulfilled here as the First State examination is required as precondition for admittance to the *Referendarzeit*. The First State examination can certainly not be qualified as only a pure academic qualification. The competent authority for the First Examination is still the official examination office situated at different Courts of Appeal in the Länder. Recent reforms of the legal education in Germany have not changed this situation. The law studies at the different law faculties in Germany and the various examinations organised by the faculties are mainly a prerequisite for admittance to the final state examination.

In our opinion, Article 1 (c) and (d) of the Directive should in principle be interpreted widely to include as many professional occupations as possible in the scope of the application of the horizontal recognition system. This seems for us the joint objective of the three General system directives, namely to guarantee that all various forms of regulating professions and professional activities which could potentially hinder intra-Community mobility fall into the scope of one of the Directives as long as they are not covered already by a vertical Directive. This interpretation is also in line with the new Directive 2005/36/EC on the recognition of Professional Qualifications. It is our submission that the “*Referendarzeit*” can be distinguished from the professional trainings period required by the Italian *practicanti* as it educates and qualifies not only for one legal profession but several ones. In so far it is not as closely intertwined with the profession *Rechtsanwalt* as the Italian professional trainings period with the profession *avvocato*.

If the *Referendarzeit* can be qualified as a regulated professional activity the Dutch academic degree giving admittance to the Bar should be recognised according to Article 3 of Directive 89/48/EEC. According to the new Directive 2005/36/EC the recognition should take place according to Articles 13 of this Directive. Although the Dutch legal education does not know any form of state exam – actually only Germany has such a system of ‘academic qualification’ via state control – the final university diploma gives access to the professional legal training at the Dutch Bar and is, in so far, the comparable qualification to the German First State examination. If one follows this line of argumentation the recognition procedure has to take place according to Article 3 of Directive 89/48 (now Article 13 of Directive 2005/36/EC). Normally, as a profession is concerned for which knowledge of the legal system of the host Member State is necessary, the host Member State, in casu Germany, could rely on Article 4 (1) (b) of Directive 89/48/EEC (now Article 14 of Directive 2005/36/EC) and require the applicant to take an aptitude test. The aptitude test should, however, be a different one as the one required from fully qualified professional lawyers. One can, however, question whether an

aptitude test according to Article 4 of the Directive can be required by the competent authorities in the special situation of the *Lubina*-case. As already elaborated above, the Court has decided very clearly in the case *Beutenmüller* that the compensatory instruments can only be invoked by a Member State if this Member State has implemented the Directive completely with regard to the professional activity in question. This was obviously not the case in Germany with regard to the access to the *Referendarzeit* at the moment the *Lubina*-case was pending before the court in Düsseldorf.

The case could, however, also be solved differently and perhaps more in the line with the *Morgenbesser* judgment. According to the Court in *Morgenbesser* Directive 89/48/EEC does not apply to ‘*practicanti*’ in Italy. If one compares the position of a *practicanto* with that of a ‘*Rechtsreferendar*’ and denies them both to be a regulated profession in the meaning of Directive 89/48/EEC, the *Vlassopoulou* criteria have to be applied again directly. According to the *Vlassopoulou* principles, the authorities of a Member State must take into consideration the professional qualifications of the person concerned as well as the professional experience. That obligation extends to all diplomas, certificates and other evidence of formal qualification as well as relevant experience of the person concerned, irrespectively of whether they were acquired in a Member State or in a third country. This obligation does not cease to exist as a result of the adoption of directives on the mutual recognition of diplomas.<sup>124</sup> Whether such an evaluation of a migrant’s individual education and professional trainings dossier is an easy task for the competent authorities might be questionable. On the other hand, the competent authorities should keep in mind that by allowing an only academically qualified person to undergo the practical training in the host Member State, this guarantees certainly a much better adaptation to the legal system of this state and the professional environment than any requirements laid down in an aptitude test for the already qualified professional. Such a solution is also fully in line with the object and purpose of article 5 of Directive 89/48/EEC.

As a follow-up of the *Lubina*-case which has ended with a compromise before the German administrative court in Düsseldorf, Germany has changed its legislation and introduced a new Paragraph in the German “*Richtergesetz*” which deals also with the access to the training to the judiciary. According to this provision any national of other Member States of the European Union who has a university diploma that gives him access to the professional training of the legal professions under Article 1 of Directive 98/5/EC may have his diploma checked by the German authorities in order to obtain a decision on equivalence. This description makes it

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<sup>124</sup> Case C-238/98 *Hocsman* [2000] ECR I-6623, para. 23 and 31; Case C-232/99 *Commission v. Spain* [2002] ECR I-4235, para. 21 and case C-313/01 *Morgenbesser* [2003], para. 57 and 58.

immediately clear that whilst Ms. Lubina could have profited from § 112a *Deutschen Richtergesetzes*, Ms. Morgenbesser could not have done so were she to seek entrance as a Referendar in Germany because she did not qualify for professional training in France yet. So even in Germany the Morgenbesser ruling is still relevant to protect those which fall outside the scope of application of § 112a *Deutschen Richtergesetzes*. Paragraph 112a further states that where it is decided that the university diploma is not equivalent to the entrance requirements in Germany the candidate concerned may take an aptitude test in order to obtain entry in the profession of the Referendar. This aptitude test will cover German civil law, penal law, administrative law and procedural law. It may be clear that in the majority of cases equivalence will not be achieved as such and passing an aptitude test will be necessary before admitted to the German professional training. On the other hand the adaptation of the *Deutschen Richtergesetzes* is a favourable action from the German authorities (even were it falls short of the *Morgenbesser* ruling) as it provides Ms. Lubina and her peers with much needed legal certainty regarding entrance in the qualification stages of the legal profession. Critically one has, however, to state that according to the provision of § 112a *Deutschen Richtergesetzes* the aptitude test can only be repeated once. Such a limitation is certainly not in line with Community law.

#### 4.4. The Establishment Directive 98/5/EC for Lawyers

The Establishment Directive 98/5/EC for lawyers is the last sectoral directive. It applies only to the fully qualified lawyer and it regulates the permanent establishment of lawyers under their home title in the host Member State. In principle, the Commission had abandoned the vertical approach in the mid-1980s, with only one exception. The Commission has been prepared to draft specific directives if two preconditions have been fulfilled: an agreement must have been reached within the profession and the national authorities must show their support for such an initiative.<sup>125</sup> These conditions were fulfilled for an establishment directive for lawyers. At the invitation of the Commission, the Council of the Bars and Law Societies of the European Community (CCBE) drafted a directive, which was accepted by the CCBE in October 1992 after seventeen years of negotiations.<sup>126</sup> The lawyers of all the Member States – with the sole exception of Luxembourg – in principle agreed on the fact that a specific

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125 See Lord Cockfields explanations towards the European Parliament in October 1988: ‘We would not, however, exclude subsequent specific complementary directives once the general system is in operation, provided that the profession concerned supported the move and was already in agreement as to the content of the further directive, and that it could be shown that a specific directive would make movement between Member States more easy’. O.J. 2-370/114, 26 October 1988.

