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FREE MOVEMENT OF LAWYERS IN THE EU

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Free Movement of Lawyers

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Chapter I. INTRODUCTION

One of the objectives of the European Community is the creation of a well-functioning common market. This objective is also one of the ways which lead to the fulfillment of other important non-economic goals of the Community as expressed in Article 2 of the Treaty - a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

The common market is being realized through basic Community freedoms – free movement of goods, persons, services and capital and payments.

The aim of this diploma thesis is to examine the legal profession as an inseparable component of liberalized economic relations throughout the Community. Throughout History, the legal profession has been viewed as a profession which is closely territorially connected to a given State and its legal order. Transnational legal practice is therefore a very ambitious idea and is worthy of a deep examination.

The free movement of lawyers is also an area which has not been explored as a separate issue very often. In world literature we find that the issue of the free movement of lawyers is usually dealt with as a part of chapters on freedom of establishment and freedom to provide services. Monographs on the free movement of lawyers have been written particularly by Hamish Adamson, Linda S. Spedding, Roger J. Goebel and Katarzyna Gromek-Broc. However, these monographs often lack an update and cannot be viewed as reflecting the current state of the free movement of lawyers.

Therefore, I assume that my thesis can prove to be a helpful instrument for orientation in the actual state of development of this undoubtedly fascinating field.

This diploma thesis can be divided into two main parts. In the first part I examine the sources of law in the field of the free movement of lawyers. In the second part I focus on a practical impact of the European legislation on the national legal orders of three Member States.

In the opening chapter of this thesis I provide an outlook into the conceptual setting of the free movement of lawyers within the system of acquis communautaire.

In the following chapters I focus on secondary legislation concerning the topic, namely on directives: 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration, 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications and 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained.

A part of each chapter concerning the secondary legislation forms a sub-chapter which provides an outlook into the relevant case-law of the ECJ , thereby facilitating comprehension and clarifying the system of above-mentioned directives.

Chapter IV is fully dedicated to the examination of implementing legislation in three Member States - Belgium, the Czech Republic and the United Kingdom. These countries were chosen in order to provide a representative sample of national legal systems of the 27 Member States.

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Chapter II. CONCEPTUAL SETTING OF FREE MOVEMENT OF LAWYERS

"The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States."[1]

Throughout the history of the European Community, the main objective to participate, by the creation of a common market, to the harmonious, balanced development of the whole complex, has always been present.

On 1 November 1993 the Treaty of Maastricht established the European Union. European integration as we know it today started.

"The establishment of a common market continues to be the Community's most important task. Although the Treaty does not define the expression "common market", a number of provisions make reference to it. Thus, a common market is mentioned as having to be progressively established during a specific transitional period, after which its operation and development is to be maintained. To that end, all practices impeding the establishment of the common market are to be eliminated as far as possible."[2]

The Treaty breaks down the establishment of the common market into the free movement of goods, the free movement of persons, services and capital.

Under Title III *Free movement of persons, services and capital* there are four chapters – *Workers, Right of Establishment, Services and Capital and Payments.*

[1] Article 2 EC
[2] Koen Lenaerts and Piet Van Nuffel: Constitutional Law of the European Union, Sweet & Maxwell, 2004

The questions of transnational legal practice throughout the EC traditionally fall within the concepts Right of establishment and Free movement of services. Therefore, I focus on these two concepts in the following text.

2.1 Right of establishment

The legal basis for the freedom of establishment lies in Articles 43 to 48 EC.

The purpose of freedom of establishment is to ensure the free movement of self-employed persons within the Community.

The right of establishment relates to activities not carried out in an employment relationship. This means economic activities carried out by a person outside any relationship of subordination with regard to the conditions of work or remuneration and under his own personal responsibility.[3]

Beneficiaries of this freedom are natural persons who are citizens of the EU as well as legal persons established according to the law of one of the Member States.

Similarly to other Community freedoms, the constituent of the freedom of establishment is the Community aspect. The Community aspect is activated at the time of integration of a person in a Member State other than the Member State of his origin.[4] The Treaty provisions cannot be applied to purely national situations.[5]

The principle of equal treatment applies; therefore, the entitled persons should be exercising their right of establishment under the same conditions as the nationals of the host Member State. Therefore, any discrimination on grounds of nationality resulting from the legislation of the host State must be abolished as construing a restriction on freedom of establishment.

The discrimination with respect to establishment is prohibited. The ECJ held in Reyners that "*after the expiry of the transitional period the directives provided for by the chapter on the*

[3] Case C-268/99 Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie [2001] ECR I-8615
[4] Tichý, L., Arnold, R., Svoboda, P., Zemánek, J., Král, R.: Evropské právo, C.H. Beck, 2006
[5] Joined Cases C-225/95, C-226/95 and C-227/95 Anestis Kapasakalis, Dimitris Skiathitis and Antonis Kougiagkas v Greek State [1998] ECR I-4239

right of establishment have become superfluous with regard to implementing the rule on nationality, since this is henceforth sanctioned by the Treaty itself with direct effect"[6].

Indirect discrimination is prohibited by Article 43 EC. This Article prohibits any national rule which places nationals of another Member State in a position less favorable than nationals of the State in question in the exercise of a self-employed activity. This was the situation in ***Thieffry*** where the Paris Bar refused to admit a Belgian who held a Belgian law degree that was recognized by a French university as equivalent, and who had fulfilled the French vocational training requirements for persons not holding a French diploma. Thus, "*the act of demanding the national diploma prescribed by the legislation of the country of establishment constitutes, even in the absence of the directives, a restriction incompatible with the freedom of establishment guaranteed by the Treaty*"[7].

The Treaty expressly forbids restricting the freedom of establishment and there are only two restrictions on the freedom of establishment permitted by the Treaty. Article 45 EC permits Member States to restrict establishment rights with regard to activities connected, even occasionally, with the exercise of official authority. Article 46 EC allows the Member States to the right of establishment on grounds of public policy, public security or public health.

For a long time, it was assumed that the Treaty provisions on the free movement of persons did not preclude a restriction on mobility of economic operators if the restriction was applied without distinction to a State's own nationals and nationals of other Member States. The ECJ seemed not to recognize the free movement of persons as having the same scope as the free movement of goods and services.[8]

One of the judgments which brought the effect of the provisions of the free movement of persons very closely to the rules on the free movement of goods and services was *Kraus*. Kraus, a German national holder of an academic title of Master of Laws, challenged the German law which required German nationals and nationals of other Member States to apply for authorization in order to be able to use the title of LLM. The ECJ in this Case held that "*[the Treaty] precludes any national measure governing the conditions under which an*

[6] Case 2/74 Jean Reyners v Belgian State [1974] ECR 631
[7] Case 71/76 Jean Thieffry v Conseil de l'ordre des avocats à la cour de Paris, [1977] ECR 765
[8] Koen Lenaerts and Piet Van Nuffel: Constitutional Law of the European Union, Sweet & Maxwell, 2004

academic title obtained in another Member State may be used, where that measure, even though it is applicable without discrimination on grounds of nationality, is liable to hamper or to render less attractive the exercise by Community nationals, including those of the Member State which enacted the measure, of fundamental freedoms guaranteed by the Treaty. The situation would be different only if such a measure pursued a legitimate objective compatible with the Treaty and was justified by pressing reasons of public interest"[9].

Article 44 EC indicates that the co-decision procedure shall be used to adopt legislation to achieve the right of establishment.

Article 47 EC authorizes the Community legislator to adopt measures for the mutual recognition of diplomas, certificates and other evidence of formal qualifications.

2.2 Freedom to provide services

The legal basis for the freedom to provide services lies in Articles 49 to 55 EC. According to Article 55 EC, Articles 45 to 48 EC apply to services as well. Consequently, the free movement of services is subject to the same exceptions as the provisions on the free movement of persons with regard to the exercise of public authority and public policy, public security and public health, and is to be facilitated by the mutual recognition of diplomas, certificates and other evidence of formal qualifications and by further co-ordinating directives.[10]

The case law interprets the provisions on the free movement of services in parallel manner to the free movement of goods, in particular where services are provided across the border without the provider or the recipient moving.

Article 50 EC defines services for the purposes of the Treaty as those "*normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons*". Services which are normally provided for

[9] Case C-19/92 Dieter Kraus v Land Baden-Württemberg, [1993] ECR 1663
[10] Koen Lenaerts and Piet Van Nuffel: Constitutional Law of the European Union, Sweet & Maxwell, 2004

remuneration, but occasionally are provided free of charge, are not excluded from the Treaty definition.[11]

As to the remuneration for services performed within the EU, services do not have to necessarily be paid by the recipient, although they primarily should be paid by private money. Accordingly, tuition provided in an educational institution which is primarily funded by the State does not constitute a service within the meaning of the Treaty.[12]

Providers of services are defined by Article 49 EC as "*nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended*". The provider of the service must be a national of a Member State and must be established in a Member State.

The transfrontier element acquires different forms. For example, the Community element is preserved when the provider of a service travels to the State of the service's recipient, and the other way round.

The provision of services differs from freedom of establishment by reason of its temporary nature. "Free movement of services cannot be relied upon where a national of a Member State goes to reside in the territory of another Member State and establishes his principal residence there in order to provide or receive services there for indefinite period."[13]

The temporary nature of the activities 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 fact that the provision of services 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.[14]

[11] Joined cases C-51/96 and C-191/97 Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo (C-51/96) and François Pacquée (C-191/97), [2000] ECR I-2549
[12] Case C-109/92 Stephan Max Wirth v Landeshauptstadt Hannover, [1993] ECR I-6447
[13] Koen Lenaerts and Piet Van Nuffel: Constitutional Law of the European Union, Sweet & Maxwell, 2004
[14] Case 55/94 Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano [1995] ECR I-4165

The ECJ held that Article 49 and the third paragraph of Article 50 produce direct effect and "may therefore be relied on before national courts, at least in so far as they seek to abolish any discrimination against a person providing a service by reason of his nationality or of the fact that he resides in a Member State other than that in which the service is to be provided"[15].

A Member State may impose restrictions on freedom to provide services on the basis of Articles 45 and 46 EC (public policy, public security and public health).

Furthermore, in Van Binsbergen the ECJ formulated a fully fledged rule of reason for the freedom to provide services: "*... taking into account the particular nature of the services to be provided, specific requirements imposed on the person providing the service cannot be considered incompatible with the treaty where they have as their purpose the application of professional rules justified by the general good - in particular rules relating to organization, qualifications, professional ethics, supervision and liability - which are binding upon any person established in the State in which the service is provided, where the person providing the service would escape from the ambit of those rules by being established in another Member State*"[16].

The restriction on trade in services must apply without distinction to all providers of services, regardless of nationality or the Member State in which they are established. These restrictions must be justified in the public interest, which can be designed to secure protection for the recipient of the service, consumer protection, protection of employees, protection of investors, fair trading, etc.

The restrictions must furthermore be proportionate – they must be suitable for achieving the objectives.

On the basis of the cases mentioned in this Chapter, we can see that it was very often the profession of lawyers which, in the absence of relevant directives, accelerated development. I assume that this profession was subject to many protectionist and restrictive tendencies

[15] Case 33/74 Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid, [1974] ECR 1299
[16] Case 33/74 Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid, [1974] ECR 1299

from the Member States and the representatives of the legal profession as well. It used to be deemed that a lawyer who acquired his education in one Member State was not capable of providing legal advice in other Member States. However, the convergence of national legal systems due to the functioning common market and lively trade between the Member States caused that these traditional views on the strict territorial nature of the legal profession are not true anymore.

Chapter III.PROVISION OF SERVICES IN HOST STATE FROM ESTABLISHMENT IN HOME STATE

3.1 Services Directive – General

The Council Directive of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (77/249/EEC) (hereinafter referred to as "Services Directive") was the first piece of legislation in the field of free movement of lawyers.

Although the Services Directive had only little effect on the provision of cross-boarder legal services, it laid down an important basis for up-coming legislative development.

"[The Services Directive] was designed as a limited measure to cover only temporary provision of services, until a more comprehensive measure could be produced to deal fully with lawyers' rights of establishment."[17]

In its Article 2, there lies one of the most important outcomes of the Directive, when the Services Directive defines a class of legal professionals entitled to perform services through the Community - "lawyers" - as persons entitled to pursue their professional activities under one of a list of national professional titles, such as *avocat* in France and its equivalents in the other Member States. List of entitled persons is as following:

Austria	Rechtsanwalt
Belgium	Avocat/Advocaat/Rechtsanwalt
Bulgaria	advokat
Czech Republic	Advokát
Denmark	Advokat
Germany	Rechtsanwalt
Estonia	Vandeadvokaat
Greece	Δικηγόρος
Spain	Abogado/Advocat/Avogado/Abokatu
France	Avocat

[17] Hamish Adamson: Free Movement of Lawyers, Butterworths, 1992

Ireland	Barrister/Solicitor
Italy	Avvocato
Cyprus	Δικηγόρος
Latvia	Zvērināts advokāts
Lithuania	Advokatas
Luxembourg	Avocat
Hungary	Ügyvéd
Malta	Avukat/Prokuratur Legali
Netherlands	Advocaat
Poland	Adwokat/Radca prawny
Portugal	Advogado
Romania	avocat
Slovenia	Odvetnik/Odvetnica
Slovakia	Advokát/Komerčný právnik
Finland	Asianajaja/Advokat
Sweden	Advokat
United Kingdom	Advocate/Barrister/Solicitor

For the United Kingdom and Ireland, the list includes not only *barristers*, but also *solicitors*, who mostly provide general corporate and commercial services. The Services Directive thus applies only to lawyers fully qualified as such in their Member States, and does not apply to persons who are holders of university law degree, but who have not yet obtained the professional qualification necessary to practice law (Case *Morgenbesser*[18]).

The scope of the application of the Services Directive is specified as the "provision of services". It is noteworthy that the Services Directive does not define the nature of the legal services that a lawyer may perform in a host State.

Article 1 (1) expressly permits the host States to "*reserve to prescribed categories of lawyers the preparation of formal documents in the administration for obtaining title to administer estates of deceased persons, and the drafting of formal documents creating or transferring interests in land*". This recognizes that in the United Kingdom and Ireland such

[18] Case C-313/01 Christine Morgenbesser v Consiglio dell'Ordine degli avvocati di Genova [2003] ECR I-0000

activities are reserved to *solicitors* whereas in most other Member States, such activities are preserved to the notarial professions which fall outside the Services Directive.[19]

The "provision of services" must mean the provision of services from the establishment in the home country. This arises both from the text of the Services Directive and the Treaty which makes a distinction between the provision of services and the right of establishment. Also, several ECJ rulings support this affirmation.

The Services Directive enables the provision of legal services only on occasional basis.[20]

3.2 Services Directive – Specific Provisions

Article 3 of the Services Directive states an important requirement on visiting lawyers – in cross boarder services, the lawyer must use the professional title used in his or her home Member State with an indication of the professional organization by which is he entitled to practise. This Article was clearly intended both to prevent inadvertent confusion of a lawyer providing services under the Services Directive with a host State professional, as well as any foreign lawyer's attempt to deceive clients by passing himself off as a local lawyer.

Article 4 of the Services Directive determines the rules of conduct applicable to the lawyer who provides the services pursuant this Directive. The duality of discipline rules is recognized. This principle is called double deontology.

Article 4 (2) states that the lawyers who perform the activities relating to the representation of a client in legal proceedings or before public authorities shall observe the rules of conduct laid down in the host Member State, "*with the exception of any conditions requiring residence, registration with a professional organization, in that State*".

On the other hand, Article 4 (4) of the Services Directive states that for all other legal services than those referred in paragraph 2 (i.e. the representation of a client in legal proceedings or before public authorities), "the rules of the home State are to apply, albeit

[19] Hamish Adamson: Free Movement of Lawyers, Butterworths, 1992
[20] Confirmed e.g. by the Case 55/94 Gebhard [1995], ECR I-4165

without prejudice to the application of several important host State rules, notably those on professional secrecy, relation with other lawyers, the prohibition on the same lawyer acting for parties with mutually conflicting interest, and publicity. However these latter home State rules only apply if they meet an objective of necessity standard."[21] These rules are applicable only if they are capable of being observed and to the extent to which their observance is objectively justified, "*to ensure, in that [host] State, the proper exercise of a lawyers activities, the standing of the profession and respect for the rules concerning incompatibility.*"

The provisions of Article 4 (4) are ambiguous. One of the outstanding problems that remain is the total or partial lack of dual control. "The overall problem of dual control was recognized while the Directive was being prepared and spawned a metaphor that a lawyer providing services abroad only ever "wore a cloak" of his own profession. The profession of a lawyer was perceived as similar but not assimilable. It was therefore only with great reluctance that the Commission accepted the compromise solution in the final version of Article 4 (4)."[22]

Paragraph 3 of Article 4 of the Services Directive contains several specific provisions to take account of the division of the profession in the United Kingdom and Ireland between solicitors and barristers (advocates in Scotland). When the lawyer performs the activities which are not reserved for barristers (or advocates in Scotland) in the United Kingdom as a host State, the rules of professional conduct applicable to the solicitors shall apply. Otherwise the rules of professional conduct applicable to the latter shall apply. However, the barristers from Ireland are always subject to the rules applicable in the United Kingdom to the barristers (or advocates).

When activities under this Directive are pursued in Ireland, the rules of professional conduct applicable to the barristers shall apply in so far as the lawyer governs the oral presentation of a case in court. In all other cases the rules applicable to the solicitors shall apply.

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[21] Roger J. Goebel: Liberalization of Interstate Legal Practise: EU and USA in Mads Andenas and Wulf-Henning Roth: Services and Free Movement in EU Law, Oxford University Press, 2002
[22] Linda S. Spedding: Transnational Legal Practise in the EEC and the United States, Transnational Publishers, Inc. Dobbs Ferry, New York, 1987

Barristers and advocates from the United Kingdom providing their services in Ireland shall be always subject to the rules of professional conduct applicable in Ireland to the barristers.

Article 7, paragraph 2 of the Services Directive establishes a sanction for the lawyers providing their services under this Directive, in the event of non-compliance with the obligations referred to in Article 4 and obligations in force in the host Member States. The host Bar is entitled to act and impose a sanction to the visiting lawyer who is in breach with the rules of conduct valid in the host Member State, in accordance with its own rules and procedures which consequence from such misconduct in the host Member State. The home Member State Bar shall be notified.

Due to the differences between the Court procedures in Common law and Continental legal systems, Article 5 of Services Directive contains an option for the host Member State to require the foreign lawyer to be introduced to the presiding judge and the president of the local Bar where appropriate. The foreign lawyer may also be asked by the host State to work in conjunction with a lawyer who practices before the judicial authority in question and who would, where necessary, be answerable to that authority.

