Free Movement of Legal Professionals within the European Union

-Master’s Thesis in Law -
Una Særún Jóhannsdóttir

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Prologue

Being, myself, a law student living and studying in another country than where I pursued my law studies I have often wondered how I can transform my purely Icelandic legal diploma into a more international legal diploma. This is a difficult situation and problems arise. My knowledge is mainly based on Icelandic law, with a basic course in European law and Public International law. Furthermore, the legal profession is a highly regulated one and it has different requirements for entrance between States.

In my year as an exchange student at Stockholm University I became accidently fascinated with European Union law. A basic course in EC Procedural Law took me all the way to competing in the European Law Moot Court Competition on behalf of the University. After that there was no turning back for me. With little background knowledge in the field I found it necessary to read and independently get to know EC Law. I found myself repeatedly coming across case law from the European Court of Justice concerning lawyers that were met with hindrances to their right to free movement. Hindrances to practice their legal skills in other Member States, even though the EC Treaty guarantees for all the possibility to move around and work within the Community. Now, almost a year later, I have written a thesis on the possibilities for European lawyers to move around within the Union. I will at least know what to expect if I ever wish to exercise my right to free movement within the Union.

During the writing of this thesis I was very lucky to have as my instructor Dr. Maria Elvira Mendez-Pinedo. She not only guided me on the subject but more importantly helped me realizing how, at least try, to do a proper research and how to not lose my voice in the complexity of EU law. For that I am deeply thankful. I have come a long way from where I started a few months ago.

I would never be where I am today if it were not for my family which is there to support me always. Special thanks to my mother for all the help and strong thoughts. Very special thanks to Ögmundur and Sverrir. You guys have been extremely patient with me in the last months and I know that it is not always easy. I am one lucky woman to have you in my life!

Stockholm, 4 September 2009

Una Særun Jóhannsdóttir
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<td>CCBE</td>
<td>Council of Bars and Law Societies of Europe</td>
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<td>Commission</td>
<td>Commission of the European Communities</td>
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<td>EC/Community</td>
<td>European Community</td>
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<td>ECJ/Court</td>
<td>European Court of Justice</td>
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<td>EC Treaty</td>
<td>Treaty Establishing the European Community</td>
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<td>EEA</td>
<td>European Economic Area</td>
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<td>EU</td>
<td>European Union</td>
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<tr>
<td>Home Member State</td>
<td>The Member State where the lawyer acquired his professional qualification and/or the right to use the legal professional title.</td>
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<tr>
<td>Host Member State</td>
<td>The Member State, different from the home State, in which the lawyer wishes to practice in.</td>
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<tr>
<td>Lawyers’ Establishment Directive</td>
<td>Directive 98/5/EC of the European Parliament and of the Council 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.</td>
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<td>MDPs</td>
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1. Introduction

"In a society founded on respect for the rule of law the lawyer fulfils a special role. The lawyer's duties do not begin and end with the faithful performance of what he or she is instructed to do so far as the law permits. A lawyer must serve the interests of justice as well as those whose rights and liberties he or she is trusted to assert and defend and it is the lawyer's duty not only to plead the client's cause but to be the client's adviser. Respect for the lawyer's professional function is an essential condition for the rule of law and democracy in Society."

– The CCBE’s Code of Conduct for European Lawyers, Article 1.1

With the words of Article 1.1 of the CCBE’s (Council of Bars and Law Societies of Europe) Code of Conduct in mind it is hard to see whether lawyers’ who carry such an important role in a society have any business providing legal services across borders. They are, after all, qualified to practice the law of the State where they obtained the qualification and each legal system has its own rules and traditions which makes the legal profession very introverted. The interests that the lawyer is responsible for could easily be risked, if for example, a Dutch lawyer decides to move to Iceland and advice on Icelandic law. This resembles the attitudes of Europeans 50 years ago but the European legal profession has experienced a sea change when it comes to trans-border legal practices within the region. This sea change is a result of the EC Treaty which created a single market for all economic activities within the European Community. It created a system for persons to move freely within the Union with the introduction of rules on free movement of workers, services and establishment.

To reach the goal of free movement of persons, the professions within the Community had to be liberalized from unjustified national rules which prevented persons from providing cross border services or establishing in other Member States. One of these professions was the legal profession. Consequently, in principle, all fully qualified European lawyers have a right to practice law in other Member States, either by providing temporary services or by becoming established. It sounds simple, but when one digs deeper into the matter there is an abundance of obstacles to lawyers’ right to free movement. Some of them have been tackled by the Community legislators and others by the European Court of Justice (ECJ). Expectedly some remain unsolved. Most importantly, European lawyers are at present stage effectively using the system of free movement, brought to them by the EC Treaty, to live and practice law in other Member States of the European Union. The free movement system is fully extended to lawyers of the European Economic Area (EEA); hence it is applicable in Iceland and for Icelandic lawyers wishing to pursue a career in another State of the European Economic Area.

This thesis focuses on the development towards creating an effective system of free movement for legal professionals within the European Union. Is there really a single
European market for lawyers or are lawyers on the move still met with obstacles? In order to answer this question the thesis surveys the evolution of EC law focusing on legal professionals. Beginning with considering the nature of the Treaty provisions on freedom to provide services (Article 49 EC) and the freedom of establishment (Article 43 EC) which are the means by which lawyers derive their right to free movement. Next the directives created to facilitate lawyers’ free movement will be thoroughly examined. These are the Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services and Directive 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. Also, Council Directive 89/48/EEC and the more recent Directive 2005/36/EC on the Mutual Recognition of Qualification will be discussed. These pieces of legislation form the system for lawyers’ free movement. A system which would probably not have seen the light of day if it were not for the European Court of Justice and it’s dynamic and progressive interpretation of Treaty Articles governing lawyers free movement. Therefore, the Court´s interpretation and role in the development of the area will be given much weight throughout the work.

1.1. The Nature of the Legal Profession

A short introduction to the nature of the legal profession is essential for the following coverage. Opening up the market for legal professionals was a challenge. The nature of the profession is complicated due to legal professionals’ inseparable link with the administration of justice. In the first place, it is a profession which is in all cases highly regulated within each Member State. What is more, legal professional qualifications, which are most commonly required for entrance into the legal profession, differ between the States. Consequently, the development of Community law on cross-border legal practices had a slow birth. The legal system takes different and varied forms, further muddying the waters. European legal professionals are all bred in different legal systems each with its own customs and traditions. Furthermore, the form of practice can vary. A lawyer can be self-employed working independently or within a law firm. He can be part of a large firm or a small rural office. He can be a salaried government agent or practising in a multi-disciplinary partnership. This multitude of situations can create problems when attempting to harmonize entrance and professional requirements.

The free movement system for lawyers is characterized by the fact that all legal professions remain regulated at national level. This means that Member States retain
regulatory control over the profession but they must exercise their regulatory powers in accordance with European free movement and competition rules. Thus, the rules may not be discriminatory and cannot constitute a hindrance to the right to free movement unless justified by imperative reasons.¹

The competent authorities, most commonly bar authorities, regulate lawyers’ activities according to the legal system and traditions of the country in order to ensure that lawyers fulfil their special role in society. Therefore, national codes of conduct under vigilance of national bar authorities are the watchdogs of inter-State legal practices. These are national rules and accordingly they vary from state to state. The Community legislator has emphasised on several occasions the importance of co-operation between national authorities in the different Member States in order for the free movement system to function properly. Furthermore, the CCBE has under its auspices created a Code of Conduct for European Lawyers which is applicable to all lawyers both in practice within their home State and in cross-border legal practices in Europe. In the case of clashes between home State and host State rules the CCBE code functions as a guide on what rule is to apply. In principle, the host State rules apply, unless for specific activities. However there is no clear rule in this respective and the two sets of national rules are often both applicable to the migrating lawyer, creating a burdening situation of double deontology. This is one of the problems that derive from the terms of the Directives and will be more closely considered in the thesis.

Entrance requirements to the profession differ from State to State. Most countries require a law degree to become a lawyer but others have no such requirement. Furthermore, a legal education can take from three to six years to achieve. Some Member States require professional experience or training periods before entrance into the profession. In some States, like in the United Kingdom, the profession is split between solicitors and barristers. In other States, like in Iceland, pleading before the courts is reserved for a particular group of lawyers.² It was therefore acknowledged early that it would be a wild goose chase to seek vertical harmonization in the field like was done in many of the other professional services. Consequently, there is no such thing as a common concept of what a lawyer is or what legal education shall consist of. The Bologna Process³ is working at creating a more coordinated approach in university level education throughout Europe. This could with time result in a

¹ This was confirmed by the Court in its milestone judgments; Case C-55/94, Reinhard Gebhard v Consiglio dell’ordine degli Avvocati e Procuratori di Milano, [1995] ECR I-4165.
² Lonbay, Julian: Elixir website, outlining the training and professional requirements for legal professionals in the Member States of the European Union. (See http://elixir.bham.ac.uk/menu/country/default.htm)
³ See generally European Commission’s fact sheet on the Bologna Process (http://ec.europa.eu/education/higher-education/doc1290_en.htm)
smoother working system of mutual recognition of legal qualifications. However, the scope and size of this thesis does not allow the author to dwell on the progress of the Bologna Process and its awaited results.

Clearly the practice and types of lawyers and their qualifications vary enormously between Member States. Somehow, the Community has coped with this variety of situations and managed to find the golden mean for opening up European legal markets and still safeguard the interest of consumers of legal services. Hand in hand with the development of the economic integration in Europe the legal market has evolved alongside, experiencing an Europeanization in law and legal matters. Many opponents of lawyers’ free movement feared that opening up for migrant legal professionals would result in deteriorating the national legal market and effect consumers negatively. However, the European integration had already affected national legal markets. First and foremost, consumers of legal services experienced an increasing need for advice concerning cross-border transactions in which international law, Community law and domestic laws often overlap. Thus, the expanding common market led to a need for lawyers that are able to provide legal services beyond national borders. Here it is assumed that the effect of this Europeanization for legal professionals is more likely to have enhanced the quality of legal services than not. The profession is not as isolated and contingent on the national legal systems, a clear result of the interchange and flow of lawyers across borders.

1.2. Purpose and Structure
As noted earlier, this thesis primarily aims at examining the development of the Community system for free movement of lawyers. This examination poses four main questions all aiming at a conclusion on how effective the lawyers free movement system is in practice. Has the European Community been successful in creating a single market for European lawyers? What were the main obstacles for lawyers on the move? Has the Community legislator been able to cope with these problems or are European lawyers still met with restrictions when practising transfrontier legal activities? If so then what types of hindrances still exist?

Different steps will be taken in an attempt to answer these questions. The thesis is structured in an almost chronological order. It starts with considering the free movement provisions of the Treaty and the case law of the Court. It was the Court that opened up for the development of lawyers’ free movement, by confirming in Reyners, its first landmark

4 Recital 5 of the Lawyers’ Establishment Directive.
judgment in the field, that lawyers’ did not fall under the public authority exception of Article 45 EC. This led to a series of cases where the Court reacted to a need for lawyers to move freely in the European Community and where often the Community legislator had not reacted. Particular emphasis will be placed upon two matters in the coverage. Firstly, what types of measures are caught by the free movement provisions of the Treaty? Does the protection of the rights go beyond purely discriminatory measures? Secondly, it will be considered whether there is really a clear difference between the freedom of establishment and freedom to provide services in practice.

Chapters 3-5 are dedicated to examining the legislation applicable to lawyers providing legal services across borders. Beginning with the first directive, the Lawyers’ Service Directive, then moving to the Directives governing the mutual recognition of qualifications and lastly considering the most recent and debated legislation in the field; the Lawyers’ Establishment Directive. Special emphasis will be placed upon explaining the way in which lawyers can practice in another Member State. What activities they can perform and how? Are lawyers allowed to practice in a group or in multi-disciplinary partnerships or is the Community free movement system only created for self-employed lawyers? Is the system applicable to trainee lawyers? How is consumer protection guaranteed? Furthermore, rules of professional conduct and the CCBE Code of Conduct and its role in inter-State legal practices will be examined.

After establishing what rules are applicable to lawyers and what rights they have when practising law across borders, the implementation of these rules will be considered in chapter 6. For this purpose, the implementation in both Iceland and Sweden will be examined.
2. The Right of Establishment and the Freedom to Provide Services for Legal Professionals

The right of establishment and the freedom to provide services extend the right of free movement to the self-employed. Consequently, these are the means by which lawyers derive their right to free movement, making the freedom to provide services and right of establishment a very significant form of cross-border legal practices. In this chapter the right of establishment and the freedom to provide services will be analyzed with regards to lawyers. A special emphasis is placed on ECJ’s interpretation of the two sets of provisions as the Court played an important role in facilitating the development in the area and liberalizing the legal profession. The chapter begins with a comparison of the right of establishment and the freedom to provide services. The two freedoms have many features in common and it is important to understand the division before the essence of the two is discussed in more detail, each in separate subsequent chapters. Next the direct effect of the provisions will be discussed as well as the Treaty based derogations. Restrictions, both discriminatory and non-discriminatory are the focus of the last part.

2.1. The Difference between the Right of Establishment and the Freedom to Provide Services

The freedom of establishment and the freedom to provide services are dealt with in separate sets of provisions in the EC Treaty (establishment in Articles 43-48 and services in Articles 49-55). However, there are close links between the two, so close in fact that sometimes it can be hard to distinguish between them. The first hint on this link is that the provisions in the Treaty are dealt with consecutively and some provisions apply to both freedoms. The provisions are similarly construed and have common characteristics and similarities. Furthermore, the fundamental principle underlying both freedoms is the elimination of discrimination. However, this does not alter the fact that the Treaty does separate the two freedoms which is originally based on the idea of the difference of persons and services, as two separate factors of production. To that extent, for example, the two provisions are considered separate in legislation concerning lawyers’ free movement: the Lawyers Service Directive and the Lawyers Establishment Directive. However, the new Service Directive

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6 Arnell, Anthony: The European Union and its Court of Justice, p. 465-466
treats the two together, establishing general provisions with the aim of facilitating the exercise of both freedoms in respect of service activities.

The Court has, likewise, considered the similarity of the two freedoms. In Gebhard\(^{10}\) the Court emphasized that the four freedoms should be similarly construed. Consequently, the Gebhard based formula of identifying restrictions hindering the free movement of persons does not distinguish between the freedoms. The development seems to be in the direction of slowly blurring the dividing line between services and establishment. This is natural when considering the evolution that has taken place since 1957 (the year that the Treaty of Rome was signed). Migrants travel easier and technology has had a great impact on communication between states and not the least on business transactions. Services take many different forms dependant on the nature of the activity. This diversity can even open up for a situation where a migrant service provider/receiver is resided for a longer time in the host Member State than a self-employed person established in another Member State. Since lawyers use both means of movement to offer services within the Community it is important to understand the implications of the two and how to distinguish between them.

The difference between services and establishment does not lie in the type of the service in question but in the link between the person and the Member State. More specifically, the borderline between the two freedoms is market by the time that the self-employed person can be regarded sufficiently connected to the host State to be considered established but not merely providing a temporary service. Therefore, the key distinction is the strength of the connection between the person and the host State and not necessarily the actual length of the dwelling in the host State.

A permanent service provider is regarded as established in a Member State if he aims at providing his services there without a foreseeable limit to its duration, e.g. by setting up an agency or office. This was the case in Gebhard where a German lawyer had moved to Italy and launched a law firm there. After careful contemplation over whether Gebhard was a temporary service provider or established in the host State, the Court found that he was in fact established in Italy. The difference between the two freedoms was discussed in some detail in the case. The Court emphasized that the provision on services envisages that the service

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provider is to pursue his activity in the host Member State on a temporary basis whereas the provisions on establishment allow the service provider to participate, on a stable and continuous basis, in the economic life of the host Member State. Furthermore, the temporary nature of the service activity is to be determined by reference to its periodicity, continuity and regularity. However, the Court noted, that the service provider will not be considered established only because he provides himself with the necessary infrastructure for providing the service in question.

The distinction between the two freedoms became more blurred with this statement of the Court and it races many questions. What is still not clear is for how long the service provider can stay in the host State without being established. How long is too long? How often? Where is the dividing line between the two freedoms? How is secondary establishment and services with necessary infrastructure distinguishable? Consequently, it may be difficult to distinguish between the two in practice. A service provider can set up an office and even move its staff to the host State and still not be regarded as established. The only sheet anchor seems to be that the service cannot be provided indefinitely and the end of it must be foreseeable. Advocate General Jacobs noted in Säger, that where the provider of the service, spends a substantial period of time in the Member State where the service is provided there is a fine line between services and establishment. As long as the residence is of temporary nature, even though the service provider spends substantial time in the Member State while rendering the service, the activities will fall within the ambit of the Treaty provisions on services. If the activities are carried out on a permanent basis, with no foreseeable limit to their duration, they are governed by the Treaty provisions on establishment.

The ECJ has acknowledged that no provision of the Treaty provides a means for determining, in an abstract manner, the duration or frequency beyond which the supply of a service in another Member State can no longer be regarded as services within the meaning of the Treaty. The Gebhard criteria remain unclear and open up for different interpretations, as many questions have not been answered. In the end determining whether an activity constitutes a service or establishment seems to be a matter of interpretation in the hands of

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12 ibid, para. 27.
15 ibid, para. 25-26.
national courts on case-by-case basis. That can lead to problems since the criteria as it stands today are open up for different interpretations. Consequently, there is very little clarity involved in the separation of the freedom of services and the freedom of establishment.

Despite this lack of clarity there still are differences between the freedoms because of the different nature of the two. Due to the closer link and deeper integration into the economy of the host State, it is acknowledged that Member States can exercise a more restrictive control over persons established in the State then over temporary service providers. Advocate General Jacobs pointed out in Säger that it should not be regarded as unreasonable that a person established in a Member State has to comply with the law of the State in all respects. On the other hand, to require a service provider that is established in another Member State to comply with all national laws and regulations is less understandable and could render the notion of a single market unattainable in the field of services. The Court has agreed with the view of the Advocate General on several occasions in its case law. Lawyers are a highly regulated profession. They do not skip easily from the supervision of regulatory authorities and are often under supervision of both host State and home State regulatory bodies. Arguably, it is equally important to keep an eye on a lawyer providing services on a temporary basis as an established lawyer. Therefore, this distinction related to the nature of the freedoms is not fully applicable to lawyers. The double deontology that lawyers on the move are met with will be discussed in subsequent chapter where this thought will be further dwelled on.

This fact makes the provisions on services vulnerable to abuse by service providers that are in fact established but attempt to pass by as merely providing services on temporary basis in order to circumvent the restrictions imposed on established persons. The Court’s answer to this problem is to be found in the anti-circumvention case law. In van Binsbergen the Court took the view that a person established in one Member State, whose activities are entirely or principally directed towards another Member State, may be treated by that State as if he were established there, if the reason for remaining established in the first State was to

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18 Arnall, Anthony: *The European Union and its Court of Justice*, p. 466.
avoid rules of professional conduct applicable in the latter.\textsuperscript{23} As a result the fact that the Member State cannot have full authority over service providers has led the Court to treat temporal service providers as established in the host State, even though there is no form of permanent presence in the host State. This does not make the blurred line between services and establishment any clearer. The cases on abuse of Community law can also be problematic especially in connection with identifying what constitutes abuse and how it can be proved.

Originally, the freedom of establishment was thought to be mainly based on the principle of non-discrimination on grounds of nationality whereas the service provisions reached further aiming at liberalizing the free movement of services. That interpretation related services more strongly with the provisions on free movement of goods and the protection offered by them was against any interference or obstruction to the freedom of services unless justified. However, the establishment provisions have been moving closer to the services principles in recent years, as other measures have been caught by the establishment provisions of the Treaty not solely emphasizing on equal treatment.\textsuperscript{24} This development is further described below.

2.2. The Freedom of Establishment

The EC Treaty provides for a freedom of establishment for all EU citizens in Article 43. Community nationals can on basis of that provision, freely move to another Member State, to establish on a permanent basis and pursue an economic activity in a self-employed capacity, under the same conditions as nationals of the host Member State. Any discriminatory restrictions on the freedom of establishment are prohibited.\textsuperscript{25} Non-discriminatory restrictions can also be caught by the provisions of freedom of establishment.

The Treaty does not further elaborate on what is to be considered establishment within the meaning of Community law. Clearly, the activity or its purpose must be of economic nature. This has been broadly interpreted by the Court, which has included activities of sportsmen, commercial activities of religious groups and even the economic activities of prostitutes within the scope of Article 43.\textsuperscript{26} Furthermore, the legislator undoubtedly intended to make the scope of the right of establishment as extensive as the freedom to provide services. Therefore,

\textsuperscript{23} Case 33/74, Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid, [1974] ECR-1299, para. 13.
\textsuperscript{24} Hansen, Jesper Lau: “Full Circle: Is there a Difference between the Freedom of establishment and the Freedom to Provides Services”, Services and Free Movement in EU Law, p. 197-198.
\textsuperscript{25} Article 43(1) EC Treaty
the non-exhaustive list of examples listed under service activities in Article 49 also applies to
establishment which includes the activities of professionals. Lawyers’ right to freedom of
establishment is the subject of separate Directive which is examined in chapter 5.

According to the Court in Factortame II for an activity to be caught by Article 43 there
must be an “actual pursuit of an economic activity through a fixed establishment in another
Member State for an indefinite period”. The key words here are fixed establishment and
indefinite period, since the connection with the host Member State is greater than when
merely providing for a temporary service. The Court further elaborated on the nature of
establishment in Gebhard, where the Court stressed that the Treaty based freedom of
establishment is a broad concept allowing a Community national to participate on a stable and
continuous basis in the economic life of a Member State other than his own. The economic
nature of the activity carried out can also be indirect but then there must be a direct link
between the activity actually performed and the economic activity, in order for the provisions
on freedom of establishment to apply. Furthermore, the Court has found that employed work
and even training for entering into a profession can be regarded as economic activity within
the meaning of Article 43. The Court discussed this in Morgenbesser and found that an
activity of a trainee lawyer falls within the scope of the right of establishment, if the activity
would normally be salaried.

The right to establishment applies to both the self employed and companies. As the
subject here is the free movement of lawyers, (which fall within the category of self-employed
persons), the freedom of establishment of companies is outside the scope of this text. A self-
employed person is not defined in the Treaty. They differ from workers in the sense that they
do not have a contract of employment with an employer, and thus bear the risk for their
activities personally, are governed by independent management, have no employment rights
and are paid directly and in full. This only applies in the case of primary establishment since

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27 Condinanzi, Massimo, Lang, Alessandra and Nazcimbene, Bruno: Citizenship of the Union and Freedom of
30 Condinanzi, Massimo, Lang, Alessandra and Nazcimbene, Bruno: Citizenship of the Union and Freedom of
Movement of persons, p. 119.
31 Case C-313/01, Christine Morgenbesser v. Consiglio dell’Ordine degli avvocati di Genova, [2003] ECR I-
13467.
32 ibid, para. 60-61.
branches or offices based on secondary establishment, normally only have limited autonomy in management and do not operate independently, because of the indistinguishable link with the primary establishment. In any event the provisions on the freedom of establishment only apply to lawyers that are self-employed. The right to establishment is, furthermore, only accorded to EC nationals.

According to Article 43(2) the freedom of establishment applies to both primary and secondary establishment. With regards to legal practices, the former consists of an actual transform of the whole legal practice, then primarily and permanently being controlled from the host Member State. The latter is when a lawyer sets up a branch or an office in the host State while remaining established in the Member State of origin. In Klopp the Court found that by the very words of Article 43 the freedom of establishment should apply to both primary and secondary establishment. The right of establishment, therefore, includes freedom to set up and maintain, subject to observance of the professional rules of conduct, more than one place of work within the community. Klopp was a German lawyer wishing to practice as an avocat in France but also remain established in Germany. This was according to French law not possible, since it required the avocat to have his chamber in the relevant district and not in more than one place at the time. This meant that Klopp would have to close down his office in Germany and establish from scratch in Paris.

It is not possible to invoke the establishment provisions if there is a lack of cross-border element. Then the situation is purely internal within one Member State. There is always a cross-border element if a Community national pursues an economic activity in another Member State than the Member State of origin. However, the cross-border requirement does not mean that the exercise of the freedom of establishment can only be invoked against a host Member State. Under certain circumstances a person can have a right to invoke his right to freedom of establishment against his home Member State. This is primarily the case when a person has exercised the right to free movement and returns to the state of origin, with qualification and/or experience from the host Member State which is not recognized in the former. This was confirmed in Knoors where the Court noted that the freedom of establishment is a fundamental right under Community law, which would be undermined if

35 Note: The Lawyers’ Establishment Directive applies to salaried lawyers under certain circumstances.
37 Ibid, para. 19.
38 The French legal professional title, see Annex I.
the Member States were able to refuse to grant the benefits of Community law to its own nationals who have taken advantage of the provisions on free movement to acquire professional experience and training in another Member State.\(^{40}\) This was for example the case in *Kraus\(^{41}\)* where a German lawyer returned to Germany after having obtained a LL.M. degree in law in Scotland but was refused to use his title unless getting a prior official authorisation. The situation was not a purely internal one since Kraus had obtained his LL.M degree in another Member State.\(^{42}\)

2.3. The Freedom to Provide Services

Article 49 EC Treaty provides for the abolition of restriction hindering cross-border services and guarantees the right for Community nationals established in one Member State to carry out economic activity for a temporary period in a Member State where either the provider or receiver of the service is not established. The freedom is similarly construed as the freedom of establishment in regards of the principle of non-discrimination which is extended to service providers in Article 50(3). Article 50(1) adds to the definition of services and provides that in order to be considered “services” within the meaning of the Treaty they must be provided for remuneration, insofar as they are not governed by the provisions of one of the other Treaty freedoms. This does not mean that the freedom of services is less important or subordinate to the other freedoms. The fact is that services play a key role in the European economy and are a wheel in its engine of growth, accounting for 54% of GDP and for 67% of employment.\(^{43}\) Thus, the importance of services cannot be underestimated. Services account for a great vast of situations, which explains the long route towards an agreement on a new Service Directive\(^{44}\) and the increase in case law concerning situations where the provisions on services come into play.\(^{45}\) Lawyer’s freedom to provide services was further articulated with the Lawyers’ Services Directive\(^{46}\) which will be the main focus of chapter 3.

The nature of services has been discussed to some extent above where it was noted that what distinguishes services and establishment is first and foremost the temporary or permanent nature of the economic activity. However, the distinction is far from being clear


\(^{42}\) ibid, para. 15.


cut since the providing of service can include a temporary residence in the host State and even the setting up of an office or other form of infrastructure. As long as such residence is of temporary nature, even though the service provider spends substantial time in the Member State while rendering the service, the activities in question will fall within the ambit of the Treaty provisions on services. If the activities are carried out on a permanent basis, with no foreseeable limit to their duration, they are governed by the Treaty provisions on establishment.

There is no concrete definition of services in the Treaty. It is hard to find a concept for something that covers so many aspects and variety of activities, which is perhaps the reason why the Treaty only mentions examples and does not intend to establish a general concept for services. Hatzopoulos describes services as having no abstract nature like a product, but instead they are always understood in the context in which they are provided or sold. Despite the lack of exact definition, the Treaty provisions on freedom to provide services apply guidelines as to what is to be considered as services within the meaning of the Treaty. Firstly, the service provider must be established within a Member State in order to be able to make use of the provisions. This means that a service provider established elsewhere would not be regarded as a service provider within the meaning of the Treaty and would therefore have no right to provide temporary services within the Community. Secondly, Article 50 provides that the services are normally provided for remuneration. This implies that the nature of the service must be economical. The Court has confirmed that the remuneration does not need to be monetary and does not need to be paid for by the recipient of the service. Traditionally, services provided directly by the State, free of charge or for a charge that does not correspond to the actual cost, did not fall within the scope of Article 49 EC, as they are not provided for by remuneration. However, it has been clarified in subsequent case law that the public nature of the funding is not in itself enough to move it away from the scope of the Treaty free movement of services provisions. Consequently, despite the remuneration factor

49 Article 50(3).
50 Hatzopoulos, V.: “Recent Developments of the Case Law of the ECJ in the Field of Services”, p. 43.
51 Article 49(1).
in Article 50 the Treaty extends to benefits, regardless of how they are funded, if they are connected in some way to the receipt of an economic service and/or the right to move.\textsuperscript{56} Thirdly, Article 50(1) lists examples of what constitutes services which includes the activities of the professions and craftsmen, as are the activities of industrial or commercial character. The non-exhaustive list has been significantly expanded by the Court and now seems to cover a great breadth of subject matters, leaving very few temporary service providers from its scope.\textsuperscript{57}

The provisions on services can invoke a number of different situations creating a cross-border element and can be used to challenge rules or measure laid down by the host State or the home State. The most common situation is when the provisions are used to challenge barriers raised by the host State.\textsuperscript{58} This is the situation when the provider moves to another Member State and temporarily provides services, as was the case in \textit{van Binsbergen}\textsuperscript{59} where a Dutch lawyer challenged a Dutch rule requiring legal representatives in court to be established in Netherlands. Although service receivers are not mentioned in the provisions, the relevant Articles also apply to service receivers, if there is a cross-border element. This was confirmed by the Court in \textit{Luisi and Carbone}\textsuperscript{60} and upheld in later jurisprudence of the Court\textsuperscript{61}, creating another type of situation where the service provisions can be invoked. More specifically where the service receiver moves temporarily to another Member State in order to receive services and even when both the recipient and provider move to another Member State to receive or provide services.\textsuperscript{62} Another possible situation is when neither provider nor recipient moves. That may seem odd considering that Article 49 specifically refers to a provider who is established in a Member State other than that of the receiver. However, this situation only adds up if the services are provided across border\textsuperscript{63}, e.g. via internet, television, etc. In fact it is the services that are moving.\textsuperscript{64} In \textit{Alpine Investment} the provider did not move from the Member State he was established in and the service was provided to a receiver of another Member State which remained in that Member State. Despite that the Court found that Article

\textsuperscript{56} Spaventa, Eleanor: \textit{Free Movement of Persons in the European Union, Barriers to Movement in their Constitutional Context}, p. 10.
\textsuperscript{57} Barnard, Catherine: \textit{The Substantive law of the EU, The Four Freedoms}, p. 360.
\textsuperscript{58} \textit{ibid}, p. 356.
\textsuperscript{59} Case 33/74, Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid [1974] ECR-1299
\textsuperscript{63} \textit{ibid}
\textsuperscript{64} Barnard, Catherine: \textit{The Substantive law of the EU, The Four Freedoms}, p. 357.
49 did apply in the situation. The last case furthermore demonstrates that Article 49 can be invoked against the home State as well as the host State.