126 This agreement of the CCBE became known as the Lisbon compromise or as one author called it ‘the miracle of Lisbon’.

directive for lawyers was needed. The CCBE took the view that the general system has not worked satisfactorily for the lawyers' profession in all aspects: Firstly, Directive 89/48/EEC does not solve the question of the right to practise on a permanent basis under the home Member State title. Furthermore, experience has shown that the aptitude test as required by the majority of the Member States often constituted a real obstacle to the freedom of establishment for lawyers. Internationally active lawyers want to be able to move easily between different Member States and establish themselves there without going through a burdensome recognition procedure by passing an aptitude test requiring knowledge in various areas of national law. These internationally operating lawyers are mostly are not interested in acquiring the professional title of the host Member State as long as they can establish themselves easily under home title and give legal advice to their clients. This is specifically true for internationally operating lawyers who want to establish themselves in Brussels, London, Paris or Frankfurt. As in some Member States legal advising is also regulated and very often in the monopoly of the national lawyers these internationally operating lawyers were until the implementation of Directive 98/5/EC in the Member States very much restricted in their professional activities. This was specifically true in Luxembourg, France and to a lesser extend in Germany.

The Commission published its own proposal based on the CCBE draft at the end of 1994.<sup>127</sup> This first Commission's proposal differed considerably from the original CCBE draft on two very essential points. According to the CCBE draft, lawyers were allowed to establish themselves under 'home title' in another Member State on a permanent basis, while the original proposal of the Commission included the obligation for the migrant to integrate fully into the profession of the host Member State after a period of five years. The Commission's Draft Directive was heavily criticized.<sup>128</sup> The five-year limitation on the right to practise under home title in other Member States, one of the Commission's alterations, could not be considered to be in accordance with Article 43 (formally 52) of the EC Treaty.

After the Gebhard judgment in 1995, however, the draft Directive made more rapidly progress through the European legislative machinery.<sup>129</sup> The original provision of a right to practise under home title on a permanent basis was reintroduced. The Directive was finally adopted on 16 February 1998 and published in the Official Journal on 14 March 1998.<sup>130</sup> Its full title is 'Directive 98/5/EC of the European Parliament and of the Council to Facilitate Practice of the

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127 COM(94) 572 final of 21 December 1994.

128 House of Lords Select Committee of the European Communities, *Establishment of Lawyers*, HL Session 1994-95, 14<sup>th</sup> Report London, HMSO, 1995, p. 10 and 69; H. Adamson, *Free Movement of lawyers*, (2nd ed., London, Butterworth, 1998), 90 *et seq.*; H. Schneider, *supra* note 14, 284.

129 H. Adamson, *Free Movement of lawyers*, 2nd ed., London, Butterworth, 1998, p. 94.

130 [1998] O.J. L77, p. 36.

Profession of Lawyer on a Permanent Basis in a Member State other than that in which the Qualification is Obtained'. Luxembourg, which had opposed the Directive from its very beginning, lodged an action with the ECJ for annulment of the Directive. Luxembourg argued that it should have been adopted unanimously by the Council. The proceedings were rejected by the ECJ by decision of 7 of November 2000<sup>131</sup> and the Directive considered valid. According to Article 16 Directive 98/5/EC had to be implemented by 14 of March 2000. Since then all old Member States as well as the Member States of the European Economic Area have implemented the Directive.<sup>132</sup> In some cases the implementation took much longer than period allowed by Article 16. Against Luxembourg the Commission started an infringement procedure. As regard the new Member States implementation has taken place. Whether their implementation measures are already fully effective has to be seen in the future.

Article 2 of Directive 98/5 EC gives lawyers the right to pursue the activities further specified in Article 5 of Directive 98/5 on a permanent basis in another Member State using their home country professional title. According to Article 5 (1) of the Directive a lawyer practising under home state title may carry on all professional activities carried on by the lawyer of the host state, namely advice on home state law, Community and international law, and host state law. The possibility to advice on host state law was one of the issues heavily discussed during the negotiations in the Council. Articles 5 (2) and (3) contain some limitations on the full rights of practice. Article 5 (3) repeats the provisions of Article 5 of the Lawyers' Service Directive relating to practice before courts of the host state. The precise formulation, however, is modified according to the case law of the ECJ, in particular the judgment *Commission v. Germany*.<sup>133</sup> As a result, a migrant lawyer does not have to work in conjunction with a local lawyer in any case where the litigant could act in person or where representation other than by a host State lawyer is allowed.

Article 10 of Directive 98/5 lays down the procedure for a migrant lawyer wishing to achieve full integration into the profession of the host State. A migrant lawyer can also prefer to continue indefinitely to practise under home title. Article 10 (2) only clarifies that a lawyer practising under home title may at any time apply for recognition under the Diploma Directive 89/48/EEC. As such the recognition will take place according to Articles 3 and 4 of Directive 89/48/EEC. Articles 10 (1) and 10 (3) provide two new alternative routes to the already existing recognition mechanism according to Directive 89/48/EEC. They have the clear purpose of avoiding the requirements of an aptitude test. Direct recognition has to take place

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131 Case C-168/98, *Luxembourg v. European Parliament and Council*, [2000] ECR I-09131.

132 See overview on the website of the CCBE: <<http://www.CCBE.org>>. In December 2004 the Commission has decided to bring Luxembourg before the Court as it still has not implemented this Directive.

133 Case 427/85, *Commission of the European Communities v. Germany* [1988] ECR 1123.

according to Article 10 (1) if the migrant lawyer has practised for a period of three years in the host Member State and he can show that he has 'effectively and regularly' pursued an activity in the law of that State including Community law. In such a case, the migrant lawyer is exempted from any compensatory instrument such as the aptitude test of Article 4 of Directive 89/48/EEC. If a lawyer does not fulfil the requirements of Article 10 (1) completely, he may fall back on Article 10 (3). Instead of complete exemption from the conditions of Article 4 of Directive 89/48/EEC, the migrant lawyer 'may obtain' from the competent authority admission to the profession of the host State without having to meet the conditions of Article 4 of Directive 89/48/EEC. This provision gives the competent authorities a certain degree of discretion.