Particularly, the United Kingdom professional bodies argued that a visiting lawyer pleading before the United Kingdom Courts should have a local lawyer's control or supervision due to the specific features of Common law procedure. However, this argument was not adopted by the Commission which felt that one of the major objectives of the Treaty was the opening of all national courts to all Community lawyers. I also assumes that the adoption of institute of control or supervisory of a local lawyer over the visiting lawyer would mean the violation of one of the basic principles of the legal profession – independence.

Limits mentioned above apply only as to the cross-boarder practice in "legal proceedings". The term "legal proceedings" used in Article 5 of the Directive in question is not defined, but presumably it refers to civil and criminal litigation before the courts.

Under Article 6 of Services Directive, those Member States who according to their national legislation do not permit its domestic in-house counsels ("*lawyers who are salaried employed of a public or private undertaking*") to perform activities relating to legal proceedings, may exclude foreign in-house counsels from such litigation as well. This right of relevant Member States was adopted as a result of a variety of in-house counsels' status within the Member States. For example, in the United Kingdom in-house counsels may be solicitors, but in France they cannot be *avocats* and hence cannot appear in courts.

The Lawyer providing his services in the host Member State under this Directive may be required to establish his qualification as a lawyer by the competent authority of the host Member State.

3.3 Case-Law

The Services Directive has been subject to several rulings of the Court of Justice which clarified numerous vague and ambiguous terms used in the Directive. Many Member States chose very restrictive ways of implementing the Directive. The ECJ's rulings declared that the Directive is to be implemented in a more liberal way.

3.3.1 *Commission v. Germany* [23]

In this case the Commission challenged the validity of national transposing legislation under the Services Directive.

The German transposing legislation[24] did not properly follow the wording of Article 5 of the Services Directive. The ECJ found the German legislation decisive in no less than 6 points:

i. the visiting lawyer was required to work in conjunction with a German lawyer, even in those cases where under the German law there is no mandatory requirement of representation by a lawyer;
ii. the German lawyer in conjunction with whom the visiting lawyer acts, must himself be the authorized representative or defending counsel in the proceedings;
iii. the visiting lawyer was not allowed to appear in oral proceedings or at criminal trials, unless he was accompanied by the German lawyer;
iv. the visiting lawyer was not allowed to visit, as defending counsel, a person held in custody unless he was accompanied by the German lawyer and the communication in

[23] Case 427/85 Commission of the European Communities v Federal Republic of Germany [1988] ECR 1123
[24] The Law of 16 August 1980 - Bundesgesetzblatt I P . 1453

writing, as defending counsel, with a person held in custody may be held only through the German lawyer;

v. unjustified requirements were laid down by requiring proof of the cooperation between the visiting and the local lawyer;

vi. the visiting lawyer was a subject to the rule of territorial exclusivity laid down in particular section of German law.

The judgment of the ECJ makes it clear that German law was excessive and that Article 5 of the Services Directive is to be understood in a very restrictive scope.

The ECJ held that the Article 5 of the Services Directive referring to the local lawyer as being "answerable" to the host State court cannot imply that the local lawyer had to be primarily an authorized representative of the client, meaning that the local lawyer should take the first role in drafting the pleadings or in oral arguments, or even be continuously present during the court proceedings.

The ECJ made it clear that the visiting lawyer is subject to only a minimal requirement of conjunction with the local lawyer.

It is not surprising that the ECJ rejected the German provisions requiring the visiting lawyer to be accompanied by a local lawyer during visits of a client held in custody and German provision requiring the visiting lawyer to correspond with such a person through the local lawyer, since it is obvious that these activities do not form the part of the actual representation of the client in the legal proceedings.

As to the German argument that the unlimited access of visiting lawyers to proceedings before German courts would be likely to create difficulties arising from insufficient knowledge of the rules of substantive and procedural law applied by those courts, the ECJ held that it "*forms part of the responsibility of the lawyer providing services vis-à-vis his client, who is free to entrust his interests to a lawyer of his choice*".

The ECJ further held that there is nothing in Article 5 of the Services Directive that would justify the subordinate role of the visiting lawyer which was provided by German law. The fact that the visiting lawyer was required to be constantly accompanied by the local lawyer when appearing at the court and special requirements for the proof of the cooperation were excessive and going beyond the scope of the Services Directive, and thus held unjustified.

In despite of this non-surprising and expectable part of the judgment, the ruling brought also a more significant statement, namely the decision that the visiting lawyer could not be subjected to the rule of territorial exclusivity laid down for German lawyers. This provision of German Law[25] "*is precisely part of national legislation normally relating to a permanent activity of lawyers established in the territory of the Member State concerned, all such lawyers having the right to gain admission to practise before one, and sometimes two, German judicial authorities, and to pursue before them all the activities necessary for representation of clients or the defence of their interests. On the other hand, a lawyer providing services who is established in another Member State is not in a position to be admitted to practise before a German court*".

This part of the decision could be regarded as putting the visiting lawyer in a more favorable position than local lawyers by the fact that the visiting lawyer is thus not bound by strict geographical or hierarchical restrictions for the provision of service within the host State.

The ECJ went even further in stating that the requirement of German law imposed on the visiting lawyer to act in conjunction with a local lawyer, where under the German law there is no requirement of representation by a lawyer, is unjustified. This is something which does not clearly emerge from the wording of the Services Directive itself. Does it mean that a host lawyer does not have to work in conjunction with a local lawyer in cases where the national law of Member States does not prescribe mandatory representation of a litigant by a lawyer? If so, the requirement is inapplicable in the majority of cases in the Czech Republic, for instance.

3.3.2 *Commission v. France*[26]

In this case the Commission challenged the French implementing legislation[27] of the Services Directive. France's implementation of the Directive was delayed for two years.

[25] paragraph 52 (2) of the Bundesrechtsanwaltordnung of 16 August 1980
[26] Case C-294/89 Commission of the European Communities v French Republic [1991] ECR I-3591

Also, the provision of legal services on an international scale has not been strong within France.

The ECJ strongly confirmed the approach taken in the German case above.
According to the ECJ, France had failed to fulfil its obligations under the Treaty and the Services Directive to facilitate the effective exercise by lawyers of freedom to provide services by:

i. depriving French nationals who practise as lawyers in a Member State other than the French Republic of the benefit of the provisions on freedom for lawyers to provide services in France;
ii. requiring a visiting lawyer to work in conjunction with a local lawyer when acting before authorities or bodies which have no judicial function and when acting in situations where French law does not make the assistance of a lawyer compulsory;
iii. requiring a visiting lawyer who appears before a Tribunal de Grande Instance (Regional Court) , in civil cases where it is compulsory to be represented by a local lawyer, to retain a lawyer registered with the Bar of that particular court or able to exercise the territorial right of "postulation" before it.

The first paragraph of Article 126-2 of Decree No 72-468 provided that "*nationals of other Member States of the European Communities who carry on their professional activities in their country of origin*" under one of the designations listed in Article 1(2) of the Services Directive "*shall be recognized in France as lawyers*". This provision prevented French nationals practicing law in other Member State than France from benefiting from the free movement granted to them by the Treaty and by the Services Directive. In this point, the French government did not challenge the Commission's opinion.

As to the first point of the second part of the judgment, the ECJ states that it clearly emerges from Article 5 of the Directive in question that the requirement of the French law imposed on visiting lawyers to act in conjunction with a local lawyer when pursuing activities before bodies or authorities which have no judicial function, is unjustified.

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[27] Decree No 72-468 of 9 June 1972 regulating the legal profession, as amended by Decree No 79-233 of 22 March 1979 (Journal Officiel de la République Française of 23 March 1979, p. 659)

In the second point of the second part of the relevant judgment, the ECJ throws further light on the decision in the German case mentioned above, by expressly saying that the visiting lawyer cannot be required to work in conjunction with a local lawyer before courts where representation by a lawyer is not compulsory. "*It must therefore be held that, by requiring a lawyer providing services to work in conjunction with a lawyer who is a member of a French Bar when acting before authorities or bodies which have no judicial function and when acting in situations where French law does not make the assistance of a lawyer compulsory, the French Republic has failed to fulfil its obligations under the Treaty.*"

Thus, local lawyers should serve as a guide to foreign legal jurisdictions but should not exercise the profession on behalf of a visiting lawyer.

The French government did not dispute the infringement with which it was charged.

As to the final point of the decision, the ECJ abides by its previous approach expressed in the German case mentioned above. The visiting lawyer cannot be subjected to the rules on territorial exclusivity. The rule of territorial exclusivity laid down by the French law normally relates to a permanent activity of lawyers established in France, all of whom are entitled to plead before the Tribunal de Grande Instance within whose area of jurisdiction they are established. However, a lawyer providing services who is established in another Member State is not in a position where he can plead before a French Tribunal de Grande Instance. "*In those circumstances, it must be stated that the rule of territorial exclusivity cannot be applied to activities of a temporary nature pursued by lawyers established in other Member States, since the conditions of law and fact which apply to those lawyers are not in that respect comparable to those applicable to lawyers established on French territory.*"

3.3.3 ***Gebhard***[28]

One of the most important judgments concerning the Services Directive arose by order of the Consiglio Nazionale Forense (National Council of the Bar) referred to the ECJ for a preliminary ruling upon two questions on the interpretation of the Services Directive.

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

The questions have been raised in connection with the disciplinary proceedings opened by the Milan Bar Council against Mr. Gebhard.

Mr. Gebhard was a German national and fully-qualified German *Rechtsanwalt* and a member of the Bar of Stuttgart. Mr. Gebhard had resided since March 1978 in Italy, where he lived with his wife, an Italian national, and his three children. He paid duly and entirely taxes in Italy, his country of residence.

Since 1 March 1978, Mr. Gebhard collaborated with an Italian *avvocato* firm, but in 1989 he opened his own office in Milan. About 65% of his turnover consisted of assisting and representing German-speakers in Italy and about 30% of his turnover consisted of representing Italian-speakers in Germany and Austria.

Due to the complaints of many Italian practitioners, the Milan Bar Council opened a disciplinary proceedings against Mr. Gebhard for using the title *avvocato* on the letterhead of notepaper which he used for professional purposes, of his having appeared using the title *avvocato* directly before the court and of his having practiced professionally from "*Studio Legale Gebhard*" without being qualified as an Italian lawyer. When in 1992 the Milan Bar Council imposed a sanction on him of a total of six months of prohibition of practice, Gebhard appealed to the National Bar Council, claiming in particular that his practice in Italy was justified under the Services Directive.
In this connection, the National Bar Council referred to the ECJ for a preliminary ruling upon two questions which are as follows:

i. whether the relevant part of the Italian law[29] which implements the Services Directive and which prohibits "the establishment on the territory of the Republic either of chambers or of a principal or branch office", is compatible with the rules laid down by that Directive, given that in the Directive there is no reference to the fact that the possibility of opening an office could be interpreted as reflecting a practitioner' s intention to carry on his activities, not on a temporary or occasional basis, but on a regular basis;

[29] Article 2 of Law No 31 of 9 February 1982 on freedom for lawyers who are nationals of the Member States of the European Community to provide services

ii. as to the criteria to be applied in assessing whether activities are of a temporary nature, with respect to the continuous and repetitive nature of the services provided by lawyers practicing under the system referred to in the above-mentioned Directive.

Not surprisingly, the ECJ ruled that the residence and practice of Mr. Gebhard in Italy took him out of the category of temporary interstate cross-boarder service providing, and thus his activities should be appraised by the establishment provisions of the Treaty.

"The ECJ however did provide useful guidance in the determination of the dividing line between service-providing and establishment, helping future courts to determine how far lawyers can go in providing interstate services on a temporary or occasional basis without being deemed to be established in a host State."[30]

The ECJ has largely followed the Opinion of Advocate General Leger[31] when stating: "*As the Advocate General has pointed out, 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 fact that the provision of services 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.*"

Pursuant this decision, a visiting lawyer providing his services under the Services Directive is entitled to open a branch office in the host Member State.

Thanks to *Gebhard* the lawyers and law firms from any Member State can provide occasional cross-boarder interstate legal services easily and freely throughout the territory of the European Union. They can also represent their clients in another Member State on an occasional basis; they may be associated with qualified host State lawyers.

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[30] Roger J. Goebel: Liberalization of Interstate Legal Practise: EU and USA in Mads Andenas and Wulf-Henning Roth: Services and Free Movement in EU Law, Oxford University Press, 2002

[31] Advocate General Philippe Leger's Opinion, [1995] ECR I-4165

3.3.4 *Gullung*[32]

In 1986, the *Cour d'Appel* in Colmar referred the ECJ for a preliminary ruling upon two questions concerning the interpretation of the Services Directive and relevant Treaty provisions. The questions were raised in the context of proceedings brought against the Colmar Bar Council and the Saverne Bar Council by Mr. Gullung.

Mr. Gullung, a national of two Member States (France and Germany) practiced as a *notaire* in France during the period of 1947 and 1966. In 1966 he resigned following the adoption of disciplinary measures against him by the *Chambre de Discipline des Notaires du Haut-Rhin.* Subsequently he sought to be permitted to practice as a *conseil juridique* in Marseilles and later as an *avocat* in Mulhouse. Both of his applications were rejected on the grounds that Mr. Gullung did not offer the guarantees of dignity, good repute and integrity necessary to practice as an *avocat* since the relevant bodies concluded that the infringements of the rules of professional conduct and ethics were too severe.

However, later on Mr. Gullung was accepted as *Rechtsanwalt* in Offenburg and at the same time he opened an office as *jurisconsulte* in Mulhouse. Soon after this, the Mulhouse Bar Council issued a decision prohibiting any member of that Bar to work in conjunction under the Services Directive with a person who does not satisfy the necessary requirements as to good character and, in particular, to Mr. Gullung, on pain of disciplinary sanctions. This decision was followed by similar decisions adopted by Bar Councils of Saverne and Colmar where Mr. Gullung appeared as a provider of services working in conjunction with a local lawyer.

Mr. Gullung brought an action against these decisions. In his action, Mr. Gullung relied on the Services Directive which provides for freedom of lawyers established in one Member State to provide services in another Member State. He also argued that the Directive in connection with the relevant Treaty provisions were of such effect that it enabled a person to establish himself as a member of the legal profession without the need of registration at a Bar.

[32] Case 292/86 Claude Gullung v Conseil de l'ordre des avocats du barreau de Colmar et de Saverne, [1988] ECR 111

Dual Nationality

The first question raised by the *Cour d' Appel* was whether a person of nationality of two Member States could rely on the Services Directive while the person is admitted to the Bar in one State and wants to rely on the Directive in the other State of which he is also citizen.

The ECJ took a view that "*the Directive might be relied upon by the nationals of all the Member States who were in the situations which the Directive defined for its application, even in respect of the state of which they were nationals.*"

The ECJ further held: "*Freedom of movement for persons, freedom of establishment and freedom to provide services, which are fundamental in the community system, would not be fully realized if a member state were entitled to refuse to grant the benefit of the provisions of community law to those of its nationals who are established in another member state of which they are also a national and who take advantage of the facilities offered by community law in order to pursue their activities in the territory of the first state by way of the provision of services.* "

Provision of Services

In the second question the *Cour d' Appel* asks whether the provisions of the Services Directive may be relied upon by a lawyer established in one Member State where he has been barred from access to legal profession by the latter Member State for reasons relating to dignity, good repute and integrity.[33]

In reply to this question the ECJ built in argumentation on the exceptions from the general rule stated in Article 2 (1) of the Directive, which sets out that any person established in another Member State as a lawyer under one of the designations listed in this Article, which include *Rechtsanwalt* in Federal Republic Germany as well, shall be recognized as a lawyer.

Article 4 (1) states that activities relating to the representation of a client in legal proceedings or before public authorities are to be pursued in each host Member State under

[33] Case 292/86 Claude Gullung v Conseil de l'ordre des avocats du barreau de Colmar et de Saverne, [1988] ECR 111

the conditions laid down for lawyers established in that state, with the exception of any conditions requiring residence, or registration with the host State Bar. Article 4 (2) provides that when pursuing his activities as a provider of services a lawyer must observe the rules of professional conduct of the host Member State, without prejudice to his obligations in the home Member State.

Also, when pursuing other activities by way of provision of services in the host Member State, a lawyer, according to Article 4 (4), is obliged to observe the rules and conditions of professional conduct of the Member State from which he comes from without prejudice to the rules which govern the profession in the host Member State only in so far as the latter rules are capable of being observed by a lawyer who is not established in the host Member State and in so far as the rules are objectively capable of such observance in order to justify the "*proper exercise of a lawyers' activities, the standing of the profession and respect for the rules concerning incompatibility*".
The ECJ concludes that it follows from these provisions that lawyers, when providing services, are required to comply with the rules of professional ethics in force in that host Member State.

This is entailed in a reply to the question of the *Cour d' Appel*: "*[The Services Directive] must be interpreted as meaning that its provisions may not be relied upon by a lawyer established in one Member State with a view to pursuing his activities by way of the provision of services in the territory of another Member State where he had been barred from access to the legal profession in the latter member state for reasons relating to dignity, good repute and integrity*".

I highly endorse the outcome of the Gullung case. On the one hand, the ECJ made clear situations regarding the dual nationality of a lawyer aiming to provide services in one Member State, national of which he is, while being a member of the legal profession in another Member State, the nationality of which he holds too: they are not purely national and also come within the scope of the Services Directive.

And on the other hand, the ECJ drew clear boundaries as to abusing and circumventing the Services Directive. I also appreciate the fact that the ECJ did not stay trapped and did not allow free movement of legal services at all costs.

3.3.5 ***AMOK***[34]

This case emerged relatively recently and it envisages the interesting issue of the reimbursement of costs from the unsuccessful party to the dispute to the winning party who was represented by a lawyer providing legal services on the basis of the Services Directive.

This case occurred before the ECJ in connection with the dispute between two parties – a company established according to the German law – AMOK Verlags GmbH (hereafter referred to as "AMOK") and a company established according to the Austrian law – A & R Gastronomie GmbH (hereafter referred to as "A & R"). The dispute was being solved by a German court and A & R, availing of the Services Directive, was represented by an Austrian lawyer. The Austrian lawyer was according to the German law[35] under an obligation to work in conjunction with a domestic lawyer who was authorized to plead before the relevant German court. The German law made use of Article 5 of the Services Directive and requires host lawyers pursuing services in Germany according to the Services Directive to work in conjunction with a local lawyer who practices before the judicial authority in question.