Notably, just as with the provisions on establishment, the chapter on services does not apply in purely internal situations. Some scholars are of the opinion that in several of the cases where a service provider has been allowed to invoke Article 49 against its home State, the Court has left very little room for the principle of purely internal situations in the field of service.

2.4. Treaty Derogations from the Right of Establishment and the Right to Provide Services

The freedom of establishment and services are not unlimited and the Treaty contains two derogations from the provisions. The public policy, security and health exception is situated in Article 46(1) and the official authority exception in Article 45. Article 55 extends both of these provisions to the chapter on services.

On grounds of Article 46(1) obstacles to the freedom of establishment may if not directly discriminatory be justified by compelling considerations of public interest. The general principles of non-discrimination and of proportionality are a part of the test for justifying public-interest restrictions and have been developed by the Court alongside the Treaty derogations. The Treaty is silent on what falls within the scope of public-interest. The concept can have different meanings in different Member States and according to the European Parliament the public interest principles are to be found in the legal system of the Member State where the restrictive rule is produced and adopted. Furthermore, the Parliament holds that there is no harmonized definition of the concept or a specific EU public-interest test.

The official authority derogation deserves further explanation in the context of lawyers’ free movement. The first paragraph of Article 45 states that the provisions on establishment shall not apply to activities connected with the exercise of official authority. In light of the fact that the rule contains derogation from the general principle of free movement, it must be strictly interpreted in accordance with the aim of the derogation. Thus only activities involving a direct and specific participation in the exercise of official authority are excluded.

This interpretation must be done on case-by-case basis, taking into account national provisions that govern the official activity.\(^{69}\) In *Reyners*\(^{70}\) the first landmark judgement of the Court in the area of free movement of lawyers, the Court was asked whether the whole of the legal profession was exempt from the free movement provisions, because the activities are connected with the exercise of official authority. The Court held that the official authority exception did not apply to the legal profession because the activities do not have a strong enough connection with the exercise of official authority, even though the activities involve regular contacts and co-operation with the courts.\(^{71}\)

### 2.5. Direct Effect

Former Articles 54 and 63 EC (now Articles 44 and 52) required the Council to draw up a General Programme and issue directives to abolish all remaining restrictions on the freedom of establishment and freedom to provide services. These requirements had not been fulfilled by the end of the transitional period which could have created a setback in the development of a single market for European Citizens. That is where the Court came in, confirming the direct effects of the provisions on establishment and services despite the lack of secondary legislation.

The vertical direct effect of the provision on freedom of establishment was confirmed in the *Reyners* case. The case concerned a Dutch national, which had a Belgian legal diploma but was denied the right to take up the profession of *avocat*\(^{72}\) in Belgium on grounds of nationality. The ECJ confirmed that “in laying down that freedom of establishment shall be attained at the end of the transitional period, Article 52 (now Article 43) thus imposes an obligation to attain a precise result, the fulfilment of which had to be made easier by, but not dependant on, the implementation of a programme of progressive measures.”\(^{73}\) Thus, since the end of the transitional period, Article 43 of the Treaty is a directly applicable provision despite the absent directives prescribed by the Treaty.\(^{74}\) Nevertheless, the Court emphasized that the directives had not lost all interest and played an important role as effective measures for making the exercise of the right of freedom of establishment easier.\(^{75}\) It must be pointed

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\(^{69}\) Condinanzi, Massimo; Lang, Alessandra and Nazcimbene, Bruno: *Citizenship of the Union and Freedom of Movement of persons*, p. 120-121.


\(^{71}\) *ibid*, para. 51.

\(^{72}\) The Belgian legal professional title, see Annex I.


\(^{74}\) *ibid*, para. 32.

\(^{75}\) *ibid*, para. 31.
out that the form of discrimination in Reyners was on basis of nationality which the Treaty itself requires the national courts to uphold and respect at all times.

Six months later the Court confirmed the direct effect of Article 49 concerning freedom to provide services in van Binsbergen\textsuperscript{76}. Using the same approach as in Reyners the Court found that despite the absence of required directives in the field, Articles 49 and 50 had direct effect. The Court opined that the obligations laid out in the provisions were well-defined and could not be jeopardized by the absence of directives required in Article 63 (now 52).\textsuperscript{77} The case concerned a residence requirement and was therefore not a directly discriminatory measure. That did not affect the outcome of the judgement and the services provisions could be directly invoked before the Court.

Nationals can rely on Articles 43, 49 and 50 against both the host state and the home State if the situation is not wholly internal. Reyners and van Binsbergen confirmed the vertical direct effect of the Articles; they can be relied upon by an individual against the state. However, the Court has not ruled on the horizontal direct effect of the provisions on services and establishment. Nonetheless, the Court has established that Article 39 on workers can have horizontal effect when it came to the conclusion in Angonese\textsuperscript{78} that the prohibition of discrimination in Article 39 also applied to contracts between individuals. Furthermore, Advocate General Poiares Madura argued in the Viking\textsuperscript{79} case that the same should apply to provisions on establishment and services when a private action can effectively restrict the free movement of others.\textsuperscript{80} In the case of lawyers it is likely that only the vertical direct effect of the Article will come into play, as actions that have been brought before the Court on lawyer’s free movement are most commonly taken by public authorities or professional regulatory bodies, e.g. the Bar Council. In Thieffry\textsuperscript{81} the Court emphasized that professional bodies, like the Paris Bar, are required to secure that their practice or legislation is in accordance with the objectives of the Treaty.\textsuperscript{82}

Having established that Articles 43, 49 and 50 could be directly sought by individuals the Court opened up for a series of cases on the interpretation of the provisions. The next step was

\textsuperscript{76} Case 33/74, Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid, [1974] ECR-1299
\textsuperscript{77} ibid, para. 26-27.
\textsuperscript{78} Case C-281/98, Roman Angonese v Cassa di Risparmio di Bolzano SpA, [2000] ECR I-4139, para 34.
\textsuperscript{81} Case 71/76, Thieffry v. Conseil de l’Ordre des Avocats à la cour de Paris, [1977], ECR 765.
\textsuperscript{82} ibid, para. 18.
to identify what types of restrictions hindering the free movement are caught by the Treaty provisions on establishment and services.

2.6. Prohibition on Restriction to the Freedom of Establishment and Freedom to Provide Services

The essence of Articles 48, 49 and 50 EC is the removal of restrictions on freedom of establishment and freedom to provide services. This means that migrant lawyers have the right to engage in the same activities and under the same conditions as national lawyers. The Articles pose a straightforward ban on discrimination based on nationality. Other discriminatory measures are also caught by the provisions, whether directly or indirectly discriminatory. Furthermore, the development in the case law has been one of including other unjustified obstacles which are not necessarily discriminatory. In this respect the interpretation by the Court on what type of national rule are regarded as constituting a restriction by Articles 43, 49 and 50 EC has evolved significantly, keeping up with the Courts practice in its case law on free movement of goods and workers.83

The case law on free movement of legal practices have made a significant contribution to the law on the free movement of persons and not least to the development of case law concerning what type of restrictions are caught by the free movement provisions. In continuance, the case law on lawyers will be used as an example of the before mentioned development and cases on other forms of free movement will only be mentioned if necessary for the context. In this way, both the development of free movement law and more specifically the development of lawyers’ right to free movement within the Community are demonstrated.

2.6.1. Directly Discriminatory Measures

Articles 43, 49 and 50 EC prohibit both direct and indirect discrimination on grounds of nationality. It is important to distinguish between directly and indirectly discriminatory measures since direct discrimination can only be justified by one of the derogations expressly provided for by the Treaty, while indirectly discriminatory measures can be justified on broader public policy grounds. A measure is directly discriminatory when it treats migrants differently and less favourably than nationals and can only be justified by one of the express derogations provided by the Treaty Articles 45, 46 and 55. The measures must also be proportionate to the aim pursued and where appropriate compatible with fundamental human

The principle of non-discrimination on grounds of nationality is one of the fundamental principles of EC law. It echoes through the whole Treaty but is principally articulated in Article 12. The Court has noted that any rules incompatible with provisions on free movement of persons are also incompatible with Article 12 EC, although indirectly discriminatory rules may be consistent with Article 12 and inconsistent with the provisions on free movement of persons. Therefore, Article 12 overlaps the scope of protection offered by the Treaty provisions on free movement of persons, but they can reach further and are more specified.

The ban on discrimination based on nationality was the starting point in the series of case law concerning the free movement of legal professional. In Reyners, the first judgment in the field of lawyers’ free movement, the Court stated that a Belgian rule preventing legal professionals from practising in the country on grounds of nationality was in breach of Article 43. Reyner was a Dutch lawyer that had obtained a doctorate in law in Belgium and was living in Belgium but was refused admission to the profession of avocat because he was not a Belgian national.

2.6.2. Indirectly Discriminatory Measures

A measure is indirectly discriminatory if on the outside it appears to be non-discriminatory but in fact it places a greater burden on non-nationals than nationals. It is therefore the effect of the rule that is relevant and not the form or intention. Indirectly discriminatory measures breach Articles 43, 49 and 50 unless they can be objectively justified or saved by an express Treaty derogation. Objective justification requires the Member State imposing the requirement to demonstrate that the measure can be justified in the public or general interest or by reference to criteria that is not connected in any way to nationality. Furthermore, the measure must be proportionate to the aim pursued.

The Court has found residence and language requirements to constitute indirect discrimination. Such requirements are likely to affect non-nationals more than nationals which are more likely to be residents in their own country and obviously more likely to speak their own language. In van Binsbergen a Dutch rule required lawyers to be resident in the State to be able to represent clients before the national courts. The case concerned a Dutch lawyer representing van Binsbergen in court in Netherlands. He had moved to Belgium in the

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course of the proceedings and was in continuance banned from representing his client since he was no longer resided in the country. The Court pointed out that requiring residence in the host State results in depriving Article 49 of all useful effect as its objective is to abolish restrictions on the freedom of services.\(^88\) Furthermore, the Court found that the obstacles to be abolished under Articles 49 and 50 included all requirements based on nationality and residence, which do not apply to persons established within that State, or may prevent or otherwise obstruct the activities of the service provider.\(^89\)

Accordingly, the Court concluded that the residence requirement did constitute a restriction within the meaning of Article 49 and 50. The judgment affirmed that each Member State is free to regulate access to a profession and take measures to protect the general good and to prevent circumvention of the applicable professional rules. The regulation must nevertheless serve a legitimate aim and be proportional to that extend.\(^90\) In regards of the residence requirement, the Court pointed out that the aim could be ensured in a less restrictive way, especially seeing that the provisions of service in Netherlands were not subject to any sort of qualification or professional regulation, apart from the residence requirement.\(^91\) This was the first time that the Court held that Article 49 did not only cover prohibition on discrimination based on nationality but also prohibited other types of restrictions. The case can be seen as an initiative in the development, of the prohibition of non-discriminatory obstacles restricting the freedom to provide services, which will be discussed below.

Measures requiring professionals to hold a domestic qualification, a licence or to be registered with the competent authority before entering into the profession have been regarded indirectly discriminatory. Taking as an example the requirement of domestic qualification; it is much more likely that nationals have completed their education in their home State than non-nationals. Thus, it is a clear example of an indirectly discriminatory measure, which is applicable irrespective of nationality but effectively restricts foreign nationals more. The discrimination is founded in the double burden that the requirement poses on non-nationals, having to fulfil all requirements in its home State and host State, whereas nationals only have to fulfil one set of rules.\(^92\) This is a special problem for legal professionals, since different

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\(^{89}\) *ibid.*, para. 10.

\(^{90}\) *ibid.*, para. 13-14

\(^{91}\) *ibid.*, para. 15.

rules on qualification apply in each Member State. The education can take from three to six years and training requirements can differ substantially between States.93

In Thieffry,94 the French Bar required lawyers to have a French diploma in order to enter the legal profession. This was regarded by the Court as indirectly discriminatory and constituting a restriction within the meaning of Article 43. Thieffry was a Belgian national, who had a Belgian doctorate in law and had practiced as an advocate in Brussels. He was refused admission to the Paris Bar as he was not recognized by it as a qualified avocat for the one reason that he lacked a French legal diploma, even though the University of Paris had recognized his degree as equivalent to a French diploma. The Court came to the conclusion that refusing the admission could not be justified as it effectively restricted the ability of non nationals to carry on their activity in another Member State.95

The Court has recognized that qualification and registration requirements can in principle be justified as they most often aim at objectively protecting public interest. In Gullung96 the Court found that the requirement of French law, that all lawyers had to be registered with the local Bar before initiating practice, could be justified on public interest grounds or as the Court put it “to ensure the observance of moral and ethical principles and the disciplinary control of the activity of lawyers”.97 This is especially pressing in connection with legal services. Legal professionals often deal with highly sensitive, ethical and significant matters, which make it more important for clients to be able to trust and know that there matters are in good hands with the professionals. Although, these types of measure can more easily be justified they must also be proportionate.98 In Vlassopolou99 the Court reiterated what it had earlier stressed in Thieffry, that in order to fulfil the principles of proportionality and necessity, the Member State must take into account the knowledge and qualifications the professional has acquired in the home State.

2.6.3. Non-Discriminatory Restrictions

There has been a shift in the Courts case law from a pure discrimination test to a broader market access or hindrance approach. This new approach may be the Court’s answer to the

93 Lonbay, Julian: Elixir website, outlining the training and professional requirements for legal professionals in the Member States of the European Union.
95 ibid, para. 27.
97 ibid, para. 29.
need to ensure the free movement of persons in the Community. A simply ban on purely discriminatory measures was not enough as many of the restrictions migrants were met with were not discriminatory but nevertheless caused complaints of restrictions. Therefore, the development towards prohibiting non-discriminatory obstacles under certain circumstances was necessary to reach the goal of a functional single market for workers, establishment, and services. The Court initiated this development in the area of freedom of goods interpreting the Treaty provisions as reaching further than simply prohibiting discrimination, in pursuit of the goal of market integration\(^{100}\), and later moved in the same direction in regulating the free movement of persons.\(^ {101}\)

This approach was important for lawyers’ free movement within the Community as arguably the most common restrictions imposed on legal professionals are not strictly speaking connected with nationality and more often concern rules governing the exercise of the professional, imposed either directly by law or by professional regulatory bodies. Now, a lawyer can question a national rule if it constitutes a hindrance to his free movement which cannot be justified, even though the measure cannot be linked with discrimination.

As was discussed earlier in this chapter, the difference between the freedom of establishment and freedom to provide services was originally based on the fact that strict interpretation of Articles 43 and 49 gave rise to the distinction that freedom of establishment only protected against discriminatory measures, whereas the freedom to provide services reached further. However, developments in the case law on freedom of establishment and services have resulted in a convergence of the principles applicable to the two freedoms. The Court has gone beyond the strict interpretation of Article 43 and stated that national rules that create restrictions on movement must be applied in a non-discriminatory way, be justified by an objective criterion and be proportionate. This seems to extend the Article and has been described as going beyond discrimination just as well as the provisions on services.\(^ {102}\)

The Court hinted towards this development in services as early as in \textit{van Binsbergen}, where it noted that the restrictions to be abolished according to Articles 49 and 50 included all

\(^{100}\) Case 120/78, \textit{Rewe v Bundesmonopolverwaltung für Branntwein}, [1979] ERC 649 (Cassis de Dijon). Where the Court noted that national regulatory rules are permissible where they apply equally to domestic and imported products; where they have a legitimate aim serving a mandatory requirement; and where they are proportionate in that they interfere to the least extent possible with the free movement of goods.


requirements which might prevent or obstruct the activities of the service provider within the Member State.\textsuperscript{103}

In the area of establishment the judgment in \textit{Klopp}\textsuperscript{104} gives an interesting example on the direction the Court was heading. Mr. Klopp, a German lawyer, challenged a French rule, restricting the freedom of establishment, under Article 43, even though the rule applied equally to nationals and non-nationals. Mr. Klopp had applied for registration to practical training at the Paris Bar and for a right to enter the profession of \textit{avocat} in France. He wished to do so but remain a member of the Dusseldorf Bar and remain established with his residence and office there. The Paris Bar rejected Klopp’s application on the grounds that an \textit{avocat} can only establish an office in one place which had to be within the jurisdiction of the regional court where the lawyer was registered. Notably, Klopp fulfilled all other personal and formal qualifications for registration. The Paris Bar and French Government attempted to justify the measures with reference to the special nature of the legal profession and on the basis of the need of advocates to maintain contact with their clients and judges and ensure that the professional abides by the rules of the profession. The Court noted that requirements imposed on professionals may not be in the form of preventing non-nationals from exercising their Treaty guaranteed right to freedom of establishment.\textsuperscript{105} Therefore Article 43 prohibits such measures that practically deny nationals of one Member States within the Union to enter and exercise the legal profession within another Member State. Here the Court abandoned the more traditional approach that tested the strict compliance with Article 43.

Despite its judgment in \textit{Klopp} the Court maintained the view that Article 43 only prohibited discriminatory restrictions. It held that \textit{Klopp} applied in isolated situations where national legislation treated primary and secondary establishment differently, as that amounted to unequal treatment.\textsuperscript{106} It therefore, did not maintain the obstacle approach in \textit{Clinical Biology Services}\textsuperscript{107} where there was no mention of justification. The Court simply said that since the rule applied equally to Belgian nationals and non-nationals it was not in breach of Article 43.

\textsuperscript{103} Case 33/74, \textit{Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid}, [1974] ECR-1299, para. 10.


\textsuperscript{105} \textit{ibid}, para. 20.

\textsuperscript{106} Weiss, Friedl and Wooldridge, Frank: \textit{Free movement of persons within the European Community}, p. 100-102.

However, in *Gullung*\(^{108}\) the Court considered the measure to require a lawyer to be registered with the Bar in France in order to establish, justified as it pursued a worthy objective, namely to secure the observance of moral and ethical principles and surveillance and disciplinary control over legal professionals.\(^{109}\) In the case a German-French lawyer, registered as a *rechtsanwalt*\(^{110}\) in Offenburg Germany, was refused admission to the French Bar because he did not meet the good character requirement of French law and thus could not establish in France. What is important about the conclusion in this case is that the Court found a non-discriminatory rule to be justified, following the same method as in *Klopp*, but this time the measure pursued a worthy objective. It would have been interesting to see, if the Court would have found the measure to constitute a non-discriminatory restriction, if not justified.

In the field of services the development was a little more straightforward and in the 90’s the Court’s case law started increasingly to take the hindrance approach into account. The clearest example of this swift change in approach was in *Säger*,\(^{111}\) in which the issue of non-discriminatory restrictions on the freedom to provide services was directly addressed. The case concerned a German regulation on the qualifications required to act as patent agent which reserved such activity to holders of a particular professional qualification, such as patent attorneys. The requirements applied equally to German and non-German companies, but the fact was that only holders of German professional qualifications fulfilled them. The Court recognised in the case that non-discriminatory principles breach Article 49 if they are liable to prevent or substantially impede access to the market. It furthermore stated that such requirements could only be applied to non-nationals if justified by imperative reasons relating to the public interest and by proportionate means.\(^{112}\) The Court pointed out that the service in question did not involve any form of legal advice and that the requirement of certain qualification was therefore disproportionate to the objective of protecting the consumers.

This approach was further developed in *Alpine Investment*\(^{113}\) where the Court found a Dutch rule to constitute a restriction because it deprived undertakings of the possibility of making rapid and direct sales contact with potential clients in other Member State, making it a restriction covered by Article 49.\(^{114}\) The rule prohibited companies from making individual calls offering financial services without a prior written consent of the individual, i.e. cold-

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\(^{109}\) *ibid*, para. 29.

\(^{110}\) The Legal Professional title in Germany (See Annex I).


\(^{112}\) *ibid*, para. 15.


\(^{114}\) *ibid*, para. 28.
calling. Even though Alpine Investment was established in Netherlands, the prohibition applied both to calls made within the Netherlands and abroad, affecting cross-border transactions and creating sufficient connection with Community law.\textsuperscript{115}

After establishing that the measure did constitute a restriction the Court applied the same test as in \textit{Säger}: Did the ban serve legitimate purpose and was it proportionate to the aim? The measure was established to protect the reputation of the domestic financial market and protect investors. This was according to the Court imperative reasons of public interest which could justify the restrictions and furthermore the prohibition was not disproportionate to the objective which it pursued.\textsuperscript{116} The effect of this conclusion is that if it can be demonstrated that the measure has an effect on individual’s access to the market of another Member State, then, regardless of the equally restrictive effect on situations wholly internal to a Member State, the measure in question will fall within the scope of Community law and require objective justification.\textsuperscript{117} These two cases point towards the willingness of the Court to identify rules that are liable to or even just potentially prone to prohibit or impede free movement, and classify them in breach of Article 49 unless justified.

The development slowly went in the same direction in regards of establishment and in \textit{Kraus} the Court held that Article 43 prohibited rules that were liable to hamper or render less attractive the exercise of the fundamental freedoms guaranteed by the Treaty.\textsuperscript{118} Dieter Kraus was a German national that had obtained a LL.M. degree in law in Scotland. For Kraus to be able to use his title he had to get official authorisation. This rule only applied to degrees obtained outside of Germany. He notified the relevant authority but refused to await formal recognition of his degree. In the case brought before the Court, the Court proclaimed that national measures which are liable to hinder or make less attractive the exercise of the freedom of establishment are only allowed when they can be objectively justified and a proportionality test is performed. The measure was found to constitute a restriction on the freedom of establishment but could be justified on grounds of its purpose to protect the public from fraud in foreign academic titles, provided that certain conditions were met which ensured that the measure was proportional to the aim. These conditions included the requirement that the authorisation procedure was only used to verify whether the title was properly awarded and the procedure had to be accessible and affordable.\textsuperscript{119} Interestingly, like

\textsuperscript{116} \textit{ibid}, para. 44.
\textsuperscript{117} Craig, Paul & de Búrca, Gráinne: \textit{EU Law, Text, Cases, and Materials}, p. 833.
\textsuperscript{118} Case C-19/92, Dieter Kraus v. Land Baden-Württemberg, [1993] ECR I-1663
\textsuperscript{119} \textit{ibid}, para. 42.
in the cases concerning services, the Court did not focus on the discriminatory aspect of this measure but mainly looked at whether the measure was liable to prevent or hinder access to the market and whether it could be justified.

The clearest indication of a broader approach in regards of establishment can be found in *Gebhard*, where the Court made it clear that non-discriminatory measures which hinder access to the market fall within the scope of Article 43 unless justified. The *Gebhard* case is a milestone in the development of EU free movement law and made clear that the possibility of non-discrimination restrictions to movement is evident. Additionally, the case clarified many of the underlying confusions with cross-border legal practices and the application of the Treaty provisions on establishment and services to lawyers.

Mr. Gebhard, was a German national that was an authorized *Rechtsanwalt* in Germany and a member of the Bar of Stuttgart. In March 1978 Gebhard moved to Italy and carried on legal practices there for 11 years, mainly as an associate member in different law firms in Milan. In 1989 he opened up his own law firm and occasionally used the official title *avvocato*. That caused Italian lawyers to complain to the Bar which prohibited him from using the title. Mr. Gebhard then applied for entrance to the Bar so he could continue to practice law under the title of *avvocato*. His application was not formally dealt with but after disciplinary proceedings the Bar decided to suspend Gebhard from pursuing his profession for 6 months. This tangle ended up before the ECJ which began with considering whether Gebhard would fall under the services or establishment provisions and concluded that in any case the same principles applied.120 This was important since if Gebhard would have merely been a service provider he could have derived his rights directly from the Lawyers’ Service Directive. However, if he was established, the home State rules would apply to him and the Court did find that Mr. Gebhard should be regarded as established in Italy. This gave the Court the opportunity to address the issue of whether the Italian rule imposed restrictions on Gebhard’s freedom of establishment. Interestingly the Court focused on the obstacles imposed on the freedom of establishment by the Italian rule saying that:

“... national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions:
They must be applied in a non-discriminatory manner;
They must be justified by imperative requirements in the general interest;
They must be suitable for securing the attainment of the objective which they pursue; and,
They must not go beyond what is necessary in order to attain it.”121.

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121 *ibid.*, para. 37.
The route that the Court decided to go was one focusing on the obstacles to the freedom of establishment and whether they can be justified. The Court made it clear that Member States cannot justify restrictions to the freedom of establishment of self-employed simply because they are not discriminatory. This was a new approach to the interpretation of freedom of establishment and was in line with the development of a broader approach in regards of free movement of services122 and goods123, creating the final knot to the formula that the Court had slowly been building in the earlier case law. This formula is sometimes called the rule of reason which is common to all four freedoms. This is evident from the judgment since the Court does not distinguish between the freedoms in regards of the test for assessing the existence of barriers to free movement of persons.

The Court now gradually uses the Gebhard method to identify a breach of the free movement provisions, then moves on to consider whether the restrictions can be justified and sometimes whether the measure is proportionate.124 An example of a more recent case where this approach is adopted is Wouters125 in which the Court found a Dutch rule prohibiting multi-disciplinary partnerships between members of the Bar and accountants to constitute a restriction on the right of establishment and freedom to provide services. After establishing that, the focus shifted to the question whether the measure could be justified. The conclusion was that the rule could be justified since it was necessary for the proper practice of the legal profession within the State.126

2.7. Concluding Comments

From the above it can be conclude that in recent year the line dividing the freedom of establishment and the freedom to provide services has slowly been fading. In situation where the service provider spends substantial time in the host State and has some kind of infrastructure for operating in the State the distinction is practically none. It is impossible to say for how long the presence has become too long. In Gebhard the Court introduced the criteria that can be used to identify which freedom is being used. However, the criteria are not all too clear and can lead to different interpretations by the national courts. This uncertainty

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126 ibid, para. 122-123.
leads to a risk of misuse of the system. Service providers are not subjected fully to the national regulations whereas established service providers become, to a large extent, subject to the controls and rules of the host State. Lawyers’ that want to avoid becoming subject to the regulatory systems in the host State might choose to appear as temporary service providers instead of becoming established. Arguably, regulatory control over lawyers should be the same, irrelevant of the method the lawyer chooses to exercise his free movement. In subsequent chapters close attention will be paid to how the directives deal with regulatory control over lawyers providing services on a temporary basis and lawyers established permanently. Furthermore, it is questionable whether these two methods of lawyers’ free movement should be dealt with in two separate directives. In line with that the new Service Directive\textsuperscript{127} deals with both freedoms together.

Furthermore, it has been established how the free movement law developed from prohibiting discriminatory restrictions to prohibiting measures that were liable to hamper or renders less attractive the exercise of the freedom. As a result, any restriction imposed on legal professionals, which is liable of prohibiting, impeding or rendering less attractive the exercise of the right to freedom of establishment or freedom to provide services, although not discriminatory, must be objectively justified. This has opened up the inner market even further for self employed and cleared the tangle that existed in the area of lawyers’ right to free movement. The approach created by the Court is furthermore reflected in subsequent regulation on the matter, e.g. in the Lawyer’s Establishment Directive and the Mutual Recognition Directives discussed in subsequent chapters.