The reference to Community law as part of the national law of the host Member State seems to include the possibility that a migrant lawyer who solely practised Community law for a period of three years, without any involvement in national law, can nevertheless demand according to Article 10 (1) direct integration into the profession of the host Member State. This issue is one of the difficult questions concerning correct implementation of this directive in the Member State.

Articles 11 and 12 of the Directive regulate the possibility of joint practice in different variations including the joint practice of several lawyers of different Member States and joint practice between migrating lawyers and host State lawyers.<sup>134</sup> The manner in which such lawyers practise jointly in the host Member State shall be governed by the law and regulations of that State.

The effects of Directive 98/5/EC for the legal profession cannot yet fully be overlooked in detail. One will have to wait a couple of years to see more clearly how many European lawyers will indeed use the directive and to what extent the mobility in the legal profession will increase. It seems, however, already quite obvious that compared to mid 70s of the last century, when the Court of Justice passed its first landmark decisions *Reyners* and *van Binsbergen*, the professional legal market has undergone an enormous and fundamental change and that this development will certainly not stop but on the contrary continue and further increase. In the light of the *Morgenbesser* judgment and the increasing mobility of students we can expect even more direct consequences for the legal profession and its education, its structure and its content in the near future.

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<sup>134</sup> See further H. Adamson, *Free Movement of Lawyers*, (2nd ed., London, Butterworth, 1998), 121.

#### 4.5. The New Directive 2005/36 /EC on Diploma Recognition

After both the vertical and horizontal Directives were adapted to the ‘SLIM-principle’ (Simpler Legislation for the Internal Market) by Directive 2001/19/EC, the Commission embarked on an even more prestigious project: a complete consolidation of the systems of diploma recognition that should result in one single Directive covering all eventualities.<sup>135</sup> This project was started in order to achieve the results set out in the Lisbon Summit.<sup>136</sup> At the Stockholm European Council the Council concluded:

The Commission intends to present for the 2002 Spring European Council [...] specific proposals for a more uniform, transparent, and flexible regime of recognition of qualifications and periods of study.<sup>137</sup>

This vision was also uttered by numerous Commission policy documents that have been concluded in the view of achieving the Lisbon strategy.<sup>138</sup> According to its explanatory memorandum it is the main objective of the European Commission to create a clear, secure and quick system for the recognition of professional qualifications in the field of regulated professions.<sup>139</sup> In order to achieve this result the new Directive revises the existing Directives founded on diploma recognition in such a way that principal conditions and guarantees are maintained, while on the other hand simplifying the structure and improving the working of the system.<sup>140</sup> This consolidation procedure mimics the procedure used for the Third General Systems Directive, Directive 99/42/EC, and has led to a consolidation of the twelve sectoral Directives and the Three General System Directives into one single Directive. Much of this simplification and clarification took place in the field originally covered by the twelve sectoral Directives.<sup>141</sup> As stated already above, only the two sectoral Lawyers Directives (77/249/EEC and 98/5/EC) were left out in this consolidation process.

With regard to the General Systems Directives there are a number of noteworthy developments. First of all the scope of the General System for the Recognition of Qualifications as laid down in article 10 of Directive 2005/36/EC is considerably broader than

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135 COM(2002) 119 final.

136 Explanatory Memorandum COM(2002) 119.

137 Conclusions of the Stockholm European Council, 23 and 24 March 2001, point 15.

138 High Level Task Force on Skills and Mobility, Final Report, 14 December 2001, page 20; Commission's Action Plan for Skills and Mobility, point 15; Commission Communication on An Internal Market Strategy for Services, COM (2000) 888 and the Commission's White Paper on European Governance, COM(2001) 428.

139 Explanatory Memorandum COM (2002) 119, p. 3.

140 Explanatory Memorandum COM (2002) 119, p. 4.

141 Explanatory Memorandum COM (2002) 119, pp. 5-7. For example by abolishing advisory committees.

the scope of Directive 89/48/EEC and 92/51/EEC combined. In essence it covers every profession that is not caught by chapters II and III of Directive 2005/36/EC dealing with professions covered by the Third General System Directive and by the sectoral Directives respectively.<sup>142</sup> This will prevent problems as encountered in the Beutenmüller-case from occurring.<sup>143</sup> The differentiation between longer and shorter duration of courses before a diploma is conferred as it results from Directive 89/48/EEC and 92/51/EEC is reflected in the new Directive 2005/36/EC since it creates five levels of training.<sup>144</sup> The actual recognition of the diplomas and possible compensatory measures as laid down in articles 3 and 4 of Directives 89/48/EEC and 92/51/EEC are maintained in the Directive.<sup>145</sup> It is noteworthy that the Commission in its original proposal tried to abolish the possibility for the Member State to impose a compensatory measure where knowledge of the national law is concerned, or to put it more simply; it aimed on the abolition of the mandatory aptitude test for lawyers. This part of the original proposal did not find the consent of the Member States.

Another novelty was introduced by article 15 of Directive 2005/36/EC. This article provides for dispensation from compensatory measures in the event that the applicant's qualifications meet the criteria laid down by a decision of the Committee on Recognition of Professional Qualifications.<sup>146</sup> These criteria should be developed by professional associations in the context of a common platform on a European level.<sup>147</sup> While the general rule remains the same, i.e. the right to an individual recognition of qualifications, the Commission also seeks to create a certain form of automatic recognition by means of co-operation through common platforms.

Furthermore, Directive 2005/36/EC provides contrary to its predecessors for a specific article on language requirements. Article 53 of Directive 2005/36/EC states that, in light of the case law of the Court,<sup>148</sup> a Member State may require the person seeking recognition of his qualifications to have sufficient language skills in order to exercise the profession. A

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142 Article 10 COM (2002) 119.

143 Cases like *Morgenbesser* will remain relevant since article 4 of the proposal indicates that it basically applies to those who seek to exercise a regulated profession for which they are qualified in their home Member State in another Member State. In other words the proposal only applies to those who can be considered to be a *produit fini*.

144 Articles 11 and 12 Directive 2005/36.

145 Articles 13 and 14 Directive 2005/36.

146 Explanatory Memorandum COM(2002) 119, p. 12.

147 *Idem*.