Eventually, A & R won the case before a German court and asked the losing party for reimbursement of legal costs. But since according to the Austrian scale for calculation of lawyer's reimbursement, the payment would be significantly higher than according to the German scale, A & R decided to claim for reimbursement calculated according to the Austrian scale. Consequently, AMOK objected to this, on grounds that "[...] *a lawyer established in Austria was not necessary for the proceedings in this case nor, consequently, was his cooperation with the lawyer established in Germany. In any event, in a dispute before a German court, the reimbursement of costs by the unsuccessful party must be calculated by reference to the German scale, which is the only scale that is foreseeable.* "

As soon as the dispute reached by way of an appeal the *Oberlandesgericht München*, the court decided to stay the proceedings and refer the matter to the ECJ. The *Oberlandesgericht München* asked the ECJ the following questions:

[34] Case C-289/02 AMOK Verlags GmbH v A & R Gastronomie GmbH [2003] ECR I-15059
[35] Gesetz über die Tätigkeit europäischer Rechtsanwälte in Deutschland of 9 March 2000

i. Whether Article 49 EC, Article 12 EC and the Directive are to be construed as precluding a rule laid down in the case-law of a Member State limiting to the level of the fees which would have resulted from representation by a lawyer established in that State the reimbursement, by an unsuccessful party in a dispute to the successful party, of the costs resulting from the services provided by a lawyer established in another Member State.
ii. Whether Article 49 EC and the Directive must be construed as precluding a judicial rule of a Member State providing that the party which has been successful in a dispute in which it was represented by a lawyer established in another Member State cannot recover, from the unsuccessful party, in addition to the fees of that lawyer, the fees of a lawyer practicing before the court seized of the dispute who, under the national legislation in question, was required to work in conjunction with the first lawyer.

Applicability of Austrian scale

The reply of the ECJ commences by clearing the question whether the provision stated in Article 12 of the Treaty is to be applied independently. Article 12, which lays down the general principle of non-discrimination on grounds of nationality, does not apply independently since it was given a specific expression and effect by Article 49 which prohibits restrictions on the freedom to provide services within the Community. The foregoing has been confirmed by settled case-law which lays down the general principle of the prohibition of discrimination on grounds of nationality, applies independently only to situations governed by Community law in respect of which the Treaty lays down no specific prohibition of discrimination.[36] Therefore, the ECJ concludes that there is no need to rule on the applicability of Article 12 EC.

The ECJ states that it may be true that the imposition of an upper limit of reimbursement of costs of a lawyer established in a Member State "*which is fixed at the level of those applicable to lawyers established in another Member State may, in the case where the fees are higher than those resulting from the scale used by the latter State, be liable to render less attractive the provision by lawyers of their services across borders*".

[36] Opinion of Advocate General Mischo in Case C-289/02 AMOK

However, Article 50 EC states that "*the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals.*"

Furthermore, in the context of transfrontier provision of services by lawyers, Article 50 EC was defined in greater context by Article 4 of the Services Directive. Article 4 (1) of the Directive provides that the activity of representing a client in legal proceedings in another Member State must be pursued under the conditions laid down for lawyers established in that State, with the exception of any conditions requiring residence, or registration with a professional organization, in that State. Article 4 (2) sets out that the rules of professional conduct of the host Member State must be observed in the pursuit of those activities. "*Although, the Community legislature has therefore excluded two conditions which would have the effect of rendering the provision of services analogous to establishment, it plainly took the view that all other conditions and rules in force in the host State can apply.*"[37]

The ECJ concludes this issue by stating that the reimbursement of fees of a lawyer established in a Member State may therefore also be made subject to the rules applicable to lawyers established in another Member State. The ECJ finds this solution as the only one which complies with the principle of predictability, and thus of legal certainty, for a party which enters into proceedings and thus incurs the risk of having to bear the costs of the other party in the event of being unsuccessful.

Reimbursement of additional fees of a lawyer practicing before the court seized of the dispute

In the second limb of the case, the ECJ was replying to the question whether the winning party to a dispute, in which it was represented by a lawyer established in another Member State, is entitled to collect from the unsuccessful party, in addition to the fees of that lawyer, the fees of a lawyer practicing before the court seized of the dispute who, under the national legislation in question, was required to work in conjunction with the first lawyer.

[37] Opinion of Advocate General Mischo in Case C-289/02 AMOK

The German Government strongly opposed the affirmative possibility; however the ECJ's opinion was different.

The ECJ held that the fact that the party which has been successful in a dispute and which has been represented by a lawyer established in another Member State cannot also obtain reimbursement, from the unsuccessful party, of the fees of the lawyer practicing before the court seized and to whom the successful party has had recourse, on the ground that such costs are not regarded as being necessary, is liable to make the transfrontier provision by a lawyer of his services less attractive. Such a solution may have a deterrent effect capable of affecting the competitiveness of lawyers in other Member States.

It is also true that cooperation with a local lawyer practicing before the relevant court is a matter of harmonization and in Germany it is mandatory which means that there is no contractual relationship between the local lawyer and the client. The appointment of a local lawyer is not a matter of a client's choice; it is not something additional which would serve to the benefit of a client represented by a lawyer established in another Member State to the detriment of counterparty.

Advocate General Mischo in his Opinion also stated that "*a reply in the negative to that question would mean that, in such a Member State, the parties to a dispute would be discouraged from having recourse to lawyers established in other Member States and there would in consequence be an impediment to the freedom of those lawyers to provide services*".

Chapter IV. RECOGNITION OF PROFESSIONAL QUALIFICATIONS

4.1 Diplomas Directive – General

Soon after *Reyners*[38] and *Van Binsbergen*[39] in which the ECJ recognized the right of Community professionals to be treated without discrimination by the host State authorities, the Council began to adopt directives of great importance to specific professions.

Medical doctors were the first profession whose diplomas were to be recognized on the Community level. Soon directives for nurses, dentists, veterinarians and pharmacists followed[40]. In 1985, eventually a directive concerning a mutual recognition of architects' diplomas was adopted.[41]

These sectoral directives followed the common approach. They were based on the strategy that professional education and training requirements be harmonized. They set a basic floor for qualifications for all members of the profession in question. Thus, a foreign-trained professional may easily meet the requirements for the particular profession in a host Member State and can also obtain a license to practice his profession in the host Member State. It can also be assumed that these directives are sufficiently clear and unconditional, so that they can produce direct effect[42].

Albeit these great advantages of this vertical method, this approach was abandoned. "It was very difficult to obtain the then necessary unanimity on the content of such directives and

[38] Case 2/74 Jean Reyners v. Belgian State [1974] ECR 631
[39] Case 33/74 Van Binsbergen v. Bestuur van de Bedrijfsvereniging [1974] ECR 1299
[40] Council Directive 75/363/EEC of 16 June 1975 concerning the coordination of provisions laid down by law, regulation or administrative action in respect of activities of doctors; Council Directive 77/453/EEC of 27 June 1977 concerning the coordination of provisions laid down by Law, Regulation or Administrative Action in respect of the activities of nurses responsible for general care; Council Directive 78/687/EEC of 25 July 1978 concerning the coordination of provisions laid down by Law, Regulation or Administrative Action in respect of the activities of dental practitioners; Council Directive 78/1026/EEC of 18 December 1978 concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in veterinary medicine, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services; Council Directive 85/433/EEC of 16 September 1985 concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in pharmacy, including measures to facilitate the effective exercise of the right of establishment relating to certain activities in the field of pharmacy.
[41] 85/384/EEC: Council Directive of 10 June 1985 on the mutual recognition of diplomas, certificates and other evidence of formal qualifications in architecture, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services
[42] Case 271/82 Auer v. Ministiér Public, [1983] ECR 2727

discussions were consequently very lengthy, but also because of the great administrative burden that directives of that type generate, especially for the Commission."[43] The process of adopting the Veterinarians Directive is an evidence of the long-lasting dialogues on the content and the basic requirements on education, etc.

For some of the professions, the substantive materials covered in the education and training, as well as the professional activities, vary so much that it is enormously difficult to develop a common approach of studies. This is especially the case of the legal profession.

"Thus, by the early 1980s, the pace of progress in attaining the rights of professionals to practice freely throughout the Community was clearly too slow, and a new approach was needed. Accordingly, in the June 1985 White Paper on Completing the Internal Market, the Commission proposed a general approach to cover all professions where the rules had not yet been harmonized. This approach, borrowed from the sphere of the free movement of goods, was to be one of mutual trust and mutual recognition: each Member State would trust the quality of higher education in every other State and recognize the other State's diplomas as being essentially equivalent to its own."[44]

The ultimate result was the Directive of 21 December 1988 on general system for the recognition of higher education diplomas awarded on completion of professional education and training of at least three year's duration (89/48/EEC), (hereinafter referred to as "Diplomas Directive") adopted by the Council.

The Diplomas Directive promotes horizontal harmonization across a number of professions. Thus, the Directive replaced the policy of sectoral harmonization and coordination by a general system of mutual recognition of qualification.

Diplomas Directive sets out the conditions in which a Member State is obliged to recognize diplomas issued by another Member State as equivalent to diplomas awarded on its own territory.

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[43] Jaques Pertek: General Recognition of Diplomas and Free Movement of Professionals, European Institute of Public Administration, Maastricht, 1992

[44] George A. Bermann, Roger J. Goebel, William J. Davey, Eleanor M. Fox: Cases and Materials on European Union Law, American Casebook Series, West Group, 2002

This Directive is designed for professionals who are nationals of one of the Member State wishing to practise their profession in a Member State other than that in which they obtained their professional qualifications. Professionals covered by specific directives are excluded from the scope of the application of this Directive.

The Diplomas Directive applies to professionals who have completed a minimum period of three years of post-secondary education and professional training for professions which are regulated under national law or subject to the requirement of a diploma, or other similar professional qualifications equivalent to a diploma, i.e. professions which cannot be taken up or practiced in the host Member State without certain specified professional qualifications. The general system of the Diplomas Directive will thus apply in cases when the profession is regulated in a host Member State.

The Diplomas Directive does not apply to nationals of non-Community states even though they obtained necessary qualification in one of the Member States.

The Directive does not apply to purely national situations, i.e. "*those which have no factor linking them with any of the situations governed by Community law and which are confined in all respects within a single Member State. It follows that persons who have neither worked nor studied nor obtained a diploma on completion of university or professional education in a Member State of the Community other than their country of origin may not rely on the rights conferred by the Directive.*" (Case Kapasakalis[45])

The scope of application of the Diplomas Directive includes workers as well as self-employed persons.

It follows that legal professions which have an equivalent in another Member State are subject to the Diplomas Directive as well.

[45] Joined Cases C-225/95, C-226/95 and C-227/95 Anestis Kapasakalis, Dimitris Skiathitis and Antonis Kougiagkas v Greek State [1998] ECR I-4239

The Diplomas Directive was a second step taken in promoting real freedom of lawyers, however eventually it failed to fulfil the expectations of lawyers, which were the facilitatation of cross-border legal practice in Europe.[46]

It is truth that the Diploma Directive provides that persons with diplomas obtained in one Member State can claim to have this diploma recognized in another Member State where they wish to be established and take up the practise of law, but the Directive contains also two safeguards which can be easily used by Member States in order to restrict access to their professions.

The first safeguard is constituted by the provision which enables the host Member State to require the professional whose length of education and training is shorter than that required in host Member State, to produce evidence of up to four years experience as a fully qualified professional in another Community country.

The second may offer even more opportunities to discourage foreign lawyers. Where there is a substantial difference in the content of education or training, incoming professional may be required to undergo a procedure designed to ensure that he or she has acquired the extra knowledge required. The procedure may be composed of either an examination – the aptitude test or a period of assessed supervised practice not exceeding three years – the adaptation test. The applicant may choose between the adaptation period and the aptitude test. But in the case of legal professions there is no choice possible. It is the Member State who opts for either the aptitude test or the adaptation test in the case of legal profession.

With regard to the nature of the profession of a lawyer and the content of education and training in various Member States, it is likely to be significantly different from that of the host Member State.

Moreover, the Diplomas Directive was deliberately drafted in fairly general terms so as to ensure that it could apply to a larger number of professions. As a result there is a large possibility of different interpretations and discrepancies between examiners can be significant.

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[46] Katarzyna Gromek-Broc: The Legal Profession In The European Union – A Comparative Analysis of Four Member States, Liverpool Law Review no. 24: 109–130, 2002

"Generally speaking, its implementation across Europe demonstrated the protectionist policies of the Member States, thus jeopardizing the real purpose of the Directive. In fact, the Directive was used rather as a tool to stop an influx of foreign lawyers instead of facilitating it. Finally, the Directive clearly envisaged establishment as assimilation within the profession of the host Member State. Consequently, it applied only to those who wanted to establish themselves permanently in the host Member State. Thus, it did not take into account the increasing need for lawyers to practise in several European countries, without a change in their principal establishment and who would practice under their title of country of origin." [47]

4.2 Diplomas Directive – Specific Provisions

4.2.1 Diploma

Article 1 defines a diploma for the purposes of the Diplomas Directive. A diploma means any diploma, certificate or other evidence of formal qualifications or any set of such documents. Furthermore, it lays down three cumulative conditions to be met. Firstly, the diploma has to be awarded by a competent authority in a Member State. Secondly, it has to be evidence that the holder completed a higher education and where necessary also required professional training. And thirdly, that this education entitles him or her to take up or pursue a regulated activity in question in that Member State.

Where a person providing a regulated activity in a home Member State on the basis of a diploma acquired in a third country and recognized in that Member State, wishes to take up or pursue an activity in another Member State, the Diplomas Directive provides for an additional period of three years practice. In its Recommendation adopted concurrently with the the Diplomas Directive, the Council urged the Member States to recognize the diplomas of EU citizens acquired in third states.[48]

Where the education necessary was acquired mainly in the Community, no other conditions are prescribed.

[47] Katarzyna Gromek-Broc: The Legal Profession In The European Union – A Comparative Analysis of Four Member States, Liverpool Law Review no. 24: 109–130, 2002
[48] Recommendation 89/49 OJ 1989 L19/24

4.2.2 Regulated Activity

A profession is said to be regulated when it is a statutory requirement to hold a diploma or other occupational qualification in order to pursue the profession in question. In that case, the lack of the necessary national diploma constitutes a legal obstacle to access to the profession. The concept of regulated activity within the meaning of the Directive covers not only activities regulated by the laws of a Member State which is the general pattern for regulated activities in most of the Member States. It covers also situations where an activity is indirectly regulated by charter professional organizations. This is the case of solicitors in the United Kingdom and Ireland.

In its judgment *Aranitis*[49] the ECJ held that the definition of regulated activity is a matter of Community law, but whether the activity is regulated or not depends on the legal situation in the host Member State. "*The effect of Article 1(c) and (d) is that the directive applies only to regulated professions and that where the conditions for taking up or pursuing a professional activity are directly or indirectly governed by legal provisions, whether laws, regulations or administrative provisions, that activity constitutes a regulated profession.*" In cases where there are no provisions governing the taking up and pursuit of the profession such profession "*cannot be regarded as directly regulated for the purposes of the directive*". A profession is indirectly regulated where there is indirect legal control of access to or pursuit of that profession. Where a profession is not regulated in a host Member State, the provisions of the Directive cannot be applied.

For instance the activity of a person undertaking the necessary period of practice to be accepted to the bar, i.e. a legal trainee, was held not to be a regulated activity separate of *avvocato* in Italy (*Morgenbesser*[50]). It is thus clear that the Diplomas Directive applies only to fully qualified professionals who have already received a professional training which might be required in addition to a diploma.

[49] Case C-164/94 Georgios Aranitis v Land Berlin [1996] ECR I-135
[50] Case C-313/01 Christine Morgenbesser v Consiglio dell'Ordine degli avvocati di Genova [2003] ECR I-0000

The competent authority may not refuse to authorize an applicant whose home Member State does not regulate the profession in question, but who has pursued that profession full-time for the period of two years during the past ten years.

4.2.3 Integration into Regulated Profession

Once the situation falls within Article 3 of the Diplomas Directive, the Directive is applicable and the applicant will be fully integrated into the relevant profession.

In order to have inconsistent national provisions disapplied, Article 3 (a) may be invoked by individuals before national courts. Article 3 (a) has direct effect, as was held by the ECJ in *Beuttenmüller*[51].

On the basis of the recognition of diplomas, a foreign professional is also entitled to use a professional title of the host Member State corresponding to the profession in question. "In effect, this protects the foreign professional, once admitted in the host State, from the risk of treatment as a "second-class citizen".[52]

4.2.4 Exceptions

If the education of a foreign professional lasted one year less than the equivalent education in a host Member State, he or she may be asked to submit evidence of professional experience in accordance with Article 4 (1) in duration of maximum four years.

If there is a substantial or structural difference between the matters covered by an applicant's education and training diploma and matters covered by the equivalent diploma in the host Member State, the foreign professional may be asked to complete either an adaptation period or an aptitude test.

An adaptation period as defined in Article 1 (f) of the Directive is the pursuit of a regulated profession in the host Member State under the responsibility of a qualified member of that

[51] Case C-102/02 Ingeborg Beuttenmüller v Land Baden-Württemberg [2004] ECR I-0000
[52] George A. Bermann, Roger J. Goebel, William J. Davey, Eleanor M. Fox: Cases and Materials on European Union Law, American Casebook Series, West Group, 2002

profession, such period of supervised practice possibly being accompanied by further training. The detailed rules governing the adaptation period and its assessment as well as the status of a migrant person under supervision shall be laid down by the competent authority in the host Member States. The adaptation period shall not exceed three years of duration.

Article 1 (g) sets out that an aptitude test is a test limited to the professional knowledge of the applicant, made by the competent authorities of the host Member State with the aim of assessing the ability of the applicant to pursue a regulated profession in that Member State. Competent authorities must take account of the fact that the applicant is a qualified professional in the home Member State. It shall cover subjects knowledge of which is essential in order to be able to exercise the profession in the host Member State. The test may also include knowledge of the professional rules applicable to the activities in question in the host Member State. The detailed application of the aptitude test shall be determined by the competent authorities of the host Member State with due regard to the rules of Community law.

Adaptation period and aptitude test cannot be required cumulatively.

Normally, the applicant is entitled to choose between an adaptation period or an aptitude test. That is not the case for legal professions where detailed knowledge of national law is required. In the situation of migrant lawyers, it is up to the host Member State to choose which possibility it will opt for.

Currently, all Member States require from the applicants either to pass an adaptation period or an aptitude test. Anything like automatic recognition of diplomas obtained in the field of law does not exist, while aptitude test is the most frequent choice.

A migrant lawyer may be exempted from the aptitude test. This exemption follows from the Establishment Directive. If a migrant lawyer has effectively and regularly pursued for a period of at least three years an activity in the host Member State under his home-country professional title. If this activity concerned the law of that State (including Community law) for at least three years, the local Bar may verify the effective and regular nature of the activity and may ask a migrant lawyer, if need be, to provide clarification or further details. If this period of activity has been for less than three years, the local Bar must take into account all knowledge and professional experience of the law of the host Member State, as well as any attendance at lectures or seminars on the law of that State. A migrant lawyer may be asked to attend an interview in order to assess his activity and his capacity to continue it.

The ECJ explains the conditions of performance of an aptitude test by competent national authorities in the judgment *Commission v. Italy*[53].

4.3 Case-Law

4.3.1 *Morgenbesser*[54]

Ms. Morgenbesser, a French national living in Italy applied to the Bar Council of Genoa on 27 October 1999 for enrolment in the register of *praticanti*, i.e. the register of legal trainees. In support of her application, she produced a diploma of *maîtrise en droit* obtained in France in 1996. In April 1998, after doing legal work for eight months in a Paris law office, she joined a firm of *avvocati* registered with the Genoa Bar, where she continued to practise at the time of the hearing before the ECJ.