The Court has had an essential role in realizing the free movement of lawyers and effectively participated in removing obstacles to their right to free movement within the Community. Now the focus shifts to the legislator’s role in creating a single European market for lawyers without unjustified obstacles.

3. Regulating Lawyers Freedom to Provide Services

The first initiative towards regulating lawyers’ free movement was the 1977 Lawyers´ Service Directive. The institutions had failed to issue directives for the co-ordination of legal education and the recognition of legal diplomas as had been done in many of the professional services within the Union. The case of lawyers was more complex and it was next to impossible to create harmonisation measures in the field. Therefore, a compromise was reached. In order to open up for the possibility of lawyers´ free movement in the European Union a special service directive was concluded for this “problematic” profession. The Directive was influenced by the Court’s recent judgments in Reyners and van Binsbergen. The cases signalled that lawyers’ were clearly attempting to exercise their right to free movement but were met with restrictions that could not be eliminated by harmonisation measures. As the name of the Directive indicates it constitutes the legal framework which governs the rights of Community lawyers to provide interstate services on a temporary basis in another Member State of the European Union.

The first proposal for a directive regulating lawyers’ freedom to provide services was issued in 1969. It was met with opposition since some of the Member States were of the opinion that legal services fell within the official authority exception of Article 45 EC. However, this view was rejected by the Court in Reyners which paved the way for an agreement on a Lawyers´ Service Directive.

The Directive neither deals with harmonization of the legal educational systems, nor with permanent establishment in the host Member State. It was as such designed as a very limited measure to cover only the temporary provision of services. It took many years and lengthy debates before an agreement would be reached on a Lawyers´ Establishment Directive. Nevertheless, the initiating legal act in the field of lawyers´ free movement, which is the focus of this chapter, resulted in being a foundation upon which the later Establishment Directive would be built.

This chapter intends to explain the rights conferred on migrant lawyers within the Union by the Lawyers´ Service Directive. In order to do so the relevant case law of the Court will be examined. Analyses of the Directive is separated into three parts; the first one dealing with

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general provisions of the Directive, the second with the reservations and requirements that the Member States are allowed to impose and finally applicable rules of conduct and the CCBE Code of Conduct are discussed in the third and last part.

3.1. General

The Directive does not seem to have opened up for many controversies in practice as the cases concerning the interpretation of it are fairly few. Notwithstanding, the Directive played an important role as the only secondary community legislation governing lawyers’ cross-border activities, until an agreement was reached on a Lawyers’ Establishment Directive in 1998.

According to the opening statement of the Directive, if lawyers are to exercise effectively the freedom to provide services, host Member States must recognize as lawyers those persons practising the profession in the various Member States. What constitutes services and how they can be distinguished from establishment was discussed in chapter 2. Accordingly, the Directive only allows for a temporary providing of legal services in another Member State. However, the lawyer can set up the necessary infrastructure for his activities in the host Member State. 132

This interpretation derives from the Gebhard judgment which was discussed in detail in the preceding chapter. It is important to note that the judgment in this regards had the effect of invalidating any provision in national legislation implementing the Lawyers’ Services Directive that prohibited a lawyer providing services in accordance with the provisions of the Directive, from opening up an office in the host State, if necessary for providing the services. That was the case with the Italian legislation questioned before the Court. 133

Article 1(2) defines lawyers as a person practising as such in one of the Member States. The Article contains a list of national professional titles of the Member States which customarily provide legal services in each Member State. The fact that the Directive lists the professional titles applicable might suggest that it is exhaustive, unless specifically added to it, when for example new Member States accede to the Union. 134 The French rules implementing the Directive provided that nationals of other Member States which fall under the list in Article 1(2) of the Directive should be recognised as lawyers in France. This

134 See Annex I.
effectively left out French nationals practising the profession of lawyers in another Member State from the benefit of the freedom to provide services in France. The rule was considered in an infringement case brought before the Court where it was confirmed that a lawyer qualified and established in another Member State may exercise the right to perform services under the Directive in the host State even though he has the nationality of the host State.\footnote{Case 294/89, Commission v. France, [1991] ECR I-3591, para. 8-12. The case is further discussed below.}

Article 2 imposes a duty on Member States to recognize as a lawyer for the purpose of providing services any persons listed in the list of legal professional titles according to Article 1(2). This implies that Member States must treat migrating lawyers as if they were fully qualified lawyers in the State, including giving them access to activities that are normally reserved to host State lawyers.\footnote{Adamson, Hamish: Free movement of Lawyers, p. 47.} However, several provisions of the Directive minimize the effect of this principle, setting forth various reservation and requirements.

3.2. Reservations and Requirements

Principally the Directive applies to all service activities of lawyers. However, the Member States can reserve certain legal activities to national lawyers or a certain group of lawyers and can require in certain circumstances cooperation with local lawyers.

Firstly, Member States may reserve to certain categories of lawyers the estate administration of deceased persons and the drafting of formal documents for real estate transfers.\footnote{Article 1(1).} This is an approach influenced from the civil law States where these activities are reserved to the separate notarial profession.\footnote{Goebel, Roger J: “The Liberalization of Interstate Legal Practice in the European Union: Lessons for the United States”, p. 419.} Also, in the United Kingdom and Ireland certain activities are reserved to solicitors.\footnote{Adamson, Hamish: Free movement of Lawyers, p. 48.}

Secondly, the Directive requires the lawyer to use his home professional title indicated in the home language while providing legal services in the host State.\footnote{Article 3} On the one hand, this is an important rule as it works to the effect of protecting consumers by making apparent that the lawyer is a temporary service provider from another Member State. On the other hand, the rule is prone to work against the idea behind the Directive, to open up the inner market for legal professional providing temporary services. The later Establishment Directive clarified this approach by separating migrating lawyers into two groups; the ones working under home State title and the ones integrated into the legal profession in the host State. As the Lawyers’
Service Directive requires the foreign lawyer to use the home title at all times it does not assume for the possibility of a full integration into the legal profession in the host State. The nature of temporary services might explain this.

Thirdly, Article 6 provides the Member State with the option of excluding salaried lawyers of a public or private undertaking from representing the undertaking in legal proceedings if such activities of lawyers are not permitted in the State. This rule is a compromise since national rules on salaried lawyers vary. Some Member States apply such restrictions to lawyers employed in-house by companies or public authorities and others do not even recognize them as legal professionals as listed in the Directive.141

Fourthly, Article 5 invites the Member State to require the foreign lawyer to act in conjunction with a host State lawyer and to be introduced to the presiding judge and the president of the local bar. This rule only applies in legal proceedings (criminal and civil litigation before the courts) and no other type of legal services. All Member States except for the three Scandinavian States, have exercised this option.142 The rule in Article 5 makes the right of a foreign lawyer to act as a legal representative in judicial proceedings limited. Fortunately, it has been brought to the attention of the Court which has interpreted the rule broadly and clarified to what extent the visiting lawyers’ right can be limited in this sense. The Court has in its case law substantially expanded the rule.

In the first case concerning the interpretation of the Lawyers’ Services Directive brought before the Court, the Commission claimed that Germany had failed to fulfil its obligations under the EC Treaty and the Directive.143 The action was specifically aimed at the provision of the national legislation adopting the rule in Article 5. The Court found the legislation flawed on several points;

- Firstly, the national rules required the foreign lawyer to collaborate with a German lawyer when providing services in litigation or appearing in oral proceedings, even though there was no requirement in German law of legal representation.

- Secondly, the German rule gave the national lawyer a primary role by requiring that he would be the authorized representative of the client or defending counsel in the proceedings. This meant that the German lawyer was to be present during the whole proceedings, leaving a small role for the foreign lawyer to play.

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142 ibid.
- Thirdly, the rules required the visiting lawyer to be accompanied by the national lawyer even on visits to clients held in custody and to communicate with the client only through the national lawyer.

- Fourthly, the law required the lawyer to proof fulfilment of the above requirements.

- Lastly, the rules made the visiting lawyer subject to the rule of territorial exclusivity applicable to national lawyers.

The Court considered these requirements both excessive and not necessary.

The most important statement of the Court was that the requirement to act in conjunction with a national lawyer could not be imposed where national law does not require any form of representation by a lawyer in legal proceedings. The Court noted:

“In all cases where the assistance of a lawyer is not a mandatory requirement under the domestic legislation and where, consequently, a party would be entitled to defend his own interests or even to entrust that task to a person who was not a lawyer, a lawyer providing services should be allowed to represent or defend a client without working in conjunction with a German lawyer.”

There is no mention of this in the Directive itself and the conclusion results in making the requirements of Article 5 meaningless in the case of several of the Member States, including in Iceland and Sweden. Furthermore, the Court made clear that the foreign lawyer has according to the Directive a primary right to provide his services during legal proceedings and the requirement to act in conjunction with a national lawyer should rather be looked at as a duty to cooperate. Requiring the local lawyer to be the primary authorized representative for the client was therefore not in accordance with Article 5.

In order to reach this conclusion the Court considered the meaning of the expression “work in conjunction” and “answerable” used in Article 5 and found that they had to be interpreted in the light of the purpose of the Directive, which is to “facilitate the effective exercise by lawyers of freedom to provide services”. With that in mind the Court found that the in conjunction rule was meant to delicately put the interest of all into account; provide the visiting lawyer with the support needed to practice within a new judicial system and to assure the judicial authority concerned that the visiting lawyer actually has that support and is therefore in a position to comply with the procedural and ethical rules applicable. Furthermore, the reference in Article 5 to the local lawyers as being “answerable” to the host

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145 ibid, para. 22-23.
State court, did according to the Court, not mean that the local lawyer had to have a leading role in the procedure.

The German government expressed their concerns about the foreign lawyer acting without the full co-operation of a national lawyer and worried that he would lack the necessary knowledge of the procedural and substantive law. The Court did not agree with this, noting that the need to have adequate knowledge of German law was a part of the responsibility of the visiting lawyer. Furthermore, the client is free to choose the lawyer he wishes, whether a German national or not. Thus, requiring the presence of the German lawyer throughout the oral proceedings, that he must be the authorized representative and the special requirements about proof of work in conjunction were way out of proportion and not necessary for the aim pursued.

The activity of visiting a client in custody was according to the Court not covered by Article 5 as that activity did not form a part of the representation in legal proceedings. More significantly, the Court found that the visiting lawyer could not be subject to the rule of territorial exclusivity which applied to all German lawyers. That was considered a restriction within the meaning of Articles 49 and 50 EC. This is an interesting conclusion since it is prone to put the visiting lawyer in a more favourable position than the German lawyer which is always bound by the strict rules on geographical restrictions. This was mainly based on the fact that temporary service providers are not in the same position as established national service providers and therefore not all applicable national legislation can be applied in its entirety to the temporary service providers.

The judgement was an important contribution to the liberalisation of inter-state legal practices within Europe. The liberal interpretation of the requirements laid out in Article 5 was crucial since a stricter approach could have seriously backlogged the temporary practices of lawyers in other Member States.

The Court’s view was reiterated in its next judgment concerning the Directive. This time it was France and its implementation of the Directive that was put to the test. The Court continued to add to its interpretation of the obligation to work in conjunction with a local lawyer. It was established that the French rule requiring the visiting lawyer to work in conjunction with a local lawyer in proceedings before bodies and authorities which are not judicial bodies was not in accordance with the Directive. Furthermore, requiring the lawyer to

147 ibid, para. 38-39.
work in conjunction with a local lawyer where French law did not require legal representations was, as earlier acknowledged, not in line with Article 5. The first part is clear from the wording of Article 5 which only applies in legal proceedings before courts not before non-judicial authorities. The latter point is a confirmation of the Court’s statement in the case against Germany; where the national law does not require a compulsory assistance of a lawyer in proceedings the foreign lawyer cannot be required to work in conjunction with a local lawyer.149

The Court also added strength to its conclusion in the former case on the rule of territorial exclusivity. The French rule required the foreign lawyer to work in conjunction with a lawyer that is a member of the Bar of that specific court or authorized to plead before it. The Court emphasised that this rule cannot be applied to temporary service providers established in another Member State, since the situation of such lawyers is in no way comparable to lawyers established in France. The Court explained this position further here. It did not accept the arguments of the French republic, which held that the rule was necessary to assure the compliance of procedural and ethical rules. Both since working in conjunction with a host State lawyer, ensures a certain link between the foreign lawyer and the judicial authority and it can facilitate disciplinary proceedings against the local lawyer. Additionally, the Court stated that modern methods of communication could ensure the necessary contacts with the client and the judicial authority and that the aim of the rule could be achieved by less inflictive measures.150

Recently, the Court got the opportunity to further interpret Article 5 of the Directive. In AMOK151 the issue was whether a national rule preventing a successful litigant from recovering both the cost of the foreign lawyer and the additional cost for the local lawyer, whom the former is required to work in conjunction with, is incompatible with Article 49 EC and the Lawyers’ Service Directive. The Court states that the rule was “liable to make trans-frontier 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.”152 The Court emphasised that the act in conjunction requirement is mandatory according to German law, so the foreign lawyer has no choice. Excluding the reimbursement of these extra costs would have the effect of strongly discouraging parties to legal proceedings from hiring a lawyer established in another Member State. The Court noted that the freedom

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150 ibid, para. 33-35.  
152 ibid, para. 36.
of lawyers to provide their services would be obstructed and the harmonisation initiated by the Directive adversely affected.\textsuperscript{153} Such rules were in violation of the Directive and the Treaty.

In \textit{Cipolla}\textsuperscript{154} the Court found that a legislation which set a scale of lawyers’ fees that could not be derogated from was liable to constitute a restriction on the freedom to provide services since it rendered access to the Italian legal service market more difficult for lawyers established in other Member States.\textsuperscript{155} Nevertheless, the Court recognized that the Italian government could maybe justify the restrictions on the grounds of consumer protection and the proper administration of justice but it was for the national court to determine the proportionality and the objective of the measures.\textsuperscript{156}

Since the Directive specifically mentions what type of activities can be reserved to national lawyers and under what circumstance the lawyer must act in conjunction with a local lawyer, it can be assumed that all other legal activities can be practices by the visiting lawyer without restrictions. This leaves open a great vast of activities, even giving advice on host State law. That is why the Directive offers a system to ensure the protection of consumers and the judicial system by applying the applicable rules of conduct to the service activities of the visiting lawyer.

\subsection*{3.3. Applicable Rules of Conduct}
Article 4 of the Directive provides a guidance on which rules of conduct are applicable to lawyers providing services. It provides for the conditions under which services may be provided in another Member State. The provision is rather unclear and complex. To put it in simple words, the home State rules apply except in legal proceedings or proceedings before public authorities where the relevant host State rules are applicable, unless they require residence or registration in the host State.\textsuperscript{157} Even though the lawyer remains subject to the home State regulation he must at all times respect the host State rules, especially those concerning what type of activities are incompatible with legal services in the State, professional secrecy, relations with other lawyers, conflict in interest and publicity. Any such rule must be objectively justified in order to bind the lawyer.\textsuperscript{158}

\textsuperscript{155} \textit{ibid}, para. 70.
\textsuperscript{156} \textit{ibid}, para. 69.
\textsuperscript{157} Article 4(1)
\textsuperscript{158} Articles 4(2) and (4).
This means that the lawyer has to juggle a fine line and most often respect two sets of rules. He is mainly bound by home State rules, since the host State rules only apply to their fullest extent to specific activities and are otherwise only to be respected. In the Lawyers’ Establishment Directive discussed in Chapter 5 this is taken one step further, stating in Article 6 that the host State rules always apply when a lawyer is practising under his home State title in a host State on a permanent basis.

There is certain security in subjecting migrating lawyers to all the applicable professional rules since it functions as a safeguard for the clients’ interest. It is only natural that the host State would prefer to subject the visiting lawyer to all the applicable rules. As has been discussed above it is normally held that more restrictive rules can apply to persons established in another Member State then to a person providing temporary services. This might explain the difference between the principles on professional rules applicable in the Service Directive and the Establishment Directive. However, as has been pointed out, the difference between these two means of providing legal services is gradually fading away. Thus, it is questionable whether more lenient rules on the applicable rules of conduct should apply to temporary legal service providers than to established lawyers.

The Court made its contribution to the interpretation of Article 4 in Gullung where it was noted that Members of the legal profession providing services in another Member State are required to comply with the rules relating to professional ethic in force in the host Member State. That interpretation was derived from Article 7(2) of the Directive which provides that in case of non-compliance with the rules in force in the host Member State, the competent authority in that State is to decide what the consequences are. The decision must then be notified to the authority in the home State.

Mr. Gullung was barred from access to the legal profession in France in accordance with the Lawyers’ Service Directive. The reason was that Mr. Gullung, that had both German and French nationality, had previously received disciplinary measures when he worked as a notary in France. Therefore he did not fulfil the dignity, good repute and integrity criteria of French regulation governing the legal profession.

The Court did not agree with the applicant’s argument that the Directive was only applicable during the providing of the services and not before. If the authority in the host Member State has already found in formal proceedings against the persons that she lacks such

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160 ibid, para. 18-19.
capacity and is barred from the access to the profession on these grounds he does obviously not satisfy the conditions laid down by the Directive. The Court concluded that the Directive cannot be relied upon by a lawyer established in one Member State intending to provide services in another Member State where he has been barred from access to the legal profession for reasons relating to dignity, good repute and integrity.\footnote{Case 292/86, Claude Gullung v. Conseil de l’ordre des avocats du barreau de Colmar et de Saverne, [1988] ECR 111, para. 22.}

The Court added to the scope of Article 4 in its judgment in \textit{Amok}\footnote{Case C-289/02, AMOK Verlags GmbH v. A& R Gastronomie GmbH, [2003] ECR I-15059.} making clear that the host State rules concerning reimbursement of legal costs apply. Therefore the German rule prevailed over the Austrian rules, according to which the fees limit was much higher. It was emphasised that this was in line with the principle of predictability and legal certainty for the unsuccessful party in a proceeding having to bear the costs of the other party.\footnote{ibid, para. 27-31.}

It is not always clear from the rule in Article 4 when the home State or host State rules or both apply. This is where the CCBE Code of Conduct comes into play. It provides for a series of harmonized rules of conduct from all the Member States and offers a solution if there is a conflict between home and host State rules. Therefore it is important in this context to examine the CCBE Code.

\subsection*{3.3.1. The CCBE Code of Conduct for European Lawyers}

Lawyers are bound by rules of professional conduct and subject to disciplinary measure by the relevant authority in their country. The rules can vary substantially between Member States. Furthermore, the legal profession is governed by a variety of legal and moral obligations towards the client, the courts, administrative authorities, and the legal profession in general.\footnote{Preamble 1.1. of the Code of Conducts} This manifold of situation can lead to problems in a Community of inter-State legal practices where conflict arises between home and host State rules. This environment led the CCBE to adopt on 28 October 1988 the Code of Conduct for lawyers of each national bar association. It has been amended three times adjusting to the changing tide in legal practices across borders. The latest amendment dates back to May 2006.

The importance of this initiative of the CCBE is immense and it has been adopted as the code of conduct governing inter-state legal practices in all of the Member States of the European Union including in the European Economic Area.\footnote{Adamson, Hamish: \textit{Free Movement of Lawyers}, p. 133.} Moreover, the Code has been recognised by the European Commission and the European Court of Justice and is beginning...
to be treated as authoritative by national courts. It has helped resolve differences between national codes, and has greatly facilitated the cross-border movement of legal services.

All lawyers who are members of the bars in the Member States must comply with the code in their cross-border activities within the European Union, the European Economic Area and the Swiss Confederation as well as within associate and observer countries.166 Article 1.3.2 of the Code provides that after national adoption of the rules the lawyer remains bound to observe the national rules to the extent that they are consistent with the rules in the Code. This means that the code is only directly applicable if adopted and incorporated into the national rules of conduct and if so, the national rules must be consistent with the Code.

The main purpose of the Code is to minimise, and if possible eliminate altogether, the problems which can arise from “double deontology” as set out in Articles 4 and 7(2) of the Lawyers’ Service Directive and Articles 6 and 7 of the Lawyers’ Establishment Directive.167 For this purpose it provides for a series of harmonized rules of professional conduct and in some areas a choice between conflicting rules. Hence, its purpose was not to set out direct rules, on which provisions of conduct should apply, but rather to reduce the risk of conflict and introduce possible solutions.168

The Code’s field of application is specified in Article 1.5 which states that its rules are intended to cover all cross-border activities of lawyers within the European Union and the European Economic Area. Thus, it only applies in cross-border activities which are defined as all professional contacts with lawyers of other Member States then the home States, whether or not the lawyer is physically present in the Member State.

As previously stated, the Code sets forth a number of harmonized and generally accepted principles of conduct, for example, provisions on independence, trust and personal integrity, confidentiality, the clients interest, payment of fee, conflict of interest and more. It contains special chapters on relations between lawyers and relations with the Courts. Of special interest to cross-border legal activities is the rule on lawyer’s competence in Article 3.1.3. It forbids lawyers from handling matters which they are not competent to handle, making clear that a lawyer practising in another Member State should not attempt to give advice on host State law that he does not have sufficient knowledge in. Another example of consumer

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167 Article 1.3.1 Code of Conduct
protection of this type is the requirement of adequate indemnity insurance.\textsuperscript{169} The rule has been further developed in the Lawyers’ Establishment Directive discussed below.

The Code includes a few rules intended to facilitate the choice of professional rules applicable. As a starting point it is provided that the lawyer has a duty check whether the host State or home State rules apply when performing the service activity.\textsuperscript{170} As in the Lawyers’ Service Directive the home State rules apply in lawyers’ appearance before courts or public authorities. The Code however adds to the list appearance before arbitral bodies. The Code also categorises rules on incompatible activities and rules on advertising and publicity as governed by one of the host State rule.\textsuperscript{171} The Code therefore extends the list of activities that fall under the host State rules.

In addition to the Code the CCBE adopted on 25 November 2006 a “Charter of core principles of the European legal profession”. This Charter contains ten principles common to the whole European legal profession and is to be adopted by national bars in their domestic legal environment. It is not thought as another code of conduct; rather it has a much broader aim and is directed towards not only lawyers, but also decision makers and the public in general. It applies to all of Europe and has as a main purpose to increase the understanding of the importance of lawyer’s role in the strengthening of the rule of law in society. The introductory paragraph states that the principles of the Charter are essential for the fair administration of justice, access to justice and the right to a fair trial, as required by the European Convention on Human Rights.\textsuperscript{172} The principles are similar to the provisions in the Code of conduct and even though not of as much importance, work to further strengthen the importance of the provisions in the Code of Conduct.

Lawyers on the move are expected to respect at all times the principles laid down by the CCBE. In addition, whenever there is uncertainty as to which rules of conduct are applicable the CCBE code functions as a guide. The CCBE code of conduct is also applicable to European Lawyers establishing in accordance with the Lawyers’ Establishment Directive.

3.4. Concluding Comments
The Lawyer’s Services Directive was the beginning of a long route towards legislating the way in which European lawyers could exercise trans-frontier legal practices. The Directive is

\textsuperscript{169} Article 3.9.
\textsuperscript{170} Article 2.4.
\textsuperscript{171} Article 2.5 and 2.6.
quite liberal for its time. It gave lawyers an opportunity to provide their services in another Member State with very few limitations to the professional activities that could be offered.

It has been described how the Court widely interpreted the limitations offered to the Member States by the Directive. For example, Article 5 and the requirement to work in conjunction with a national lawyer, is according to the Court’s case law only applicable in situations where lawyer’s representation is required by national law. This interpretation is important. Firstly, it transformed the Lawyers’ Service Directive into an instrument that actually promoted free movement of legal professionals, and, secondly, it would have been ridiculous to require a lawyer to act in conjunction with a national lawyer in a State where anyone can be a representative before the courts. The interpretation of the Court also applies to the comparable provision in the Lawyers’ Establishment Directive.

The importance of the CCBE Code of Conduct and Article 4, on which professional rules apply, is not to be underestimated. These principles are a natural consequence of more lawyers providing trans-frontier services. Having the same principles applicable to all European lawyers helps to realize this possibility for lawyers. Lawyers’ right to free movement cannot become a way for lawyer’s to choose a State where more lenient rules apply or even more importantly for lawyer to escape a dodgy professional background in the home State. Nevertheless, it can be feared that the Code will not fulfil its purpose since it is only directly applicable if adopted or incorporated into national law. It is celebrated that national courts and the ECJ are increasingly using the Code but it must be borne in mind that the Code does not intent to lay out direct rules on what rules of conduct shall apply. Rather, its purpose was to minimize the risk of conflicts between different rules of conduct and introduce possible solutions. The risk of double deontology is still very real in cross-border legal practices.

From the above it seems that lawyers providing temporary services in another Member State have a complete mutual recognition of professional competence. They need not show any proof of professional qualification unless especially requested by the host State authority, according to Article 7(1) of the Directive. How then does the Community legislation on mutual recognition of professional qualifications affect lawyers on the move in Europe? This will be considered in turn.
4. The Mutual Recognition of Legal Professional Qualifications

Difference in legal education, diplomas and qualifications existing between Member States was a difficult obstacle that had to be overcome in the route towards liberalizing the European legal profession. In all of the Member State access to the legal profession was controlled by laws requiring the possession of a national legal diploma which resulted in being the most imminent and serious threat to lawyers’ free movement. With the goal of the EC Treaty being the creation of a common market for all economic activities it included a special provision proposing secondary legislation to facilitate the free movement of professionals. Article 47 EC plans for the issuing of directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications. The initiating legislation in this direction was a series of vertical directives dealing with specific professions.173

It was early acknowledged that coordinating the requirements in each Member State would be impossible in the area of legal professionals and it had been painfully slow in other professional fields. Thus the focus shifted to a new approach developed by the Court: the horizontal harmonization based on the mutual recognition approach which is essentially the focus of this chapter. The General System Directives on the recognition of professional qualifications, which will be considered in turn, allow lawyers who are qualified to practice in one Member State to transfer their qualifications and skills to pursue the legal profession in another Member State by acquiring recognition of their diplomas, certificates or other evidence of formal qualifications in the latter State.

The chapter opens up with a discussion on the recognition of qualifications developed by the Court in the absence of applicable secondary legislation. Thereafter, the Community legislation will be analysed and emphasis placed on the Court’s interpretation of the relevant directives. As before the discussion will be mainly limited to the legal instruments and provisions that are relevant for the free movement of lawyers.

4.1. Recognition of Qualifications in the Absence of Applicable Secondary Legislation

The Court developed in its early case law the principle of mutual recognition of professional qualifications. With very slow process in the legislative field the Court was left with the

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essential task of reconciling the Member States different requirements for professional qualifications and adjusting them to the fundamental principles of free movement. The essential theme underlying the Court developed approach is that a national rule, requiring a person to possess a particular qualification in order to carry on a professional activity, is in itself a restriction on a fundamental freedom that must be justified. The mutual recognition approach was gradually used by the Court despite that the Treaty required the adoption of specific legal instruments to govern the recognition of qualifications. Even after the adoption of detailed legislation in the field the principles laid down by the Court in its case law continue to apply in situations where the relevant directives are not applicable.¹⁷⁴

The first sign of this approach in connection with the free movement of lawyers was in *Thieffry¹⁷⁵* which has been discussed earlier. The Court began here to shift its focus from a non-discriminatory approach to an approach based on the mutual recognition of qualifications.¹⁷⁶ Thieffry, a holder of a Belgian doctorate of laws was denied admittance to the Paris Bar because he did not have a French Law degree. This was decided even though Thieffry’s degree had been recognized by a French university as equivalent to a French degree. Also, Thieffry had passed the French Bar exam. In relation to these two factors, the Court found the denial of admittance constituted an unjustified restriction on the freedom of establishment.¹⁷⁷ It was maintained before the Court that there could be no requirement of recognizing foreign diploma’s in the absence of directives to be adopted under Article 47 EC. The Court however, held that such requirement could under certain circumstance be derived directly from Article 43.¹⁷⁸ This meant that individuals had a right to have their professional qualifications and work experience recognised in other Member States despite the lack of secondary legislation.