148 For case law on language requirements see Case 379/87, *Anita Groener v. Minister for Education and the City of Dublin Vocational Educational Committee* [1989] ECR 3967, *Case 33/88, Pilar Allué and Carmel Mary Coonan v. Università degli studi di Venezia* [1989] ECR 1591, *Case C-281/98, Roman Angonese v. Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139, *Case C-424/97, Salomone Haim v. Kassenzahnärztliche Vereinigung Nordrhein* [2000] ECR I-5123.

proportionality test is required. When it is decided that the candidate lacks the necessary skills it is for the Member State to provide possibilities to the candidate to acquire these skills.<sup>149</sup> The legislative process towards this Directive was not an easy one. At its first reading the European Parliament proposed 134 amendments to the original proposal.<sup>150</sup> Many of these amendments breathe an atmosphere of conservatism and an apparent reluctance to change the existing systems. Exemplary is amendment number 56 that reintroduces the obligatory aptitude test for lawyers who seek integration in the legal profession of the host Member State. As a reaction to this first reading the Commission has issued a new proposal.<sup>151</sup> Stubbornly, the Commission stood by its original proposal when it comes to the rules affecting the General System as described above, including the abolition of the obligatory aptitude test. The Commission's adapted proposal has largely been taken over by the Council in its Common Position, although the Council reintroduces the aptitude test for lawyers.<sup>152</sup> The Commission issued finally a statement that it accepts the Common Position of the Council.<sup>153</sup> The Directive 2005/36 was accepted by the European Parliament in its second reading. The final version of Directive 2005/36/EC was published in the Official Journal on 7 September 2005.<sup>154</sup> The Directive had to be implemented by the Member States until 20 October 2007. Apart from the enlarged scope of the Directive, the simplification of recognition for cross-border service providers and introduction of a specific language requirement, Directive 2005/36/EC brings no major new elements to the system of diploma recognition. Only application of the new system will tell whether the objectives of the Commission, i.e. simplification and clarification, will have been achieved.

##### 5. A EUROPEAN AREA OF EDUCATION AND THE MOBILITY OF PROFESSIONALS

As it was already elaborated above, all efforts regarding the recognition of diplomas on EU level concerned originally only professional recognition. Academic recognition of qualification was considered to be clearly outside the legislative competences of the European Community. Member States consistently and most jealously defended their own competences against any European interference into their educational systems<sup>155</sup>. This is especially true for the federal Member States like Germany and Belgium where the legislative competence in the area of education is situated at "Länder" level. The Member States defended their sovereignty

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149 Explanatory Memorandum COM (2002) 119 page 14.

150 PE A5-0470/2003 REV1.

151 COM (2004) 317 Final.

152 CS 2004/1607.

153 COM (2004) 853 Final.

<sup>154</sup> 2005 OJ L 255/22.

<sup>155</sup> K. Lenaerts, *Education in European Community Law after Maastricht (1994)*, CMLRev, 7-41.

in this area also quite explicitly during the European Convention while preparing the Constitutional Treaty.

At the moment, Article 149 EC does not give any competence to take harmonisation measures in the area of education. On the contrary, Article 149 (4) EC explicitly excludes harmonisation measures and this will not be changed when the Lisbon Treaty enters into force<sup>156</sup>. Interesting is, however, in this regard the decision of the Court of Justice in an infringement procedure against Austria<sup>157</sup>: In this case the issue of equal access to study at the medical faculties in Austria was at stake. In order to avoid that Austrian universities were flooded by potential German medical students, the Austrian parliament had passed a legislation in which the access to medical schools in Austria was guaranteed to all persons who had acquired an Austrian national secondary school diploma which gives access to university education and additionally, to all other persons who in the country were they have received their secondary education would qualify for a study at a medical faculty. With this legislation Austria wanted on the one side discourage specifically German students who did not qualify in Germany for the medical studies due to the there existing numerus fixus, on the other side Austria wanted to avoid to be called discriminatory in its selection system. For purely internal political reasons the introduction of a numerus fixus system in Austria was not a political option. The Commission, however, nevertheless considered the Austrian legislation as a violation of Article 12 EC Treaty in combination with Article 149 EC Treaty and started an infringement procedure. In the Commission's view the Austrian regulation was an indirect discrimination on the ground of nationality and this national system discouraged the mobility of students. Advocate General Jacobs in its opinion clearly stated that the contested national provision in the Austrian case is liable to affect nationals from other Member States more than Austrian nationals and that there is a consequent likelihood that it will place the former at a particular disadvantage. The contested national provision therefore gives rise to indirect discrimination unless it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of the national provisions. The principle of equal treatment, of which the prohibition of any discrimination on grounds of nationality in the first paragraph of Article 12 EC is a specific instance, prohibits not only overt or direct discrimination by reason of nationality but also indirect discrimination. Cases of indirect discrimination are covert forms of discrimination which, by the application of other criteria of

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<sup>156</sup> See for the exclusion of harmonisation, Habitzel, *Harmonisierungsverbot und Subsidiaritätsprinzip im Europäischen Bildungsrecht*, (2002) DöV, 407-414; K. Lenaerts/P. Van Nuffel, *Constitutional Law of the European Union*, (Sweet and Maxwell), London 2005, 305

<sup>157</sup> Case 147/03 *Commission v. Austria*, [2005] ECR I-05969

differentiation, lead in fact to the same result<sup>158</sup>. A rule is indirectly discriminatory if it works to the particular disadvantage of a group comprising mainly nationals of other Member States and cannot be justified by objective considerations independent of the nationality of the persons concerned or is not proportionate to the legitimate aim pursued by the national measure<sup>159</sup>. The Advocate General could not see any reason that the Austrian measure could be justified on such objective considerations. The Court followed in its judgment the opinion of the Commission and the Advocate General and declared:

“that, by failing to take the necessary measures to ensure that holders of secondary education diplomas awarded in other Member States can gain access to higher and university education organised by it under the same conditions as holders of secondary education diplomas awarded in Austria, the Republic of Austria has failed to fulfil its obligations under Articles 12 EC, 149 EC and 150 EC; “

This judgment can be considered as being quite revolutionary as it will have serious consequences for the national educational systems and the political choices Member States' governments want to make by organizing their national educational system. Interesting is also that Article 149 does not only mention the encouragement of the mobility of students but also the encouragement of academic recognition of qualifications. The line of argument used in the decision against Austria might be in other cases used when an academic recognition of a certain foreign qualification is at stake. The *Commission v. Austria* case has, however, also direct political consequences. The decision of the Court of Justice has caused in Austria a national political outcry. During the negotiations of the Lisbon Treaty the Austrian government has used this opportunity to come to a sort of agreement on suspension of this decision for the direct future. On the 24 of April 2008 both chambers of the Austrian Parliament voted in favour of the Lisbon Treaty and its ratification. Without such a special arrangement agreed on the provisional suspension of the Court's judgment the Austrian government and the members of the Austrian Parliament might have been not as willing to take this positive step as far as the ratification of the Lisbon Treaty is concerned. Considering these national animosities, the recent developments towards a European Space for Higher Education, also known as the so-called Bologna process are very surprising. We want to give here a very short historic overview concerning these developments.<sup>160</sup>

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<sup>158</sup> Case C-65/03 *Commission v Belgium*, judgment of 1 July 2004, [2004] ECR I-0642 at paragraph 28 of the judgment.