The Bar Council of Genoa rejected her application citing Italian law[55], making enrolment in the register of *praticanti* subject to the holding of a legal diploma issued or confirmed by an Italian university.

Ms. Morgenbesser then applied to the Università degli Studi of Genoa for recognition of her *maîtrise en droit*. The faculty of law of that university made such recognition subject to her completing a shortened course of two years, passing 13 examinations, and writing a final thesis.

Ms. Morgenbesser appealed against both decisions mentioned above. On that appeal, the Corte suprema di cassazione decided to stay the proceedings and ask the ECJ for a preliminary ruling whether Community law precludes the authorities of a Member State

[53] C-145/99 Case Commission of the European Communities v Italian Republic [2002] ECR I-2235
[54] C-313/01 Case C-313/01 Christine Morgenbesser v Consiglio dell'Ordine degli avvocati di Genova [2003] ECR I-0000
[55] point 4 of the first paragraph of Article 17 of Decree-Law No 1578/33

from refusing to enroll the holder of a legal diploma obtained in another Member State in the register of persons undertaking the necessary period of practice for admission to the Bar solely on the ground that it is not a legal diploma issued or confirmed by a university of the first State.

The ECJ examined whether a situation such as that of Ms. Morgenbesser falls within the scope of the Diplomas Directive.

The ECJ states that: "*According to the definition given in Article 1(c) of Directive 89/48, a regulated profession is the regulated professional activity or range of activities which constitute this profession in a Member State and, according to the definition appearing in Article 1(d), a regulated professional activity is a professional activity, in so far as the taking up or pursuit of such activity or one of its modes of pursuit in a Member State is subject, directly or indirectly by virtue of laws, regulations or administrative provisions, to the possession of a diploma.*" Therefore the profession of *praticanti* is a regulated activity within the meaning of the Diplomas Directive.

"*However, it follows from those provisions that the pursuit of those activities is designed to constitute the practical part of the training necessary for access to the profession of avvocato.*"

It follows that the *maîtrise en droit* which was obtained by Ms. Morgenbesser in France does not constitute a diploma for the purposes of the Diplomas Directive in the absence of the *certificat d'aptitude à la profession d'avocat (CAPA)* which was the professional qualification required for the access to the *stagiaire* register in France. Ms. Morgenbesser did not hold *CAPA* and was therefore unable to rely on the Diplomas Directive.

The ECJ rejected that the notion of regulated activity could also cover "traineeship". But either Article 39EC or 43EC could provide a legal basis for a foreign professional's right to have his or her professional qualifications taken into account. The ECJ ruled that national authorities must take into consideration the professional qualification of an applicant including diplomas, certificates or other formal qualifications and any professional experience wherever acquired. The qualification should then be compared to those required nationally.

"The Court ruled that whilst academic equivalence of diplomas is important in other contexts, it is unnecessary in the context of assessment of the migrant's qualifications under Articles 39 and 43 EC. All qualifications of the migrant had to be taken into account in the assessment of his whole training, which must enable the authority of the host member state to assess the equivalence of the candidates' qualifications objectively. The qualifications need not be identical."[56]

This judgment extends rights of legal trainees since they are not covered by the Diplomas Directive. It goes beyond the scope of Article 5 of Diplomas Directive which makes this optional.

It also imposes the following obligations on the competent national authorities:

i. According to the case-law the principles of which were set out in ***Vlassopoulou***[57], the authorities, must take into consideration the professional qualification of that person by making a comparison between the qualifications certified by his diplomas, certificates and other formal qualifications and by his relevant professional experience and the professional qualifications required by the national rules for the exercise of the profession in question. This has been taken into account and incorporated into the Diplomas Directive by the amendment 2001/19.

ii. The competent national authorities must take into account qualification wherever acquired and this obligation does not cease to exist as a result of the adoption of the Diplomas Directive.

iii. The competent national authorities must assess all the applicant's abilities, knowledge and competences to carry out the professional role of "lawyer" in the host country.

iv. The knowledge, learning and skills of applicants have to be taken as a whole, and there can be no prior requirement of equivalence of the academic stage of training.

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[56] Conseil des Barreaux de l'Union européenne: Chronology (I), Analysis (Ii) and Guidance (Iii) To Bars and Law Societies Regarding Case C-313/01 Christine Morgenbesser v Consiglio dell'Ordine degli avvocati di Genova [2003] ECR I-0000

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

4.3.2 ***Commission v. Italy***[58]

In 1999 the Commission brought an action against Italy for the infringement of the EC law concerning several issues on free movement of lawyers. The ECJ found that provisions of Italian law setting out the following matters were contrary to Articles 49 and 43 EC and the Diplomas Directive:

i. the general prohibition whereby lawyers established in other Member States and practicing in Italy in the exercise of their freedom to provide services cannot have in that State the infrastructure needed to provide their services,
ii. the obligation of residence in the judicial district of the court to which the Bar at which they are enrolled is attached,
iii. the absence of rules regulating the conduct of the aptitude test for lawyers from other Member States.

In this case the ECJ gave us among other a useful definition of the aptitude test.

Since Article 1(g) of the Diplomas Directive provides that in order to enable the aptitude test to be organized, the competent authorities of the host Member State are to draw up a list of subjects, on the basis of a comparison of the education and training required in [their] Member State and that received by the applicant. Subjects not covered by the diploma or other evidence of formal qualifications possessed by the applicant are to be examined by the aptitude test.

"It follows that precise content of the aptitude test must be determined on a case-by-case basis following a point-by-point comparison between the qualifications and experience of the applicant, who, as stated in the ninth recital in the preamble to Directive 89/48, is a person who has already received his professional training in another Member State, and the list of subjects regarded as indispensable for education and training for the profession concerned."

[58] Case C-145/99 Commission of the European Communities v Italian Republic [2002] ECR I-02235

Even though the Diplomas Directive does not "*require the Member States to regulate in detail all aspects of the aptitude test, it does not relieve them of the obligation to specify and publish the subjects regarded as indispensable for practising the profession concerned and the rules regulating the conduct of the aptitude test, so that applicants can be aware, in a general way, of the nature and content of the test which they may be required to sit.*" Otherwise the Member States are at risk of being arbitrary or even discriminatory.

4.4 New Diplomas Directive

The Stockholm European Council of March 2001 asked the Commission to present proposals for a more uniform, transparent and flexible regime in order to make Europe the world's most dynamic and competitive economy by 2010 (Lisbon European Council of March 2000). In July 2001 the Commission launched a public consultation on how to improve the EU regime for recognition of professional qualifications in all Member States. The reform of the system for the recognition of professional qualifications was started in order to help make labor markets more flexible, further liberalize the provision of services, encourage more automatic recognition of qualifications, and simplify administrative procedures.

As a result of wide discussions, the Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, which repeals 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, 85/432/EEC, 85/433/EEC, 89/48/EEC, 92/51/EEC, 93/16/EEC and 1999/42/EC was adopted, (hereinafter referred to as the "New Diplomas Directive").

The New Diplomas Directive entered into force on 20 November 2005. The implementation period will expire on 20 November 2007.

This Directive consolidates fifteen directives into one piece of legislation. These include twelve sectoral directives - covering the professions of doctor, nurse responsible for general care, dentist, veterinary surgeon, midwife, pharmacist and architect - and three directives which have set up a general system for the recognition of professional qualifications and cover most other regulated professions. The Diplomas Directive relevant for the recognition of lawyers' qualifications shall be replaced by this new legislation as well.

However, the Services Directives and the Establishment Directive are not covered by this exercise, since they concern the recognition not of professional qualifications but of the authorization to practice. This is mainly a result of strong lobbying pressure by the CCBE. The CCBE had strongly reacted to the plan of the Commission to incorporate the rules of the general system of professional recognition and those in the sectoral Directives applicable to some professions, including the legal profession, into a single Directive. The CCBE emphasized the necessity to exclude from the process of reform the Directives applicable to the legal profession.[59]

The New Diplomas Directive does not prescribe one system or one blueprint for mutual recognition, but it combines a number of approaches depending on the type of qualification, training or experience involved. The New Diplomas Directive also uses different approaches according to whether the recognition is being sought in the context of the right of establishment or the freedom to provide services. "The aim of the treatment is to provide understanding of the scheme of the [New Diplomas] Directive, and of its central principles, rather than to offer a comprehensive handbook on its detailed provisions."[60]

The New Diplomas Directive comprises three regimes of recognition:

i. Automatic recognition of diplomas: This regime incorporates the sectoral directives for doctors, nurses, dentists, veterinary surgeons, midwives, pharmacists and architects.
ii. Automatic recognition of professional experience: This regime embodies the Directive 1999/42 for activities in the fields of industry, crafts and trade.
iii. General System: This regime regulates the fields covered by the Diplomas Directive and by the Directives 92/51, 1999/42 for all regulated professions not covered by a specific Directive and activities in the fields of industry, crafts and trade.

[59] Conseil des Barreaux de L'union Europeenne: INFO March 2002 / N° 1
[60] Wyat's and Dashwood's European Union Law, 5th Edition, Sweet & Maxwell, London, 2006

This Directive establishes rules according to which a host Member State which makes access to or pursuit of a regulated profession in its territory contingent upon possession of specific professional qualifications, shall recognize professional qualifications obtained in one or more other Member States and which allow the holder of the said qualifications to pursue the same profession there, for access to and pursuit of that profession.

The New Diplomas Directive is applicable to all nationals of a Member State who wish to pursue a regulated profession in a Member State, including those belonging to the liberal professions, other than that in which they obtained their professional qualifications, on either a self-employed or employed basis.

The recognition of professional qualification by the host Member State allows the professional to gain access to the same profession in the host Member State as that for which the professional is qualified in the home Member State and to pursue it in the host Member State under the same conditions as its nationals.

As to the regime of recognition of legal professional qualification, the rules laid down by the Diplomas Directive remain unchanged.

Chapter V. ESTABLISHMENT IN HOST MEMBER STATE

5.1 Establishment Directive – General

Negotiations over the concept of the establishment of lawyers lasted twenty years. Europe was divided into two camps – common law countries and the Netherlands on the one hand and Continental Europe on the other hand. The final adopted version is a victory of the common law concept. It is based on mutual trust and the recognition of qualifications obtained in particular Member State, instead of the deep harmonization of the legal educational system and vocational training.

On the basis of Article 47 (2) EC the European Parliament and the Council have adopted the Directive 98/5/EC of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (hereinafter referred to as "Establishment Directive").

There are three main objectives of this Directive. The first aim is to facilitate the integration of lawyers into the profession in a host Member State as compared to the general system of mutual recognition of diplomas according to the Diplomas Directive, by enabling them to practise under their home-country professional title on a permanent basis and by enabling them to integrate fully into the profession after a certain period of time. The second objective sought by the Establishment Directive is the elimination of differences which may occur as regards legal practice under the home-country professional title. Thirdly, it is to meet the needs of consumers of legal services who, owing to the increasing trade flows resulting, in particular, from the internal market, seek advice when carrying out cross-border transactions in which international law, Community law and domestic laws often overlap.

The Establishment Directive uses the same definition of a lawyer as the Services Directive, and that is by way of enumerating professional titles used by the Member State. A lawyer is thus a person who is a national of a Member State and who is authorized to pursue his professional activities under one of the following professional titles:

Austria	Rechtsanwalt
Belgium	Avocat/Advocaat/Rechtsanwalt
Bulgaria	advokat
Czech Republic	Advokát
Denmark	Advokat
Germany	Rechtsanwalt
Estonia	Vandeadvokaat
Greece	Δικηγόρος
Spain	Abogado/Advocat/Avogado/Abokatu
France	Avocat
Ireland	Barrister/Solicitor
Italy	Avvocato
Cyprus	Δικηγόρος
Latvia	Zvērināts advokāts
Lithuania	Advokatas
Luxembourg	Avocat
Hungary	Ügyvéd
Malta	Avukat/Prokuratur Legali
Netherlands	Advocaat
Poland	Adwokat/Radca prawny
Portugal	Advogado
Romania	avocat
Slovenia	Odvetnik/Odvetnica
Slovakia	Advokát/Komerčný právnik
Finland	Asianajaja/Advokat
Sweden	Advokat
United Kingdom	Advocate/Barrister/Solicitor

The Directive thus applies to fully qualified professionals as such in their Member State of origin, and does not apply to person who, although holding a university law degree, have not yet acquired the necessary qualification to practice law as a lawyer. (*Morgenbesser*[61])

[61] Case C-313/01 Christine Morgenbesser v Consiglio dell'Ordine degli avvocati di Genova [2003] ECR I-0000

Nationality of one of the Member States is also a condition in order to be able to exercise the rights conferred to the lawyers by the Directive.

The Establishment Directive does not cover purely domestic situations. Where it does influence national legislation on the legal profession, it does so only in a proportionate way in order to achieve its objectives.

Foreign lawyers are subject to the double deontology principle, i.e. they are subject to both professional rules of conduct both of their home Member State, and to the professional rules of conduct of the host Member State; the Establishment Directive therefore requires a certain extent of cooperation between the competent authorities of the Member States in question.

The Directive is applicable to self-employed lawyers and salaried lawyers as well. Salaried lawyers may establish themselves in a host Member State under the condition that the Member State offers that possibility to its own lawyers too.

The Establishment Directive embodies several principles already set out by the Services Directive such as the option of excluding from the activities of lawyers practicing under their home-country professional titles in a host Member State the preparation of certain formal documents in the conveyancing and probate spheres; the possibility of the host Member State to require a lawyer practicing under his home-country professional title to work in conjunction with a local lawyer when representing or defending a client in legal proceedings. The Directive expressly refers to the judgment of the ECJ *Commission v. Germany*[62] which has been discussed in Chapter III of this thesis.

5.2 Establishment Directive – Specific Provisions

The Directive regulates two regimes of incorporation into a host Member State legal profession. The lawyer may practice in a host Member State either under his home-country title or after a certain period he may use also the host-country title and be admitted to the host-country Bar.

[62] Case 427/85 Commission of the European Communities v Federal Republic of Germany [1988] ECR 1123

5.2.1 Practice under Home-Country Title

In its Article 2, the Establishment Directive lays down the right of a lawyer to pursue on a permanent basis, in any other Member State under his home-country professional title, the same professional activities as a local lawyer such as giving advice on the law of his home Member State, on Community law, on international law and on the law of the host Member State.

However, there are some restrictions. Member States which reserve administering of estates of deceased persons and transferring of interests in land for other professions than that of lawyer, may exclude lawyers practicing under their home-country title in the host Member State from carrying these activities as well. According to Article 5(3), the host Member State may require the lawyer practicing under his home-country professional title to work in conjunction with a local lawyer when representing or defending a client in legal proceedings. Member States may also lay down specific rules for access to supreme courts, such as the use of specialist lawyers.

A lawyer who wishes to practise under his home-country professional title is obliged to register with the competent authority in the host State. He is also obliged to submit a certificate attesting his registration with the home Bar. The host-country Bar has to inform the home Bar of the lawyer about the fact that he has been registered.

Lawyers practicing under their home-country professional title are entitled to have their name published in places where the names of local lawyers are being published by the local Bar.

The home-country title of a foreign lawyer has to be used in the official language/languages of his home country. This is to avoid confusion with the professional title of the host Member State. There are Member States whose professional titles are expressed in the identical manner, e.g. Slovak lawyers hold the title *advokát* which is the same title as used in the Czech Republic for lawyers. A similar situation can be found in France and Belgium since both countries use the title *avocat*. In such cases the home State Bar may require the lawyers who wish to practice in that State to indicate alongside the home-country title also the professional body of which he is a member or the judicial authority before which he is entitled to practice in his home State. A reference to his registration with the Bar in that State may be required as well.

Each decision not to effect the registration in a host Member State Bar has to state reasons and there has to exist a remedy against it before national courts.

An extremely important step towards liberalization of the European Bar is that there is no time limit on practicing under the title of origin. The migrant lawyer has the choice of either practicing in another Member State under the home country title for an unlimited time, or to become integrated into the host country Bar without any examinations or control of competencies.

5.2.2 Rules of Professional Conduct

The foreign lawyer is subject to the rules of professional conduct both in his Member State and in the host Member State. Thus, in case of misconduct, he may face disciplinary proceedings both by the host Bar and by the home Bar in respect of the same misconduct.

Such a lawyer may be required by the host Member State to take out a professional indemnity insurance or to become a member of a professional guarantee fund. Nevertheless, the host Member State has to exempt him from such obligation if he proves that he is covered by insurance taken out or he is member of a guarantee fund in his home State. In case that such indemnity insurance or membership in a guarantee fund proves not to be equivalent to that required by the host Member State, the lawyer may be required to take out additional insurance or membership in a guarantee fund.

The withdrawal by the home Bar of the authorization to practice means automatic prohibition of practice in the host State as well.

Furthermore, the ECJ confirmed in its judgment *Luxemburg v Parliament and Council* [63] that a lawyer practicing under his home-country professional title is also bound by the rules

[63] Case C-168/98 Grand-Duchy of Luxemburg v European Parliament and Council of the European Union [2000] ECR I-9131

applicable to lawyers generally, such as those issued by the CCBE. These entail the obligation, breach of which may incur disciplinary sanctions, not to handle matters which the lawyer knows or ought to know he is not competent to handle.[64]
The ECJ has pointed out that: "*The [Community] legislature has not abolished the requirement that the lawyer concerned should know the national law applicable in the cases he handles, but has simply released him from the obligation to prove that knowledge in advance. It has thus allowed, in some circumstances, gradual assimilation of knowledge through practice, that assimilation being made easier by experience of other laws gained in the home Member State. It was also able to take account of the dissuasive effect of the system of discipline and the rules of professional liability.*"

Indeed, all CCBE Members States are signatories to the Code of Conduct on cross-borders practice and all EU Members are CCBE Members States.

Each decision imposing disciplinary measures by the host Member State Bar has to state reasons and there has to exist a remedy against it before national courts.

5.2.3 Practice under Host-Country Title

The Establishment Directive allows lawyers practicing under the home-country professional title to use the professional title of the host Member State without fulfilling the conditions set out in the Diplomas Directive provided that they have practiced in the host Member State under the home-country professional title for a period of at least three years. This pursuit must be effective and regular without any interruption other than resulting from the events of everyday life and must include Community law.

If the lawyer has effectively and regularly pursued the professional activity in the host Member State for a period of three years but for a lesser period in the law of that Member State, he may still obtain the admission to the host country profession subject to certain conditions, without having to meet the compensatory requirements of the Diplomas Directive. The host Bar has to take into account the effective and regular professional

[64] John Tillotson, Nigel Foster: Texts, Cases and Materials on European Union Law, Cavendish Publishing, 2003

activity pursued during the above-mentioned period and any attendance at lectures or seminars on the law of the host Member State and the rules of professional conduct.
In both cases, the admission is subject to verification of the lawyer's professional competence.