The Court extended the Thieffry approach in *Heylens¹⁷⁹* which is a case concerning the free movement of workers, governed by Article 39, but is nonetheless significant for the development of the mutual recognition approach. Foreign football trainers in France had to be either holders of a French football trainer’s diploma or have their diploma recognized as equal. Mr. Heylens was a Belgian national who held a Belgian football trainer’s diploma and was offered to work as a trainer in France. Unfortunately, his diploma was not recognized as

¹⁷⁴ This is confirmed in later cases, such as Case C-234/97, *Fernández de Bobadilla v. Museo Nacional del Prado*, [1999] ECR I-4773, and Case C-313/01, *Christine Morgenbesser v. Consiglio dell’Ordine degli avvocati di Genova*, [2003] ECR I-13467.
¹⁷⁸ *Ibid*, para. 27.
¹⁷⁹ Case 222/86, *Uneceft v Heylens* [1987], ECR 4097.
equivalent to a French diploma by the competent authority. The Court declared that while there was no harmonization for the access into a certain profession the Member States were allowed to lay down the requirements needed for a professional to get his diploma recognized as equal to the Member States diplomas.\(^{180}\) However, the Court reiterated that when it was possible under national law to recognize the equivalence of foreign diplomas, the Member State in question could not deny a person to exercise their guaranteed right to free movement, solemnly on the ground that no directives on mutual recognition had been adopted on Community level.\(^{181}\) The Court added that the national authorities must be able to proceed by objectively examining whether the foreign diploma certifies whether the professional has knowledge and qualifications that are the same as in the Member State or equivalent. If the authority does not find the diploma equivalent the decision had to be reasoned and reviewable by a court, which is a principle inherent to the mutual recognition approach as later confirmed in Vlassopolou.\(^{182}\)

The Vlassopolou\(^{183}\) judgment was the Court’s final missing piece to complete the mutual recognition of professional qualifications where the importance of the approach was made very clear. Vlassopolou was a Greek lawyer that had a German doctorate in law. She had been working for several years in a German law office mainly giving advice on Community law and Greek law. She applied for admission to the German legal profession but her application was refused since she did not have the qualification required by German law. This was a delicate matter. Member States have the right to restrict access to the legal profession to those professionals that have the required qualification and fulfil the conditions for accessing the profession. Furthermore, the German rule did not discriminate on grounds of nationality, since the same would have applied to a German national holding a legal diploma from Greece. Moreover, there was no formal procedure for examining whether the relevant diploma was equivalent to a German law degree and Vlassopolou was relying not only on her Greek law degree but her experience of working in a German law firm and her German doctorate in law. Notwithstanding the rule was obviously prone to indirectly discriminate against non-nationals since nationals are far more likely to have a German law degree.\(^{184}\) The Court did however not choose to go down that path.


\(^{181}\) ibid, para. 11.


\(^{184}\) Arnell, Anthony: The European Union and its Court of Justice, p. 472.
The Court began by stating that even if applied without discrimination on the basis of nationality, national requirements concerning qualifications may have the effect of hindering nationals of the other Member States in the exercise of their right of establishment guaranteed to them by Article 43. That could be the case if the national rules in question took no account of the knowledge and qualifications already acquired by the person concerned in another Member State.¹⁸⁵

The Court proceeded by applying the principle of mutual recognition. It noted that the competent authority in the host State has to make a comparison between the qualification required in the host State and the applicant’s qualification in order to evaluate whether they are equivalent. This has to be done on an objective basis by taking into consideration the diplomas, certificates and other evidence of qualifications of the person.¹⁸⁶ If this comparison results in finding that the knowledge and qualifications certified by the foreign diploma correspond to the national requirements than the Member State must recognize the foreign diploma as equivalent to a national diploma. If, on the other hand, the comparison revealed that the applicant only partially fulfils the necessary requirements and qualifications the Member State can require the person to show that she has acquired the missing knowledge and qualification, which then has to be taken into account.¹⁸⁷

The decision in Vlassopolou went further than the earlier decisions since the Court in fact required the Member States to take positive steps in order to evaluate equivalence of foreign diplomas. The examination apparently needs to be done on case-by-case basis, taking different qualifications into account and measure them against the national requirements. Additionally the Court added to the approach by stating that if the qualification only partially matched with the national requirements then the disparities could be compensated for by additional training or experience.

It appears that the Court was in the ruling partially influenced by Council Directive 89/48 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 which had recently been adopted but was not in force by this time.¹⁸⁸ The Directive is further discussed in due course where the symbiosis between the Court and the Commission and the Council can be seen. Irrespective of the link with the provisions of the new directive the Court has in later case law

¹⁸⁶ ibid, para. 16-17. Referring to Case 222/86 Unectef v. Heylens.
¹⁸⁷ ibid, para. 19.
¹⁸⁸ Arnell, Anthony: The European Union and its Court of Justice, p. 473-475.
described the *Vlassopolou* principle as inherent in the fundamental freedoms of the Treaty.\(^{189}\) Therefore, as *Bobadilla*\(^{190}\) demonstrates, the principle developed in *Vlassopolou* continues to apply in cases that fall outside of subsequent directives on mutual recognition of diplomas. Thus, the legal effect of the principle has not been reduced with the implementations of directives and it continues to apply in situations which are not covered by the legislation on mutual recognition. Such a situation is for example when an individual seeks to pursue a profession which is unregulated in the host State or simply cases which are not covered by the secondary legislation.

The most interesting recent case on the recognition of diplomas in regards of lawyers, the *Morgenbesser*\(^{191}\) case, describes very well how the principle functions for situations where the directives do not come into play. A French national, Christine Morgenbesser, had studied law in France and received the *Maitrise en droit*\(^{192}\) in 1996. After graduating she worked in a French law firm for eight months. She moved to Italy in 1998 and worked in a Genoa based law firm. After one and a half year working in Genoa she applied for a registration as a *practicanti* with the Genoa Bar.

Two points need to be explained at this point. Firstly, a *Maitrise en droit* does not suffice to qualify as an *avocat* in France which means that if Christine would have stayed in France she would have had to fulfil the requirements for access to the Bar in France before becoming a fully fledged *avocat*. Second, in Italy practicanti are lawyers who are in process of qualifying as *avvocato*. Ms. Morgenbesser was denied registration as practicanti by the Genoa Bar since she did not have a law degree issued or confirmed by an Italian university which was a compulsory requirement for registration as a practicanti. Furthermore, she was informed by the University of Genoa that in order to get her French degree recognised as equivalent to an Italian degree she had to take a two years course at an Italian university, pass thirteen exams and write a final thesis. She appealed against aforementioned decision.

The Italian court referred a preliminary question to the ECJ. The court wanted to know whether an academic diploma should be automatically recognised for the purpose of

\(^{190}\) Case C-234/97, Teresa Fernández de Bobadilla v. Museo Nacional del Prado, Comité de Empresa del Museo Nacional del Prado and Ministerio Fiscal, [1999] ECR I-4773. In the case the Court added to the mutual recognition principle that where no general procedure for recognition has been laid down at national level or where that procedure does not comply with the requirements of Community law, it is for a public body seeking to fill the post itself to investigate whether the diploma obtained by the candidate in another Member State and where appropriate with experience is to be regarded as equivalent to the qualification required. para. 34-35.
\(^{192}\) The French law degree
registering a person in a register of trainee-lawyers. The Court rephrased the question and stated that what the Italian Court basically wanted to know was whether Community law precluded a Member State from refusing to enrol the holder of a legal diploma obtained in another Member State in the register of trainee lawyers practising to enter the bar solemnly because that person’s law degree was not issued or confirmed by a university of that State. The applicant argued in the first place that the activity of *practicanti* falls within the definition of “regulated profession” within the meaning of Directive 89/48. Secondary, she argued that the *Vlassopolou* doctrine should apply, requiring the Genoa Bar to make an assessment and comparative examination of her knowledge.

The Court began by considering whether the situation of Ms. Morgenbesser fell within the either Directive 98/5 on Lawyer’s Establishment or Directive 89/49. The Lawyers’ Directive did not apply since it concerns only lawyers that are fully qualified as such in their home State. Furthermore, the activity of *practicanti* could not be considered as “regulated profession” within the meaning of Directive 89/48. Since neither Directive could be applied in the case the Court turned to the *Vlassopolou* doctrine it had earlier developed.

In the first place the Court confirmed that both Article 39 and 43 EC applied since trainee activities comprise of activities that are normally remunerated by the client or by the firm for which the trainee lawyer works, hence taking the form of salary. The Court recalled the principles laid out in the judgement and stated that while evaluating Ms. Morgenbesser’s diploma the Italian authority had to make a comparison with the national diploma, taking into account the whole of the training, academic and professional, which the applicant could demonstrate. This way the authority could identify any differences, taking account of the differences between the legal systems concerned, and whether the lacking qualifications could be supplemented by for example prior training. If that comparative examination resulted in finding that the knowledge and qualifications certified by the foreign diploma corresponded to those required by the national provisions, the Member State had to recognise that diploma as fulfilling the requirements laid down by national provisions. Consequently, the Genoa Bar was not allowed to refuse to register Ms. Morgenbesser in the register of *practicanti* on the sole ground that she did not have a diploma issued, confirmed or recognised as equivalent by an Italian University.

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194 *ibid*, para. 60.
195 *ibid*, para. 67-70.
196 *ibid*, para. 70.
The consequences of this judgment are that the Vlassopolou doctrine is extended and can be applied in cases where the professional is not fully qualified yet. This means that it extends the right of free movement of lawyers to those lawyers that are still in training. The legal bases for the conclusion are Article 39 and 43 EC. If Ms. Morgenbesser would have been a fully qualified lawyer she could have relied on either Directive 89/48 or the Lawyers’ Establishment Directive. Hence, the case opened up for the recognition of purely academic qualifications. In a time when student mobility is encouraged by the Bologna Process an increase in demand for recognition of qualifications at different stages of training can be expected.

However, the training requirements for entrance to the legal profession vary even more than the requirements for legal diplomas in the Member State. It is therefore doubtful that the Vlassopolou doctrine can be applied in all instances. In Iceland, after five years of legal studies, the legal professional can enter a course to become a practising lawyer before the courts (héraðsdómslögmaður) which is hardly suitable for a foreign lawyer with no knowledge of the Icelandic language or Icelandic law. In Sweden, the training can take an even longer time and is reliant upon having a contract with a sponsoring law firm.\footnote{See Chapter 6 on the implementation of the lawyers free movement system in Iceland and Sweden.}

Conversely, the practical training for lawyers could in some States be a more suitable way to adapt the migrating legal professional to the legal system of the host State than for example an aptitude test. This would mean that young lawyers could choose to do their vocational training in another Member State, developing their academic law degree from a national one to a degree recognised in another Member State. Once again, this approach can be difficult to perform in practice because of the differences existing between Member States in the field. It is nevertheless to be celebrated if student mobility can further open up for free movement of legal professionals by giving law students the possibility and an easier way of acquiring a multinational law degree.

To summarize and conclude this means that the provisions on free movement of persons impose a requirement on Member State authorities to examine the qualification of the person already acquired in another Member State and to give a reasoned opinion of the non-recognition of a qualification and a possibility to appeal that decision. This applies even in situations where the secondary legislation does not apply.

The Court has not been a solo contributor to the development of the mutual recognition of professional qualifications. Now the focus shifts to examining the steps taken by the
Community legislator in regulating the diverse and complex system of recognition of diplomas between Member States.

4.2. The First Vertical Harmonization Directives on Mutual Recognition of Qualifications

Community law intended for the Community legislator to adopt measures to facilitate the taking-up and pursuit of activities covered by the fundamental freedoms.\(^{198}\) Accordingly, in the 1970s the legislator initiated this process with the so-called sectoral directives, a vertical approach of harmonizing the different national rules. This resulted in being both a difficult and lengthy process since it consisted of providing for a separate legal basis for each profession. The scope of the sectoral directives was also limited. For that reason a more general approach was favoured. The answer was horizontal harmonization based on the mutual recognition approach, the so-called general system directives.

The first general system directive was Council Directive 89/48/EEC 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.\(^{199}\) The new Directive differed in many aspects from the sectoral system. Firstly, it was applicable to all regulated professions which required three years of university level training and were not covered by other specific directives.\(^{200}\) Secondly, it was based on the principle of mutual trust, so it did not assume coordination of the requirements in each Member State. This meant that if a person was qualified to exercise a regulated profession in one Member State the same person could exercise the profession in any other Member State. Consequently, the competent authorities were not permitted to refuse a person entry into a regulated profession if that person held a diploma qualifying her to exercise the profession in another Member State. The competent authority could, in certain circumstances, ask for evidence of the professional experience.\(^{201}\) Furthermore, the Directive provided for compensatory measures if the professional did not or only partially fulfil the requirements of the Member State.\(^{202}\)

\(^{198}\) Article 47 EC (ex Article 57 EC).


\(^{200}\) Articles 1 and 2

\(^{201}\) Article 3

\(^{202}\) Article 4
The first Directive was followed by the second general system Directive 92/51/EEC\textsuperscript{203}, which included the professions for which the level of training was lower and also covered diplomas awarded after a post-secondary course of at least one year duration. The third general directive was Directive 1999/42/EEC\textsuperscript{204} which extended the mutual recognition approach to a range of industrial and professional activities prior covered by sectoral directives. Further, it extended the recognition approach which was earlier only based on formal qualifications to also covering post-diploma experience and other acquired skills.

The Court has largely contributed to the interpretation of the Directives and in its case law considered the meaning and scope of the most important concepts, such as the definition of “diploma”\textsuperscript{205} and “third country diploma”\textsuperscript{206}. Furthermore, the Court has had a chance to interpret the definition of “regulated profession” and “regulated professional activity”.\textsuperscript{207} Not many cases concerning lawyers’ free movement have contributed to the interpretation of the Directives. Maybe since legal diplomas fall in most instances within the meaning of “diploma” according to the Directive and the legal profession is a highly regulated profession. Nonetheless, in \textit{Morgenbesser}\textsuperscript{208} discussed in details above, the Court regarded whether the activity of trainee lawyers could fall within Directive 89/48. The problem with the situation of Ms. Morgenbesser was that she was not a fully qualified lawyer which created problems with fitting her situations into the frame of Directive 89/48. The applicant’s main argument was that the activity of \textit{practicanti} fell within the definition of “regulated profession” within the meaning of Directive 89/48, both since the professional rules of conduct apply and since the activities are pretty much the same as those of practising lawyers. During the proceedings the Commission expressed its view that only activities which are habitually pursued in a long-term and definitive manner can be regarded as a “regulated profession” and doubted that the activities of trainee lawyers could fall within the concept.\textsuperscript{209}

\begin{thebibliography}{9}
\bibitem{6} Case C-313/01, Christine Morgenbesser v. Consiglio dell’Ordine degli avvocati di Genova, [2003] ECR I-13467.
\bibitem{7} \textit{ibid}, para. 41.
\end{thebibliography}
The Court was of the opinion that Ms. Morgenbesser could not rely on Directive 89/48. Firstly, the Court concluded that the activities of trainee lawyers did not fall within the concept of “regulated profession” since it constituted of the training necessary for access to the profession of *avvocato*. Therefore the activity of a *practicanti* could not be regarded as a separate profession from that of *avvocato*. Secondly, the Court found that Ms. Morgenbesser’s diploma did not constitute a “diploma, certificate or other evidence of formal qualifications” within the meaning of Article 1(a) of Directive 89/48. Mainly since the diploma *Maitrise en droit* does not suffice as a professional qualification for access to the Bar in France, for that she lacked the *certificate d´aptitude à la profession d’avocat (CAPA)*.

4.2.1. Compensatory Measures

The mutual recognition approach as laid out in the earlier directives does not guarantee recognition. If the competent authority in the Member States did not feel that the requirements for admittance to a profession were fulfilled or that the qualification obtained in another Member State differed from the ones required in the former it could require the professional to endure different time consuming measures in order to be fully-fledged to enter the profession. The purpose of introducing these measures was to reach an agreement between all the Member States of the Union, leaving some power in the hands of the States and ensure that the quality of the regulated professions did not deteriorate.

The compensatory measure consisted of either an aptitude test or an adaption period. The difference could also be compensated by a proof of professional experience. In some cases the difference could be compensated with undergoing additional professional education or training with the assistance of a qualified member of the profession in the host State. It does not specifically say in the Directive that this additional professional training or education would have the same effect as the two compensatory measures and it is not further explained, but when read in conjunction with Article 4(a) it is difficult to understand it differently. In practice, most countries exercised the option of requiring an aptitude test for migrating lawyers.

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211 *ibid*, para. 54-55.
212 Article 4 (b) of Directive 89/48/EEC.
213 Article 4 (a)
214 Article 5
215 Adamson, Hamish: *Free movement of Lawyers*, p. 64.
The Court has had one opportunity to interpret the nature of an aptitude test imposed on migrating lawyers under Directive 89/48. This was in a case brought by the Commission against Italy.\(^{216}\) The Commission was troubled with the legislation implementing Directive 89/48/EEC in Italy. Firstly, the Italian rule required migrating lawyers to be permanently resident in the country before being able to take the aptitude test. This was clearly a hindrance to the freedom of establishment as had been confirmed by the court in *Klopp*.\(^{217}\) The second part concerned the way that the Italian authorities had implemented the aptitude test for lawyers. The rules governing the aptitude test were unclear and very general. The Commission held that in practice migrating lawyers wishing to become integrated in the Italian legal profession were discriminated against since the aptitude test was in fact much more difficult and demanding than the test required of Italian lawyers wishing to enter the profession. The Court was not able to confirm the discriminatory effect of the rules but did agree with the Commission that the rules lacked coherence and transparency which created a situation of legal uncertainty.\(^{218}\) It is evident from the judgment that the national rules governing the operation of an aptitude test must be clear and coherent in order to not create a legal uncertainty in the area. Furthermore, the test cannot ask for more of the migrating lawyer than is actually required for national lawyers wishing to enter the profession. The compensation measures will be further examined in the continuing coverage on the new Directive.

### 4.3. Directive 2005/36 on the Recognition of Professional Qualifications

The most important Community legislation adopting the mutual recognition approach is Directive 2005/36/EC of the European Parliament and of the Council on the recognition of professional qualifications.\(^{219}\) The Directive consolidated and replaced all of the previous legislation in the field. This includes, the three mutual recognition Directives covered above and all of the sectoral directives, except for the two Lawyers’ Directives which continue to be the leading legislation covering lawyers’ authorisation to practice and the way in which they can practice within another Member State. The Lawyers’ Directives do not, however, specifically deal with the recognition of qualification which is where the mutual recognition Directive applies. Consequently, where a lawyer applies for recognition of professional

qualifications for the purpose of immediate establishment under the professional title of the host member State he is covered by the rules of the Directive.220

The Directive is a long, comprehensive and complex instrument. According to its preamble it establishes a system for the recognition of professional qualifications, in order to help make labour markets more flexible, further liberalise the provision of services, encourage more automatic recognition of qualifications, and simplify administrative procedures.221

It does not prescribe a single approach for mutual recognition of qualifications but rather combines different approaches connected with different types of qualification, training or experience of the professional. Presumably there are not many other ways to grasp the great vast of situations that can arise out of the mutual recognition of different professional qualifications in the 25 Member States. That explains both the length and the complexity of this instrument. The Directive is divided into two parts, according to whether the professional is seeking mutual recognition in the context of freedom of establishment or the freedom to provide services.

The Directive applies to all nationals of a Member State wishing to pursue a regulated profession in another Member State than where the qualification was obtained, on either a self-employed or employed basis.222 The core principle underlying the Directive is the mutual recognition of professional qualifications. This means in practice that if a Member State regulates the access to a certain profession and requires specific qualification it must in principle recognise the qualification obtained in other Member States which allows the holder to pursue the same profession in that Member State.223 Thus, the recognition of professional qualifications by the host Member State allows the person concerned to gain access in that Member State to the same profession as he is qualified for in the home State and to pursue it in the host State under the same conditions as nationals.224

In continuance the discussion will be divided into an analysis on the relevant provisions concerning freedom to provide services and the relevant provisions governing the freedom of establishment.

220 Preamble paragraph 42.
221 Preamble paragraphs 2-45.
222 Article 2(1)
223 Article 1
224 Article 4(1)
4.3.1. *Freedom to Provide Services*

Any national of a Community Member State legally established in a given Member State may provide services on a temporary and occasional basis in another Member State using their national professional title without having to apply for recognition of qualifications. However, if the profession in question is not regulated in the home Member State the service provider must present evidence of two years’ professional experience in the field. Conversely, if the profession is regulated, which is the case with the legal profession within all the Member States, the two years’ prior practice cannot be required.

Although the Directive does not require the recognition of qualifications for service providers, it does allow the host Member State to make certain requirements. Most important of those is the right to require the service provider to make a declaration prior to providing any services which it can require to be annually renewed. This declaration can include details on insurance cover or other forms of consumer protection to ensure professional liability. The host State may require certain documents to be attached to the first application, which are listed in the second paragraph of Article 7. These documents include proof of nationality, legal establishment and documentation on professional qualification. In the case of requiring two years practice, the host State may call for a proof of sufficient practice time. Furthermore, the host State can require a service provider using the home State professional title, to give the recipient of the service certain information. In particular information about whether the professional is covered by insurance in case of financial risk or other forms of protection with regard to professional liability.

Similarly to both the lawyers’ Directives, the Mutual Recognition Directive contains a specific provision aimed at establishing cooperation between the competent authorities. Article 8 states that the competent authority shall ensure that the exchange of all information necessary for complaints by a recipient of a service against a service provider is correctly pursued. The host State authority can also ask the home State to provide information on the service provider’s legal establishment, good conduct, and any past penalties for professional misconduct. Furthermore, the Directive provides for a proactive exchange of information.

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225 Article 5(1) & (2).
226 Article 7(1) and Summary of the key provisions of the Directive from EU’s official website. (See http://europa.eu/scadplus/leg/eb/cha/c11065.htm.)
227 Article 9 and Summary of the key provisions of the Directive from EU’s official website. (See http://europa.eu/scadplus/leg/eb/cha/c11065.htm.)
228 Article 8
relating to any serious breaches or misconduct by the service provider which could have consequences for the activities in question.\textsuperscript{229}

The importance of lawyers’ codes of conduct and regulatory bodies governing the professional conducts of lawyers has been stressed earlier. The cooperation duties are especially important in regards of lawyers’ providing services over boarders, since temporary service providers lack the link with the host State that established service providers have. It is essential that all relevant information concerning any form of disciplinary sanctions or misconduct of the lawyer is communicated between boarders to the authorities in the host State. This is one of the fragile issues surrounding the profession of lawyers. They must be governed by rules of conduct and it is crucial that information about the breach of these rules reach authorities in the host State since it can concern the lawyers’ professional integrity. Free movement of lawyers is not intended for lawyers to escape their shaky background in one Member State and start fresh in another.

4.3.2. \textit{Freedom of Establishment}

The provisions on freedom of establishment apply when a professional becomes established in another Member State for the purpose of practising his profession there on a stable basis. These provisions are more detailed and the Directive offers three different systems of recognition of qualification upon establishment. Firstly, the general system for the recognition of professional qualifications (Chapter I), secondly, a system of automatic recognition of qualifications attested by professional experience (Chapter II)\textsuperscript{230} and thirdly, a system of automatic recognition of qualifications for specific professions (Chapter III).\textsuperscript{231} The first system will be considered in turn since the two last mentioned do not affect lawyers.

4.3.2.1. \textit{The General System for Recognition of Professional Qualifications}

The general system for recognition of professional qualifications applies as a backup for all the professions not covered by specific rules of recognition (covered in Chapters II and III) and to certain situations where the migrant professional does not meet the conditions set out in other recognition schemes.\textsuperscript{232}

\textsuperscript{229} Article 56, which applies to both the provisions on services and establishment. Summary of the key provisions of the Directive from EU’s official website. (See http://europa.eu/scadplus/leg/eb/cha/c11065.htm.)

\textsuperscript{230} Chapter II applies to the industrial, craft and commercial activities listed in Annex IV of the Directive.

\textsuperscript{231} Chapter III covers the automatic recognition of training qualifications on the basis of coordination of the minimum training conditions and applies to the professions of doctors, nurses responsible for general care, dental practitioners, specialised dental practitioners, veterinary surgeons, midwives, pharmacists and architects.

\textsuperscript{232} Article 10 of Directive 2005/36/EC
The general system is based on the principle of mutual trust and envisages two different situations; firstly where the access to or pursuit of the profession is regulated or subject to the possession of a specific qualification and secondly where the access to the profession is not subject to any such requirements. In the first mentioned situation the competent authority of the host Member State must permit access to and pursuit of the professions, under the same conditions as apply to its nationals. This is only the case if the applicant holds a qualification from another Member State which attests the individual’s professional competence and/or the level of training required to access the profession in the host Member State.\(^233\)

The confirmation of competence or evidence of formal qualification must meet two conditions. It must be issued by the competent and designated authority in home State and attest a level of professional qualification at least equivalent to the level immediately prior to that which is required in the host Member State, as it is described in the Directive Article 11.\(^234\) Article 11 of the Directive identifies five levels of qualifications, ranging from an attestation of competence, to three or four years of university level studies or equivalent degrees, combined with professional training which can be required in addition.\(^235\)

What is curious is the wording *immediately prior level* which could suggest that Member States are required to recognise a lower-level qualification. It is however more likely that it is intended to reflect the fact that although in some states obtaining a qualification takes longer than in others it does not necessarily mean that the qualification are of different quality.\(^236\) Law degrees can take from three to six years in different Member States.\(^237\) For example in Iceland\(^238\) a Law degree is granted after five years and in Sweden after four years of full time studies without requiring any training. In the United Kingdom it takes on average three years to obtain a Law degree which is then followed by a legal practice course. Thus for a UK lawyer to hold a diploma in accordance with the Directive he would have to accompany the law degree with a period of professional training, making it equivalent to a five year Icelandic Law degree. Thus the professional training works as an amendment for professionals which do not hold a degree equivalent in length to the one required in the host State. Therefore, it is

\(^{233}\) Article 13(1).
\(^{234}\) Article 13(1) (a) and (b).
\(^{235}\) Article 11
\(^{237}\) Lonbay, Julian: Elixir website, outlining the training and professional requirements for legal professionals in the Member States of the European Union.
\(^{238}\) The Directive is extended to Iceland and the other EFTA countries with the EEA Agreement.
important to see the different mechanisms of the general system as a whole with one adding to the other.\textsuperscript{239}

The second situation in which the general system applies is one where the host State does not require the possession of specific professional qualification for entering the profession and the migrant is trying to gain access to the profession in a host Member State where the access is regulated. In that situation the applicant has to provide proof of two years' full-time professional experience which must have been acquired in the preceding ten years in addition to the qualification required.\textsuperscript{240} This situation will not be explored further because it does not apply to lawyers which is a profession regulated in all of the Member States.

4.3.2.2. Compensatory Measures

Completing the general system and a part of the whole picture are the provisions on compensation measures. As has been discussed above, the compensatory measures have been a part of the general system from the beginning. However, the new Directive includes provisions that are more detailed and therefore the role of the compensatory measures will be more thoroughly explored at this stage. The Member States can under certain circumstance make recognition of qualifications subject to the applicant completing a compensatory measure. In the light of the diversity of national systems of qualifications and training the principle of mutual recognition would probably have been impossible to realize in practice if Member States were not under certain circumstances given the right to require the migrating professional to further adapt their qualification to the national system.

It must be kept in mind that the compensation measures are an exemption to the principle of recognition. They must therefore be applied in accordance with the principle of proportionality and only if there are substantial differences between the training acquired by the person concerned and the training required in the host Member State.\textsuperscript{241}

The compensatory measures can only be used in three situations. First of all, in situations where the training of the applicant is at least one year shorter than the training required in the host Member State. In the older directives there was a possibility to compensate such differences in training with proof of professional experience.\textsuperscript{242} In this sense the new Directive is stricter than the older since it does not make room for the less intrusive measure of requiring evidence of professional experience. Second, where the training received covers

\textsuperscript{239} Wyatt, D. and Dashwood, A: Wyatt’s and Dashwoods European Union Law, p. 819-820.
\textsuperscript{240} Article 13(2)
\textsuperscript{241} Wyatt, D. and Dashwood, A: Wyatt’s and Dashwoods European Union Law, p. 820-821.
\textsuperscript{242} Article 4(a) of Directive 89/48/EEC.
substantially different matters than required in the formal training of the host Member State. Thirdly, where the profession in the host State contains one or more professional activities which do not exist in the corresponding profession of the home Member State, and that difference consists of specific training which covers substantially different matters from those completed in the home Member State.

These measures can be either in the form of an adaptation period or an aptitude test. It is necessary to give a brief explanation on what these two requirements consist of. An adaptation period is a period of supervised practice within a regulated profession in the host Member State. The migrant is over the training period under the supervision of a qualified member of the profession. The competent authority in the host State is to lay down detailed guidelines about the adaptation period, its assessment and on the status of the migrant under the supervision.

An aptitude test is designed to fit the professional knowledge of the applicant. It is made by the competent authority of the host Member State with the aim of assessing the ability of the applicant to pursue a regulated profession in that Member State. To carry out this test the competent authority is supposed to compare the two diplomas and draw up a list of subjects which are not covered by the education and training required for the diploma in the Member State. The test must take account of the fact that the applicant is a qualified professional in the home Member State and therefore it is supposed to only cover subjects which are essential for pursuing the profession in the host Member State. The test can include professional rules applicable to the activities in question. Rules of professional conduct governing the legal profession are most likely always a subject of the aptitude tests for migrating lawyers.