<sup>159</sup> See, inter alia, Case C-224/98 *D'Hoop* [2002] ECR I-6191, at paragraph 36 of the judgment.

<sup>160</sup> See also E. Hackl, *Towards a European Area of Higher Education: Change and Convergence in European Higher Education*, EUI Working Papers, RSC No. 2001/09. See most recently Sacha Garben, *The Bologna Process –From a European Law Perspective*, EUI Working Papers, Law 2008/12.

## 5.1. A European Space for Higher Education: From Bologna via Bergen to London

In May 1998, the Ministers responsible for higher education in France, Germany, Italy and the United Kingdom met to celebrate the Sorbonne University's eight-hundredth anniversary. In the course of the celebration and a concurrent conference, they signed a 'Joint declaration on the harmonization of the architecture of the European higher educational system'. This became known as the Sorbonne declaration. One has to note here that in France the Attali report including recommendations for educational reforms in France had just been published in May 1998 and that in Germany the Hochschulrahmengesetz was amended in August 1998. In the new Hochschulrahmengesetz bachelor's and master's degrees were introduced as the traditional German degrees are less known and, therefore, less attractive for foreign students. The option to choose between four years undergraduate cycles with a one-year master programme or three years bachelor degrees with a two years master programme was given to the German faculties.

In the Attali report the existence or emergence of a single European model of higher education was proposed, based on a sequence of studies and degrees of 3-5-8 years and a Bachelor-Master-Doctorate structure. The Sorbonne Declaration, however, only recommended that studies should be organised in an undergraduate cycle leading to a first qualification and a graduate cycle leading to a master degree. Although an extensive debate has taken place based on the assertions in the Attali report, an indication on the duration of these cycles was not provided. The only indication being that the undergraduate programme should have a minimum of three years. Furthermore, Guy Haug,<sup>161</sup> clearly underlined in a report 'Main Trends and Issues in Higher Education Structure in Europe' which was prepared for the Bologna meeting of the Ministers of Education that a model strictly following the pattern 3-5-8 does not exist. No country in Europe has such a system across the board in all sectors of higher education or all disciplines.<sup>162</sup> Bachelor programmes with four or even more years exist even in the United Kingdom, while there are master programmes with one-year as well as two-year duration. In Trends IV published for the Bergen summit in May 2005, it is stated that 'the misconception that the Bologna process "prescribes" in any way the 3+2 year structure is still widespread'.<sup>163</sup>

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161 Principal Advisor, European Association of Universities (CRE), Geneva/Paris.

162 Project Report of Guy Haug, *Main Trends and Issues in Higher Education Structures in Europe*, prepared for the Bologna meeting on 18 June 1999, p. 5.

163 Sybille Reichert/Christian Tauch, Trends IV: European Universities Implementing Bologna, EUA report for the Bergen meeting in May 2005, p.12.

A year after the Sorbonne Declaration, in June 1999, Ministers for Education from 29 European countries met in Bologna, to sign this document, the so-called Bologna Declaration. Many of the signatories were countries from Central and Eastern Europe, not Member States of the European Union at that moment. It has therefore strongly to be underlined that this Bologna Declaration is not a legal instrument passed in the context of the European Union or even the European Community. The binding character of this declaration is therefore very limited, especially as many of the Ministers involved by the setting up of this Declaration had, from the perspective of their national constitutional system, no legitimacy to bind the national legislators and authorities in this area of law. This clearly is the case as far as federal States are concerned where the legislative power as regards educational matters rest at State/Länder level (e.g. Belgium and Germany).

The Bologna Declaration is, in our opinion, a very typical form of soft law with all its democratic deficits. No Parliament, neither on European nor on national level was involved in this development. Soft laws are according to Francis Snyder 'rules of conduct which, in principle, have no binding force, which nevertheless may have practical effects'.<sup>164</sup> If we see the effects of the Bologna Declaration on the European university education then it certainly fulfils these criteria. A majority of the 40 States meanwhile involved in the Bologna process have adapted their systems to a Bachelor-Master structure or are going to do so in the nearest future. In some of the Nordic and Central and Eastern European Country the bachelor-master model is already applied.<sup>165</sup>

It was, however, quite remarkable that on European Union level at the European Council meeting under the Portuguese Presidency in Feira in March 2000, the Member States could not come to an agreement for 'the Establishment of a European Area of Education'. There the Member States jealously defended their sovereignty in general education matters against any direct European involvement, while the European Council under the same Presidency announced the famous Lisbon Strategy proclaiming the European knowledge-based society.

While on the other hand, outside the European Union's framework another Education Summit was prepared in Prague in order to review the Bologna process for the first time in May 2001.<sup>166</sup> Numerous policy papers were published since<sup>167</sup>. All with the intention of creating

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164 F. Snyder, *Soft Law and Institutional Practice in the EU Community*, EUI Working Paper, No. 93/5, p. 2.

165 Sybille Reichert/Christian Tauch, *Trends IV: European Universities Implementing Bologna*, EUA report for the Bergen meeting in May 2005, p.10.