Furthermore, a lawyer practicing under his home-country professional title is always entitled to apply to have his professional title recognized in that host Member State in accordance with the Diplomas Directive.

A lawyer who fulfils the conditions of the Establishment Directive may gain full access to the host Member State Bar and use the host-country professional title. He is also entitled to use his home-country professional title alongside the professional title obtained in the host Member State.

The system of the Establishment Directive seems to be helpful, especially in the situation where most of the Member States opted under the Diplomas Directive for an aptitude test rather than for an adaptation period. I assume that under these circumstances the regime of the Establishment Directive forms only an alternative variant to the aptitude test chosen by the most of the Member States. In countries where adaptation period was chosen, the Establishment Directive does not prove to be of much use. The duration of the adaptation period and the period under which the lawyer has to practice under his home-country title is identical. One of the advantages of the Establishment Directive is the case when the lawyer has effectively and regularly pursued his professional activity in the host Member State for a period of three years but for a lesser period in the law of that Member State, then he may still obtain admission in the host State Bar. In the adaptation period regime this would not be possible. I also assume that the adaptation period regime is stricter, because during the adaptation period the lawyer has to practice under the responsibility of a qualified member of that profession which is a position more similar to the position of a legal trainee than the position of a real independent lawyer. A lawyer practicing under his home-country title is only obliged to work in conjunction with a local lawyer when representing or defending a client in legal proceedings, which definitely is a more independent position.

However, the period of effective and regular practice which precedes the real integration into the legal profession of the host Member State seems to me to be too long and reflecting only one part of migrating lawyers - those lawyers who want to permanently establish themselves in the host country. The globalization of clients due to the functioning internal market implies the need of globalization of the legal profession across Europe. The Establishment Directive does not consider the situations when a client establishes a branch or a sister company in a Member State other than the State of origin and may require the services of his lawyer. Although there is the Services Directive, there are legal matters which cannot be dealt with without real establishment in that Member State.

In my view, the most important outcome of free movement of lawyers throughout Europe should be a possibility for European lawyers to work simultaneously in more than one country, which under current legislation is possible only after a host lawyer fulfills the three-year period of practice in a host Member State and becomes fully integrated into the host State legal profession. If we take into account the duration of legal vocational training in most of the Member States plus three years of practice under home-country professional title according to the Establishment Directive, the total time necessary for a lawyer to be able to practice in more than one Member State is extremely long and the consequence of this would be that the Establishment Directive will not be of much use in today's speedy and flexible legal world.

Consequently, my suggestion would be to either shorten the period of practice in a host State under the home-country professional title to one year or to cancel the institution as such and enable foreign lawyers to use the host-country professional title immediately after fulfillment of certain formalities. The principle that a lawyer should not handle matters which he knows or ought to know he is not competent to handle, ensures that no foreign lawyer would handle matters that he is not competent to handle without a proper sanction.

5.2.4 Joint Practice

The Establishment Directive allows also lawyers practicing in a host Member State under their home-country professional title to join or start a joint practice in the area of this host Member State under certain conditions set out by the Directive. The first and most important condition is that such joint practice must be authorized in the relevant Member State in respect of lawyers carrying out their professional activities under the host Member State professional title.

The Establishment Directive sets out further detailed conditions in respect to joint practices by lawyers practicing under their home-country professional title. However, I do not find necessary to look at them in detail since I found them to be more of a technical nature and to be easily found under Article 11 et seq. of the Establishment Directive.

5.3 Case-Law

5.3.1 ***Luxembourg v. Parliament and Council***[65]

This judgment presents a fundamental contribution to the achievement of a true internal market for lawyers.

The Grand Duchy of Luxembourg brought an action for the annulment of the Establishment Directive before the ECJ soon after its issuance. The action was based on the following grounds:

i. Luxembourg alleged that by abolishing all requirement of prior training in the law of the host Member State as regards migrant lawyers, the Establishment Directive violates the second paragraph of Article 43 EC when it unjustifiably introduces a discrimination which operates to the detriment of national lawyers.
ii. Furthermore, Luxembourg alleged that the Establishment Directive prejudices the public interest, in particular the protection of consumers, pursued by the various Member States in requiring, for access to and practice of the profession, a legally prescribed qualification and thus violates Article 43 EC.
iii. Luxembourg invoked Article 47 (2) EC by alleging that the Establishment Directive amends existing major principles governing training and conditions of access for natural persons to the profession of lawyer. According to that the Directive ought to have been adopted, not by a qualified majority in accordance with the procedure laid down in Article 251 EC, but unanimously, in accordance with the second sentence of Article 47(2) EC.
iv. Luxembourg claimed that the Parliament and the Council failed to meet their obligation which arises from the Article 253 EC state the reasons on which an act is based.

[65] Case C-168/98 Grand-Duchy of Luxembourg v European Parliament and Council of the European Union, [2000] ECR I-9131

In support of its pleas Luxembourg calls into question Articles 2, 5 and 11 of the Directive. Surprisingly, it does not call Article 10 which provides the most revolutionary outcome of the Directive.

Discrimination

Luxembourg argued that the second paragraph of Article 43 EC establishes a principle that a migrant self-employed worker is to be treated in the same way as his national counterpart. The applicant explained that the knowledge to be acquired in the field of national law is not identical or even broadly the same from one Member State to another. Thus, according to Luxembourg, by abolishing all requirements of prior training in the law of the host Member State and by permitting migrant lawyers to practise that law, the Establishment Directive unjustifiably discriminates between nationals and migrants which is unjustified and contrary to Article 43 EC and this does not authorize the Community legislature to abolish a requirement of prior training in the Directive which does not purport to harmonize training conditions.

The ECJ's reasoning is based on its established definition of the general principle of equality which requires that comparable situations should not be treated differently unless such difference in treatment is objectively justified.[66]

The ECJ focused on the comparability of the situation of a migrant lawyer practicing under his home-country title and the situation of a lawyer practicing under the professional title of the host Member State. It stated that those two situations cannot be comparable "*whereas the latter may undertake all the activities open or reserved to the profession of lawyer by the host Member State, the former may be forbidden to pursue certain activities and, with regard to the representation or defence of clients in legal proceedings, may be subject to certain obligations.*" The ECJ illustrated this distinction on the basis of Articles 4(1), 5(2) and (3).

[66] Case C-280/93 Federal Republic of Germany v Council of the European Union [2000] ECR I-4973, and Case C-27/95 Woodspring District Council v Bakers of Nailsea Ltd. [1997] ECR I-1847

Pedro Cabral in his annotation[67] to this judgment finds the ECJ's reasoning regarding this matter to be not entirely convincing. He states that "...the fact that the Court attaches equal importance on the one hand to Article 4(1) of the Directive and, on the other, to its Articles 5(2) and 5(3) is unfortunate since the difference in treatment that may result from the latter provisions will most of the time be purely eventual and not inevitable like the Court's decision might lead to suppose."

Article 5 (2) of the Establishment Directive provides for the possibility of a Member State to exclude migrant lawyers practicing under their home title from the activity of preparing deeds for obtaining title to administer the estates of deceased persons or for creating or transferring interests in land. However, a Member State may do so only if it authorizes this activity to a prescribed category of lawyers also in its own territory. In fact, the only addressees of this provision are United Kingdom and Ireland.

Article 5 (3) of the Establishment Directive is similar in this sense. It allows the Member States, in certain circumstances, to require migrant lawyers practicing under their home title to work in conjunction with a locally qualified lawyer as regards the representation or defence of clients in legal proceedings, insofar as the law of the host Member State reserves such activities to host State lawyers.

Pedro Cabral concludes that "[the ECJ's reasoning] reflects a superficial and excessively formal analysis, which is all the more striking in that a more in-depth examination of those provisions would only have contributed to further reinforcing the "integrative potential" of Article 5 of the Directive."

Article 4 (1) sets out that a migrant lawyer practicing under his home-country professional title has to do so under this title which has to be expressed in the official language/languages of his home country. According to Pedro Cabral this is the only decisive element allowing a distinction to be drawn between the position of migrant lawyers practicing under their home State title and the position of lawyers of the host State. "In particular, since under the

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[67] Pedro Cabral: Case C-168/98, Grand-Duchy of Luxembourg v. European Parliament and Council of the European Union, Judgment of 7 November 2000, [2000] ECR I-9131, Common Law Revue no. 39: 129–150, 2002

Directive the former have virtually the same rights and obligations as the latter the professional title remains in fact the only substantial difference between them."[68]

Also, the Advocate General has based his analysis solely on the ground of Article 4 (1) of the Directive.

Furthermore, in his Opinion, the Advocate General Colomer examines the submission also with regard to Article 10 of the Establishment Directive. He comes to a conclusion that there cannot be any discrimination between local lawyers and migrant lawyers practicing under the host State professional title since these two groups are treated identically. Even if some form of discrimination could be found in one of those cases it would not be prohibited under Article 43 EC in so far as this provision does not apply to purely internal situations like that in the case at hand.

Protection of Consumers

The Grand Duchy of Luxembourg has challenged the validity of the Establishment Directive in the interests of consumers and in the interest of the proper administration of justice. In its opinion, the Establishment Directive may cause that a migrant lawyer practicing under his home-country title would lack necessary training in a host State national law because various Member States require practice in national law before access to the profession of lawyer is allowed.

The ECJ explained that instead of prior testing of qualification in the national law of the host Member State, the Community legislator has chosen an arrangement combining various measures such as consumer protection, restriction on the right of practice, rules on professional conduct, compulsory insurance and disciplinary measures.

In addition to the above obligations, the ECJ held that a lawyer practicing under his home-country professional title is also bound by the rules of professional conduct applicable to lawyers in general, "*like Article 3.1.3 of the Code of Professional Conduct adopted by the Council of the Bars and Law Societies of the European Union (CCBE), an obligation,*

[68] Hamish Adamson: Free Movement of Lawyers, 2nd edition, Butterworths, 1998

breach of which may incur disciplinary sanctions, not to handle matters which the professionals concerned know or ought to know they are not competent to handle."

"The [Community] legislature has not abolished the requirement that the lawyer concerned should know the national law applicable in the cases he handles, but has simply released him from the obligation to prove that knowledge in advance. It has thus allowed, in some circumstances, gradual assimilation of knowledge through practice, that assimilation being made easier by experience of other laws gained in the home Member State."

All these measures, taken together, ensure an adequate level of consumer protection and proper administration of justice.

Legal Basis

In its second plea, Luxembourg maintained that the Establishment Directive ought to have been adopted, not by a qualified majority in accordance with the procedure laid down in Article 251 EC, but unanimously, in accordance with the second sentence of Article 47(2) EC.

The wording of Article 47 (2) is as follows:

For the same purpose [in order to make it easier for persons to take up and pursue activities as self-employed persons], the Council shall... issue directives for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons. The Council, acting unanimously throughout the procedure referred to in Article 251, shall decide on directives the implementation of which involves in at least one Member State amendment of the existing principles laid down by law governing the professions with respect to training and conditions of access for natural persons. In other cases the Council shall act by qualified majority.

In the view of Luxembourg, the Directive's Articles 2, 5 and 11 amend existing major principles governing training and conditions of access for natural persons to the profession of lawyer.

In fact the ECJ was asked whether the Establishment Directive could have been adopted on the basis of Article 47 (1) rather than on the basis of Article 47 (2) EC.

The wording of Article 47 (1) is as follows:

In order to make it easier for persons to take up and pursue activities as self-employed persons, the Council shall, acting in accordance with the procedure referred to in Article 251, issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications.

The ECJ stated that Articles 2 and 5 of the Directive," *itself intended in particular to make it easier to practise as a self-employed lawyer, affirm the right, subject to certain exceptions, for any lawyer to pursue on a permanent basis, in any other Member State, under his home-country professional title, the same professional activities as a lawyer practising under the relevant professional title of the host Member State, including advising on the latter's national law.*"

The ECJ showed that Articles 2 and 5 of Establishment Directive fall within the scope of Article 47 (1) EC and thus the analysis concerning the amendment of the existing fundamental principles governing training and access to the profession was not necessary. The analysis of the latter would be appropriate only if Article 47 (2) EC would have been proved to be the correct legal basis. "The Court's answer to Luxembourg's plea is crystal clear and its reasoning indisputable."[69]

Duty to state reasons

The Grand Duchy of Luxembourg claimed that the Establishment Directive infringes the obligation, laid down in Article 253 EC, to state the reasons on which an act is based by stating insufficient and partly contradictory reasoning.

[69] Pedro Cabral: Case C-168/98, Grand-Duchy of Luxembourg v. European Parliament and Council of the European Union, Judgment of 7 November 2000, [2000] ECR I-9131, Common Law Revue no. 39: 129–150, 2002

The ECJ dismissed this plea by stating that it is indisputable that the recitals of the Directive contain a clear and precise indication of the general situation which led to its adoption: the existing inequalities in the Member States as regards the conditions of access to and exercise of the profession and the need to complete the regulatory framework for the free movement of lawyers set up under the Services and the Diplomas Directives. Secondly, the Establishment Directive also contains a sufficient statement of the objectives it proposes to attain: facilitate the practice of the profession by migrants, either by allowing them to continue to practice in another Member State under their home title or by making integration in the host State profession easier, thereby eliminating distortions of competition and all this while meeting the needs of consumers.

5.3.2 *Wilson*[70]

The judgment of the ECJ *Wilson* gives us useful guidance for the interpretation of Articles 9 and 5 of the Establishment Directive.

Mr. Wilson is a UK national and a barrister who has been a member of the Bar of England and Wales since 1975. Since 1994 he has practiced in Luxembourg as a lawyer. In 2003 Mr. Wilson was requested by the Bar Council to attend a hearing as provided for by Luxembourg law[71]. He attended the hearing accompanied by a Luxembourg lawyer, but the Bar Council refused to allow the latter to be present and thus, Mr. Wilson refused to attend the hearing without the assistance of a Luxembourg lawyer.

Later, Mr. Wilson was notified that the Bar Council refused to register him in the list of lawyers practicing under their home-country professional title in the Bar Register. In the statement of reasons of the decision, the Bar Council stated that they were not in a position to ascertain his proficiency of language as required by the Luxembourg law. The letter also stated that the decision may be subject to an appeal, by application to the *Conseil disciplinaire et administratif.*

Mr. Wilson brought an action for annulment before the Administrative Court, Luxembourg but the Court stated that it lacks jurisdiction to hear the case. Mr. Wilson soon appealed

[70] Case C-506/04 Graham J. Wilson v Ordre des avocats du barreau de Luxembourg [2006] ECR
[71] Article 3(2) of the Law of 13 November 2002

against this decision before the Higher Administrative Court in Luxembourg. The Higher Administrative Court decided to stay the proceedings and refer the following questions to the ECJ for a preliminary ruling:

i. Does the appeal procedure according to the Luxembourg law (appeal to the *Conseil disciplinaire et administratif* and to the *Conseil disciplinaire et administratif d'appel constitute*) violate Article 9 of Establishment Directive which states that "*A remedy shall be available against such decisions before a court or tribunal in accordance with the provisions of domestic law.*"?

ii. Is the right of a migrant lawyer practicing under his home-country professional title in another Member State made subject to the requirement of proficiency in language in compliance with Article 5 of the Establishment Directive?

iii. Is the requirement that the migrant lawyer has to sit an oral examination in all (or more than one) of the three main languages of the host Member State for the purpose of allowing the Bar to verify whether the lawyer is proficient in the three languages justified, and if so, what procedural guarantees, if any, are required?

Remedy against Bar decision

According to Luxembourg law, a person whose access to the Bar Registry has been refused may appeal to the *Conseil disciplinaire et administratif.* Decision issued by the *Conseil disciplinaire et administratif* may be subject to appeal to the *Conseil disciplinaire et administratif d'appel constitute.* Both of these are bodies of the Bar. The decision of the latter may be examined by the Grand Duchy of Luxembourg which is the supreme court of Luxembourg and permits judicial review only of the law and not the facts.

Luxembourg essentially seeks the answer to the question whether this procedure of judicial review complies with Article 9 of the Establishment Directive which provides that a remedy against a decision of a Bar of the host Member State which refuses to register a lawyer who wishes to practise there under his home-country professional title must be available before a court or tribunal in accordance with the provisions of domestic law.

The ECJ ruled that in order to ensure effective judicial protection of the rights laid down in the Establishment Directive, the body called upon to hear appeals against decisions refusing registration, referred to in Article 9 of that Directive, must be a court or tribunal as defined by Community law.

The definition of the latter has been given by the ECJ several times[72].
The concept of the court or tribunal according to the ECJ contains three aspects.

Firstly, it is the aspect of independence "*which is inherent in the task of adjudication, involves primarily an authority acting as a third party in relation to the authority which adopted the contested decision.*"

Second aspect is external and presumes that the body is protected against external intervention or pressure liable to jeopardize the independent judgment of its members as regards proceedings before them.

Third aspect is internal and is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject-matter of those proceedings.

Both the Disciplinary and Administrative Committee and the Disciplinary and Administrative Appeals Committee are composed of the Luxembourg lawyers practising under the Luxembourg professional title and who have passed the examination at the end of the traineeship – and elected by the general assemblies of the Bar Associations of Luxembourg and Diekirch. According to the ECJ, a European lawyer whose registration has been refused by the Bar Council "*has legitimate grounds for concern that either all or the majority, as the case may be, of the members of those bodies have a common interest contrary to his own, that is, to confirm a decision to remove from the market a competitor who has obtained his professional qualification in another Member State, and for suspecting that the balance of interests concerned would be upset*". Therefore, the ECJ does not find rules governing the composition of these bodies to provide a sufficient guarantee of impartiality.

[72] see, to that effect, Case 61/65 Vaassen-Gobbels [1966] ECR 261 and Case C-54/96 Dorsch Consult [1997] ECR I-4961, Case 14/86 Pretore di Salò v Persons Unknown [1987] ECR 2545, Case 338/85 Pardini [1988] ECR 2041, Case C-17/00 De Coster [2001] ECR I-9445

The ECJ further stated that the Establishment Directive does not preclude that appeal procedure be held before two non-judicial bodies with later access to the court or tribunal as defined by Community law, which is competent to give a ruling on both fact and law. However, the competent Luxembourg court provides for cassation, i.e. judicial review only of the law and not the facts.

On the basis of facts mentioned above, the ECJ held that Article 9 of the Establishment Directive must be interpreted "*as meaning that it precludes an appeal procedure in which the decision refusing registration, referred to in Article 3 of that directive, must be challenged at first instance before a body composed exclusively of lawyers practicing under the professional title of the host Member State and on appeal before a body composed for the most part of such lawyers, where the appeal before the supreme court of that Member State permits judicial review of the law only and not the facts*".