The choice between one or the other of these measures is up to the migrant unless specific derogations exists, such as when the profession requires a precise knowledge of national law and where the professional activity concerns advice or assistance relating to national law. The legal profession fits perfectly with that description. In the Commission’s original proposal of the new mutual recognition Directive it tried to abolish this derogation in what seems to be purely an attempt to abolish the mandatory aptitude test for lawyers. However this part of the proposal did not get the consent of the Member States.

\[243\] Article 14 (1) of Directive 2005/36/EC
\[244\] Article 3(1)(g).
\[245\] Article 3(1)(h).
\[246\] Article 14 (2) and (3)
Most of the Member States have chosen to require an aptitude test for migrating legal professionals. The test is by its nature an obstacle to the freedom of establishment of lawyers but nonetheless necessary in certain situations. This will be considered more closely in turn in the chapter on the Lawyer’s Establishment Directive. The aim with that Directive was to open up for the possibility of lawyers to practice law in other Member States without becoming fully integrated into the profession and thus without being required to undergo an aptitude test. It also opened up for an easier way for lawyers to become integrated into the profession and in that sense overlaps with the mutual recognition Directive in regard of the compensation measures. Yet, Article 10(1) of the Lawyers’ Establishment Directive makes the integration according the Mutual Recognition Directive one of the ways in which lawyer can seek integration according to the Directive.

The new Directive introduces the so called “common platforms”. They are to be drawn up by representative professional associations in the Member States and are defined as a set of criteria of professional qualifications which are suitable for compensating for substantial differences which have been identified between the training requirements existing in the various Member State for a given profession. The draft common platform made inside the Member State is submitted to the Commission and if the Commission finds that the platform is likely to facilitate the mutual recognition of professional qualifications it can submit it to the Member States for adoption.

The common platforms can have great meaning for migrating professionals. If the professional does not fulfil the professional qualifications required in the host State but does satisfy the criteria established in an adopted common platform, the host State cannot impose the compensation measures on the applicant. For that reason the platforms can be considered as a type of predefined compensatory measure.

By this innovation the Commission got through with a plan of creating a form of automatic recognition by means of co-operation through these common platforms. The Commission is to report to the European Parliament and the Council on the functioning of the platforms by 20 October 2010. It will be interesting to see if the measures have in practice been able to facilitate the mutual recognition of qualifications and whether they can be a

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248 Article 15(1)
249 Article 15(2)
250 Article 15(3)
252 Article 15(6)
future method of recognition. In regards of lawyers it will no doubt be very difficult to find a
common platform in such an accumulation of diverse European legal professions.

4.3.2.3. **Common Provisions on Establishment**

Contrary to the earlier mutual recognition directives, the new Directive provides for a specific
article on language requirements. According to Article 56(1) the host State can require the
migrant to have the necessary knowledge of the language for practising the profession. If
identified that the applicant lacks the necessary skills it is for the Member State in question to
provide possibilities for the candidate to acquire these skills.\(^{253}\) This provision must be
applied proportionately, which rules out the systematic imposition of language tests before a
professional activity can be practised.\(^{254}\)

The rule nevertheless leaves open the possibility for Member States to pose very strict
language requirements which could ultimately result in a hindrance to the free movement of
professionals. The language requirement can be problematic for Lawyers as legal language
requires often more than basic knowledge in the language. All the same, language knowledge
is often an implicit part of integration into the legal profession. It must be regarded that the
national language is inherent in the legal system and the operation of the national courts of
each Member State. The Court has dealt with the issue of requiring certain language skills
under the Lawyer’s Establishment Directive in the *Wilson*\(^{255}\) case which will be studied in
continuing chapter. In the case the Court confirmed that the Establishment Directive did not
allow for language requirement tests. It emphasised that other provisions of the Directive
protect the interest at stake leaving no necessity for language tests. There is a discrepancy
here between the two Directives. One allowing language tests while the other does not.

The Directive contains in Articles 50 and 51 the procedural requirements for submitting a
request for recognition of professional qualifications. These provisions especially deal with
the deadlines the national authorities have to fulfil. It must contact the applicant within one
month of the receipt of the application if any documents are missing. Furthermore, the
authority will have to take a final decision within three months from the date that the
application was received. This is extremely important since the whole procedure would be
prone to fail if it could take months or even years to get a decision on the recognition of
qualifications. Prior to the 2005 Directive a considerable number of applicants had

\(^{254}\) ibid
complained of the delays that they experienced in getting a decision from the competent authorities.256 If the authority fails to reach a decision within the deadline the applicant must have the possibility to appeal under national law.257

The Directive allows migrants, which have been authorised to practice a regulated profession under the chapter on Establishment, to use the professional title of the host Member State if the profession in question is regulated. Further, if a profession is regulated in the host Member State by an association or organization, the migrant must be able to become a member of the organization or association to be able to use the title.258 Lawyer’s use of the host State professional title will be discussed in the chapter on the Lawyers’ Establishment Directive.

4.3.2.4. Administrative Cooperation

The same as with the provisions on Services the Directive contains administrative cooperation provision in concerns of establishment rights. It largely facilitates the practice of mutual recognition if the competent national authorities co-operate. This suggestion is spelled out in Article 56 where it is stated that the competent authorities of both States shall work in close collaboration and provide mutual assistance in order to facilitate the application of the Directive.259

In this direction the Directive requires the Member States to designate a coordinator for the activities of the authorities. The coordinators role is to promote the uniform application of the Directive and collect all relevant information important for the application of the Directive for example the requirements imposed for the access into the regulated profession in the Member States.260

Also, the Directive proposes that each Member State designates contact points to assist citizens in enforcing their rights under the Directive and to provide information to citizens and the other Member States on the national rules governing the qualification of professional qualifications.261 The contact points can for example assist applicants that experience delays in the processing of their applications or feel that their application has not been rightly processed. This new system of administrative cooperation and responsibility for implementation will hopefully improve the older cumbersome and complex mutual

257 Article 51(3).
258 Article 52(1) and (2).
259 Note that this provision applies both in the case of service providers and established professionals.
260 Article 56
261 Article 57.
recognition mechanism and improve the willingness of authorities to apply the principle of mutual trust which is essentially what the system is based on.

4.4. Concluding Comments

Once again the European Court of Justice acted as the engine that pushed the European Union towards its goals. This time it was the recognition of professional qualifications and the method used was to confirm that individuals, lawyers as a matter of fact, had a right to have their professional qualifications recognised even in the absence of secondary legislation. (Thieffry and Vlassopolou). The case law of the Court created a system for the mutual recognition of qualifications later incorporated into the Mutual Recognition Directives. The Morgenbesser ruling might offer a new approach on the horizon. As discussed above, the possibility of opening up the option for legal students or professionals to enter trainee programs in other Member States can facilitate the recognition of qualifications substantially. But many questions remain unanswered in this regard.

With lawyers’ right to free movement in mind, the Directives opened a new window. Most notably, the new Directive offered lawyers the possibility of full integration into the legal profession and proposed for that purpose the use of host State professional title. Despite this effort the imposition of aptitude tests remains lurking over legal professionals on the move. Once again this is due to the very special nature of the legal profession and the diverse legal systems that live separate life’s in the Member States. It is likely that in each case there are substantial differences between the profession in the home State and the host State which means that the aptitude test is often in fact needed. In these cases the actual recognition of the qualifications is left to the discretion of the Member State.

There have been no cases brought before the Court, where lawyer’s right to recognition of qualification under the system of the new Directive, has been challenged. Directive 2005/36/EC did manage to put into one instrument a number of sectoral directives and the older Mutual Recognition Directive which is an accomplishment in itself. Nevertheless the same problem remains as with the older system. The mutual recognition approach relies heavily upon mutual trust between competent authorities and non-protectionist attitudes of Member States.\(^{262}\) It is, therefore, extremely important that Member States allow this system to function smoothly since it is the most appropriate manner to allow European professionals

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\(^{262}\) Craig, Paul & de Búrca, Gráinne: EU Law, Text, Cases, and Materials, p. 836.
to pursue a regulated profession in another Member State and hence to exercise their fundamental right to free movement within the Union.

As has been noted several times in this chapter, many of the rights conferred on lawyers by the mutual recognition Directives are further developed and construed specifically to fit the Legal profession in the Lawyer’s Establishment Directive. These rights and its surrounding legal instrument, the Lawyer’s Establishment Directive, will be examined in subsequent chapter.
5. Regulating Lawyers Freedom of Establishment

It is now time to turn to the final missing piece in the process of regulating the free movement of legal professionals within the Union. This is of course the highly debated Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the professions of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (the Lawyers´ Establishment Directive).

Regulating lawyers´ right to freedom of establishment within the Union resolved much more complex than regulating the freedom of services for the same group. The concept establishment raced alarms within some of the Member States since by establishment the lawyer becomes more connected with the host Member State, generating a stronger social, economic and legal bond. It was one thing to have migrant lawyers rendering occasional and temporary services within the State, but to open up for foreign lawyers establishing on a permanent basis, was for some States, one step too far.263

As discussed above, by the time the Establishment Directive was adopted, EU lawyers enjoyed a freedom to provide services within the Union regulated under the Lawyers´ Service Directive. Furthermore, the Mutual Recognition Directives dealt with the recognition of legal diplomas and required lawyers to take an aptitude test or to complete an adaption period to become qualified within the host Member State. Despite these efforts, it was clear that there was a gap in the area of free movement of legal professionals. Lawyers that exercised their Treaty based freedom of establishment were met with uncertainty, mainly deriving their rights from the Lawyers´ Service Directive and the ECJ’s interpretation of lawyers´ right to free movement. Some of the issues surrounding lawyers´ free movement were clarified with ECJ’s judgment in Gebhard in 1994. However, the debated area of freedom of establishment of lawyers was not fully solved until with the adoption of the Directive which is the focus of this chapter.

The discussion below aims at examining in details the rights conferred on lawyers on the move by the Directive. Since it is the most useful instrument for lawyers and it arguably will override the application of both the earlier directives applicable to lawyers, unless in very specific situations, it is important to thoroughly explain it. This will be done by firstly covering the debate behind the area of lawyers´ freedom of establishment and the events which led up to finally adopting the Directive. That development explains the vacuum

263 The History of the CCBE, p. 28.
5.1. Debate on Lawyers Right to Establishment and Events leading up to the Adoption of an Establishment Directive

The Lawyers´ Establishment Directive is the outcome of a complex and longsome two decades of debate and negotiations between the Commission, the European Parliament, the Council, the Governments of the Member States and the Council of the Bars and Law Societies of the European Union (CCBE), resulting in a delicate compromise. The resistance was caused by each Member States´ distinct methods of qualifications for legal professionals and difference of the legal traditions and systems.

When the representatives of each Member State gathered to find a way to make lawyers´ right to establishment real the distinct legal systems clashed. Various domestic legislations hindered lawyers´ entrance and establishment in the country. Member States were divided into two groups in this respect. The first group consisted of those countries reserving all forms of legal practice for local professionals, e.g. Germany, Austria, Spain, Portugal, Italy and Greece. The second group featured countries that made no reservations concerning local lawyers allowing non-national lawyer to practice under home title, e.g. the United Kingdom, Ireland, Belgium and Netherlands. However, in many of those States there were and are areas of law reserved for local lawyers, such as practice before the courts and notarial activities. The only States that had no activities reserved for local lawyers were Sweden and Finland.264

In addition, the Member States required non-national lawyer to take an aptitude test in domestic law under the Mutual Recognition Directives in order to practice in the State. Therefore, the right of establishment for lawyers could only be exercised by way of integration in accordance with the Mutual Recognition Directives and de facto there was no right under Community law for a lawyer of one Member State to establish under his home title in another Member State. That created a strange situation where the right to practice law under home title by establishing on a permanent basis in the host state was narrower then the

right for lawyers to provide services under the Lawyers’ Services Directive.\textsuperscript{265} Creating more risk of lawyers using the Lawyers’ Service Directive abusively, appearing as temporary legal service providers but in fact being established.\textsuperscript{266} The difference in practice was among the reasons for immediate action at Community level as expressed in paragraph 6 of the recitals to the Establishment Directive:

“...only a few Member States already permit in their territory the pursuit of activities of lawyers, otherwise than by way of provision of services, by lawyers from other Member States practising under their home-country professional titles; whereas, however, in the Member States where this possibility exists, the practical details concerning, for example, the area of activity and the obligation to register with the competent authorities differ considerably; whereas such a diversity of situations leads to inequalities and distortions in competition between lawyers from the Member States and constitutes an obstacle to freedom of movement; whereas only a directive laying down the conditions governing practice of the profession, otherwise than by way of provision of services, by lawyers practising under their home-country professional titles is capable of resolving these difficulties and of affording the same opportunities to lawyers and consumers of legal services in all Member States.”\textsuperscript{267}

As we can see by now, there existed a whole lot of uncertainties in the field. The most problematic aspect of the drafting stage is that there were much divided opinions on the actual establishment rights of lawyers. Was the lawyer to be allowed to practice under home State title and how could he become integrated into the legal profession, what activities should the lawyer be allowed to practice and to what extent should he be subjected to the rules and regulations of the host Member State.\textsuperscript{268}

On the one hand, there were those that considered that lawyers established under home-country title should not be fully subject to national rules, whereas on the other hand, there were others that considered necessary to subject the lawyer to full regulation of the host State, without giving the established lawyer equal rights with the host State lawyer.\textsuperscript{269} The proposal kept on stranding on these two issues. The United Kingdom was of the opinion that the lawyer should remain under home rules and discipline, while the French were of the opinion that the lawyer should become a full member of the legal profession in the host State and be subject to host State rules. Furthermore, Luxembourg was against opening up for any form of freedom

\textsuperscript{265} Adamson, Hamish: \textit{Free movement of Lawyers}, p. 91.
\textsuperscript{266} Lonbay, Julian: “Lawyers bounding over the borders: the Draft Directive on lawyer’s establishment”, p. 50-58.
\textsuperscript{267} Recital 6 of the Establishment Directive.
\textsuperscript{268} The History of the CCBE, p. 28-29.
\textsuperscript{269} Adamson, Hamish: \textit{Free movement of Lawyers}, p. 89-90.
of establishment for lawyers and Spain wanted a more liberal system for establishment of lawyers.270

The Directive was developed in co-operation between the European Parliament, the Commission and the Council.271 Furthermore, the Commission built its proposal largely on a draft from the CCBE, which had worked on a draft Establishment Directive for lawyers as far back as 1977.272 In the Commission’s proposal it introduced a new idea as an attempt to reconcile the difference in opinion on the nature of lawyers’ establishment rights.273 The proposal did not include a permanent right of practice under home title, but a temporary right of five years which was to be regarded as a transitional period before full integration in to the legal profession in the host State.274

This outcome reflected the Commission’s interpretation of Article 43275, as prohibiting permanent right to practice under home title.276 However, the view was not shared by the Court, which one year later came with its judgment in Gebhard277. In the ruling the Court confirmed that the Treaty provisions on the freedom of establishment did allow for a permanent right to practice under home title. The case came at the right time for the Directive, which had stranded with the Commission proposal, confirming that establishment under home title without full integration existed.278 The five year time limit is nowhere explained in the proposal and neither what would happen to a migrant lawyer practising under home-country title after the five years time period was over, e.g. if he did not wish to become integrated into the host State profession. Clearly, the five year rule caused problems and the Commission was heavily criticized. Lonbay describes the proposal as hindering mobility of lawyers instead of facilitating it, because of the five years rule.279

Fortunately, these limitations did not find their way to the final draft. The golden means was hard found but in the final draft the European Parliament and the Council adjusted the Commission’s draft to fit the recent case law of the Court and dropped the five year rule completely. Both institutions were of the opinion that practise under home-country

270 The History of the CCBE, p. 29-30.
271 Co-decision process according to Article 189b.
272 The History of the CCBE, 29-30.
273 Proposal for a European Parliament and Council Directive 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, COM(94) 572 final.
274 Explanatory Memorandum on Commission´s Proposal, COM(94) 572 final, p. 3.
275 Especially the phrase: “under the same conditions as nationals of the host Member State”,
278 Explanatory Memorandum on Commission´s Proposal, COM(94) 572 final, p. 3.
professional title should not be of temporary nature and the final draft is predicated upon that. The results were that the Directive included a right to practice under home State title without any time limits and the lawyer was offered a way to become fully integrated in the profession of the host State without going through the mutual recognition system. These rights will be further analyzed in turn as well as the other provisions of the Establishment Directive.

5.2. The Lawyers Establishment Directive

The purpose of the Directive is, as indicated by the title, to facilitate practice of the profession of lawyer on a permanent basis in a self-employed or salaried capacity in a Member State other than that in which the professional qualification was obtained. More specifically, the Directive enables EC nationals, qualified as legal professionals within one Member State and registered with the national competent authority, to practice in another Member State than where the qualification is originated.

Accordingly it applies to so called “final products”, that is, lawyers who have obtained their legal qualification and are already registered as such in one Member State. This means that trainee lawyers do not fall within the scope of the provisions of the Directive. The Directive does not mention the situation of EU nationals that have obtained there qualification in a third country, presumably, they would be treated in the same way as third country nationals. The definition of lawyers as applied in the Directive is in accordance with the different titles used for the profession in each Member State, displayed in a list in Article 2(a). (see Annex I). A lawyer wishing to establish in another Member State must have acquired one of these titles in order to be able to take advantage of the Establishment Directive.

Article 1(4) states: “Practice of the profession of lawyer within the meaning of this Directive shall not include the provision of services, which is covered by Directive

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281 The Court judged on the late implementation of the Directive in the case of both France (Case C-315/01, Commission v. French Republic [2000] ECR I-8101) and Ireland (Case C-362/01, Commission v. Ireland, [2002] ECR I-11433. The Court found that both States had failed to adopt the laws, regulations and administrative measure necessary to comply with the Lawyers’ Establishment Directive.
282 Article 1 of the Directive
283 Articles 1-3
284 Guidelines on the implementation of the establishment directive (98/5/EC of 16th February 1998) issued by the CCBE for Bars and Law societies in the European Union, p. 3. See also Case C-313/01, Christine Morgenbesser v. Consiglio dell’Ordine degli avvocati di Genova, [2003] ECR I-13467 where the Court found that the situations of the French trainee lawyer, Ms. Morgenbesser, did not fall within the ambit of the Lawyers’ Establishment Directive.
This is a negative definition of the term permanent establishment. Services are, however, not defined in the Lawyers’ Services Directive. Then what type of situations fall within the Directive? At Community level the concept establishment has been interpreted by the ECJ as pursuit of an economic activity on a permanent basis. Furthermore, in the Gebhard case, discussed above, the Court interpreted the concept in connection with legal professional. Consequently, the lack of definition in the Directive is perhaps irrelevant. Even so, this once again poses the problematic question whether there does really exist any difference between the freedom to provide services and the freedom of establishment in practice. This has been discussed earlier in chapter 2 where the nature of the two freedoms was explained. That discussion led to the conclusion that in certain situations it can be very hard to draw a dividing line between the freedoms. It leads to legal uncertainty. Furthermore, not knowing which Directive applies can intensify the risk of abuse of the system.

The Directive provides lawyers with two different options for establishing. Firstly, by establishing in the host Member State and practicing under home-country professional title, without having to undertake any training or examination. Secondly, the Directive allows for integration into the host State profession and an acquisition of the professional title of the host State, after a period of practicing under home title. The period of practice comes instead of an aptitude test as most States required under the mutual recognition Directive and serves as an adaptation period to get a qualification in the host State. These two options will now be looked more carefully into.

### 5.2.1. Practice under Home-State Professional Title

All lawyers that fall under the Directive have a right to pursue their professional activity on a permanent basis in another Member state under their home-country professional title. According to the Directive’s preamble, enabling this new and easier form of legal services was necessary to meet up to the demands of consumers. The need became ever more evident with the increase in interstate trade within the internal market, leading to an increase in demand of legal advice on Community law and issues when Community law and national law overlap.

This is arguable the most important right conferred on lawyers by the Directive. Now, lawyers practicing under home title can do so practically without restrictions on the same
footing as host State lawyers, the only differentiation being the title. It opened up for a great advancement in the free movement of legal professionals as there is no prior assessment of qualifications for entering another Member State. The mutual recognition of qualifications system already offered lawyers a route for integration. Furthermore, under the Lawyers’ Service Directive the lawyer could provide temporary services under home-State professional title. There was, however, no way for lawyers to establish under home State title. This means that they had to always go through the system of either taking an aptitude test or go through an adaption period. It is up to the lawyer to decide whether to later seek integration into the legal profession or continue to practice under home title. It is therefore a matter of choice in what manner the lawyer decides to exercise his right of establishment. This would have been different if a five year roof would have been put on the right to practice under home-title as suggested in the Commission proposal of the Directive.289

There are certain requirements and exceptions to the right of the lawyer to practice under home title which principally aim at safeguarding all interests at stake and giving the Member States some discretion in controlling and regulating their legal profession. The requirements and exceptions will now be examined.

5.2.1.1. Registration

The main requirement for practising law in another Member State under home title is registration with the competent authority. The registration requirement is not only a duty for the lawyer but also for the competent host State authority. It must at all times agree to register a lawyer from another Member State, if he so wishes and hands in a certificate from the competent authority in the home State attesting his registration there.290 It appears that the Directive allows no discretion for the host State in this matter. The authority must register a lawyer who is authorised to practice under one of the titles set forth in Article 1(1)(a) and there is no grounds for refusal.291 The only minor additional requirement the host State authority can call for is that the certificate handed in from the home State authority may not be older than three months.292 This is to ensure that the host State has updated information about the lawyer, e.g. whether he has been subject of disciplinary proceedings in his home

289 Explanatory Memorandum on Commission’s Proposal, COM(94) 572 final, p. 3.
290 Articles 3(1) and 3(2)
291 Adamson, Hamish: Free movement of Lawyers, p. 100
292 Article 3(2)
country. Furthermore, the registration is necessary for the host State authority to verify the lawyer’s compliance with the rules of professional conduct applicable in the home State.\footnote{Explanatory Memorandum on Commission’s Proposal, (COM(94) 572 final, Article 3.}

Importantly, the Member State is not allowed to impose other requirements upon registration if not connected with the exceptions in Article 5. This was confirmed by the Court in two cases concerning Luxembourg’s implementation of the Directive. In the first one, \textit{Commission v. Luxembourg}\footnote{Case C-193/05, \textit{Commission of the European Communities v. Grand Duchy of Luxembourg}, [2006] ECR I-08673.}, the Commission brought to the attention of the Court that Luxembourg required visiting lawyers to prove proficiency in the three official languages upon registration in addition to requiring an annual submitting of registration confirmation from the host State. The Court found that making registration of a migrant lawyer subject to prior language test was contrary to Article 3 of the Directive.\footnote{\textit{ibid}, para. 47.} This conclusion was based on the fact that the Directive, with reference to recital 6, was a measure with the aim of putting an end to the difference in national rules on the conditions for registration which resulted in inequalities and obstacles to the freedom of movement.\footnote{\textit{ibid}, para. 35-38}

Luxembourg based this rule on protection for consumers. Assuming that inefficiency in the court language equals inability to practice law within the State. The Court did not agree. It referred to Article 5(4), which entitles Member State to require the migrant lawyer to work in conjunction with a host State lawyer who practices before the judicial authority. That rule, according to the Court, compensated for any lack of proficiency in the court languages of the host State.\footnote{\textit{ibid}, para. 42-43.} Furthermore, the dual professional rule of conduct and disciplinary system according to the Directive and the CCBE code of conduct indeed require the lawyer to have sufficient language knowledge or recourse to assistance if the knowledge is insufficient.\footnote{\textit{ibid}, para. 44.}

With regards to integrated migrant lawyers the Court noted that the requirement under Article 10, prior practice of three years or its equivalence enables migrant lawyers wishing to get admission to the profession to become familiar with the language(s) of the host State.\footnote{\textit{ibid}, para. 46.}

In connection with the requirement of annual renewal of confirmation for registration, the Court found that the requirement could not be justified by the need to ensure continuing compliance with conditions for registration in the home State. The Court was of the opinion
that the collaboration system between the authorities in both States, which will be considered in continuance, reduced the risk of that happening.\textsuperscript{300}

In the second case, \textit{Wilson v. Luxembourg}\textsuperscript{301} a British barrister, Mr. Wilson, brought a case before the ECJ against Luxembourg. He had practiced as a lawyer in the State since 1994. In 2003 he was refused registration as a lawyer practising under home-country title by the Bar Council on grounds of him not having proved sufficient language skills. The Court arrived at the same conclusion as in the first case; no language skills test is allowed under the Directive. In accordance with the Court’s interpretation of Article 3, no other requirement may be imposed upon registration, than specifically mentioned in the Article.\textsuperscript{302}

All lawyers registering under Article 3 of the Directive pay a registration fee to the competent authority in the host State. There are no rules on the registration fee in the Directive. However, CCBE has suggested the principle that such fee may be equivalent but not higher than charged on host State lawyers. Clearly, a higher fee for migrating lawyers would be rendered discriminatory.\textsuperscript{303}

According to Article 9, any decision which affects a lawyer’s registration or application for registration shall be reasoned. The recipient of the decision must have a judicial remedy under the host State law to appeal such decision before a court or tribunal.\textsuperscript{304} In \textit{Wilson v. Luxembourg}\textsuperscript{305} the Court considered the meaning of Article 9. Mr. Wilson was informed that he could appeal the decision of refusing him registration to the \textit{Conseil disciplinaire et administrative} (Disciplinary and Administrative Committee of the Bar Association). However, Mr. Wilson brought an action for annulment before the Administrative Court of Luxembourg. That court held that it did not have jurisdiction in the matter, as it should have been brought before the Disciplinary and Administrative Committee. Mr. Wilson appealed

\textsuperscript{302} In Ireland and the United Kingdom the legal profession is separated into barristers and solicitors. Article 3(3) of the Directive deals with this and assumes that lawyers coming to the United Kingdom or Ireland can choose with which professional authority they register. The Directive thus applies that both the profession of solicitors and barristers are equivalent to the legal professions in other Member States. The separation of the profession has therefore no affect at Community level. The two last paragraphs of Article 3(3) deal with the situation of lawyers from these two countries establishing under home-country title in either of the two States. A solicitor must register with the authority for solicitors and barristers with the authority of barristers. These rules could lead to odd situations. For example, there seems to be nothing to stop a third State lawyer to register as a solicitor in United Kingdom and as a barrister in Ireland. The situation would change if that third State lawyer would be qualified as a solicitor in the United Kingdom. Then assumedly the lawyer would have to register with the competent authority for solicitors in Ireland.
\textsuperscript{304} Article 9
against this decision to the Higher Administrative Court which decided to stay the proceedings and refer the matter to the ECJ. One of the questions referred to the Court concerned whether Article 9 of the Directive prohibited appeal procedures as Luxembourgian law provided for.

The Court stated that the Article provides that a remedy must be available before a court or tribunal in accordance with the provisions of national law in cases such as that of Mr. Wilson. The Member States must take measures which are sufficiently effective to achieve the aim of the Directive and must ensure effective judicial protection. The Court first considered whether the Committee could be regarded as a court or tribunal in accordance with Community law. Many of the requirements in that direction were not fulfilled in the matter at hand, mainly since members of the Committee were mostly lawyers of Luxembourg nationality practising under the Luxembourg professional title. Consequently, the decision of refusal would be reviewed by a body composed only of lawyers registered with the same authority and the same applied to the appeals Committee.\footnote{Case C-506/04, Graham J. Wilson v. Ordre des avocats du barreau de Luxembourg, [2006] ECR I-08613. para. 54-55.} As the Court put it;

“In those circumstances, a European lawyer whose registration ... has been refused by the Bar Council has legitimate grounds for concerns that either all or the majority, ..., of the members of those bodies have a common interest contrary to his own interest, 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 interest concerned would be upset”.\footnote{ibid, para. 56.}

These rules, in the Court’s opinion, could therefore not provide sufficient guarantee of impartiality. The Court was not satisfied with Luxembourg’s argument that after exhausting all remedies before the Bar Associate Committee’s, then the migrant lawyer can seek legal remedy, since Article 9 requires actual access within a reasonable period to a court or tribunal as defined by Community law.\footnote{ibid, para. 60.} This led to the conclusion, that the judicial remedy offered in Luxembourg for lawyers to appeal a negative decision of registration, was not in accordance with Article 9 of the Directive.

5.2.1.2. \textit{Cooperation Duty between the National Competent Authorities}

Yet again we arrive at the principle of co-operation between competent authorities in home and host Member State which is in the Establishment Directive envisaged in Article 13. The importance of this rule has been emphasised earlier in connection with both the Lawyers’
Service Directive and the Mutual Recognition Directives. It is easy to catch a glimpse of the principle in other specialized provisions of the Directive as it in fact echoes through the whole Directive.