166 See Lourtie report: *From Bologna to Prague*.

<sup>167</sup> <[www.bologna-bergen2005.no/](http://www.bologna-bergen2005.no/)>

such a European Space of education. This process was followed by the Berlin Summit in 2003<sup>168</sup> and continued in May 2005 in Bergen<sup>169</sup>, and most recently in 2007 in London.<sup>170</sup>

In addition, one can notice the increasing importance of the Council of Europe/UNESCO Convention on the Recognition of Qualifications Concerning Higher Education in the European Region as most Member States of the European Union have ratified this Convention, better known as the Lisbon Convention during the last five years.<sup>171</sup> Only Belgium, Germany, Greece, Italy, Malta, the Netherlands and Spain are still missing as party to this Convention. The Lisbon Convention is one of the main international legal texts concerning the academic recognition of qualifications. It was adopted on 11 April 1997 and entered into force on 1 February 1999. The Council of Europe/UNESCO Recognition Convention is considered to be a key instrument for the Bologna Process aiming to establish a European Higher Education Area by 2010, the main goals of which include improving the mobility of students, staff and graduates, facilitating the recognition of qualifications and increasing the transparency of higher education systems in Europe.

In the beginning of the Bologna process, the role of the European Commission and other European institutions was rather limited. It seems that the influence at least of the Commission has increased since the Prague Summit and became more explicit at the Berlin Summit 2003. At this Berlin Summit the Ministers of Education referred explicitly in their Final Communiqué to the European Council Conclusions of Lisbon 2000 and Barcelona 2002 and stressed their importance. Worth mentioning is further, the Maastricht Communiqué of the Future Priorities of Enhanced European Cooperation in Vocational Education and Training of December 2004 reviewing the Copenhagen Declaration of November 2002, which also is considered to be an important step set in the Bologna process. Insofar we can see already a certain link between developments on European Union level and outside its framework.

At the Bergen Summit in May 2005, the European Union is next to the Council of Europe addressed as a participating organisation. Still, it clearly has to be underlined that this process takes place outside the European Union's institutional framework. The Commission can not

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168 See Zgaga Report: From Prague to Berlin.

169 The European Higher Education Area – Achieving the Goals, Communiqué of the Conference of European Ministers Responsible for Higher Education, Bergen 19-20 May 2005, <[www.bologna-bergen2005.no](http://www.bologna-bergen2005.no)>, last accessed 07 April 2008.

170 <[www.dfes.gov.uk/bologna/uploads/documents/LondonCommuniqufinalwithLondonlogo.pdf](http://www.dfes.gov.uk/bologna/uploads/documents/LondonCommuniqufinalwithLondonlogo.pdf)>, last accessed 8 May 2008.

171 CETS No 165.

take any legislative initiatives in this area<sup>172</sup>. Neither is the European Parliament directly involved. Furthermore, any control by the European Court of Justice is excluded as these developments do not concern European Community legislation.

## 5.2. European Education and the Lisbon Strategy

Inside the European Union's framework, higher education and the position of universities, mobility of researchers and students has also become a topic of major concern in the last five years. Mostly these issues are addressed by Council and Commission in the context of the knowledge based society. At its Spring Summit in Lisbon 2000 the European Council set a strategic goal for the European Union to become, by 2010, 'the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth, with more and better jobs and greater social cohesion'.<sup>173</sup> Recognising the important role of education and training in reaching this goal, the Lisbon Council invited the Ministers of Education to reflect on the concrete future objectives of the education systems in the Union. As a result, the Educational Council adopted a report on the concrete future objectives of the education and training systems in 2001.<sup>174</sup> This report was followed by the working programme Education & Training 2010, jointly adopted by the Council and the Commission in February 2002.<sup>175</sup> The Commission in addition to these documents published a Communication "Mobilising the brainpower of Europe: enabling universities to make their full contribution to the Lisbon Strategy" very recently in April 2005. This Communication as well as a Commission Staff Working Paper annexed to it, wants to address the European Higher Education in a worldwide perspective.<sup>176</sup> In its Communication "The role of universities in the Europe of knowledge" the Commission considered already the compatibility and transparency of the educational systems insofar as qualifications have to be recognised. The Commission referred at this point explicitly to the ongoing Bologna process of convergence.<sup>177</sup> Increasingly, the European institutions stress the importance of education and research hereby strongly referring to Europe's position on the world market. The issues addressed are mainly the competing position concerning research and education with the United States and other actors. Especially

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<sup>172</sup> See J. Pertek, *L'action communautaire en matière d'éducation et le processus de Bologne*, (2004) JTDE, 65-70; M. Verbruggen, *De Bolognaverklaring kritisch getoetst aan het Europees onderwijsbeleid* (2003) S.E.W. 199-212

<sup>173</sup> Presidency conclusions, Lisbon European Council, 23/24 March 2000, para. 5.

<sup>174</sup> Report from the Education Council to the European Council adopted by the Education Council on 12 February 2001.

<sup>175</sup> [2002] O.J. C142.

<sup>176</sup> COM (2005) 152 final. See also the recent Communication of the Commission "Working together for growth and jobs. A new start for the Lisbon Strategy COM (2005) 24.

<sup>177</sup> COM (2003) 58 final.

China becomes an important actor on the education and research market. In this context, one has to notice that the mobility of third-country national students was regulated in a special directive<sup>178</sup> and agreement has also been reached in the Council on another directive aiming on the liberalisation of the mobility of researchers.<sup>179</sup> Both directives are supposed to contribute to the Lisbon targets by attracting high quality researchers and students to the European research and educational space. In this context clear regulations concerning the recognition of third country qualifications are again relevant.

With the exception of the last two documents concerning the legal migration of third-country national researchers and students all other documents belong into the category policy papers and have no binding legal character. Interesting and strange enough is that none of these policy papers, communications and Council conclusions addresses clearly the inter-linkage between professional recognition and academic recognition as well as the consequences for professional mobility and labour migration based on the existing Treaty provisions, secondary legislation as well as case law of the Court of Justice. It seems as if the developments related to the fundaments freedoms and the Internal Market concept have no influence on actions taken by the Community institutions in the field of education and visa versa. It even seems that the responsible Directorate Generals “Internal Market” on the one hand and “Education” on the other hand do not communicate with each other. At least, already their web-sites do not give any indications that there are aware of the developments in the other DG. In our opinion, these issues should be addressed together as a holistic approach to qualification regulations and their recognition is necessary to encourage and stimulate increasing mobility of professionals as well as students. Furthermore, if the European Union wishes to become an attractive place for education and research in a worldwide perspective the infrastructure including the accessibility for third country nationals to study, do research and work has to improve considerably.

### 5.3. The European Process and its Consequences for the National Educational Systems

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178 OJ 2004 L For the original proposal, see COM (2002) 548.

179 Council docs. 14473/04, 18 Nov. 2004 (agreed text of Directive) and 10388/04, 11 June 2004 (agreed text of Recommendation). For the original proposals, see COM (2004) 178.