Condition of proficiency in language

The referring court asked whether and, if appropriate, in what circumstances Community law allows a host Member State to make the right of a lawyer to practise on a permanent basis in that Member State under his home-country professional title subject to a test of his proficiency in the languages of that Member State.

In its reply to this question, the ECJ states that the Establishment Directive imposes only one condition on a lawyer who wishes to practise in a Member State other than that in which he obtained his professional qualification, and that is registration with the competent authority in that State, which must register him "upon presentation of a certificate attesting to his registration with the competent authority in the home Member State" (Article 3 (2)).

The Establishment Directive carried out a complete harmonization of the prior conditions for the exercise of the right it confers.

The ECJ explained that the exclusion of prior testing of knowledge, particularly of languages, for European lawyers is however accompanied by a set of rules intended to ensure, to a level acceptable in the Community, the protection of consumers and the proper administration of justice. Protection of consumers is ensured by the obligation of a migrant lawyer to practice under his home-country professional title which is intended to ensure that clients are aware that the professional to whom they entrust the defence of their interests has not obtained his qualification in that Member State and does not necessarily have the knowledge, in particular of languages, which is adequate to deal with the case.

Furthermore, a lawyer practicing under his home-country professional title is according to Article 5(3) of the Establishment Directive obliged to work in conjunction with a lawyer who practises before the judicial authority in question and who would, where necessary, be answerable to that authority or with an *avoué* practicing before it.

A lawyer practicing under his home-country professional title is obliged to observe the rules of professional conduct of the State where his qualification was obtained and the rules of professional conduct of the host Member State. Whatsmore, the rules of conduct applicable to lawyers in general are also to be observed by a migrant lawyer. "*One of the rules of professional conduct applicable to lawyers is an obligation, like that provided for in the Code of Conduct adopted by the Council of the Bars and Law Societies of the European Union (CCBE), breach of which may lead to disciplinary sanctions, not to handle matters which the professionals concerned know or ought to know they are not competent to handle, for instance owing to lack of linguistic knowledge (see, to that effect, Luxembourg v Parliament and Council, paragraph 42). Communication with clients, the administrative authorities and the professional bodies of the host Member State, like compliance with the rules of professional conduct laid down by the authorities of that Member State, requires a European lawyer to have sufficient linguistic knowledge or recourse to assistance where that knowledge is insufficient.* "

Under foregoing considerations the ECJ concludes the judgment: "*Article 3 of Directive 98/5 must be interpreted as meaning that the registration of a lawyer with the competent authority of a Member State other than the State where he obtained his qualification in order to practise there under his home-country professional title cannot be made subject to a prior examination of his proficiency in the languages of the host Member State.*"

Chapter VI. IMPLEMENTATION OF DIRECTIVES IN NATIONAL LAW OF THREE MEMBER STATES

In this Chapter I am focusing on the implementation of the Services, Diplomas and Establishment Directives in the national laws of three Member States. The purpose of this chapter is to look at the system established by the Directives mentioned above in real life and to point out several possible wrongful implementation provisions.

In the European Union, there are already twenty-seven Member States, which entails the fact that I will not examine all of them and will focus on implementation of the Directives only in three Member States, which in my view relatively sufficiently represent the whole spectrum of the Member States and their approaches toward the legal profession.

I have chosen Belgium, the Czech Republic and the United Kingdom.

I have chosen Belgium because of its classic Civil Law structure of legal professions. Belgium also represents one of the original Member States. Belgium with its capital – Brussels – the headquarters of the European Union has experienced large development in the field of the legal profession in the recent years. Furthermore, thanks to my study stay at Katholieke Univertsiteit in Leuven, I have had enough space and time to examine the legal profession in that country.

The Czech Republic, on the other hand, joined EU only in 2004 and thus, it represents one of the new Members of European Community. Despite its communist past, the Czech Republic is fast-growing and an outlook on its legal profession system can be more than interesting. Also penetration into its laws is one of the simplest for me since I am a student of Charles University in Prague.

The United Kingdom is interesting for its Common Law approach towards legal professions which makes it unique among the twenty-seven Member States. I could not leave the United Kingdom out since "[it] is the UK legal profession which is a precursor of new ideas in the organization of the profession and its structures. It has the highest quality of legal services in Europe, and is an example of high specialization. The UK legal profession also constitutes an important bridge between the EU and the USA. Moreover, the UK legal profession is incontestably the most aggressive and the most competitive in Europe."73

Due to the existence of three legal professions in the United Kingdom (barrister, solicitor and advocate in Scotland), I am focusing only on the system of legal profession in England and Wales and, i.e. barristers and solicitors. 74

[73] Katarzyna Gromek-Broc: The Legal Profession In The European Union – A Comparative Analysis of Four Member States, Liverpool Law Review no. 24: 109–130, 2002
[74] R.Y. Walters: The English Legal System, Butterworths, 1985

6.1 Belgium

6.1.1 General conditions of practice

In Belgium the legal profession has a classic Civil Law structure. Lawyers in Belgium practice under the titles: *avocat*, *advocaat* and *Rechtsanwalt*. This reflects the linguistic as well as administrative structure of the country as whole, which is divided into Dutch-speaking north, French-speaking south, French-Dutch bilingual Brussels and a small German-speaking part in the east of the country.

According to the CCBE Brochure published in 2006, in Belgium there are 14,529 lawyers for a total population of about 10 million people. Belgian lawyers practice mostly as sole practitioners and small firms, with only few larger groupings mainly in Brussels. The structure of professional organizations is decentralized. There are twenty-nine Bars across the country[75]. These include three for Brussels alone, one French-speaking, one Dutch-speaking and one for the small number of lawyers practicing before the Court of Cassation. There are two bodies of coordination of all Belgian Bars - *Ordre des barreaux francophones et germanophone* and *Orde van Vlaamse balies* which are composed of representatives of all these Bars.[76]

The general rules governing the profession of lawyer, including conditions for qualification are to be found in Book Three of the Judicial Code[77].

Belgian law imposes on its lawyers an academic requirement of university qualification of *licence en droit* or for future graduates *master*. This qualification is obtained after five years of study of which the first two years are spent studying for what is called the *candidature en droit* and the next three years studying for the full *licence en droit*.

[75] those are: L'Ordre des Avocats d'Arlon, Charleroi, Dinant, Huy, Liège, Marche-en-Famenne, Mons, Namur, Neufchâteau, Nivelles, Tournai, Verviers et Eupen, l'Ordre français des Avocats du barreau de Bruxelles, l'Ordre des Barreaux francophones et germanophone. L'Ordre des Avocats d'Anvers, Audenarde, Bruges, Courtrai, Furnes, Gand, Hasselt, Louvain, Malines, Termonde, Tongres, Turnhout et Ypres, avec l'Ordre néerlandais des Avocats du barreau de Bruxelles, l'Orde van Vlaamse Balies.
[76] www.avocat.be and www.advocaat.be
[77] the Law of 2 July 1975, Articles 428-508

To be admitted to a Belgian law faculty to study a *candidature en droit*, one must be a holder of a Belgian Certificate of Higher Studies, which is similar to Czech *maturitni zkouška* or French *baccalaureat*. In addition to this, a candidate must obtain a diploma of competence to proceed to higher education. This serves as a test of a candidate's maturity and aptitude for degree study and is obtained immediately after the Certificate of Higher Studies has been awarded.

University studies are available either in Dutch or in French. Degree certificates are issued in the language of the university were the education was obtained. Degrees from both Dutch-speaking or French-speaking universities carry the equivalent value for the purposes of professional qualifications.

The Belgian law degree also imposes requirements going beyond the study of law. There are specific conditions for the award of the law degree that the recipient must have shown (i) a sufficient knowledge of a second language in order to be able to consult legal works published in that language; (ii) sufficient knowledge of principles of accountancy to enable the graduate to examine, make relevant comments on accounting documents.

The law graduate must then undergo a period of practical training before he can be accepted as fully qualified lawyer. This period is called *stage* and the legal trainee is called *avocat-stagiaire*. The duration of the traineeship period is a continuous period of three years without interruption other than normal reasonable holidays or for good cause, such as military service or attendance at courses for legal trainees. During this period a trainee works under the supervision of an older colleague, so-called *patron de stage*. To be able to be a *patron de stage*, a lawyer has to be enrolled in the Bar for at least ten years.

It is important to note that after the inscription to the list of *stagiaires*, a *stagiaire* has full prerogatives of fully qualified lawyer and is entitled to use the title *avocat*, *advocaat* or *Rechtsanwalt*.

6.1.2 Implementation of the Services Directive

The Services Directive was transposed into Belgian law by Articles 477a et seq. of the Judicial Code[78].

Article 477bis. sets out that any person who is a national of a Member State and by that State authorized to pursue his professional title corresponding to the title *avocat* in conformity with the Services Directive, is entitled to make use of this title in Belgium. (*Toute personne, ressortissant d'un état membre de l'Union européenne et y habilitée à porter le titre correspondant à celui d'avocat, conformément à la directive 77/249/CEE du Conseil du 22 mars 1977 tendant à faciliter l'exercice effectif de la libre prestation de services par les avocats, peut faire usage de ce titre en Belgique.*)

I assume that this Article goes beyond Article 1 (2) of the Services Directive. Article 1 (2) states that *"Lawyer" means any person entitled to pursue his professional activities under one of the following designations*... The Belgian law expressly states that a national of a Member State has to be authorized by that State to pursue an activity of a lawyer. It follows that a person who is a national of Slovakia and is fully qualified as a lawyer in Czech Republic would not be able to make use of the Services Directive in Belgium according to the wording of Article 477bis of Belgian Judicial Code. This, in my opinion exceeds the scope of the Services Directive.

Article 477bis. imposes a further requirement on a person entitled to pursue activity under the professional title corresponding to the title *avocat.* This person must have fulfilled all the requirements and formalities which may be imposed on him by his home Member State.

Again, this provision also goes beyond the definition of a lawyer in the Services Directive. It can be presumed that a lawyer entitled to pursue his professional activity in a home Member State has probably met all the prescribed conditions, formal and factual, furthermore has to establish himself as a lawyer according to Article 477bis. The main safeguard contained in the Services Directive is that the provision of services in the host Member State is inevitably connected with the fact that if a lawyer fails to observe the

[78] the Law of 2 July 1975

obligations imposed on him by his home Member State Bar, the host State Bar shall be informed and relevant consequences shall be drawn by the cooperation of home and host Member State Bar. Plus the visiting lawyer is subject to double principle deontology, thus he has to observe both professional rules of conduct of his home Member State, both of the host Member State.

Subparagraph 3 of Article 477bis. implements Article 3 of the Services Directive correctly. It states that a person referred to above shall adopt the professional title used in the Member State from which he comes, expressed in the language or one of the languages, of that State, with an indication of the professional organization by which he is authorized to practise or the court of law before which he is entitled to practise pursuant to the laws of that State. In the end it states that a lawyer may be requested to establish his qualifications as a lawyer.

Article 477ter. the first paragraph states that a visiting lawyer may exercise all the activities which may be exercised by Belgian lawyers. On the basis of Article 5 of the Services Directive, Belgian legislator opts for the requirement for the visiting lawyers to work in conjunction with a local lawyer in pursuit of activities relating to the representation of a client in legal proceedings. It also requires visiting lawyer to be introduced by the lawyer with whom the visiting lawyer works in conjunction with to the President of the Bar of the relevant resort (*le bâtonnier du barreau dans lequel la juridiction a son resort et le président de la juridiction devant laquelle elle se présente*).

The second paragraph of Article 477ter. correctly (almost literally) implements Article 4 (4) of the Services Directive concerning double deontology of the professional rules of conduct applicable.

The third paragraph of Article 477ter. makes use of the possibility set out in Article 6 of the Services Directive to exclude lawyers who are in the salaried employment of a public or private undertaking from pursuing activities relating to the representation of that undertaking in legal proceedings in so far as lawyers established in that State are not permitted to pursue those activities, which is the case of Belgium.

6.1.3 Implementation of the Establishment Directive

Under the chapter *Du libre établissement* of the Belgian Judicial Code, the implementation of the Establishment Directive can be found.

Definition of a lawyer

Article 477quinquies of the Belgian Judicial Code defines a lawyer for the purposes of the Establishment Directive in a similar way as Article 477bis. does for the purposes of the Services Directive. It uses the same formulation (*Toute personne, ressortissant d'un état membre de l'Union européenne et y habilitée à porter le titre correspondant à celui d'avocat, conformément à la directive 98/5/CE du Parlement européen et du Conseil du 16 février 1998 visant à faciliter l'exercice permanent de la profession d'avocat dans un état membre autre que celui où la qualification a été acquise, peut exercer cette profession en Belgique à titre permanent et sous son titre professionnel d'origine.*) which in my view limits the scope of beneficiaries of the Establishment Directive in comparison with the definition of a lawyer set out in Article 1 (2) a) of the Establishment Directive. The wording of the first sentence of Article 477quinquies (*...y habilitée...*) suggests that a lawyer who is a national of one Member State, but who has obtained his qualification of a lawyer in another Member State, would not be covered by the Belgian implementation law, which I assume construes an incorrect implementation of the Directive in question.

Furthermore, another part of Article 477quinquies follows the wording of Article 477bis. in requiring full compliance with the formalities of the host Member State. Again I must state that I assume that this provision goes beyond the definition of a lawyer made by the Establishment Directive which does not impose on lawyers a condition like this and I assume that creating other conditions that those prescribed by the Directive is unjustified. I think that fulfillment of the formal requirements imposed on a lawyer by the home Member State is purely a business of the lawyer and his home State Bar and it is not for the host Member State to examine these. What is more, the home State Bar may impose sanctions on its lawyers which will inevitably affect the lawyer also in the host Member State. In the light of forgoing I must consider the Belgian implementation in these two questions to be incorrect.

Registration

The second paragraph of Article 477quinquies of the *Code Judiciaire* makes the migrant lawyer subject to the obligation of registration in the local Bar, which complies with Article 3 of the Establishment Directive. Further, it requires the migrant lawyer to remain enrolled in his home Member State Bar, which flows from the wording of the Establishment Directive. A migrant lawyer pursues his profession under the home-country professional title in Belgium.

Belgium requires the migrant lawyer to submit a certificate attesting his registration with the home State Bar which is not older than three months. According to the wording of this provision, this certificate should also mention past disciplinary proceedings of the migrant lawyer in the home Member State if relevant. I have to state that a corresponding provision is not to be found in the Establishment Directive. However, Belgium does not draw consequences if a migrant lawyer was subject to disciplinary proceedings in the past. But then I have to ask what is the purpose of such provision? Furthermore I assume that this is not a correct implementation.

Le conseil de l'Ordre informs the home Member State Bar about migrant lawyer's inscription into the host Member State Bar (Article 3 (2) of the Directive).

Paragraph 3 of Article 477quinquies prescribes a migrant lawyer to indicate in all documents relating to his professional activity under his home-country professional title expressed in the official language or one of the official languages of his home Member State. Furthermore, the migrant lawyer has to indicate the host Member State Bar and the professional body of which he is a member in his home Member State or the judicial authority before which he is entitled to practise pursuant to the laws of his home Member State. In this matter, the Belgian legislator transposes the Directive and opts for the most stringent options given by the Establishment Directive.

A lawyer practicing under his home-country professional title in Belgium is entitled to carry on the same professional activity as a Belgian lawyer. In activities relating to the representation or defence of a client in legal proceedings, the migrant lawyer is obliged to work in conjunction with a local lawyer who practices before the judicial authority in question. The Article in question states that "[*Un avocat inscrit au tableau*] *l'introduit, avant l'audience, auprès du président de la juridiction devant laquelle elle se présente*". I think that this requirement is not in accordance with the Establishment Directive. Introduction of a visiting lawyer to the to the President of the Bar of the relevant resort and to the presiding judge can be found only in the Services Directive which is understandable in respect of the different nature of the visiting lawyer according to the Services Directive who provides legal services in the host Member State on an occasional basis and the migrant lawyer according to the Establishment Directive who is literally established in the host Member State. In my view this provision goes beyond the scope of the Establishment Directive.

Rules of professional conduct

Article 477sexies paragraph 2 correctly transposes the Establishment Directive's provisions concerning the rules of professional conduct applicable. Paragraph 3 then requires the migrant lawyer to take out professional indemnity insurance if he cannot prove that he is covered by insurance taken out in accordance with the rules of his home Member State, insofar as such insurance is equivalent in terms of the conditions and extent of cover. Where the equivalence is only partial, the migrant lawyer is required to take out additional insurance to cover the elements which are not already covered by the insurance or guarantee contracted in accordance with the rules of the home Member State.

A migrant lawyer cannot practise as a salaried lawyer in the employment of another lawyer, an association or firm of lawyers, or a public or private enterprise since Belgium prohibits its home lawyers to do so.

Article 477septies obliges the relevant Belgian Bar to inform the home Member State Bar about up-coming disciplinary proceedings against the migrant lawyer. This information should contain all relevant details ("...*toutes informations utiles, notamment sur le dossier disciplinaire en cause, les règles de procédure applicables ainsi que les délais de recours, et prend les dispositions nécessaires afin que cette autorité soit en mesure de faire des observations devant les instances de recours*"). The Belgian Bar informs the home Member State Bar in question about each decision taken. The temporary or permanent withdrawal by the Bar in the home Member State of the authorization to practise the profession shall automatically lead to the lawyer concerned being temporarily or permanently prohibited from practicing under his home-country professional title in Belgium.

Entry into the profession of avocat, advocaat or Rechtsanwalt

Article 477nonies sets out conditions for full integration into the profession of a lawyer in Belgium. Lawyers who have effectively and regularly pursued a professional activity under their home-country professional title in Belgium for a period of at least three years are entitled to use the title *avocat*, *advocaat* or *Rechtsanwalt*. The practice had to be pursued in the Belgian law including Community law. The migrant lawyer has to be able to prove this activity by presenting "*toutes informations et tous documents utiles, notamment, concernant le nombre et la nature des dossiers traits*". The relevant Belgian Bar may verify the effective and regular nature of the activity pursued and may, if need be, request the lawyer to provide oral clarification or further details on the information and documentation mentioned above.

Belgian law does not give definition of effective and regular practice other than the one provided by the Establishment Directive in Article 10 (1): "Effective and regular pursuit means actual exercise of the activity without any interruption other than that resulting from the events of everyday life." This can be regarded as regretful, since I find the definition provided by the Directive quite vague and currently there is no case-law which would clarify it.

A migrant lawyer who has effectively and regularly pursued a professional activity in Belgium for a period of three years but for a period lesser than specified in the Belgian law, may obtain the right to pursue the professional activity under the title *avocat*, *advocaat* or *Rechtsanwalt* under the conditions set out in Article 10 (3) of the Directive which is literally implemented into Belgian law.

It is *Le conseil de l'Ordre* who is entitled to receive applications. These applications have to be drafted in the language of the relevant part of Belgium or be accompanied by the authorized translation. Inscription to the Bar can be refused only if the proof of the requirements is not presented or if it appears that the public order ("*l'ordre public* ") could be violated because of disciplinary breaches, complaints or incidents, etc.