The cooperation duty makes the European transfrontier legal practices possible. Instead of choosing the method of establishing a centralized authority, with all the implications that could have the aim is to conquer the problems deriving from free movement of lawyers, with cooperation between the authorities. Thus, to say the least, these rules are of great importance for the proper functioning of the Directive.309

One example of the principle in the provisions of the Directive is in Article 3(2) where it is stated that the host State authority has a duty to inform the home State authority of the registration of a lawyer.310 That way the authorities can keep track on the transferring of their members between Member States and the competent authorities in the host Member States. This is important for example when a home State initiates disciplinary proceedings against the lawyer and thus must inform the host State authority.311 The CCBE encourages bars and law societies to adopt provisions, to get their members to sign a declaration upon transferring to another Member State, allowing for the free exchange of information between home and host State authorities, emphasising the need for cooperation.312 That would undoubtedly make the cooperation and exchange of information easier.

In Commission v. Luxembourg313 the Court found that requiring annually submitting of confirmation of registration was not in line with the Directive. Luxembourg argued that the measure was necessary to ensure the lawyer’s continuing compliance with the conditions of registration in the home Member State. However, as the Court noted, the collaboration system between the relevant competent authorities in the Member States set out in Article 13, was intended to reduce the risk of such happenings. The authority is to inform the host State authority if disciplinary proceedings are initiated against the lawyer in the home State and the authorities are supposed to afford each other mutual assistance. All these measures enable the authority of the host Member State to ensure continuing compliance and the formality imposed by Luxembourgian law was deemed by the Court to be an administrative measure,

310 Article 3(2)
311 Adamson, Hamish: Free movement of Lawyers, p. 100.
both disproportionate to its objective and unjustified under the Establishment Directive.\textsuperscript{314} Accordingly, the co-operation duty is the mechanism intended to ensure that any breach of rules of conduct of the lawyer in either State do not slip through the system.

Each Member State decides and designates the competent authority within the State. According to Article 14 all the Member States and the Commission must be informed of the appointment. Most commonly these authorities are bar and law societies of Member States. Taking Iceland and Sweden as examples, the professional body governing admission into the profession in Iceland is the Ministry of justice and the body governing discipline in general is the Icelandic Bar Association (Lögmannafélag Íslands). In Sweden the Swedish Bar Association (Sveriges advokatsamfund) is responsible for both.\textsuperscript{315}

5.2.1.3. \textit{Area of Activity}

What type of activities can a lawyer established under home State title practice? In fact, the lawyer can carry out all the same activities as a lawyer practicing under the host country professional title. This means that the lawyer can practically practice on the same footing as the host State lawyer, giving advice on the law of his country of origin, on Community law, on international law and on the law of the host Member State.\textsuperscript{316}

Interestingly, migrating lawyers can advice on the law of the host Member State. It is questionable whether a lawyer which holds a law degree from another State and not necessarily a long time practicing law within the host Member State is qualified to be advising on the host State law. This is where the home title requirement in Article 4 comes in. The lawyer is required to practice under home title, which must be expressed in an official language of the home Member State in an intelligible manner and in such a way as to avoid confusion with the professional title of the host Member State. If the title is incomprehensible in the host State, further explanation may be needed: for example ‘Lögmaður’ (Icelandic lawyer). In addition, the host Member State has the option of requiring the lawyer to indicate the name of the bar association he is a member of in the home Member States and to include a reference to the registration with the competent authority in the host Member State: for example, ‘advokat’ (lawyer of the Swedish Bar).\textsuperscript{317}

\textsuperscript{314} \textit{Case C-193/05, Commission of the European Communities v. Grand Duchy of Luxembourg, [2006],} para. 66-70.

\textsuperscript{315} See on the application of the EU system of lawyers’ free movement in Iceland and Sweden in Chapter 6.

\textsuperscript{316} Article 5(1)

\textsuperscript{317} Article 4(2)
The indication of the home-State title is also for the protection of service consumers. The consumer must be properly informed of the fact that the lawyer is a foreign national. In addition to the protection of Article 4 of the Directive, the CCBE encourages EU bars and law societies to ensure that lawyers practising under home-country professional title in another Member State also put on their notepaper information about their registration with the competent authority in the host State, in the official language of the host State and information about their registration with the home State authority, translated into the host language. Realistically it is doubtful that legal professionals will attempt to give advice on law or legal issues that they are not fully qualified to do. Nevertheless, there is always need for safeguards. Rules of professional conduct and disciplinary measures set out in Articles 6 and 7 of the Directive further supplement the protection. Moreover, CCBE’s code of conduct applicable to all European lawyers, sets out a provision to this effect in Article 3.1.3: “A lawyer shall not handle a matter which the lawyer knows or ought to know he or she is not competent to handle, without cooperating with a lawyer who is competent to handle it”.

It is important to note that the Court laid out in Gebhard a principle on what activities the visiting lawyer can practice. If the home State activities of lawyers are wider than those allowed in the host State the visiting lawyer can carry on all his activities in the host State unless strictly banned. It further derives from the judgement that if specific activities are subject to restrictions or certain conditions in the host Member State the non-national lawyer must in principle comply with them. Conversely, if specific activities are accepted for domestic lawyers in the host State, then the visiting lawyers must be authorized to exercise those as well, even though not allowed in their State of origin. If there are additional requirements for lawyers to practice specific activities, other than those applying to them as lawyers (e.g. financial services in the United Kingdom) then the same requirements apply to the visiting lawyer.

5.2.1.4. Exceptions

There are two exceptions or requirements to the permission to practice under a home State title. Firstly, on basis of Article 5(2), the host Member States can exclude migrant lawyers practising under home-country title from the activity of creating or transferring interest in land

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318 Article 4(1) and recital 9
319 Guidelines on the implementation of the establishment directive (98/5/EC of 16th February 1998) issued by the CCBE for Bars and Law societies in the European Union, p. 3.
and of preparing deeds for obtaining title to administer estates of deceased persons. The conditions under which the host State may make such reservation are quite strict. The migrant lawyer can only be excluded from these activities, if they are reserved for a particular group of lawyers in the host State and if, in the Member States of origin, the activity is reserved for other professions. The conditions are more demanding upon the host Member State than under the older Service Directive, which has the same provision in Article 1. Under this Directive the activity must also be reserved for other professions than lawyers in the Member State of origin. There are only two Member States, the United Kingdom and Ireland, where such activities are reserved to solicitors or other specific groups of lawyers.

Secondly, there are certain limitations to the lawyer’s activity in the host State when it comes to representation or defence of a client in legal proceeding. In some Member States such activities are reserved to lawyers practicing under the professional title of that State. In such situations, Article 5(3) allows for the possibility for a Member State, to require lawyers practising under home-country professional title to work in conjunction with a lawyer who practises before the judicial authority and would, when necessary, be answerable to that authority.

This is the same rule as applies under the Lawyer’s Services Directive and should therefore be interpreted in the light of the Courts case law on the matter, especially the Courts judgment in Commission v. Germany and Commission v. France. The rule has in the Establishment Directive been adjusted to fit the Court’s case law. Thus, at present it states that the host State may only impose on a lawyer, practising under his home country title, to work in conjunction with a national lawyer if national law reserve such practices for host State lawyers.

In addition to the above, the Directive allows for specific rules concerning lawyers practising before the supreme courts, such as reserving the access to specialist national lawyers. This is understandable as the supreme courts play a special role within a democratic society and excluding non-national lawyers practising under home state title can be necessary for the smooth operation of the justice system.

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322 Article 5(2)
324 Article 5(3)
326 Article 5(3).
These rules are also built on the notion of consumer protection. However, in the light of fact that the exceptions can only apply in very narrow circumstances and will most of the time be purely eventual, it is natural to put more emphasises on national title requirement in Article 4(1). It is the decisive element in drawing a distinction between national lawyers and migrant lawyers as the professional title is in fact the only substantial difference between the two.\textsuperscript{327}

Once again the Courts judgment \textit{Commission v. Luxembourg}\textsuperscript{328}, donates to the interpretation of the Directive. In Luxembourg there was a rule applicable to migrating lawyers which prohibited them from accepting services on behalf of companies. The Court agreed with the Commission, that prohibiting lawyers from accepting services on behalf of companies goes against Article 5 of the Directive. Luxembourg emphasised the risk of abuse and the need for lawyers working for companies to have professional experience and a good knowledge of company law.

The Court stated that Articles 2 and 5 of the Directive assume that migrant lawyers are entitled to pursue the same activities as lawyers practising under the host State title. The only exceptions to this principle are laid out in Articles 5(2) and 5(3). Thus, Member States are not allowed to lay out any further exceptions in their national law and the activity of accepting service on behalf of companies does not fall within either exception.\textsuperscript{329} On the matter of abuse, the Court found that the Directive itself provided sufficient protection, both with the combination of professional rule of conduct, disciplinary system and the compulsory liability insurance or membership of a professional guarantee fund.\textsuperscript{330}

As a result, no other exceptions to activities practiced by the lawyer according to Article 5 are permitted. Luxembourg seems in these cases to assume that migrant lawyers are more capable of doing damage than national lawyers. The Directive is based on the notion that lawyers themselves must judge whether they are competent or not to handle a case because of language barriers or insufficient knowledge of company law. Furthermore, the Court emphasised throughout the case that consumer protection is guaranteed and that the objectives of the Directive, were after all, to meet the needs of consumers of legal services, who have

\textsuperscript{329} \textit{ibid}, para. 56-58.
\textsuperscript{330} \textit{ibid}, para. 60.
become ever more Europeanized because of the increase in trade flows in the internal market.\textsuperscript{331}

5.2.1.5. Rules of professional Conduct and Disciplinary Proceedings

According to Article 6(1) of the Directive a lawyer practising under home State title is subject to the rules of professional conduct of the host State. Since the Directive enables a lawyer practising under home State title to practice almost on the same grounds as the host State lawyers it is only logical that the host State rules of professional conduct apply equally to both sets of lawyers. Furthermore, because the lawyer must be registered in both host and home State the home State rules of conduct remains applicable to him as well. However, the rules of the host State always apply when the lawyers pursues activities in that State.\textsuperscript{332} The Article implies that in case of conflict of home State and host State rules the host State rules apply irrespectively. The rules of professional conduct, must like other national measures, fulfil the four criteria of the Gebhard test. That is, non-discrimination, justification by imperative requirements in the general interest, suitability and proportionality.\textsuperscript{333}

Article 3 allows Member States to require migrant lawyers to take indemnity insurance. With two sets of professional rules applicable the lawyer can possibly be faced with a double requirement of taking professional indemnity insurance or other types of guarantees. The risk of lawyers practising under home title being required to cover the same risk twice is dealt with in Article 6(3). The first part of paragraph 3 states that the host State may require the lawyer to take professional indemnity insurance or become a member of a professional guarantee fund in accordance with national rules. However, if the lawyer can demonstrate that he is covered by equal insurances in his home Member State, the host State must exempt the lawyer from fulfilling the requirement in the visiting State. To the same extend, if the insurance is only partial, the host Member State can require the visiting lawyer to obtain additional guarantee or insurance to cover the gap.\textsuperscript{334}

Concerning the payment of pension, social security and health scheme there are no specific rules in the Directive. It would be natural to allow the lawyer established under home State title to choose the system most suitable for his needs.\textsuperscript{335} To avoid double payment the

\textsuperscript{331} Case C-193/05, Commission of the European Communities v. Grand Duchy of Luxembourg, [2006] ECR I-08673, para. 45.
\textsuperscript{332} Explanatory Memorandum on Commission’s Proposal, (COM(94) 572 final, Article 6.
\textsuperscript{334} Article 6(3)
\textsuperscript{335} Pinedo, Elvira Méndez: “La Europa de los abogados (Comentario a la Directiva 98/5, de 12 febrero de 1998, sobre libertad de establecimiento de los abogados”, p. 82.
CCBE encourages EU bars and law societies to permit migrant EU lawyers to continue paying into such schemes in their home State, if they can prove that they do perform these payments in the home State.\textsuperscript{336}

According to Article 7 the migrant lawyer is subject to all the local disciplinary rules if he fails to fulfil his obligation or violates the host State rules of professional conduct. This means that the lawyer is subject to all the rules of procedure, penalties and remedies provided for in the host Member State. The competent authorities in the two Member States must cooperate in the case of disciplinary proceedings and the home competent authority must be informed of any such actions as soon as possible and applied with all the relevant details and evidence before action is taken.\textsuperscript{337}

Conversely, this duty to report applies to home State authorities when initiating disciplinary proceedings against a lawyer established under home State title in another Member State. It is further emphasised in Article 7(3) that the host State authority must cooperate with the home State authority and give the latter an opportunity to make submission in proceedings of appeal.\textsuperscript{338} Thus the cooperation duty goes through the whole Article and further promotes the co-operation between the competent authorities as required by Article 13. These rules are connected with the duty in Article 3(2) to present a certificate from the competent authority in the home State upon registration. The certificate normally would contain information about any disciplinary proceedings or penalties against the lawyer in the home State. It is not clearly stated in the Directive itself, that the certificate should contain such information, but can be derived from the cooperation duty between the authorities and the importance for the host Member State to receive information of any such proceedings.

The home State has the freedom to decide what action to take under its own procedural and substantiative rules. A withdrawal of entitlement to practice law in the home State automatically affects the right to practise in the host State.\textsuperscript{339} However, this does not mean that the host State authority can withdraw temporarily or permanently a lawyer’s right to practice under his home title in his home State or somewhere else.\textsuperscript{340} In that situation it is up to the home State authority to decide whether to impose the same penalties as decided by the

\textsuperscript{337} Article 7(2)
\textsuperscript{338} Interestingly it only applies in appeal hearings which diminishes somewhat the influence the host State authority could have, by for example presenting arguments in the main hearings.
\textsuperscript{339} Article 7(5)
\textsuperscript{340} Adamson, Hamish: Free movement of Lawyers, p. 111
host Member States or other penalties or none, for that matter. Consequently, the lawyer can be subjected to disciplinary measures both by the host- and home State authorities.341

5.2.2. Admission to the Legal Profession in the Host Member State

One of the aims of the Directive was to establish more flexible conditions, than under the existing mutual recognition system, for EU lawyers to become fully integrated into the legal profession in another Member State. The fact that the choice between integration after taking an aptitude test or integration after a period of effective and regular practice in the host State is now in the hands of the migrants themselves and not, as before, the choice of the Member State, is a significant step towards achieving the integration that Article 47(1) aims at reaching. Even though the earlier system under the Mutual Recognition Directives made it a choice for Member States whether to impose an adaption period or aptitude test, the reality was that all States, opted for the aptitude test.342

With the Lawyers’ Establishment Directive there are now three ways for a lawyer to fully integrate into the legal profession in another Member State. Firstly, by applying to have his diploma recognised in accordance with the Mutual Recognition Directives, which often requires the taking of an aptitude test.343 Secondly, under Article 10(1) if the lawyer can show that he has “effectively and regularly” pursued the practice of host State law and Community law in the host State for at least three years he can become integrated without having to go through the compensatory measures of the mutual recognition system.344 Thirdly, Article 10(3) proposes a less demanding practice requirement. It applies if the lawyer does not fulfil all the conditions laid out in Article 10(1) and the law of the host State assumes a shorter adaption period then the Directive. The second and third route to integration will be the focus here.

A lawyer that has practiced under his home-country professional title for three years can demand admission into the profession if all the conditions of the Directive are met. Firstly, the lawyer must have obtained practise in the host state for at least three years. Secondly, the practise must be effective and regular, which means according to the last sentence of Article 10(1) “actual exercise of the activity without any interruption other than that resulting from the events of everyday life”.

342 See chapter 4.
343 Article 10(2).
344 Article 10.
It is not clear from the Directive what can be regarded as effective and regular pursuit of the activity. According to the Commission’s Proposal for a European Parliament and Council Directive on the Establishment of lawyers\textsuperscript{345} the definition of effective pursuit of an activity for an unbroken period has been taken from the judgment in \textit{Van de Bijl}.\textsuperscript{346} In the judgment the Court emphasised on the need to give a Community interpretation to the concept which in the Directive is phrased as pursuit of activity for “consecutive years”. The Court stated: "the fact that the activity in question has been pursued in another Member State for ... ( x ) consecutive years ..." refers solely to the actual exercise of the activity in question for a period which must be unbroken except for reasons of (short) illness or (normal) holiday leave, and which excludes, in particular, the pursuit of an activity in another Member State...”\textsuperscript{347}

In the draft proposal the phrase used was “effective pursuit for an unbroken period” which was replaced by “effective and regular pursuit”. The \textit{Van de Bilj} concept can therefore not strictly speaking be applied to the latter concept which leaves open the possibility to interpret the provisions as meaning that the activity in the host State does not necessarily need to be continuous. If this were the case the lawyer could for example, practice for two years in the host State, then e.g. return to his home State, and later take up his practice in the host State for one year and still fulfil the effective and regular criteria.\textsuperscript{348} This interpretation is however not supported directly by Article 10 itself, where it is clearly stated that exercise of the activity must be uninterrupted unless the interruption is a result of everyday life situations. From the \textit{Van de Bijl} case this seems to apply to short absences because of illness and usual holiday leave. Maternity leave could also be regarded compatible with the Article.\textsuperscript{349} The question that remains unanswered is whether the Directive intended to allow for other intervals in between the three years period or if it should always be uninterrupted.\textsuperscript{350}

The lawyer must provide the competent authority in the host State with all relevant information that can prove effective and regular practice. The information must include

\textsuperscript{345} European Commission, Proposal for a European Parliament and Council Directive 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, Com (94) 572, 21.12.1994.


\textsuperscript{347} \textit{ibid}, para. 19.

\textsuperscript{348} European Commission, Proposal for a European Parliament and Council Directive 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, Com (94) 572, 21.12.1994.

\textsuperscript{349} Adamson, Hamish: \textit{Free movement of Lawyers}, p. 116.

\textsuperscript{350} According to CCBE, the period that a lawyer has pursued professional activity according to the Directive, before the implementation of the Directive, should qualify towards the three years time limit. Therefore, periods already realised before the implementation should be taken into account for the purpose of Article 10. (Guidelines on the implementation of the establishiment directive (98/5/EC of 16th February 1998) issued by the CCBE for Bars and Law socities in the European Union, p. 5.)
documentation on the number of matters dealt with in the host State and their nature. If the
authority finds the information insufficient in order to evaluate the nature and length of the
practice it may request clarifications in written or orally. The difference from the evaluation
in the Mutual Recognition Directive is that there seems to be no specific provisions on the
evaluation of competence of the lawyer in question. Rather the evaluation is solemnly built on
proof of effective and regular practice. The assumption seems to be that such prove equals
evidence of competence. The Article refers to practice of host State law or Community law.
This means that although a lawyer only practices Community law within the host State he is
still entitled to request admission into the profession.

In cases where lawyers do not fulfil the conditions of Article 10(1) they can attempt the
less restrictive requirement route according to Article 10(3). If a lawyer has effectively and
regularly pursued a professional activity in the host Member State for at least three years but
for a lesser period in the law of that Member State he may nonetheless be granted admission.
For that to be possible the lawyer must demonstrate that his experience of the host State law is
sufficient or that he has obtained experience by other means, e.g. by attending lectures and
seminars on the law of the host Member State, including rules of conduct. This provision
clearly derives from the Courts judgment in Vlassopolou which called upon the competent
authority to take into consideration any professional experience gained after obtaining the
qualification.

Even though the Article only mentions host State law it should be interpreted as though
including Community law as is the case in Article 10(1), so that the practice of Community
law is to be taken into account. The third paragraph requires three years of effective and
regular pursuit of professional activity as in the first paragraph. The major difference between
10(1) and 10(3) is that the latter applies when the practice is for a shorter period in the law of
the host State or Community law. Furthermore, Article 10(3) states that the lawyer may obtain
from the competent authority admission to the profession without meeting all requirements of
the Mutual Recognition Directive.

These provisions therefore give the competent host State authority a certain degree of
discretion upon evaluating whether the lawyer fulfils the requirements which is not the case in
the first paragraph. It is not made clear how the competent authorities should make this

351 Article 10 (1) a and b.
352 Adamson, Hamish: Free movement of Lawyers, p. 115
353 Article 10(1) and 10(1)a.
354 Explanatory Memorandum on Commission’s Proposal; COM(94) 572 final, Article 10.
355 Guidelines on the implementation of the establishment directive (98/5/EC of 16th February 1998) issued by
the CCBE for Bars and Law societies in the European Union, p. 4.
assessment or what weight should be given to the additional elements enlisted in the Article.\textsuperscript{356} It does say that the lawyer shall be interviewed for the purpose of evaluating the effective and regular activity in the host State. That is part of the discretion given to the authority as in change of Article 10(1) where no interview is required. If the lawyer applying for admission cannot show sufficient experience in host State law for any significant period the authority should rightly be able to reject the application. What is a significant period is unclear. Paragraph 14 of the recitals gives a hint on the interpretation: “if the period of effective and regular professional activity of at least three years includes a \textit{shorter period} of practice in the law of the host Member State...”, making it clear that some period of practice of host State law is a requirement.

The authority should evaluate each application individually; taking all circumstances into account and it is not preferable that the authority uses a pre-established method in the matter.\textsuperscript{357} This is because the Directive itself does impose an individually based evaluation, depending on the experience of the lawyer and other relevant factors in connection with his professional activities and furthermore the assessment required is not fairly clear.

Upon integration to the profession the lawyer can take up the host-State professional title, but is entitled to use is home-State title alongside, if he so wishes.\textsuperscript{358} Conversely, there is nothing in the Directive that permits the host-State to require a lawyer admitted to the profession to use his home-State title if he does not wish to.\textsuperscript{359}

The competent authority in the host State has the power to deny the lawyer admission to the profession on grounds of public policy, in particular because of disciplinary proceedings, complaints or other incidents of the kind. This warrant is not granted to the authorities upon registration when legal professionals enter the country in order to pursue legal activities under home-country title. Integration into the profession gives the lawyer much closer bonds with the host State profession then when a lawyer practices under home-State title and is required to make that fact known to his clients. If the authority decides to deny admission, it must give a reasoned decision, which is subject to appeal under domestic law and as we have seen can find its way to the European Court of Justice. There is, therefore, little risk that a decision

\textsuperscript{356} Lonbay, Julian: \textit{“Lawyers bounding over the borders: the Draft Directive on lawyer’s establishment”}, p. 50-58
\textsuperscript{357} Adamson, Hamish: \textit{Free movement of Lawyers}, p. 120.
\textsuperscript{358} Article 10(6).
\textsuperscript{359} Adamson, Hamish: \textit{Free movement of Lawyers}, p.121
denying lawyers to enter the profession can be taken in an unjustifiably or discriminatory manner.\textsuperscript{360}

These rules make the exercise of free movement for lawyer substantially more advanced than before. Although, admission to the legal profession was one of the most disputed area of the Directive, Article 10 meets up to the demands of being a powerful and necessarily flexible instrument for the integration of migrant lawyers in the host State legal profession.

5.2.3. Salaried Lawyers

The Establishment Directive applies to both self-employed and salaried lawyers. Although, salaried lawyers can only practice as such in the host State if that is not contrary to the host State legislation.\textsuperscript{361} The drafters of the Directive, encountered serious criticism from many of the continental Member State, who emphasised on safeguarding the privileged status of lawyers as self employed.\textsuperscript{362} This was taken into account in the final draft and explains the phrase “to the extent that the host Member State so permits”. A salaried lawyer is defined as a lawyer that is an employee of another lawyer, an association or a firm of lawyers, or a public or private enterprise.\textsuperscript{363}

Member States vary on their regulations concerning salaried lawyers. In some States there is a complete prohibition on lawyers being employed by non-lawyers. Thus salaried legal professionals are not registered with the legal profession. Thus the Directive recognises that in some jurisdictions there are both self-employed and salaried legal professionals who are entitled to be registered with a competent authority and that in other jurisdictions within the European Union salaried legal professionals cannot be registered, and thus are not regulated by a competent authority.

This rule can be very restrictive for a lawyer wishing to establish in a country which does not allow salaried practices. The consequence seems to be that the lawyer is neither required nor entitled to register under the Directive and therefore regarded as not practising the legal profession.\textsuperscript{364} Conversely, a lawyer migrating from a Member State that prohibits salaried practices of legal professionals would be able to become employed in a Member State that allows such practices. Many Icelandic lawyers could be categorized as salaried lawyers, either

\textsuperscript{360} Article 10(4)
\textsuperscript{361} Article 8
\textsuperscript{362} Gromek-Broc, Katarzyna; “The Legal Profession in the European Union – A Comparative Analysis of four Member States”, p. 112.
\textsuperscript{363} Article 8
\textsuperscript{364} Adamson, Hamish: Free movement of Lawyers, p. 113-114
as employees of law firms or of public and private enterprises e.g. banks and official institutions.

The rule is rather strict. Also when considering that the Directive does not apply to law firm, since there is no recognition of legal offices or legal firms between Member States. The provisions of the Directive only apply to individuals holding legal qualifications. Law firms wishing to become established in another Member State process that transfer as a company. However, a lawyer working as a salaried lawyer in a law firm in the home State may be required to indicate that he is part of a grouping in the home State. We will look more closely into the rules on groupings in turn.

5.2.4. Joint Practices and Multi-Disciplinary Partnerships

Articles 11 and 12 on joint practices were considered necessary provisions because of the growing tendency for lawyers within the Community to practice in a group or jointly. Lawyer’s associations have increased substantially, since, in the complex and diversified market of legal services, associations can increase the possibilities for lawyer to optimize their talent. Furthermore, as Gromec-Broc notes, the globalisation of the legal profession has introduced new models for practising law, new structures, and organizations of the profession, sharp specialization and recognised the need to work in a team in the new international legal environment. Therefore it was essential that the Directive dealt with and made clear that the fact that a lawyer is a part of a grouping in his Member State should not amount to a hindrance to his right to the exercise of freedom of establishment. That is how the provisions in the Directive serve their purpose.

Joint practice or grouping according to the Directive is: “any entity, with or without legal personality, formed under the law of a Member State, within which lawyers pursue their professional activities jointly under a joint name”. The wording is a bit confusing. The Directive refers to joint practices and groupings and despite that, only the concept grouping is defined in Article 1. These words are meant to have equal meaning and could also be referred to as a firm or association of lawyers. Upon registration, a lawyer practising in a grouping

365 Recitals, para. 15.
366 Toms, Christopher: “Associations of Lawyers in the European Union”, p. 113-149.
367 Gromek-Broc, Katarzyna; “The Legal Profession in the European Union – A Comparative Analysis of four Member States”.
368 Article 1(2)(e)
in his home Member State should inform the registration authority in the host Member State about that fact.\textsuperscript{370}

According to Article 11(1), lawyers that belong to a grouping in their home Member State and practise under their home-country professional title in a host Member State are permitted to practice in a branch or agency of their grouping in the latter State. If the rules governing joint practices in the home State are incompatible with the same set of rules in the host State, the latter shall prevail, as long as their application is justified by the public interest in protecting clients and third parties.\textsuperscript{371} An example of a situation where the host State rule prevails is where Member States allow different forms of partnerships with different liability rules behind them. An example is the limited liability form of companies and partnerships which is not allowed in all Member States on grounds of protection for third parties.\textsuperscript{372}

Article 11(1) must be read in conjunction with Article 12, which states that a lawyer practising under home-country title may use the name of a grouping he belongs to in the home Member State. For that purpose he may be required to mention the legal form of the grouping in the home Member State and/or the names of members of the grouping also practising in the host Member State.\textsuperscript{373} This rule is focused on the consumer protection. It can be important for consumers of the legal service and third parties to know what form of company or association they are interacting with.\textsuperscript{374}

Article 11(2) opens up for the possibility of two or more lawyers from the same grouping or the same Member State who practice under home-country professional title in the same host Member State to form a joint practice, in whatever form is available to lawyers that are nationals of the host Member State.\textsuperscript{375} Accordingly, two or more migrant lawyers can practice together in a joint practice and they do not necessarily need to be a part of the same grouping in the home State. It is simply enough that the lawyers come from the same Member State. Paragraph 3 takes the possibility of joint practices one step further extending it to other mixed forms of joint practices. It requires Member State to take all necessary measures to make it possible for several lawyers from different Member States practising under home-country title to form a joint practice. This also applies to one or more lawyers practising under home-

\textsuperscript{370} Article 11(4)
\textsuperscript{371} Article 11
\textsuperscript{372} The limited liability partnership form is a popular form of groupings for the liberal professions, including lawyers e.g. in the United Kingdom. A similar form is available to Icelandic lawyers, either as \textit{Sameignarfælag} or \textit{Samlagsfælag}. No form of grouping in Iceland assumes total limited liability for all partners. (See, Áslaug Björgvinsdóttir: \textit{Félagarétur}, p. 50-55).
\textsuperscript{373} Article 12
\textsuperscript{374} Adamson, Hamish: \textit{Free movement of Lawyers}, p. 126
\textsuperscript{375} Article 11(2)
country title and one or more lawyers from the host Member State practising jointly. The Member State must allow such practice but the migrant lawyers are subject to the laws, regulations and administrative provisions of that State.376

Lastly, the Directive leaves open the possibility of multi-disciplinary partnerships (MDPs) despite the clear opposition from the civil law Professions in this regards.377 According to Article 11(5) multi-disciplinary groups are permitted if they are not prohibited under host State law.378 The Directive therefore remains quite neutral on the issue. According to the Directive a multi-disciplinary practice is one where the capital of the firms is held entirely or partly, or the name under which it practices is used, or, the decision-making power in the grouping is exercised by persons who are not lawyers.