In this last chapter we specifically want to address the consequences of this “Europeanization” process for the national educational systems. We want to concentrate here specifically on the consequences for the legal education. How will the national legal education in the Member States react on these developments?

Although the Bologna Process has a number of significant shortcomings, both in its structure (soft law) and in its application, it is undeniably a part of the policies in the participating states and, as the stocktaking report rightly assumes, many states have taken legislative actions in order to implement (parts of) the Bologna Process. It would therefore be naïve and short-sighted to assume that the Bologna Process could be replaced with a different and perhaps more effective system for assuring complementary systems of higher education in Europe. There is no real alternative. The European Community Treaty still includes the prohibition on harmonisation in the field of education and there is no outlook that this is going to change in the near future.<sup>180</sup>

The key to making the best of the Bologna Process as it stands today with respect to the furthering of the free movement of lawyers in Europe, lies, in our view, in a modernisation and adaptation of the content of the different law programmes in the various Member States.<sup>181</sup> Traditionally, a law study (and the degree that follows it) focuses very much on the national law of the state in which it is taught. This at least has been the case since the 19<sup>th</sup> century. Room for specialisation or internationalisation often only occurs in the final part of the study, which, in many cases, is now part of the master part in the two-cycle system.<sup>182</sup> Generally, Bar Associations, require a sound knowledge of national law of the state concerned before they allow candidates to be admitted to the professional legal training of that state. In most cases students start their bachelor studies, however, in their home country as the decision to study abroad right from the beginning is often seen a too big step. Although, we can see that an increasing number of students motivated by different reasons is willing to take this step across the border right from the beginning of their studies. This is specifically true when the legal education offered at the home country is considered to be too long, too burdensome, old

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<sup>180</sup> Van der Mei (2001), pp. 409-410. The Lisbon Treaty will keep the prohibition of harmonisation as now included in Article 149 (4)

<sup>181</sup> This is also the view of the European Law Faculties Association (ELFA) that has immediately after the adoption of the Bologna Declaration started the discussion of reform of legal education in Europe. See: ELFA (1999); ELFA (2007) A; ELFA (2007) B; ELFA (2008); Posch (2005) A; Reich (2002) and Steger (s.d.).

<sup>182</sup> This is actually the system that ELFA proposes, see: ELFA (1999) and Reich (2002). Remarkably ELFA proposes direct access to the professional training of the legal profession after obtaining a masters degree in another jurisdiction (where the bachelor degree focuses on national law of the home member state and the masters degree on international (European) law) without having to resort to the ‘cumbersome and lengthy process of directives 89/48/EEC and 98/5/EC. In our opinion this is not a realistic option due to the value that Bar Associations give to the knowledge of national law, where this system would provide access to the legal profession without any knowledge of the national law of the host Member State.

fashioned or at least not enough internationally orientated. This is at least a development Maastricht University faces with an increasing number of bachelor law students from Germany who consider the legal education in their home country not anymore as adequate for a globalizing legal market. These students hope that with a legal education abroad to be more adapted to these new professional challenges than studying at home under the classical German legal educational system and passing two State examinations.

The question is, however, in which phase of the study law faculties should offer the sound knowledge of the national law necessary for the professional training in this state? Should it be offered already in the bachelor phase or should this specialisation on a national legal system take place in the master-phase of the two-cycle degree system.<sup>183</sup> Luxembourg is an example, where students traditionally specialised in Luxembourg law in a later phase of their training, since Luxembourg had, until recently, no law faculty of its own and it was therefore forced to accept students with foreign degrees. It must, however, admitted, that the majority of the Luxembourg students received a French law degree. The French legal system is quite similar to the Luxembourg legal system. An adaptation in a second phase to the Luxembourg legal system is therefore not very difficult. Is a master study concentrating on the national legal system of one year enough when the bachelor study differs more profoundly, e.g. a Bachelor in a common law jurisdiction in combination with a Master in a civil law country.

Questions remain further what should be studied during the bachelor phase. This is not an easy question to answer. In the past, when Roman law was studied at the different universities in Europe people who had studied Roman law taught themselves, by means of books specially issued for that purpose, the law of the jurisdiction they chose to work in.<sup>184</sup> In that sense the reconceived Roman law was a true *Ius Commune Europeum*. Nowadays there is no clear *Ius Commune* that is the basis for all the legal systems in Europe, but there are still ties that bind legal systems close together, often closer than what is assumed in those legal systems.<sup>185</sup>

It may therefore provide a solution, if a bachelor programme in law was developed that would focus largely, or completely, on the common ground between two or more legal systems. Even with close ties in place, it would be overambitious to create a bachelor study

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<sup>183</sup> Dubbed by ELFA as the 'upside-down system' see: ELFA (1999) and Reich (2002) where it is concluded that this system is 'premature on a general scale' mainly due to the absence of adequate teaching materials. Main advantage of this approach in my opinion is the fact that the knowledge of national law that the student obtains is in the field of the national law of the host member state where he seeks to enter the legal profession.

<sup>184</sup> Lokin & Zwalve (2001), pp.110-120. See for a very detailed overview of the reception of Roman Law in Europe: Mather (2001), pp. 323-362.

<sup>185</sup> Van Gerven (2001), pp. 485-503.

that tries to capture every legal system in Europe, but it would be possible to create such a bachelor study on a regional level. Such a bachelor study would then be followed by a master, and a professional education, that focuses largely on the legal system of the Member State where the professional wants to establish..

Maastricht University in the Netherlands has created such a bachelor curriculum. Because of its geographical location, Maastricht has fewer ties with the rest of the Netherlands and more ties with the surrounding regions in Belgium and Germany. Maastricht University has a very good reputation in these countries and other faculties, which prepare for non-regulated professions, have always greatly benefited from considerable student influx from Belgium and Germany. Although the law faculty has a considerable number of Belgian students, these students are always faced with some extra hurdles of having to apply for recognition of their Dutch degree in Belgium. This is at least the case when they want to be accepted directly after their university graduation to the Belgian professional training and not using the way offered by the European directives. This way, however, is only open after being fully qualified as a lawyer in the Netherlands. Close cooperation between Belgian and Dutch authorities<sup>186</sup> now ensures that the recognition process even directly after the university graduation works now quite smoothly. More and more students who have studied in the Netherlands will continue for their professional training in Belgium. Differences between the Dutch and German legal systems, and educational systems for that matter, prove to be much more difficult to overcome, so traditionally very few German students enrolled in the law faculty in Maastricht. In 1995, the law faculty created a new curriculum called the European Law School.<sup>187</sup> The purpose of this curriculum was to provide students with a sound foundation in Dutch law, good knowledge of the surrounding legal systems (i.e France, Germany and the United Kingdom) and the law of the European Union in order to prepare students for a career in law (predominantly in law firms that operate internationally) yet without sacrificing the so-called *civiel effect* which qualifies students with a law degree to enter the training stage of the Dutch Bar Association in order to qualify as an *advocaat*. This curriculum has proven to be attractive for both students and employers and is now a well established part of the curricula offered by the law faculty.