Paragraph 5 of Article 477nonies implements Article 10 (6) of the Establishment Directive.

6.1.4 Implementation of the Diplomas Directive

The Diplomas Directive, with respect to the authorization to practice as *avocat/advokat/Rechtsanwalt* in Belgium of lawyers who have received their training in another Member State, was transposed into Belgian law by the Royal Decree of 2 May 1996 published in Belgian official gazette of 15 May 1996.

Where the training received by the foreign lawyer covers subjects that differ substantially from those covered by the Belgian degree in law, the foreign lawyer must take an aptitude test.

The procedure is following:

The candidate must in first place submit a diploma or certificate or other title which proves his qualification on the basis of which the lawyer is authorized to practice in his home Member State.

The lawyer has to submit a proof of his *honorabilité et à sa moralité, à l'absence de faillite, à l'absence de faute grave commise en l'exercice de la profession d'avocat* or an extract from the penal register.

The migrant lawyer has to take an aptitude test organized by the *Ordre des barreaux francophones et germanophone* or by the *Ordre des barreaux flamands*. The migrant lawyer takes an aptitude test organized by that Bar of which he wants to be a member. The test is designed to check whether a migrant lawyer is familiar with the Belgian law and with the relevant language. [79]

Since Belgian *avocats/advokaten/Rechtsanwälte* do not have a monopoly on the provision of legal advice, lawyers from other Member States who wish to work only as legal advisers

[79] Vade-mecum de l'établissement en Belgique pour les Avocats communautaires et non-communautaires issued by the Barreau de Bruxelles

can also establish themselves, without having to complete any particular formalities, under their home-country professional title.

6.2 Czech Republic

In the Czech Republic lawyers use the professional title *advokát*. The legal profession in the Czech Republic has been influenced by the Civil law tradition which is indicated also etymologically (*advokát* x French *avocat*).

According to the CCBE Brochure published in 2006 the number of lawyers in the Czech Republic amounts to 7,947 for a population of 10 million inhabitants. In comparison with Belgium there are only fifty percent of lawyers in the Czech Republic for approximately the same number of inhabitants.

There is one centralized professional organization (*Česká advokátní komora*) with its seat in Prague and a branch in Brno.

The general rules governing the profession of a lawyer in the Czech Republic are to by found in the Act on the Legal Profession[80].

Each Czech lawyer is required to be a graduate of one of the four faculties of law in one of the four universities[81] which provide legal education in the Czech Republic or to have other education which can be acknowledged in Czech Republic. After graduation in the Czech Republic, the qualification of *magistr* [82] is obtained.

To be admitted to a Czech law faculty, the *maturitní zkouška* is required (similar to French *baccalauréat*). In addition, the prospective students are required to undergo an entrance test which is highly selective.

[80] Act no. 85/1996 Coll., as amended, on the Legal Profession
[81] Právnická fakulta Univerzity Karlovy v Praze, Právnická fakulta Masarykovy Univerzity v Brně, Fakulta práva Jihočeské Univerzity v Plzni, Právnická fakulta Univerzity Palackého v Olomouci
[82] Act no. 111/1998 Coll., as amended, on Universities, Article 46 (4) f)

The content of the study is orientated on general knowledge of every area of law. Specialization is not possible. Each study program on each university is called law and legal research (*právo a právní věda*).

In conformity with the continental practise, the law graduate must undergo a period of practical training before he can be accepted as a fully qualified *advokát*. As soon as a graduate is enrolled in the list of legal trainees he is entitled to use the title *advokátní koncipient*. He is not entitled to use the title *advokát*[83]. The prerogatives of *advokátní koncipient* are significantly restricted in comparison with *advokát*.

The duration of the traineeship is for a continuous period of three years without interruption other than for normal holidays. The period of interruption other than holidays (for the reason on the side of *koncipient* or the interruption due to the excused absence in work) counts to the period of traineeship only for maximum period of 70 days.

During the period of traineeship a *koncipient* is obliged to participate in a certain amount of lectures and seminars.

At the end of the traineeship a *koncipient* has to take a Bar examination (*advokátní zkouška*) which comprises (i) constitutional and administrative law, (ii) criminal law, (iii) civil, family and labor law, (iv) commercial law, (v) and rules of professional conduct.[84]

6.2.1 Implementation of the Services Directive

Implementation of the Services Directive is to be found in the Part Three of the Act on the Legal Profession, Article 35f et seq.

The lawyer providing the services on the basis of the Services Directive is defined as a Visiting European Lawyer (*Hostující evropský advokát*) by the Act. Article 35f states that a Visiting European Lawyer can provide legal services in Czech Republic on temporary or occasional basis (*dočasně nebo příležitostně*).

[83] In comparison with Belgium, where the *avocat-stagiaire* is entitled to use the title *avocat*
[84] www.cak.cz

A Visiting European Lawyer is obliged to adopt the professional title used in the Member State from which he comes, expressed in the language or one of the languages, of that State, with an indication of the home Member State Bar.

A Visiting European Lawyer is not entitled to become a member of a lawyer's grouping or an associate in a law firm. Whilst a Visiting European Lawyer is not enrolled in the Czech Bar and is providing his legal service only on occasional and temporary basis, this provision is reasonable and in compliance with the Services Directive.

Article 35h (3) of the Act on the Legal Profession is interesting and quite new in its wording. This paragraph was added by the Act no. 79/2006 Coll. which amended the Act on the Legal Profession. It basically uses the option of Article 1 (1) of the Services Directive. As a result, Article 35h (3) does not authorize Visiting European Lawyers to draft agreements on the transfer of real estates, agreements on right of lien and agreements on transfer or lease of enterprise or its part; also, a Visiting European Lawyer is not entitled to certify the authenticity of signature. (*Hostující evropský advokát není oprávněn sepisovat smlouvy o převodu nemovitosti, zástavní smlouvy a smlouvy o převodu nebo nájmu podniku nebo jeho části; hostující evropský advokát není oprávněn činit prohlášení o pravosti podpisu.*) It is not clear why the Czech legislator decided to opt for the possibility of Article 1 (1) of the Services Directive only in 2006 and not in 2002 when the Services Directive was originally implemented.

However, what is more important is the fact that Article 35h (3) of the Act on the Legal Profession goes far beyond the relevant provision of the Services Directive. The second sentence of Article 1 (1) of the latter states that: "Notwithstanding anything contained in this Directive, Member States may reserve to prescribed categories of lawyers the preparation of formal documents for obtaining title to administer estates of deceased persons, and the drafting of formal documents creating or transferring interests in land."

It is clear that the Directive enables the Member States to reserve certain activities to prescribed categories of lawyers. Those activities are only (i) the preparation of formal documents for obtaining title to administer estates of deceased persons and (ii) the drafting of formal documents creating or transferring interests in land. Thus, the following activities are not covered by the Directive: (i) the drafting of agreements on transfer or lease of enterprise or its part, (ii) the certification of the authenticity of signature, and the Czech interpretation must be thus rejected. The list of excludable activities is not enumerative and thus it cannot be extended by the national laws by arbitrary means.

The other point due to which I assume the Czech implementation is incorrect is the fact that the above-mentioned activities may be excluded from the scope of professional activity of those Visiting European Lawyers who cannot carry out these activities in their home Member State, because these activities are reserved to professions which fall outside of the scope of the Services Directive. It makes no sense and it is not allowed to apply this Directive provision indistinctly.

The explanatory report to this Act does not help us much in consideration about the controversial provision in Czech law. It only states that it was the consumers' interest which needed to be protected. (*S ohledem na zvláštní charakter služeb poskytovaných hostujícím evropským advokátem je v zájmu ochrany právní jistoty klientů potřeba z okruhu právních služeb jimi poskytovaných vyloučit věci, které tomuto charakteru poskytování právních služeb neodpovídají.*)

Article 35i makes the Visiting European Lawyer subject to double deontology principle of rules of professional conduct. The Czech model created by this Article states that a lawyer is subject to Czech rules of professional conduct in pursuit of activities relating to the representation of a client in legal proceedings. If there are some issues not covered by the Czech rules of professional conduct, a visiting lawyer is obliged to act in accordance with his home-country rules of professional conduct in these questions.

In professional activities other than the pursuit of activities relating to the representation of a client in legal proceedings, a Visiting European Lawyer is subject to his home-country rules of professional conduct. If there are some issues not covered by these rules, a visiting lawyer is obliged to observe the Czech rules of professional conduct in these questions.

The latter rules are only applicable if they are capable of being observed by a visiting lawyer in the view of all circumstances. However, the Czech law states that there are some provisions that must be observed always. Those are Articles 16, 17, 19 to 21 and Article 24 (1) and (2). (A lawyer is obliged to protect and defend his client's rights and interests and follow his instructions, unless the instructions are contrary to the legal order or the rules of professional conduct. A lawyer is obliged to explain this to his client. A lawyer is obliged to act faithfully and honestly. He has to do everything what is in his opinion useful for his client. A lawyer is obliged not to act in such a manner which could question the dignity of the legal profession. He is obliged to observe the rules of professional conduct, ethics and competition. He cannot act for mutually conflicting parties, etc.) The choice of the rules that cannot be excluded is reasonable and not conflicting with the Services Directive.

Article 35j is solving a complicated situation of mail delivering to the Visiting European Lawyer. The first paragraph of Article 35j of the Act on the Legal Profession sets out that a Visiting European Lawyer is obliged to announce to the Bar his address in Czech Republic when providing legal service in Czech Republic for a period longer than one month for the purposes of delivering of mail by the Bar. In case of not observing this obligation, the mail delivery will be deposited and the delivery will become effective in three days.

Article 35j (2) implements Article 5 of Services Directive. Czech legislator interprets the obligation of a Visiting European Lawyer to work in conjunction with a local lawyer in pursuit of activities relating to the representation of a client in legal proceedings also as the obligation of a visiting lawyer to authorize a local lawyer to whom the mail will be delivered. The Visiting European Lawyer is obliged to announce such an address to the Bar or the relevant court or other body. In case of not observing this obligation, the mail delivery will be deposited and the delivery will become effective in three days. The question of mail delivering to the Visiting European Lawyer is not contained in the Services Directive. However, handling this matter by the national law seems reasonable to me and I therefore cannot regard it as conflicting with the Services Directive.

Furthermore, in pursuit of activities relating to the representation or defence of a client in legal proceedings where the Czech law reserves such activities to *advokát*, a Visiting European Lawyer is obliged to work in conjunction with a local lawyer and to announce his address to the court or other body. The Czech legislator interprets this as a duty of a Visiting European Lawyer to appoint a local lawyer as a consultant in procedural matters. Such a consultant is entitled to accompany a Visiting European Lawyer in every legal action unless a relevant court or other body decides that he is not entitled to. The choice of a consultant has to be discussed with the client.

A visiting lawyer is obliged to provide to the Bar or the relevant court or other body his authorization to exercise the profession of lawyer in one of the Member States with official translation attached to it. If he fails to do so, he is not entitled to pursue legal services in Czech Republic according to the Services Directive.

6.2.2 Implementation of the Diplomas Directive

The Diplomas Directive was transposed into the Czech law by Act no. 18/2004 Coll., as amended, on recognition of professional qualification. This act lays down general principles of recognition of qualification according to the Diplomas Directive.

Particular rules for the recognition of qualification of migrant lawyers are laid down in an Order of the Ministry of Justice of the Czech Republic no. 197/1996 Coll. In the Part Three "Aptitude test" there are set out principles of aptitude test for migrant lawyers who want to establish themselves as lawyers in the Czech Republic.

The migrant lawyer has to take an aptitude test in the following fields:
a) Rules regulating the pursuit of the legal profession,
b) Basics of the Czech constitutional law,
c) Basics of the Czech private law.

The aptitude test takes no longer than two hours and is written. It is held before a senate of three members.

Besides Czech or Slovak, the aptitude test in the Czech Republic can be taken also in three foreign languages – English, German or French.

6.2.3 Implementation of the Establishment Directive

The Establishment Directive was implemented into Czech law by Articles 351 et seq. of the Act on the Legal Profession. The Czech law defines a lawyer according to the Establishment Directive, as an Established European Lawyer. An Established European Lawyer is a lawyer who is enrolled in the list of the Established European Lawyers.

An Established European Lawyer is entitled to pursue his professional activities on a permanent basis.

Registration

An Established European Lawyer shall be enrolled in the list of European Lawyers within one month following the delivery of an application in writing. The application has to contain (i) the proof that the lawyer is a national of one of the Member States, (ii) the certificate attesting to his registration with the competent home Member State Bar which cannot be older than 3 months, (iii) the certificate proving that he has fulfilled the condition of mandatory professional indemnity insurance.

This is in accordance with Article 3 of the Establishment Directive. Article 3 (2) states that a lawyer shall be registered with the host State Bar upon presentation of a certificate attesting to his registration with the home State Bar. There is no time-limit for the host State Bar to do so. On the other hand the Czech legislator obliges the Czech Bar to observe the time-limit of 1 month. This in my view cannot be regarded as incorrect implementation. On the contrary it strengthens the legal certainty. If we compare the provision of the Czech law in question with the relevant provision of the Belgian law, where the Belgian legislator only accepts what has been said in the Directive and does not impose a time-limit on the Belgian Bar, the Czech law has to be regarded as more practical. The time-limit of 1 month is not excessively long; on the contrary it seems to be justified in the view of administrative procedure connected to the registration of a lawyer in the Bar and the prospective Established European Lawyer can have legitimate expectations as to the date of the start of his activity.

The Act on the Legal Profession focuses itself on the reasons which can lead to suspension or striking from the list of the Established European Lawyers or the Bar membership. Besides special reasons which can apply only to Established European Lawyers, general reasons which apply to the suspension of the Bar membership of the Czech lawyers apply appropriately to Established European Lawyers as well. Both categories of reasons, which vary from the death of the lawyer to the disciplinary measure, are reasonable and not very surprising.

As to the practice under the home-county professional title, the Established European Lawyer is under the duty to practice under his home-country professional title expressed in the official language or one of the official languages of his home Member State. The Czech legislator has decided not to opt for the possibility contained in Article 4 (2) of the Establishment Directive to require an Established European Lawyer to indicate his home-country Bar. On the other hand an Established European Lawyer is obliged to include a reference to his registration with the Czech Bar and his subscription in the list of Established European Lawyers.

An European Established Lawyer is entitled to become (i) a member of a lawyers' grouping, (ii) an associate in a law firm or (iii) to work like an employed lawyer. The latter reflects the fact that by the Act no. 79/2006 Coll. which amended the Act on the Legal Profession a possibility was created for Czech lawyers to work in employment relationship.

An European Established Lawyer is entitled to vote in elections to the governing bodies of the Czech Bar, but is not entitled to be elected. This reflects the minimum standard of appropriate representation in the Bar of a host Member State set out by Article 6 (2) of the Establishment Directive.

In pursuit of activities relating to the representation or defence of a client in legal proceedings where the Czech law reserves such activities to *advokát*, an Established European Lawyer is obliged to work in conjunction with a local lawyer. The Czech legislator interprets this as a duty of an Established European Lawyer to appoint a local lawyer as a consultant in procedural matters and as an obligation to authorize a local lawyer to whom the mail will be delivered. Such a consultant is entitled to accompany an Established European Lawyer in every legal action unless a relevant court or other body decides that he is not entitled to. An Established European Lawyer is obliged to announce the address of a consultant to the relevant court or other body within the first legal action that he makes towards the relevant court or other body. If he fails to observe the latter obligation, he is not entitled to continue in pursuit of the legal service in the matter. The choice of a consultant has to be discussed with the client.

An Established European Lawyer is subject to the same rules of disciplinary rules as the local lawyers.

An Established European Lawyer is allowed to enroll in the Czech Bar after three years of effective and regular practice.

6.3 United Kingdom

6.3.1 General Conditions for practice

The United Kingdom is specific due to the Common law system. This influences also the division of the legal profession into two branches and the existence of three legal professions. In England, Wales and Northern Ireland the legal profession is pursued by *barristers* and *solicitors*. On the other hand in Scotland, the legal profession is pursued by *advocates*.

In the following text I am using the term "the United Kingdom" only to cover England and Wales.

"The legal profession in the United Kingdom, although not fused, comprises solicitors and barristers whose work is becoming increasingly similar in many respects. Additionally, the ending in monopolies in litigation, probate and conveyancing has meant that lawyers' traditional work is increasingly becoming blurred with that of other professionals. The liabilities of lawyers for errors and negligence are key issues. Another is the way in which the complaints are handled by the professionals."[85]

According to the CCBE Brochure published in 2006 there are 123,500 lawyers, which makes the United Kingdom the State with the third highest number of lawyers in the European Union (after Spain and Germany). In the United Kingdom there is a total population of about 60 million approximately.

The UK legal profession has served as a model to the continental legal profession, as far as new techniques and methods of legal practice are concerned.

[85] Gary Slapper, David Kelly: The English Legal System, Routledge Cavendish, 2004

London is of particular importance, representing the largest global European city and the most important European link between lawyers from Wall Street and other global cities such as

Tokyo and Beijing. By the beginning of the 1990s, 70 American law firms were well established in London. For those and other foreign law firms, the City of London is a base from which they can operate throughout Europe. On the league table of foreign and domestic law firms, totaling around 10,000, England and Wales has an unbeatable lead on the rest of Continental Europe. [86]

The first step to achieve a goal of legal career in the United Kingdom is to acquire basic legal university degree, which is a LLB or sometimes BA. LLB/BA study program usually lasts for three years and is offered by many universities in the United Kingdom.

After the graduation, one has to decide whether one wants to be a *barrister* or a *solicitor*.

After graduation, one has to enroll in a Legal Practice Course to become a *solicitor* or Vocational Course to become a *barrister*. These courses are designed to acquire necessary skills for each of the types of legal profession and usually are of a duration of one year.

After graduation in the program of Legal Practice Course, a lawyer works under a traditional two-years contract to become fully qualified as a *solicitor*.

Prospective barristers have to complete a one-year long *pupillage* before they are fully qualified and are allowed to enter the Chambers.

6.3.2 Differences between solicitor and barrister

Until recently, the most obvious differences between the two professions was that, firstly, only *barristers* had exclusive and wide rights of audience (a right to plead) in all courts in England and Wales, and secondly, only *solicitors* could be directly engaged for payment by clients. These differences have been eroded by recent deliberate changes, although the style of the distinction in practice has changed little.