The Directive in fact recognises the legitimacy of restrictions upon multi-disciplinary practice, following in the same steps as the CCBE which had repeatedly expressed its concerns about integrated forms of co-operation between lawyers and persons outside the legal professions, such as accountants. The CCBE noted in a position paper from 1999 that:

“The legal profession is a crucial and indispensable element in the administration of justice and in the protection available to citizens under the law. Safeguarding the efficacy and integrity of this factor within a democratic society, is a matter of the highest concern and priority. It is part of CCBE’s mission to ensure, that both are given their due. CCBE consequently advises that there are overriding reasons for not permitting forms of integrated cooperation between lawyers and non-lawyers with relevantly different professional duties and correspondingly different rules of conduct. In those countries where such forms of co-operation are permitted, lawyer independence, client confidentiality and disciplinary supervision of conflicts-of-interests rules must be safeguarded.”379

Notwithstanding the viewpoint taken by the CCBE, the Commission has in its report on competition in professional services from 2004 identified regulations governing business structure and multi-disciplinary practices as one of the categories of restrictive regulations in the EU professions.380 The report focuses on, amongst other, the profession of lawyers. The Commission notes that these types of regulations can have the effect of restricting certain types of ownerships of professional services companies and the scope for collaboration with other professions.381 For example, they might inhibit lawyers and accountants from providing integrated legal and accountancy advice for tax issues or prevent the development of one-stop

376 Article 11(3)
378 Article 11(5)
379 Position of CCBE on Integrated Forms of Co-operation between Lawyers and Persons outside the Legal Profession, November 12th 1999.
381 ibid, para. 59.
shops for professional services in rural areas. Aside from that, these types of regulations can be necessary to ensure lawyers personal responsibility and liability towards clients, independence and avoid conflicts of interest. Thus, if law firms were controlled or influenced by non-professionals it might compromise practitioners’ judgment or respect for professional values.\textsuperscript{382} In the report it is noted that regulations hindering collaboration between members of the same profession would be least justifiable on Community level. It follows, that these types of regulations might be more justifiable in professions where there is a strong need for independence or professional liability, fitting with the description of the legal profession. The Commission emphasises that there might be a possibility to replace ownership restrictions with less restrictive rules which have less effect on competition.\textsuperscript{383}

The Court had a very interesting contribution to the discussion on MDP’s of lawyers in Europe in it judgment in Wouters\textsuperscript{384}. The case does not however consider the interpretation of the Article 11(5) of the Directive but nevertheless contributes to its interpretation. In the case the Court considered whether a Dutch rule prohibiting multi-disciplinary partnerships between members of the bar and accountants constitutes a restriction and whether it could be justified. The Dutch Bar prohibited lawyers from entering MDPs with accountants on the grounds that it is necessary to protect the confidential relationship between the lawyer and his client. The view taken by the Court was a rather strict one. It did find the rule to constitute a restriction but that it could be justified because of the special nature of the legal profession. Thus, the Court recognized the core values surrounding the legal profession; independence, absence of conflicts of interest, and professional secrecy/confidentiality. Furthermore, it found that these values qualify as public interest consideration.\textsuperscript{385} This was in line with what the CCBE had emphasised for many years in connection with MDPs of lawyers with other types of professionals.\textsuperscript{386}

Moreover, the Court considered whether such business structure regulations could have any effect on competition and whether it infringed Article 81(1). To begin with the Court confirmed that the Dutch Bar should be considered an association of undertakings within the meaning of Article 81(1). It arrived at this conclusion since when the bar authority adopted the banning regulation it was not exercising public authority powers. It was simply acting as a


\textsuperscript{384} Case C-309/99, J.C.J. Wouters et al. vs. Algemene Raad van de Nederland Orde van Advocaten, [2002], ECR I-1577.

\textsuperscript{385} \textit{ibid}, para. 119-123.

\textsuperscript{386} CCBE Position on Multi-disciplinary Partnerships (MDPs), June 2005.
regulatory body. The Court continued with considering the effect of the ban on competition within the Community and found that even though the ban was liable to infringe EC competition rules, it could be justified as it was necessary for the proper practice and function of the legal profession. The regulation was based on the fact that the rules of professional secrecy for accountants were not as strict as those applicable to lawyers. Therefore, the Court concluded, the ban could reasonably be considered to be necessary in order to ensure the proper practice of the legal profession, as it is organised in the State. This is much in line with the Establishment Directive where the possibility of prohibiting MDPs is left open for States which have traditionally done so.

In its judgement the Court hinted in the case that there are certain assets to MDPs of lawyers and accountants:

Since legal services, especially in business law, more and more frequently require recourse to an accountant, a multi-disciplinary partnership of members of the Bar and accountants would make it possible to offer a wider range of services, and indeed to propose new ones. Clients would thus be able to turn to a single structure for a large part of the services necessary for the organisation, management and operation of their business (the one-stop shop advantage).

It will be interesting to see what the development will be on this issue in the future.

The Court attributed in its judgment to the freedom of national bars to regulate its own affairs and under certain circumstance restrict the freedom of its member while doing so. In the Wouters case, even though the effects of the ban restricted competition, the regulation was necessary for the proper practice of the legal profession within the State. Furthermore, the Court recognised the importance of the key core values surrounding the legal profession and its activities and the importance of allowing regulation on national level in matters which can affect the profession to the worse. This means that the core values of the legal profession, regulated by the national competent authority, can pre-empt EC competition principles.
5.3. Special Comment on the Case C-168/98, Grand-Duchy of Luxembourg v. European Parliament and Council of the European Union

Luxembourg was one of the Member States that opposed to the Establishment Directive from the start. As has been detailed above, after years of lengthy discussions, the Community finally reached an agreement which led up to the adoption of the Establishment Directive. The waters were muddied further when Luxembourg brought an action for its annulment before the Court on 4 May 1998, less than two months after the entry into force of the Directive. The Grand Duchy of Luxembourg alleged an infringement of the second paragraph of Article 43 EC, of the second sentence of Article 47(2) EC and infringement of Article 253 EC. In support of its pleas in law, it called into question Articles 2, 5 and 11 of the Directive. With its judgment in the case the Court once again, made a ravelling contribution to the establishment of a single market without borders for legal professional, rejecting Luxembourg’s claims for annulment. The judgment gives a very good insight into the Directive and deserves a thorough discussion.

5.3.1. The Court’s Judgment

The first argument concerning the second paragraph of Article 43 was divided into two parts by the applicant. Firstly, that the Directive infringed the Article by producing difference in treatment between nationals and migrants and secondly that it risked the protection of public interest, especially those of consumers. Concerning the first part Luxembourg argued that by abolishing all requirements of prior training in the law of the host Member State and to permit migrant lawyers established under home-country title to practice host State law, the Directive could lead to reverse discrimination, contrary to Article 43. Accordingly, this was the case since Luxembourgian lawyers had to fulfil professional qualifications according to Luxembourgian law but migrant lawyers, establishing in the State in accordance with the Establishment Directive, did not have to fulfil any such requirements. The Court disagreed with the applicant and found there to be no discrimination, since the situation of a migrant lawyer practising under his home-country title and the situation of a national lawyer are not comparable. The difference being that the latter can take up all activities opened or reserved to the profession of lawyers by the host Member State, whereas the former can be forbidden to practice certain activities and may be subject to certain obligations when representing a


392 Under Article 230 the time limit is 3 months.
client in legal proceedings. The Court referred to Articles 5(2) and 5(3) in this connection. In addition, the Court emphasised on the protection of Article 4, which requires the lawyer to make noticeable that he is practising under home-country title.\textsuperscript{393}

The Court also rejected the second part of the first plea. In that part Luxembourg challenged the Directive on grounds of the interest of consumers and proper administration of justice. It found that by abolishing all requirements of training in the law of the host State the Directive diminished all quality control of the Member States, leading to a weaker consumer protection. Luxembourg emphasised that the Directive makes nothing of the principle laid down by law that every candidate for the profession of \textit{avocat} should be tested on his knowledge of Luxembourgish law, to the detriment of consumer protection. In that connection it maintained the special characteristic of law and the legal profession, and the need for thorough knowledge of national law, making dispensation from knowledge of host State law unfeasible.

The Court confirmed that, in absence of coordination at Community level, Member States are allowed to pose certain restrictions that constitute barriers to the free movement, if necessary to pursue a legitimate aim and justified on public interest grounds, such as consumer protection. However, Article 57(2) is one of the provisions that authorises the Community to eliminate that type of obstacles, having regards to the protection of public interest. The Community does enjoy a wide margin of discretion for assessing adequate protection. The Court found that consumer protection and the proper administration of justice are properly safeguarded in the Directive.\textsuperscript{394} This protection is set up in a system of consumer information, restrictions on certain activities of the profession, a number of applicable rules of conduct, compulsory insurance and the joint disciplinary jurisdiction of both host State and home State authorities, which inevitably ensures the public interest that the Luxembourg government claimed was prejudiced. The Court concluded that the legislator had not abolished the requirement that the lawyer concerned should know the national law applicable, but had simply released him from the obligation to prove that knowledge in advance. Therefore, the Court found no breach of Article 43(2).\textsuperscript{395}

In its second and more technical plea Luxembourg maintained that the second sentence of Article 57(2) had been breached, since the Directive had been adopted by qualified majority as required by Article 189b EC, and not rightly in accordance with the second sentence of

\textsuperscript{393} Case C-168/98, Grand-Duchy of Luxembourg v. European Parliament and Council of the European Union, [2000], ECR I-9131, para. 24-29
\textsuperscript{394} \textit{ibid}, para. 32-41.
\textsuperscript{395} \textit{ibid}, 43-44.
Article 57(2) which requires unanimous voting. That is to say, that the Directive had not been adopted on the correct legal basis.

According to Article 57(2); “the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, 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 in accordance with the procedure referred to in Article 189b.” Luxembourg submitted that since there was no longer a training requirement there was a definite amendment to existing major principles governing training and conditions of access to the profession and especially referred to Articles 2, 5 and 11 of the Directive.

The Court found that the Directive simply established a mechanism for the mutual recognition of legal professional titles intended to allow the unrestricted practice of the profession, which was in fact a supplement to the system under Directive 89/48/EEC. Therefore, the Directive introduced no new principles requiring amendments in the Member States law, since the Member States were already required to have adapted national law to the prior mutual recognition legislation. Consequently, it was appropriate to adopt the Directive by qualified majority according to Article 47(1) and thus, Articles 2 and 5 of the Directive fall within the Scope of Article 47(1) and not 47(2) as upheld by Luxembourg.396

In regards of Article 11 of the Directive, concerning joint practice, the Court stated that is does not deal with conditions for access to the profession of lawyer but rather certain conditions for the exercise of the profession. Furthermore, the Article does not require Member States to accept the conditions, if joint practices of lawyers, is not permitted in the law of the State. As a result, the rules on joint practice could be properly adopted on the basis of the first and third sentences of Article 57(2).397

The third and last plea of Luxembourg concerned infringement of the obligation to state the reason on which the Directive was based on, according to Article 253 (ex. 190) EC. This was the case according to Luxembourg since, the Commission and the European Parliament had failed to provide any serious justification for abandoning all requirements of a prior qualification in the national law of the host Member State. Furthermore, there was no explanation of the need to grant migrant lawyers immediate access to the profession and the

397 ibid, 59.
possibility to work with host State law as of day one. Luxembourg also argued that the right to integrate into the legal profession of the host Member State after a certain period of time was contrary to the possibility of unlimited establishment under home title.

The Court simply reviewed the recitals of the Directive and concluded that they firstly contain a clear and precise indication of the general situation which led to the adoption of the Establishment Directive and secondly, contain sufficient statement of the objectives it proposes to reach.\(^{398}\) The reasons behind the adoption can be read from recitals 1, 2, 6 and 10: the existing inequalities in the Member States concerning access to and exercise of the legal profession and the apparent need to complete the regulatory framework initiated by Directives 77/249/EEC and 89/48/EEC. The objectives can be read from recitals 3, 5, 6 and 9: to facilitate the practice of the profession by non-nationals, both by way of practising under home-country title or by integration, with the aim of eradicating barriers, eliminating distortion in competition but at the same time regarding the interest of consumers.\(^{399}\)

Finally, the Court found there to be no inconsistencies between the recitals referring to migrant lawyers practising under home-country title and migrant lawyers obtaining integration into the host State profession, as the two are subject to different rules.\(^{400}\) Thus, the Community legislator had satisfied the obligation to state reasons laid down in Article 190 of the Treaty.\(^{401}\) The Court’s decision as regards the duty to state reason provides additional strength to its conclusions concerning the Directive’s legal basis and bears witness to the Court’s unconditional commitment to promoting freedom of establishment for lawyers.\(^{402}\)

### 5.3.2. The Advocate General’s Opinion

Advocate General Colomer delivered on 24 February 2000 his in depth Opinion in the case.\(^{403}\) He went into a much more detailed analysis of the provisions of the Directive, the alleged reverse discrimination and lack of legal basis. Furthermore, he examines the case not only with regards to Articles 2, 5 and 11 of the Directive but also with regard to Article 10

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\(^{399}\) See paragraph 64 of the judgment and recitals 3, 5, 6 and 9 of the Directive: Also, Cabral, Pedro: Case Law: Case C-168/98, Grand Duchy of Luxembourg v. European Parliament and Council of the European Union, p. 139


\(^{401}\) ibid para. 63.


concerning admission to the legal profession in the host State. It is quite remarkable that Luxembourg didn’t question Article 10 in its plea, since that Article is prone to require the most altering of Member States rules and laws governing professional legal qualification.

The Advocate General’s opinion regarding the alleged discrimination was not exclusively built on the comparability of the situations as the Court’s judgment. It also considered whether the Directive imposed reverse discrimination, that is, a discrimination working to the detriment of host State lawyers. First of all, he found no discrimination between host State and migrant lawyers, since the two situations are different. He continued by noting that Article 43 confers rights, on self-employed persons who establish themselves in another Member States, to equal treatment with nationals. Those same rights are conferred on nationals of the host State when exercising their right to free movement within the Union. There is therefore no discrimination since both are treated identically. Furthermore, the Article does not confer any rights on workers who have not exercised their right to movement as the Treaty provisions on freedom of establishment do not apply to situations which are purely internal to a Member State. Consequently, there was no existing discrimination to be challenged on basis of Article 43.

The Advocate General basis his analysis principally on Article 4(1) of the Directive, whereas the Court’s reasoning is based on equal importance of Article 4(1) and Articles 5(2) and 5(3). The problem with the Courts analysis is that the special requirements under Articles 5(2) and 5(3) only apply if the host State law so requires and is therefore not inevitable, whereas Article 4(1) always applies and is arguably the decisive element for distinction between the two sets of lawyers.

The Advocate General also compared the situation of a host State lawyer with that of an integrated lawyer under Article 10 of the Directive. He found that the Directive treated national lawyers and integrated lawyers in the same way as in both cases it is presumed that the lawyer has sufficient skills to practice his profession under the professional title of the host State. He concluded that there is no discrimination to the detriment of national lawyers.

Concerning the second argument of Luxembourg, the Advocate General’s approach is different from that of the Court which solemnly focused on determining whether Articles 2, 5

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404 Paragraphs 23-24 of the opinion.
405 Paragraph 26 of the opinion
407 Paragraph 27 of the opinion
and 11, fall within the scope of Article 47(1). The Advocate General’s took another route in the analysis and made a wider assessment as to whether the Directive amended the existing major principles governing training and access to the profession and most importantly considered whether Article 10 was prone to make such amendments. After determining that the rights laid down in Articles 2, 5 and 11 of the Directive derived directly from the Treaty or came as a consequence of the Service Directive 77/249 he concluded that Luxembourg’s argument did not apply to lawyers practising under home-country professional title.408

Here is a clear difference in approach from that of the Court which considered that the source of the rights was in the Establishment Directive itself.409 He emphasised that the Lawyers’ service Directive already confers on migrant lawyers the possibility to give advice on the law of the host State and it would be inconsistent to deny a migrant lawyer practising on a permanent basis in the host State under his home country title a right which is recognised to a migrant lawyer who only provides services. Especially when kept in mind that the former obviously has a much closer link to the legal order of that State than the latter.410

Concerning Article 10 the Advocate General found that only Article 10(1) could be considered connected with Luxembourg’s complaints as the second and third paragraph recognise the right of the host country to verify that the acquired skills are at hand.411 According to the Opinion, Article 10 does not amend the existing major principles governing training and access to the profession in the Member States, it only generalizes the system for integration into the profession after three years of effective and regular practise that Article 4(1)(b) of Directive 89/48 already offered as a choice. Therefore, the possibility of lawyers joining the profession in the host country without having to pass an aptitude test already existed as a principle.412 Pedro Cabral praises this analysis of the Advocate General and adds that Article 10 of the Establishment Directive provides a powerful yet extremely flexible instrument for the integration of migrant lawyers in the host State profession and as such it must at all costs be protected against the Member State’s protectionist attitudes.413 It has yet to be seen how the Court will interpret Article 10 when it eventually comes to its consideration.

408 Paragraph 50 of the opinion.
410 Paragraph 44 of the opinion
411 Paragraph 52 of the opinion
412 Paragraph 69 of the opinion
5.3.3. Comments

It seems like the Court was juggling a fine line in its first judgment concerning the Lawyers Establishment Directive. Reading behind the lines it is clear that the Court’s focus was on saving the newly born Directive and at the same time the development of lawyers’ free movement within the Union. This is apparent from the conclusions. In the first argument the Court found that the situation of lawyers practising under home-country professional title and lawyers established under their home country title is not comparable. Thus, acknowledging the fact that with the Establishment Directive there were now three routes for lawyers free movement; lawyers providing temporary and occasional services in another Member State, lawyers established under home-country professional title in another Member State and lawyers integrated into the profession in another Member State. However, when considering the second argument the Court found the Directive to be supplementary to the system laid down in Directive 89/48/EC. Obviously, this conclusion moves the Directive away from the unanimous legislative procedure in Article 57(2) but is not consistent with the conclusion concerning the first argument, because it links the two systems instead of regarding them as separate. If the Court would have confirmed that there is a new system of establishment for lawyers than the procedure in Article 57(2) accurately should have applied and then it is highly likely that Luxembourg would have voted against it, making the realisation of a lawyer’s establishment Directive next to impossible.

Furthermore, the Courts conclusion that the Directive contains a sufficient form of protection for consumers is important. It is important in the light of the importance for users of legal service to be able to approach Community lawyers that move freely within the Economic Area without risk. Luxembourg’s attitude is coloured by the assumption that migrating lawyers are likely to abuse their freedom, by assigning up for project they are not qualified to handle, working to the detriment of the legal profession and affect consumers to the worse. Luxembourg’s assumption that this is a risk with migrant lawyers and not national lawyers can be considered deeply biased.414

The Advocate General discussed this in his opinion, stating that it is impossible to hinder lawyers, whether national or migrant, from behaving negligently.415 That is simply the nature of all profession; there will always be a rotten apple in between. To this extend, the Advocate General, points out that Luxembourg is free to modify its legislation, prohibiting lawyers from

415 Paragraph 47 of the Opinion.
accepting cases which they know they do not have the competence to handle or introducing more severe sanctions for professional misconduct. This rule is emphasised in Article 3.1.3 of the CCBE’s Code of Professional Conduct where it states that it is the lawyers’ obligation to not handle matters which he knows or ought to know he is not competent to handle.\textsuperscript{416}

Despite the occasional rotten apple, modern European lawyers’ should be looked at as mostly highly qualified and specialized professionals and the free movement of such professionals should be regarded as a positive step towards a stronger legal market with consolidated knowledge and practices in different specialized fields.

5.4. Concluding Comments

The system that the Lawyers’ Establishment Directive proposes is very progressive and takes a big step forward when considering the earlier systems existing under the Lawyers’ Service Directive and the Mutual Recognition Directives.

Now, a European Lawyer can choose between three different routes towards integration. As opposed to the older integration possibilities under the mutual recognition system where the lawyer was in all Member States subjected to an aptitude test, the new system gives the migrating lawyer the possibility to choose which measure to undergo. With that betterment the field of free movement of legal professionals has moved closer to achieving the integration aimed at with Article 47(1) of the Treaty.

Also, the Community legislator succeeded in creating a possibility for a qualified lawyer to register under home State title. That way the lawyer can become established and practice law in the host Member State simply by registering with the host State authority. This allows the lawyer, without prior examination of his legal qualification, to practice host State law on almost an equal footing with the host State lawyers.

Even though the plan is to allow the lawyer to work on the same level as a host State lawyers, he is always classified as foreign and will in that sense never be equal to national lawyers while working in the home State. However, the road does not end there and after three years of practising host State law the lawyer can apply for integration. That is when a foreign lawyer can in fact say that he is practising law on equal footing with the host State lawyers.

In this chapter the requirements for registration, area of activity and exceptions to the permissible activities have been looked into. With the interpretation of the Court, it is clear

\textsuperscript{416} Code of Professional Conduct adopted by the Council of the Bars and Law Societies of the European Union (CCBE), referred to in para. 42 of the judgment.
that the exceptions to activities and the requirements for registration listed in the Directive are exhaustive. Therefore, Member States are not allowed to steer away from the specifics detailed in the Directive. This is an important interpretation since if Member States would add requirements in their national law it would obviously jeopardize the functioning of the system.

The Lawyers’ Establishment Directive deals with prior untouched areas such as salaried lawyers and the right for lawyers’ to practice in a joint grouping or a multi-disciplinary partnership. By that the Directive answers to the call of a modernized and more globalized European legal profession. Although the Directive acknowledges the existence of salaried lawyers and joint practices, including MDPs, it left the choice of whether to allow such practices at national level, in the hands of Member States. These types of legal practices are therefore only allowed in Member States where such practices are permitted. It is understandable why the Directive did not stretch further in this matter. New types of practices unfortunately bare the risk of jeopardizing some of the key values of the legal profession, such as; the independence, absence of conflicts of interest, and professional secrecy/confidentiality. These matters will undoubtedly be in the limelight in future development in the area of free movement of lawyers.

From the coverage and detailed descriptions on the rights conferred on lawyers by the Directive it is easy to say that the Lawyers’ Establishment Directive is a powerful and progressive tool which fulfils its purpose without risking the interest of consumers. Looking closer into the implementation of the free movement system for lawyers can possible give a clearer picture of how it works in practice.
6. The Implementation of the Lawyers Free Movement System in Iceland and Sweden

After over thirty years of slow development the system for lawyers’ free movement is in place. Now it is in the hands of Member States to implement the Directives properly in their national legislation so that European lawyers can take advantage of them. In previous chapters concerning the legislation it was noted that the Commission has on several occasions brought before the Court cases against Member States for the improper implementation of the Directives. In this chapter the aim is to address the implementation of the lawyers’ free movement system in Iceland and Sweden.

It is interesting to look at the actual numbers of lawyers that exercise their right to free movement. The CCBE has published statistics on the number of lawyers that take advantage of the Lawyers’ Establishment Directive. The most recent statistics, published on 25 Mars 2009, count for the number of lawyers registered under their home country professional title, according to Article 2 of the Lawyers’ Establishment Directive in the year 2008. According to that there are 3566 lawyers registered under home title in total in the European Community, out of that 2 in Iceland and 14 in Sweden. The most popular country for lawyers practising under home-State title is France with 708 registered lawyers. Thereafter, is Belgium with 580 lawyers.417

Unfortunately, the information available on number of Community lawyers integrated in a host State profession according to Article 10 of the Lawyers’ Establishment Directive is outdated. The last statistical survey published by the CCBE is based on data from 2005. Under that period there were no lawyers integrated into the national legal profession in neither Iceland nor Sweden. France provided no data and Belgium had a total of nine lawyers integrated into the profession. The country listed with most lawyers integrated in accordance with Article 10 is Liechtenstein with 20 lawyers.418

No statistics are available on how many lawyers move between Member States on the basis of the Lawyers’ Service Directive. Probably, there are quite many lawyers that practice occasional legal service activities in other Member States which is hard to collect numeric data on. However, it would be interesting to see how many lawyers provide legal services on a temporary basis in another Member State with the necessary infrastructure, that is, those

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417 See Annex II.
418 See Annex III
lawyers that are on the borderline of being permanently established or temporarily providing services.

The European Commission provides for an online database of regulated professions in the EU Member States, EEA countries and Switzerland. This database lists the number of lawyers that have received recognition to their legal diploma on grounds of the Mutual Recognition Directives. According to the database there are nineteen lawyers that have passed the aptitude test in Sweden, in the years 1997-2007. Most of them are Danish. Furthermore, there are two lawyers that received automatic recognition and did not have to go through compensatory measures. This is not in line with recent information retrieved from the Swedish Bar Association. As of August 2009 there are 14 European lawyers practising law in Sweden. There are no statistics available for Iceland on this database.

6.1. Iceland

The official legal professional title in Iceland is lögmaður. In order to receive that title the legal professional must pass a special exam in accordance with Regulation no. 1095/2005 on the granting of District Court Attorneys rights. To be eligible for the exam the lawyer must have a legal diploma from a recognised University in Iceland. Lawyers that have a legal diploma from another University which is comparable to the Icelandic diploma can be granted a permission to take the exam. Then the lawyer must provide the exam board with information demonstrating sufficient knowledge in Icelandic law. The exam committee can require the lawyer to take a special exam to compensate for lack in knowledge of national law. Note that as with the two Lawyers’ Directives, the free movement system is open for fully fledged lawyers that are holders of one of the professional titles listed in the Directives.

Article 4 in the abovementioned regulation is one of the provisions that the State of Iceland has adopted to implement the EU system of Lawyers’ right to free movement. Furthermore, Iceland has implemented special regulations for this purpose.

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419 European Commission, Database of regulated professions in the EU Member States, EEA countries and Switzerland. (http://ec.europa.eu/internal_market/qualifications/regprof/index.cfm?fuseaction=home.welcome )
420 Information from Kristin Persson, Swedish Bar Association, e-mail on 21.08.2009
421 The free movement system is fully extended to lawyers of the European Economic Area (EEA); hence it is applicable in Iceland and for Icelandic lawyers wishing to pursue a career in another State of the European Economic Area.
422 Article 4, Regulation no. 1095/2005.
423 Annex I
Regulation 648/2005\textsuperscript{424} governs the right of attorneys from another EEA-State to Render Time-limited Services in the Country. The regulation implements the Lawyers’ Services Directive into the Iceland legal system. In Article 4 the rule of acting in conjunction is adopted;

An attorney rendering service in this Country in accordance with the present Regulations may safeguard the interests of parties to a Case before a Court of Law in this Country corresponding to the Court at which he is authorized in his home country, provided that he practise at Sessions with an Attorney who has acquired Attorney’s right in this Country and is then responsible vis-à-vis the Court of Law.\textsuperscript{425}

The Icelandic legislator has decided to require in this connection the lawyer to practice at Session with a host State professional. The English translation is remarkably confusing. It is, however, clear from the original text that what the provision intends for is that the migrant lawyer works in conjunction with a local lawyer who is responsible to the Court. This is not in accordance with the Court’s interpretation of the requirement to act in conjunction. Icelandic law does not require legal representation before the courts and thus the State cannot require a migrant lawyer to work in conjunction with a local lawyer.

It is noteworthy that a fellow EFTA State to Iceland, Lichtenstein, was considered to have improperly implemented the act in conjunction provision of the Lawyers’ Service Directive. Lichtenstein law required a migrant lawyer to act in conjunction with a local lawyer in proceedings. This was the case even though representation by a lawyer is not mandatory in the State. The matter ended up before the EFTA-Court\textsuperscript{426} which did find the national rule incompatible with the Directive. However, the Court found that the EEA Agreement does not require that a provision of a directive that has been made part of the EEA Agreement is directly applicable and takes precedence over a national rule that fails to transpose the relevant EEA rule correctly into national law.\textsuperscript{427}

Regulation no. 896/2004, respecting the Right of Attorneys from another EEA-State to Render Services in this Country, implements the Lawyers’ Establishment Directive. The same rule of acting in conjunction is to be found in this regulation in Article 4(2). Apart from that requirement, the lawyer working under home State title is authorized to give legal advice and

\textsuperscript{424} Regulation 648/2005, respecting the Right of Attorneys from another EEA-State to Render Time-limited Service in this Country, 16.06.2005
\textsuperscript{425} Article 4, Regulation 648/2005, respecting the Right of Attorneys from another EEA-State to Render Time-limited Service in this Country, 16.06.2005.
\textsuperscript{427} \textit{ibid}, para. 43.
practice law on the same grounds as a national lawyer. The requirements for registration are exactly the same as laid out by the Lawyers’ Establishment Directive.