Recently, the Maastricht law faculty created a new version of the European Law School which will lead to a bachelor degree that is also appealing for students who do not seek to obtain a title that gives them the opportunity to become an *advocaat* in the Netherlands.<sup>188</sup> This new bachelor curriculum includes two years of English-taught courses (focussed on

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<sup>186</sup> See Bologna Stocktaking Report

<sup>187</sup> Heringa (2002), pp. 3-15 See also: De Groot (1992).

<sup>188</sup> The *civiel effect* requires curricula by law to include fixed subjects in Dutch law.

comparative law and International and European law) and a third year which offers the possibility to be much more focussed on national law. In this last year students have an option to follow a track based on Dutch law, or as alternative a more general track. The national track does prepare students for a master degree and this will lead to access to the qualification track for the legal profession in the Netherlands. As of yet, (students are still in their second year) and are mainly German students who seek to follow the Dutch track in order to qualify for access to the Bar in the Netherlands. This will give them the choice either to benefit from §112a of the *Deutschen Richtergesetz* and finalize their professional education in Germany or to continue professional training in the Netherlands. When proven effective, the curriculum of the new European Law School which started in September 2006, can serve as an example throughout Europe as a method by which, at least the regional furthering of the free movement of lawyers in Europe can be achieved.

A second initiative is also being worked out in this border region. In the Bologna Stocktaking Report, it is mentioned that the Netherlands and Belgium share a Transnational University.<sup>189</sup> Maastricht University and Hasselt University are both partners in this Transnational University. Recently, a plan had been launched to create a joint law degree (Maastricht, Hasselt) in cooperation with the Catholic University of Leuven. This degree would qualify students to enter the qualification process to become a lawyer in both Belgium and the Netherlands, and it would give them a sound foundation in International and European law. Such a law degree could become very sought after by people who want to establish themselves in small to medium sized law firms that operate in the Dutch-Belgian border area. Implementation of this joint degree is planned for September 2008.

## 5. SUMMARY AND CONCLUSION

In this article we have attempted to give a detailed overview of the developments concerning recognition of professional qualifications in the European Union during the last four decades. In these developments a clear two-tier structure can be identified. In the first place, it has been the European Court of Justice who acted as the important motor for the recognition of diplomas and increasing mobility of professionals. The European Court of Justice was responsible for the fact that individuals could rely on the Treaty provisions directly (*Reyners* and *van Binsbergen*) and that individuals had a right to have their professional qualifications

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<sup>189</sup> The Transnational University of Limburg, or TUL, is a cooperation between the University of Hasselt and Maastricht University.

and work experience recognised even if no secondary legislation was yet in force (*Thieffry* and *Vlassopoulou*). These rulings, and other case law mentioned in this article, established eventually a system in which any hindrance to the fundamental freedoms must objectively be justified by the Member State in order to avoid violation of the Treaty (*Kraus* and *Gebhard*).

The second tier is constituted by secondary legislation. Although the original EEC Treaty provided for General Programmes supported by Directives which should be completed before the end of the transitional period, negotiations concerning directives regulating the recognition of diplomas were difficult and slow. In the 1970s the legislative institutions sought to adopt Directives for diploma recognition for several regulated professions. This is the so-called sectoral or vertical approach. The system was successful in the beginning, when medical professions were dealt with, but the difficulties surrounding the directives for the professions of architect and pharmacists as well as the impossibility to create directives concerning the profession of engineers led to the conclusion abandon. In mid-1980s European institutions took a new direction and created a general system for the recognition of diplomas that was completed with a second and even a third general system directive. After working with the sectoral system and the three General Systems for a number of years, time has come to consolidate and simplify the system. A first step towards this consolidation has been taken with the SLIM-Directive 2001/19/EC and a second, larger step, has been taken with the adoption and implementation of Directive 2005/36/EC .

Recent case-law of the European Court of Justice shows that the general systems do not replace general recognition principles developed by the Court in its earlier case law but that they form part of a larger system in which migrants who are not yet fully qualified benefit from the rules developed by the Court (*Morgenbesser*).

The final question is, whether this case law of the Court of Justice will be of direct influence on the development of a European Area of Higher Education. We see great potential in the *Vlassopoulou*, *Morgenbesser* and *Hocsman* rulings and their application in future procedures before national authorities and courts. If the Bologna process indeed will lead to an increasing mobility of students, shopping from one educational system to the other, receiving a bachelor's degree in one Member State and a Master degree from the second in order to finally apply for access to the profession or at least the professional training in a third country will become a normal professional qualification process. Consequently, we very much will need the wide interpretation and application of the *Vlassopoulou* and *Morgenbesser* ruling. If these students

cross the oceans for further training and studies outside the European Union the application of *Hocsman* will often be necessary. Secondary Community law concerning professional recognition of qualification as it stands or even develops with the new Directive on professional qualifications will not be sufficient to solve all the possible recognition issues. The national authorities who have to apply these legislation will often be at loss to handle the individual cases satisfactory purely on the basis of the implementing measures. The *Vlassopoulou/Morgenbesser* doctrine should give national authorities the legal means to consider these recognition cases taking into account the migrant's individual education and professional trainings dossier. National authorities dealing with these recognition cases should be encouraged not jealously to defend the nationally developed educational and professional standards but fairly taking into account the different knowledge acquired by the migrant in the educational system of another Member State as well as professional experienced gained abroad including the qualifications and experiences acquired in non-EU countries<sup>190</sup>. In the light of the Lisbon strategy and the urgent need for increasing professional mobility, a positive attitude towards recognition of qualification is of vital importance in the general economic and societal interest of the European Union. The basic philosophy of the General System Directives, mutual trust in the quality of education and training of all Member States should be the guideline by taking these decisions.

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<sup>190</sup> Such an positive approach is often missing when recognition is required by the competent national authorities, e.g. the Case C-31/00 *Conseil national de l'ordre des architectes v. Dreessen* [2002], ECRI-663.