[86] Katarzyna Gromek-Broc: The Legal Profession In The European Union – A Comparative Analysis of Four Member States, Liverpool Law Review no. 24: 109–130, 2002

Barristers have full rights of audience to appear in all courts, from highest to lowest. *Solicitors*, on the other hand, have traditionally only been able to appear as advocates in the inferior courts (that is, the magistrates' and county courts) and tribunals. Indeed the bulk of such work continues to be handled by *solicitors*. Under section 17 of the Courts and Legal Services Act 1990, *solicitors* with appropriate advocacy experience are entitled to acquire higher "rights of audience", enabling them to appear in the superior courts. *Solicitors* who attain these rights are known as *solicitor-advocates*. However, in practice few exercise the option to do so, and *solicitors* continue to engage a specialist advocate or adviser from the Bar (that is, a barrister). Not only is this division traditional; in higher value civil or more serious criminal cases, it is often tactically imperative to engage a specialist advocate (because if one side does not the other might), and the Bar is a specialist advocacy profession with an abundance of trained and experienced practitioners.

Until 2004, *barristers* were prohibited from seeking or accepting "instructions" (that is, being hired) directly by the clients whom they represent. The involvement of a *solicitor* was compulsory. The rationale was that *solicitors* could investigate and gather evidence and instructions and filter them - according to the interests of the client - before presenting them to the *barrister*; in return the *barrister*, being one step removed from the client, could reach a more objective opinion of the merits of the case, working strictly from the evidence that would be admissible in court. In addition, being less involved in the current affairs of clients, including many matters that might never come to court, *barristers* had more time for research and for keeping up to date with the law and the decisions (precedent) of the courts.

Theoretically, this prohibition has been removed. In certain areas (but not crime or conveyancing), *barristers* may now accept instructions from a client directly ("Direct Access"). However, a *barrister* cannot undertake any work that requires him to hold funds on behalf of their client, something only a *solicitor* may do.

A *barrister* is in principle required to act for any client offering a proper fee, regardless of the attractions or disadvantages of a case, if he is available to take the case and feels competent to handle the work. A *barrister* who specializes in, for example, crime is not therefore obliged to take on employment law work if he is offered it. He is also entitled (and, indeed, obliged) not to take a case which he feels is too complicated for him to deal with properly. This is known as the "cab-rank rule", since the same rule applies to licensed taxi-cabs.[87]

6.3.3 Implementation of Services Directive

The implementation of the Service directive with respect to the United Kingdom legal profession did not create any particular problems, mainly because the provision of legal services by foreign lawyers had already existed on a customary basis.

In the United Kingdom, the Services Directive was implemented by The European Communities (Services of Lawyers) Order 1978 (S.I. 1978 No. 1910) (hereafter referred to as "**Order of 1978**")

As implemented in the United Kingdom there is very little change from the wording of the Services Directive. There are no recorded instances where the implementation has caused any difficulties or has not been in the spirit of the Community legislation.[88]

The Order of 1978 defines a European lawyer as a person entitled to pursue his professional activities in a Member State under one of the enumerated designations.

A European lawyer shall be enabled to pursue his professional activities in any part of the United Kingdom by providing, under the conditions specified in or permitted by the Services Directive, services otherwise reserved to *barristers* and *solicitors*.

Article 5 of Order of 1978 contains a condition as to the practice of a European lawyer in representation of a client in legal proceeding. A European lawyer is obliged to work in conjunction with a local lawyer while representing a client before a judicial authority. (*No enactment or rule of law or practice shall prevent a European lawyer from providing any service in relation to any proceedings, whether civil or criminal, before any court, tribunal or public authority (including appearing before and addressing the court, tribunal or public authority) by reason only that he is not an advocate, barrister or solicitor; provided that*

[87] www.lawsociety.org.uk/ and http://www.barcouncil.org.uk/

[88] Nigel Foster: European Community Law and the Freedom of Lawyers in the United Kingdom and Germany, The International and Comparative Law Quarterly, Vol. 40, No. 3 (Jul., 1991), pp. 607-634

throughout he is instructed with, and acts in conjunction with, an advocate, barrister or solicitor who is entitled to practise before the court, tribunal or public authority concerned and who could properly provide the service in question.)

A salaried European lawyer may act before a judicial authority on behalf of his employer in the proceedings only in so far as a *barrister* in such employment could properly do so.

On the basis of Article 1 (1) of the Services Directive, the United Kingdom reserved preparation for remuneration of any instrument creating or transferring an interest in land or for obtaining title to administer the estate of a deceased person to domestic lawyers.

In providing any services, a European lawyer is obliged to use the professional title and description applicable to him in his country of origin, expressed in the language or one of the languages of that country, together with the name of the professional organization by which he is authorized to practise or the court of law before which he is entitled to practise in that country.

The status of European lawyer may be verified at any time by a competent authority. The competent authority in this case would be a relevant Bar or Law Society or a judicial body before which the person concerned seeks to provide services.

As to the observance of professional rules of conduct, the UK legislation refers to the Services Directive and its relevant provisions.
The transposition of the Services Directive has been made very clearly and no disparities between the wording of the Directive and the wording of the Order of 1978 cannot be found. The United Kingdom proved once again that it is "a good pupil" in implementing the European legislation.

6.3.4 Implementation of the Diplomas Directive

The Diplomas Directive was transposed to the UK legislation by the European Communities (Recognition of Professional Qualifications) Regulations 1991 (SI 1991 No 824). In the area of lawyers it was brought into effect by the Qualified Lawyers Transfer Regulations 1990 (hereafter referred to as "**Regulations of 1990**").

According to the Regulations of 1990, there are six professional associations designated as authorities competent to deal with matters of the recognition of professional qualifications of lawyers. Such designated authorities have the function of considering applications and granting authorizations.

Lawyers qualified in one of the Member States outside of the United Kingdom who wish to be admitted as *solicitors* or who wish to be called as a *barrister* in the United Kingdom are required to take an aptitude test which is called "Qualified Lawyers Transfer Test".

The first step is to apply for a Certificate of Eligibility to sit the Qualified Lawyers Transfer Test. It is the Law Society of England & Wales which issues the certificates. To obtain a Certificate of Eligibility all candidates must fill in a questionnaire to which they should attach certified copies of their academic and professional qualifications and certificates of good repute and solvency, etc. issued by the professional association of which they are a member.

Qualified Lawyers Transfer Test covers:

a) Property law, including trusts, conveyancing, wills and probate, etc.;

b) Litigation: the English legal system (including a basic knowledge of civil and criminal procedure), the law of evidence and civil or criminal procedure (the choice being left to the candidate);

c) Professional rules and accounts; and

d) Principles of common law.

Parts a) to c) are written examinations, while part d) is an oral examination. Proficiency in English is a must.

6.3.5 Implementation of the Establishment Directive

The Establishment Directive has been transposed into the UK legal order by the European Communities (Lawyer's Practice) Regulation 2000 (hereafter referred to as "**Regulation of 2000**").

A registered European lawyer is a person authorized to practise as a lawyer in a Member State other than the United Kingdom and is registered with a competent professional body in the United Kingdom.

A registered European lawyer is entitled to carry out under his home-country professional title any professional activity that may lawfully be carried out by a member of the professional body with which he is registered.

There exists a limitation as to the salaried registered European lawyers who are limited in pursue of their professional activity to the same extent as their UK colleagues.

A registered European lawyer is obliged to use his home-country professional title expressed in an official language or languages of his home State in a manner which avoids confusion with the title of *solicitor* or *barrister*. A registered European lawyer should also indicate the professional organization by which he is authorized to practise or the court of law before which he is entitled to practise in that Member State and the professional body with which he is registered in the United Kingdom. The practice under the home-country professional title in the United Kingdom is fully in line with Article 4 of Establishment Directive.

In representation in legal proceedings, a registered European lawyer shall act in conjunction with a solicitor or barrister who is entitled to practise before the relevant judicial body.

Property transactions and probate

Article 12 and Article 13 of the Regulation of 2000 prevents a registered European lawyer from preparing for remuneration (i) *any instrument creating or transferring an interest in land* or (ii) *any instrument for obtaining title to administer the estate of a deceased person* unless he has a home professional title obtained in (i) Sweden, Iceland, Liechtenstein, Norway, the Czech Republic, Cyprus, Hungary or Slovakia or in (ii) Sweden, Iceland, Liechtenstein, Norway, Cyprus or Slovakia.

These above-mentioned Articles of Regulation of 2000 reflect Article 5 (2) of the Establishment Directive. It is very interesting that the United Kingdom is the only Member

State out of three Member States under examination in this thesis, which has implemented Article 5 (2) of the Establishment Directive correctly.

Article 5 (2) of the Establishment Directive states that Member States which authorize in their territory a prescribed category of lawyers to prepare deeds for obtaining title to administer estates of deceased persons and for creating or transferring interests in land, which are in other Member State reserved for professionals other than lawyers, may exclude lawyers from such States from carrying out such activities.

This is the exact case of the United Kingdom where property transactions and probate are reserved to one of the categories of lawyers, namely to *solicitors*, whereas other Member States except Sweden, Iceland, Liechtenstein, Norway, the Czech Republic, Cyprus, Hungary and Slovakia in case of property transactions; and except Sweden, Iceland, Liechtenstein, Norway, Cyprus and Slovakia in case of probate, preserve such activities to notarial professions, which is not covered by the Establishment Directive.

Registration

Each of 6 professional bodies in the United Kingdom maintains a list of registered European lawyers. A registered European lawyer must hold a current practicing certificate, and one must renew that certificate annually.[89]

A foreign lawyer may apply to be registered with more than one professional body, however a registered European lawyer may never be registered with both branches of the UK legal profession, i.e. one cannot be *solicitor* and *barrister* at the same time.

The Regulation of 2000 established a new offence in the UK legal order - Offence of pretending to be a registered European lawyer (Article 21 of Regulation of 2000). Who is required to register in the United Kingdom under the Establishment Directive and who does not, commits a criminal offence. In addition he will not be able to enforce payment of his fees for the services provided.

[89] Registered European lawyers (RELs) and the Establishment Directive – a booklet issued by Solicitors Regulation Authority

Regulation and Discipline

A registered European lawyer is subject to the same rules, codes and principles of professional conduct as local lawyers in respect to all activities pursued in the United Kingdom. A registered European lawyer is also subject to his home State rules. The general requirement is to comply with two sets of rules – those of the relevant professional authority and those of the home Member State. However, the Solicitors Regulation Authority interprets Article 6 of the Establishment Directive as if, when a lawyer registered under the Establishment Directive cannot comply with a home State rule without breaking a host State rule, the host State rule must prevail and a lawyer must comply with the host state rule.

Entry into the profession of solicitor or barrister

If a registered European lawyer has for a period of at least three years effectively and regularly pursued in the UK professional activities under his home-country professional title in the law of the UK, he may become a *solicitor* or a *barrister.*

A registered European lawyer who makes an application to become *solicitor* and *barrister* is obliged to provide evidence in support of this application which the professional body may reasonably require. A professional body is entitled to verify the effective and regular practice.

The effective and regular practice in the UK context means a practice without any interruption other than those resulting from the events of everyday life.

There is a time limit of four months for a professional body to decide on the acceptance or rejection of a registered European lawyer application.

A registered European lawyer who has been granted an entry into the profession of *barrister* or *solicitor* is entitled to use his home-country professional title alongside with the relevant UK professional title.

The United Kingdom's transposing legislation is clear and free of mistakes. Once again, the United Kingdom has proved that it is worthy to follow its implementing techniques by other Member States.

What is more, the recent development in the field of the legal profession in the United Kingdom has shown that especially the Establishment Directive really facilitated access to the profession.

The challenge of the Establishment Directive has diminished the number of applications for the aptitude test to a minimum for the first five months of 2002. In May 2000, the UK implemented
The Establishment Directive, and became one of the first Member States to do so. The UK experience provides clear evidence that the Establishment Directive has effectively opened up borders for lawyers.[90]

[90] Katarzyna Gromek-Broc: The Legal Profession In The European Union – A Comparative Analysis of Four Member States, Liverpool Law Review no. 24: 109–130, 2002

Chapter VII. CONCLUSION

The aim of this thesis was to analyze the status of lawyers migrating from one Member State to another. The status of migrant lawyers was deeply influenced by the Community law and its effort to liberalize economic relationships among the European Community.

The system established by the Services, Diplomas and Establishment Directives created a huge leap from protectionist and restrictive approach of the Member States where the pursuit of a legal profession was bound to many conditions, often unconquerable for the members of the legal profession from an other Member State, such as a condition of nationality or degree obtained in that Member State; to the system where under certain conditions a lawyer from one Member State may relatively easily migrate to another Member State for the purpose of temporary provision of services on the one hand or permanent establishment on the other hand.

However, as was shown on the case-law of the ECJ, the Member States did not definitively give up some of their restricting efforts. In this connection I must praise the role of the ECJ in the liberalization of the transnational pursuit of the legal profession. The ECJ has constantly fought against impediments to the free movement of lawyers created by the Member States.

Even though, I assume that especially establishment in other Member State than that where the authorization to practise as a lawyer was obtained, could be liberalized even more, I cannot conclude differently than that the free movement of lawyers was established.

This was illustrated especially on the examples of the transposing legislation of the three Member State – Belgium, the Czech Republic and the United Kingdom.

Although, all three of these States allow free movement of lawyers in their territories, it must be pointed out that I found several overriding provisions in implementation laws, particularly in the law of Belgium and the Czech Republic.

As to the further research possibilities regarding free movement of lawyers, it could be very interesting to look at the possibilities of migrant lawyers especially from the overseas and also at the possibilities of migrant lawyers from the European Union in the United States.

In Prague, 2007

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Chapter VIII. ABSTRACT *(In Czech)*

Tato diplomová práce si klade za cíl prozkoumat právní postavení osob, které jsou oprávněny vykonávat profesi advokáta podle národního práva jednoho z členských států ES a přejí si vykonávat profesi advokáta v jiném členském státě, byť formou dočasného poskytování právních služeb nebo formou trvalého usazení.

Volný pohyb advokátů v rámci ES má právní základ ve Smlouvě o založení ES, a sice v ustanoveních týkajících se svobody usazování (články 43 až 48 SES) a volného pohybu služeb (články 49 až 55 SES).

Tato diplomová práce se skládá ze dvou částí. Prvá část je věnována rozboru primárních a sekundárních pramenů práva volného pohybu advokátů v rámci práva ES. V druhé části práce se věnuji implementaci relevantních směrnic v národním právu tří členských států (Belgie, Česká republika a Spojené království).

Cílem kapitoly nazvané *Conceptual setting of free movement of lawyers* (*Zařazení volného pohybu advokátů*) je konceptuální umístnění volného pohybu advokátů v rámci systému práva ES. Tato kapitola také podává stručný výklad ke svobodě usazování a k volnému pohybu služeb.

Kapitola *Provision of services in host State from establishment in home State* (*Poskytování služeb v jiném státě ze sídla v domovském státě*) zkoumá právní úpravu ES v oblasti poskytování právních služeb advokátem v jiném členském státě, než je členský stát, který ho opravňuje vykonávat profesi advokáta. Pro tuto oblast byla vydána směrnice Rady 77/249/EHS ze dne 22. března 1977 o usnadnění účinného výkonu volného pohybu služeb advokátů. Částí této kapitoly je také rozbor jednotlivých rozhodnutí ESD relevantních pro tuto oblast (*Komise v. Německo, Komise v. Francie, Gebhard, Gullung, AMOK*).

V následující kapitole *Recognition of professional qualifications* (*Uznávání odborné kvalifikace*) se zabývám směrnicí Rady 89/48/EHS ze dne 21. prosince 1988 o obecném systému pro uznávání vysokoškolských diplomů vydaných po ukončení nejméně tříletého odborného vzdělávání a přípravy, která umožňuje advokátům kvalifikovaným ve svém

domovském státě, aby si pro účely usazení v jiném členském státě nechali uznat svou kvalifikaci advokáta za určitých podmínek.

Vzhledem k tomu, že výše uvedená směrnice bude dne 20. listopadu 2007 plně nahrazena směrnicí Evropského parlamentu a Rady 2005/36/ES ze dne 6. července 2005 o uznávání odborných kvalifikací, věnuji ji také stručný výklad.

Součástí kapitoly jsou také analýzy dvou rozhodnutí ESD v oblasti uznávání diplomů (*Morgenbesser, Komise v. Itálie*).

Následuje kapitola *Establishment in host Member State* (*Usazování se v hostitelském členském státě*), která se zabývá nejvýznamnější směrnicí pro oblast volného pohybu advokátů v ES, a to směrnicí Evropského parlamentu a Rady 98/5/ES o usnadnění trvalého výkonu povolání advokáta v jiném členském státě než v tom, ve kterém byla získána kvalifikace. Tato směrnice umožňuje, aby migrující advokát vykonával praxi v jiném členském státě pod profesním označením udělovaným v domovském členském státě. Po uplynutí tří let faktického a pravidelného výkonu činnosti v hostitelském státě, může být advokát přijat do povolání advokáta v hostitelském členském státě.

Ohledně této směrnice byly v nedávné době vydány rozhodnutí ESD *Lucembursko v. Parlament a Rada* a *Wilson*. Tyto judikáty jsou velice zajímavé a jejich analýza je součástí kapitoly.

Následující část diplomové práce zkoumá implementace výše uvedených směrnic ES do národních právních řádů tří členských státu. Belgie, Česká republika a Velká Británie byly vybrány se záměrem vybrat co nejreprezentativnější vzorek se současných 27 členských států EU.

Belgie byla vybrána z důvodu, že je jedním ze zakládajících členských států EU. Je to typická kontinentální západní demokracie s klasickou strukturou advokátního povolání. Transpozici práva ES v oblasti volného pohybu advokátů v Belgii nacházíme zejména v Code Judicaire. Domnívám se, že belgická transpozice obsahuje několik chyb, zejména pak zužuje definici advokáta v porovnání se směrnicemi 77/249/EHS a 98/5/ES.

Česká republika reprezentuje jeden z nových členských států EU. Česká úprava v oblasti poskytování právních služeb je blízko klasické kontinentální úpravě jak ji známe z Francie, i když obsahuje několik specifik. Směrnice umožňující volný pohyb advokátů byly transponovány zejména zákonem o advokacii. Česká implementace je zdařilá, nicméně obsahuje několik chyb. Jedná se zejména o nepochopení článku 1 odst. 1 směrnice 77/249/EHS českým zákonodárcem.

Nakonec se zabývám implementací směrnic ve Spojeném Království. Spojené Království je klasickou common law zemí se specifickou strukturou povolání advokáta (barrister, solicitor). Implementačním nástrojem jsou ve Spojeném království tzv. statutory instruments. Britská implementace je jasná a bezchybná.

Evropská úprava nepochybně přinesla ulehčení výkonu povolání advokáta v hostitelském členském státě EU oproti předešlému stavu, kdy výkon advokátní praxe byl považován za nutně teritoriálně omezenou záležitost. S fungujícím vnitřním trhem dochází ke globalizaci také právní profese a Evropské společenství naplňuje ambiciózní myšlenku volného pohybu advokátů. Nicméně, dle mého mínění, by v budoucnu právní úprava této oblasti mohla jít ještě liberálnější cestou, aby společně s nadnárodními klienty mohli nadnárodně působit i jejich právní zástupci.

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