Article 10 of the Lawyers’ Establishment Directive is implemented in Articles 9 and 10 in the Regulation. The former Article provides for the rule that if the host State lawyer has practised under home State title for at least 3 years he shall be exempted from the requirements of the Mutual Recognition Directive. Article 10 mirrors Article 10(3) of the Directive, allowing the lawyer to become integrated if he can demonstrate that he has for at least 3 years practised law in the Country, but for a shorter time practising in the Icelandic judicial system. The Icelandic Regulation does not mention the third alternative for integration: with either an adaption period or an aptitude test in accordance with the Mutual Recognition Directive. This alternative is specially mentioned in Article 10(1) of the Lawyers’ Establishment Directive since it allows the lawyer to choose between either an aptitude test or adaption period. In the Mutual Recognition Directive this choice is left to the discretion of the State. Thus, the rule in Article 10(1) should have been included in the Regulation.

The Icelandic Bar Association (Lögmannafélag Íslands) is the designated competent authority in Iceland. The migrant lawyer is required to work in conformity with the Code of Ethics of Icelandic Attorneys and Law respecting Attorneys, with the exception of conditions concerning a place of business and membership of the Icelandic Bar Association.

Article 12 considers the possibilities for lawyers to work in groupings. It specifically mentions that in cases where the rules concerning groupings in the home State are incompatible with the rules on groups of lawyers in Iceland, the Icelandic provisions shall apply, as long as they pursue legitimate aims, such as, protection of customers and third parties. Article 13 concerns MDPs, but not just any MDPs. It is a specific provision on MDPs of lawyers and accountants, which are according to Icelandic law not permitted. The provision is silent on whether MDPs of lawyers and other professions are incompatible with national law or not.

Two German lawyers have acquired the right to call themselves lögmaður and thus finished the obligatory exam imposed on national lawyers. The first one, who acquired the title in 2002, was only a holder of a legal diploma from his country and therefore not the holder of a professional title in accordance with the Directives. The Committee evaluating the

428 Codex Ethicus for the Icelandic Bar Association
429 Article 5
legal diploma found it to be equal to an Icelandic legal diploma. However, it was determined that it would be appropriate to acquire the German lawyer to take an aptitude test in constitutional law and procedural law. The latter lawyer which became integrated in 2005, was a fully qualified professional from the host State and was therefore only required to take an aptitude test on the Iceland Code of Ethics and Act on Lawyers. After passing the custom-made tests both lawyers where permitted to take the test for entrance into the profession. In addition, one solicitor from the United Kingdom has been registered under home-State title in accordance with the Lawyers’ Establishment Directive.430

6.2. Sweden

The official professional legal title in Sweden is *advokat* and they have a formal monopoly on their title. That means that only lawyers that are officially recognized as *advokat* can practice under the title. All legal professionals that have acquired a Swedish University law degree can title themselves as *jurist* which entitles them the right to give legal advice.431 *Jurist byrå* is the name of the law firm a *jurist* is allowed to establish and practice law from. It is quite common for *jurists* within Sweden to work as salaried lawyers and thus have no need to acquire entrance into the *advokat* profession.432

For a *jurist* to become an *advokat* he must have a *jur.kand* diploma from a university. It says nothing on whether that diploma must be national or not, but in accordance with EC law free movement law that would be a discriminatory requirement. Furthermore, the *jurist* must have professional practice of five years where during at least three of them he has been working for a law firm or in his own *jurist byrå*. In addition to this, the *jurist* must pass an oral exam after a course which is compulsory for retrieving the title. This exam is the Bar exam for entrance into the Swedish Bar association; advokatsamfundet. The *advokat* must furthermore, be known for his integrity and be suitable to pursue the legal profession.433 The requirements for entering the Bar in Sweden are therefore much stricter than in Iceland.

It is to be noted that even persons with no law degree and who thus have no legal training, can practise law. There is nothing that prevents anybody from practising as legal adviser or legal counsel, or from providing other legal services to the public or enterprises. The exact number of legal practitioners without a law degree is unknown, but they are very few. They

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430 Information received from Hjalti Zóphóníasson, Director of Civil Affairs, Ministry of Justice and Ecclesiastical affairs, by e-mail on 18.08.2009.
431 Lonbay, Julian: Elixir website, outlining the training and professional requirements for legal professionals in the Member States of the European Union.
432 ibid.
433 Instructions for application for admission to the Swedish Bar Association, (www.advokatsamfundet.se).
can be easily differentiated from the qualified lawyers, since the qualified lawyer will normally practice under the applicable title, either *advokat* or *jur. kand.* Consequently, a migrant lawyer cannot be required to act in conjunction with a national lawyer in legal proceedings.

There is therefore no legal monopoly on legal activities making the Swedish law market quite easy to access for other European legal professional, especially if the professional wishes to register under home-State title. Since the requirements for access to the *advokat* profession are quite strict for nationals and the same applies for migrating lawyers it is likely the migrating lawyers will opt for practising under home-State title in the State.

Rules governing admission of members to the Swedish bar are to be found in section 3 of the Charter of the Swedish Bar Association, the latest amendments of which entered into force on 1 January 2004. These rules are also to be found in chapter 8, section 2 of Rättegangsbalken (The Swedish Code of Judicial Procedures). Both the Lawyers’ Service Directive and the Lawyers’ Establishment Directive are implemented in that chapter of the Code of Judicial Procedure. According to Section 2:

Membership in the Bar Association is open only to a person who:

1. is a Swedish citizen or a citizen in another state within the European Economic Area;
2. is resident in Sweden, or in another state within the European Economic Area;
3. has passed proficiency tests prescribed for Judicial service;
4. has had the practical and theoretical training required for work as an advocate;
5. has acquired a reputation for integrity; and
6. is also otherwise considered suitable to practise as an advocate.

There are certain exceptions from these requirements. The board of the Bar Association may, in particular cases, waive the admission requirements 1 and 2 of the first paragraph. What can lead to exceptions of requirements 1 and 2 is not further explained. The lawyer can also be exempted from the requirements 3 and 4 of the first paragraph if he is authorized as advocate in other Member State in accordance with the rules regulating the profession in that State. Then it says in the third paragraph; “A person who has completed an education required to be an advocate in a states within the European Economic Area and in Sweden has passed an examination showing that he has sufficient knowledge of the Swedish legal system shall be

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434 Lonbay, Julian: Elixir website, outlining the training and professional requirements for legal professionals in the Member States of the European Union.
435 Information from Kristin Persson, Swedish Bar Association, e-mail on 21.08.2009
deemed to fulfil the requirements under 3 and 4 of the first paragraph”. This refers specifically to an aptitude test.

In order to be considered to have passed an examination demonstrating sufficient knowledge of the Swedish legal system, the applicant must have passed exams in two course; Introduction to law and Procedural law. Furthermore, the lawyers must have participated in the preparatory course for, and passed, the Swedish bar examination. Consequently, these are the requirements for integration into the legal profession as proposed by Article 10(1) of the Lawyers´ Establishment Directive.

However, in the Code of Judicial Procedures there is no clear rule on integration into the legal profession after a period of practice under home-State title in accordance with Article 10 (a) and (b). Interestingly, in paragraph, section 2 of Chapter 8, there is a special provision applying to lawyers from Denmark, Finland, Iceland or Norway. If lawyers authorised as advocates in these States, in accordance with the rules applicable for the profession, have practiced law for at least three years as assistant to an advocate office in Sweden, they are considered to fulfil requirements 3 to 6 of the provisions.

This provision should in accordance with the Lawyers´ Establishment Directive apply to all qualified legal professionals of the European Union. Rather oddly, the right of all European legal professionals to become integrated into the legal profession in Sweden is dealt with in Article 3(3) of the Charter of the Swedish Bar Association. Accordingly, a lawyer is considered meeting the requirements of items 2, 3 and 5 of the first paragraph of the Swedish Code of Judicial Procedure, if he has practised as a registered lawyer in the State subsequently, actually and continuously, for at least three years, provided that the practice has primarily involved Swedish law. If the practice has not primarily involved Swedish law but the registered person has in some other manner acquired sufficient proficiency and experience the lawyer is to be admitted as a member of the Bar Association. That way Article 10(2) and (3) of the Lawyers’ Establishment Directive are incorporated into the Swedish legal system.

Article 4(a) implements Article 2 of the Lawyers’ Establishment Directive regarding practice under home-State title. According to it any person who is licensed as the counterpart of an advokat in another State within the European Union and who practices in Sweden on a permanent basis under home State title has a right register with the Swedish Bar Association.

436 Chapter 8, section 2 of Rattegangsbalken (The Swedish Code of Judicial Procedures), para. 1-3.
The Swedish bar thus requires the lawyer registering under home-State title to have the equivalence professional title in the home State, which is in accordance with the list of professional titles provided for by the Treaty. (See Annex I).

In Sweden the lawyers’ free movement Directives are implemented with adjusting the national legislation with a very broad provisions in chapter 8, section 2 of the Swedish Code of Judicial Procedure. More specific rules applicable are to be found in application instructions adopted by the Swedish Bar and in the Charter of the Swedish Bar association. The provisions are not very clear and they assume that the procedure surrounding lawyers’ moving to the State is done on case-by-case basis. Furthermore, for integration into the profession an aptitude test appears to be informally required. According to the Swedish Bar Association there are now twelve registered EU lawyers in the State.438

438 Information from Kristin Persson, Swedish Bar Association, e-mail on 21.08.2009.
7. Conclusion

This expedition through a specific field of EC free movement law began with describing how fifty years ago no one would have imagined that lawyers would be easily crossing borders within the Union to provide their legal services, either on temporary or permanent basis. Considering the nature of the legal profession the progress made, so far, is quite remarkable. This thesis has mainly focused on the development in the field aiming at establishing how effective the system is in practice. Many questions had to be answered before reaching the conclusion that the lawyers free movement system is in fact effective but needs to continue evolving along with the changing tide of legal practices within the Community.

Many factors contribute to the outcome, one of them being the essential role of the Court in the development of a system of free movement for legal professionals. This development was slow and the Court acted as a necessary force for action when progress by the legislator was none. The Court took a big step in the Reyners and van Binsbergen judgments, by confirming that the rules on free movement were applicable to legal professionals and that they did have direct effect, despite the lack of prescribed secondary legislation in the field. By this the Court importantly opened up for a series of cases on the interpretation of the provisions.

As has been described, the case law on free movement of legal professionals has made a significant contribution to the law on the free movement of persons and not least to the development of case law concerning what types of restrictions are caught by the free movement provisions. Hand in hand with the development of the common market for lawyers the free movement law developed in the Court’s case law from prohibiting discriminatory restrictions to prohibiting measures that are liable to hinder or render less attractive the exercise of the freedoms. This was essential for lawyers’ free movement since the hindrances lawyers’ are met with are far from being purely discriminatory.

The clearest indication of a broader approach in regards of establishment can be found in Gebhard, where the Court made it clear that non-discriminatory measures which hinder access to the market fall within the scope of Article 43 unless justified. The Gebhard case is a milestone in the development of EU free movement law and made clear that the possibility of non-discrimination restrictions to movement is evident. Additionally, the case clarified many of the underlying confusions with cross-border legal practices and the application of the Treaty provisions on establishment and services to lawyers. It can thus be confirmed that the
Court’s progressive interpretation of lawyers’ right to free movement paved the way for what was later to come.

The system of lawyers’ free movement consists of three directives; the Lawyers’ Service Directive, the Lawyers’ Establishment Directive and the Mutual Recognition Directive. The first mentioned served its purpose well as the only secondary legislation governing lawyers’ cross-border activities until 1998. The Directive gives lawyers the opportunity of providing temporary services in another Member State without requiring prior recognition of qualification. Furthermore, it makes few limitations to the activities the lawyer can pursue, one of them being the requirement of acting in conjunction with a local lawyer. However, that requirement was broadly interpreted by the Court, which perhaps saved the system of free movement of lawyers’ from caving in, in its early stage.

The root of the problem for many lawyers wishing to become established or provide services in another Member States is the difference in legal education, diplomas and training. This was one of the obstacles that had to be overcome in the route towards liberalizing the European legal profession. The Mutual Recognition Directive introduces a horizontal approach of recognition of diplomas. For lawyers this meant a possibility for integration into the host State profession. However, the Mutual Recognition Directive gives rise to problems in practice. Firstly, lawyers are required to take an aptitude test and secondly, the system relies heavily upon mutual trust between Member States. The later Lawyers’ Establishment Directive introduced solution to these problems.

The final missing piece in the process of creating a single European market for lawyers, although difficult in birth, resulted in a delicate compromise that functions! Now, the European lawyer can provide services on temporary basis without having to register in the host State. The lawyer can go through the mutual recognition of qualifications system if he so wishes, but he can also choose to register under home State title and become established in the host State. In addition, the lawyer can choose from three different routes towards integration in another Member State.

The dilemma of the obligatory aptitude test imposed on all migrating lawyers was finally prevailed. Considering the variety of legal systems and difference of legal diplomas, the aptitude test has been considered essential by many of the Member States. Mainly since, it serves the purpose of ensuring that only qualified lawyers gain entry into the profession in the State. It might, therefore, be considered risky to reduce the possibilities of posing an aptitude test. After all, knowledge of national law is a crucial factor in practising it. However, there are other means to achieve that goal and this perspectives lacks all trust in the legal professionals
of Europe. Furthermore, even though the lawyer passes an exam it does in no way guarantee the integrity and proper qualification of the lawyer. Practical training is one manner in which a lawyer can possibly acquire more knowledge in the host State law.

The approach introduced by Article 10 of the Lawyers’ Establishment Directive shows that the Directive is based on trust. Trust towards the European legal professionals. That they have respect for the applicable rules of conduct at all times. That they respect the national legal environment in which they work in and make an effort to learn its rules and traditions before taking the step of advising on it. Three years of practice within the host State before becoming integrated into the profession serves this purpose. The lawyer can also choose to go through the mutual recognition system and either take an aptitude test or fulfil an adaption period. Moving the choice of an aptitude test from the Member State to the lawyer is a vital step. That way the aptitude test does not work against the idea of free movement of lawyers but alongside it. It is not unlikely, that many legal professionals will wish to undergo basic training in the national law and go through examination before practising in a legal system that is unknown to them. That is why the choice is such an important factor.

The Directive proposes a wide scale of rights for lawyers on the move but also emphasises on safeguarding the interests at hand. Thus, the underlying notion of the Directive is, on the one hand, to open up the right for lawyers to become established in another Member State, and on the other hand, to protect and guarantee the interests of consumers and the administration of justice, at the same time. The provisions that essentially aim at protecting these interests are firstly, the rules of conduct, and secondly, the requirement of practising under home State title if not integrated into the host State profession.

The rules of professional conduct have, with the Lawyers’ Establishment Directive, for large parts been moved to the host State. It is however unfortunate that this leads more often than not to a double set of rules applying to the migrant lawyer. This is problematic and in away can be seen as indirectly discriminatory. It could be an option to further coordinate the rules of conduct at European level but that would require an enforcement mechanism. It is doubtful whether the interests in questions are in better hands at European level. The cooperation between competent authorities in both Member States is, as has been emphasised throughout this thesis, essential for the system to work. Improved rules on what rules actually apply and a more coordinated approach seems to be the solution most likely to conquer the problem. The CCBE Code of Conduct is a positive gesture but unfortunately not legally binding unless incorporated into national legislation which does not in any way minimize the risk of double deontology.
Bearing in mind the different practice and opinions of the Member States on establishment rights for lawyers the Directive is an achievement. After considering the possibilities that the Directive introduces for lawyers it is easy to say that the Community institutions have been successful in creating a single European market for lawyers. That does, however, not mean that the Directive is flawless nor that lawyers on the move are no longer met with hindrances of some sort.

The Lawyers´ Establishment Directive deals with prior untouched areas, such as salaried lawyers, joint practices and MDPs. Even though the Directive includes provisions on this type of legal services it remains very neutral which could cause problem. The Directive pretty much leaves open for the Member State whether to allow or restrict such practices. These are areas that are likely to cause problems for lawyers on the move in the future.

The focus here has mainly been on the free movement system for lawyers and has therefore not gone into details on the competition implications identified in the legal professional environment. Recently, the Commission published a report on competition in professional services. In that report the Commission identifies five main categories of potentially restrictive regulation in the EU professions. These are: i) price fixing, ii) recommended prices, iii) advertising regulations, iv) entry requirements and reserved rights, and v) regulations governing business structure and multi-disciplinary practices. Restrictive regulations in these areas have customarily been justified in the legal professional sector. However, the Commission is of the opinion that even within professions such as the legal profession, in some cases more pro competitive mechanisms can and should be used instead of the traditional restrictive rules.439

Thus, it is likely that there will be much development in this area in the future. Certainly, there is and will be a tension between, on the one hand, the need for a certain level of regulation in the legal profession and, on the other hand, the competition rules of the Treaty. The Court’s recent judgment in Wouters demonstrates this tension. The Court found that a prohibition on MDPs of accountants and lawyers could be justified on grounds of protecting the legal profession. The Court emphasised in its judgment that national bars should have freedom to regulate its own affairs and under certain circumstance restrict the freedom of its member while doing so. This was the Courts findings, with reference to the key core values surrounding the legal profession and the importance of allowing regulation on national level

in matters which can affect the profession to the worse. This interpretation leads to the conclusion that the core values of the legal profession, regulated by the national competent authority, can in certain circumstances pre-empt EC competition principles, for now at least.

Another factor within Member States that which can possible create further problems is the rule of territorial exclusivity. According to the Court in Commission v. Germany 440 and Commission v. France 441 these rules are not applicable to migrating lawyers in the State. However, they are always applicable to national lawyers. This interpretation relates to the Lawyers’ Service Directive. However, the effect of the rule in regards of established lawyers has not been ruled upon. When the lawyer is established and maybe even integrated into the host State legal profession it would be odd if he were not subjected to the same rules as the national lawyer. It is yet to be seen if and how the rule of territorial exclusivity applies to established lawyers.

The survey of the implementation of the system in the two different States reveals that it is more difficult for a Swedish legal professional to use the system than for an Icelandic legal professional. In order to be able to make use of the Lawyers’ Directives the lawyer must have the official legal professional title of the Country. In the case of Sweden, to acquire the title advokat and admission to the Bar the lawyer must have around five years of practice as an assistant to an advokat or in a jurist byrå. In addition, the lawyer must pass a course and an exam. Conversely in Iceland, the only requirement for lawyers wishing to get the legal professional title lögmaður, is to have a legal education from a recognised University according to national law. If a Swedish kand.jur would seek integration to the legal profession in Iceland he would, in the strict sense, not be able to do so unless by taking an aptitude test, since he is not an advokat. An Icelandic lawyer that has passed the exam to become lögmaður, which he can do in straight continuance of having received his legal diploma, is entitled to take the Bar exam in Sweden without having to pass an aptitude test.

The situation described above resembles the situation of Ms. Morgenbesser. In the case the Court concluded that the home State authority is obliged compare the applicant’s legal diploma in order to establish whether there is a substantial difference or not. Furthermore, the authority must take prior practice into account. With this the Court confirmed that even though the Directives do not apply to the situation there is a Court developed approach of mutual recognition which applies to those lawyers that have not acquired the title of advokat

or lögmaður. With reference to the judgment, the host State authority cannot deny the legal professional entrance to the profession in the host State on the sole ground that the lawyer is not qualified in accordance with the Lawyers’ Directives.

These types of problems open up for thoughts on whether the system should be opened up for lawyers on earlier stages in their professional life. The practical training for lawyers could in some States be a more suitable way to adapt the migrating legal professional to the legal system of the host State than for example an aptitude test. This could, for example, create possibilities for young lawyers to do their vocational training in another Member State, developing their academic law degree from a national one to a degree recognised in another Member State. It is to be celebrated if student mobility can further open up for free movement of legal professionals by giving law students the possibility of an easier way of acquiring a multinational law degree.

The analysis of the difference dividing the lawyers’ freedom of establishment and right to provide services established that in certain circumstances there is hardly any difference between the two freedoms. It followed from that assumption that there was maybe no longer a need to separate the two in the Directives governing lawyers’ free movement. However, it must be acknowledged at this stage that it is important to have a separate Directive on the temporary providing of legal services. It is necessary to have a system allowing lawyers to practice law on occasional basis in other Member States, without having to register with the competent authority. Nevertheless, it is maintained that development in case law concerning free movement of services and establishment has led to a situation where in practice it is practically impossible to distinguish between the two. What makes the whole picture very unclear is that service providers can provide themselves with the necessary infrastructure, including quite simply offices even equipped with staff. It is suggested here that temporary should mean temporary in the literal meaning of that word. Temporary providing of services is for the lawyer to handle incidental cases or transactions. Setting up offices and spending long period of times in the State should be considered establishment.

Even though the most comprehensive Directive on lawyers’ Establishment is what lawyers’ will mainly use in practice the importance of the Lawyers’ Service Directive and the Mutual Recognition Directive should not be underestimated. These three Directives together form a smooth system, covering the majority of situations that can come up and consequently the legislator has managed to cope with most of the problems that arise in transfrontier legal practices. Often, if not covered by the Treaty the Court is quick to make amendments where needed, as was the case in Morgenbesser.
Finally, in theory the system created for lawyers to make use of their right to free movement is in place and effectively working. The aim was never to eliminate the differences in the legal systems or legal educations. Rather it aimed at giving lawyers a mechanism to use if they wish to practice in another Member State. As a consequence, there will always be hindrances to lawyers’ freedom originating at national level, either because of improper implementation of the system or because of the very special nature of the legal profession.

More surprising is the statistical data available on lawyers in Europe which shows that the number of lawyers’ on the move is relatively low. Here it is assumed that this is not due to the system working ineffectively. Rather the nature of the legal profession is holding lawyers back. Despite an effective system in place the different languages, legal systems and traditions create a hindrance which for some lawyers cannot be eliminated with EC legislation. Not surprisingly, the States that have most migrant lawyers practising within its borders are the States that are the home of many of the European or International institutions, where an international environment for legal practices is flourishing.

Perhaps the European legal profession will in the next years or decades experience another sea change in cross-border legal practices. It is likely that this time the sea change will be caused by new forms of legal practices, in groupings or even MDPs. Furthermore, competition implications will affect the European legal market. Despite changing tides in the European legal market, no development will ever change the special role of lawyer in society and in the administration of justice. Thus, as long as the special nature of the legal profession needs to be protected there will be rules at hand protecting it.
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Case C-45/93, Comission v. Spain, [1994] ECR I-911
Case C-384/93, Alpine Investments BV v. Minister van Financiën, [1995] ECR I-1141
Case C-415/93, ASBL & UEFA v. Jean-Marc Bosman, [1995] ECR -4921
C-238/98, Hocsman v Minister de l’Emploi de la Solidarité, [2000], ECR I-6663
Case C-309/99, J.C.J. Wouters et al. vs. Algemene Raad van de Nederland Orde van
Advocaten, [2002], ECR I-1577
Case C-215/01, Bruno Schnitzer [2003], ECR I-14847
Case C-313/01, Christine Morgenbesser v. Consiglio dell’Ordine degli avvocati di Genova, [2003] ECR I-13467
Case C-351/01, Commission of the European Communities v. French Republic, [2000] ECR I-08101
Case C-362/01, Commission of the European Communities v. Ireland, [2002] ECR I-11433
Case 102/02, Ingeborg Beuttenmüller v. Land Baden-Württemberg, [2004] ECR I-5405
Case C-456/02, Trojani v. Centre public d'aide sociale de Bruxelles, [2004] ECR I-7573
Case C-193/05, Commission of the European Communities v. Grand Duchy of Luxembourg, [2006] ECR I-08673
Case C-438/05, International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti, [2008]

The EFTA-Court
Case E-1/07, Criminal Proceedings against A, judgment of 3 October 2007

Advocate General's Opinion
Opinion of Advocate General Jacobs, delivered on 21. February 1991 in Case C-76/90,


Annex I

Legal professional titles applicable under the Lawyers Directives\textsuperscript{442}

<table>
<thead>
<tr>
<th>Member State</th>
<th>Legal professional title</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>Avocat/Advocaat/Rechtsanwalt</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>Advokát</td>
</tr>
<tr>
<td>Denmark</td>
<td>Advokat</td>
</tr>
<tr>
<td>Germany</td>
<td>Rechtsanwalt</td>
</tr>
<tr>
<td>Estonia</td>
<td>Vandeadvokaat</td>
</tr>
<tr>
<td>Greece</td>
<td>(Δικηγόρος)</td>
</tr>
<tr>
<td>Spain</td>
<td>Abogado/Advocat/Avogado/Abokatu</td>
</tr>
<tr>
<td>France</td>
<td>Avocat</td>
</tr>
<tr>
<td>Ireland</td>
<td>Barrister/Solicitor</td>
</tr>
<tr>
<td>Italy</td>
<td>Avvocato</td>
</tr>
<tr>
<td>Cyprus</td>
<td>(Δικηγόρος)</td>
</tr>
<tr>
<td>Latvia</td>
<td>Zvērīnāts advokāts</td>
</tr>
<tr>
<td>Lithuania</td>
<td>Advokatas</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>Avocat</td>
</tr>
<tr>
<td>Hungary</td>
<td>Ügyvéd</td>
</tr>
<tr>
<td>Malta</td>
<td>Avukat/Prokuratur Legali</td>
</tr>
<tr>
<td>Netherlands</td>
<td>Advocaat</td>
</tr>
<tr>
<td>Austria</td>
<td>Rechtsanwalt</td>
</tr>
<tr>
<td>Poland</td>
<td>Adwokat/Radca prawny</td>
</tr>
<tr>
<td>Portugal</td>
<td>Advogado</td>
</tr>
<tr>
<td>Slovenia</td>
<td>Odvetnik/Odvetnica</td>
</tr>
<tr>
<td>Slovakia</td>
<td>Advokát/Komerčný právnik</td>
</tr>
<tr>
<td>Finland</td>
<td>Asianajaja/Advokat</td>
</tr>
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<td>Sweden</td>
<td>Advokat</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>Advocate/Barrister/Solicitor</td>
</tr>
<tr>
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<td>Advocate</td>
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<tr>
<td>Iceland</td>
<td>Lögmaður</td>
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<tr>
<td>Liechtenstein</td>
<td>Rechtsanwalt</td>
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\textsuperscript{442} List taken from latest official version of Directive 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, [1998], OJ L 77/36. EFTA countries are added.
### Annex II

**Number of EU lawyers registered under their home-State professional title in 2008**

(According to Article 2 of the Lawyers Establishment Directive)

<table>
<thead>
<tr>
<th>Member State</th>
<th>Number of EU lawyers registered under home-State professional title – Article 2 of the Lawyers Establishment Directive</th>
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<tbody>
<tr>
<td>Austria</td>
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<td>Bulgaria</td>
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<td>Cyprus</td>
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<td>Denmark</td>
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<td>Estonia</td>
<td>16</td>
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<tr>
<td>Finland</td>
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</tr>
<tr>
<td>France</td>
<td>708</td>
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<tr>
<td>Germany</td>
<td>297</td>
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<tr>
<td>Greece</td>
<td>182</td>
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<tr>
<td>Hungary</td>
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<td>Malta</td>
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<td>Poland</td>
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<td>Portugal</td>
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<td>Sweden</td>
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<td>Switzerland</td>
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<td>329</td>
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</table>

Annex III

Number of Community lawyers who received admission to the host title of a Member State after three years of establishment under home title (Art. 10 of the Establishment Directive 98/5/EC)\textsuperscript{444}

<table>
<thead>
<tr>
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<th>Number of lawyers integrated into the host-State legal profession – Article 10(2) Lawyers Establishment Directive</th>
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<td>Finland</td>
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<tr>
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<tr>
<td>Germany</td>
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<tr>
<td>Greece</td>
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<tr>
<td>Hungary</td>
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<tr>
<td>Iceland</td>
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<tr>
<td>Ireland</td>
<td>*</td>
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<tr>
<td>Italy</td>
<td>*</td>
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<tr>
<td>Latvia</td>
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<td>The Netherlands</td>
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<tr>
<td>United Kingdom</td>
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</table>

*No data provided

**No request yet since the Establishment Directive was implemented only recently

\textsuperscript{444} Statistic retrieved from the CCBE, dated 31 August 2005. (http://www.ccbe.org/index.php?id=29&L=0)