FREE MOVEMENT AND ESTABLISHMENT OF LAWYERS IN EUROPEAN UNION

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FREE MOVEMENT AND ESTABLISHMENT OF LAWYERS IN EUROPEAN UNION

M.A. Degree Thesis

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ABBREVIATIONS

AMS	Treaty of Amsterdam
Art	Article
EC	European Community
ECJ	European Court of Justice
ECR	European Court Reports
ECSC	European Coal and Steel Community
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Area
i.e	Example
MAS	Maastricht Treaty
OG	Official Gazette

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TURKISH LEGISLATION

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Introduction:

This thesis will examine one of the important freedoms established in European Union(hereinafter cited as EU). Free movement of services is related with many kinds of services such as doctors , pharmacists also including lawyers. Free movement of lawyers is an important subject bearing many problems within its content and scope and that is why the writer has chosen this freedom as a subject. This freedom makes the second greatest economic contribution to the market integration.It is believed that lawyers are playing an important role in harmonization of EC legislation so by providing freedom to lawyers for their profession , adaptation and effective use of provisions will be sustained. Although it is accepted as a freedom still Member States wants to practice in a limited extent. The study will be composed of three sections.The first part is composed of the general concept of European Union. According to my conviction,general information must be given briefly before mentioning main section because we can not expect to obtain knowledge on European Union from ordinary readers.The second section will define right of establishment , recognition of diplomas awarded in Member States and free movement of services this section will be solely focused on free movement of lawyers. And finally the last section will discuss the differences and make comparisons on rights of lawyers in our and EU legal system.As a future candidate country we must be concerned with the approximization of our legislation to acquis communataire so the legal amendments which is required in case of being a Member State will be examined from the point of view of practising the profession of advocacy. The Conclusion is composed of our ideas both for eliminating restrictions on practising the profession and for amendments in order to approximate our legal system to European Union legislation.

§ I PART ONE

1. The European Union

The thought of creating a Union is synchronous with the formation of national states. Peace across Europe wanted to be settled permanently with the Vienna Congress in 1815.By the Ouchy Agreement (18 July 1932) three states Belgium,Netherland,Luxembourg which constitutes Benelux was the first economic integration in Europe.[1] In 1946 Winston Churchill at first mentioned establishment of United States of Europe in one of his speech in University of Zurich and believed in cooperation between French and German in order to ensure this ideal.[2] With the end of the second World war nations blamed steel and coal (before the Second World war the production of Coal was in the amount of 54101 tones whereas after the War it was reduced to 29748 tones) as a reason wanted to control these war crimes.In may 1950 Schuman revealed a plan for the fusion of the coal and steel industries of France and Germany with an invitation to other countries to participate.Six states began the progress towards European unity. In 1951 France the fledging Federal Republic of Germany ,Italy ,the Netherlands ,Belgium and Luxembourg signed at Treaty of Paris ,which bought into the existence the European Coal and Steel Community (ECSC) at the beginning of 1952 . [3] .

The Messina Conference of 1955 prepared the ground for more broadly based economic integration . In 1956 the United Kingdom made conscious by the

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[1] Karluk Rıdvan ; Avrupa Birliği ve Türkiye 5. Edition ; page 1-3

[2] Tekinalp /Tekinalp ;Avrupa Birliği Hukuku ;page 4

[3] Weatherill Stephen , Beaumont Paul :EU Law ; page 2 , Tekinalp /Tekinalp ;page 5 Churchill wishes confederation that does not deal with the sovereignty of the States instead of federation because he knows as well how difficult it was. Jansen M. :The History Of European Union ; page 4 ;Bozkurt Veysel ;Avrupa Birliği ve Türkiye ; page 60 / El –Agraa : The European Union ; page 22

decisions stemming from the Messina conference that co-operation on the lines of ECSC would involve an unacceptable loss of sovereignty ,decides to set up a working party under the auspices of the Organisation for European Economic Cooperation (OEEC) (which helped to liberalise trade between its Member States , introduce the first ideas on monetary agreements and develops a more concrete economic cooperation in general) in order to create a European Free Trade Association (EFTA) ,a rival organisation which will differ from the proposed EEC by not being a customs union with a common tariff separating its members from the rest of the world but simply a free trade zone in which countries abolish tariffs between themselves.[4] By 1957 the six participant states were ready to take a further step.The two Treaties of Rome were signed ,establishing from the beginning of 1958 two further communities. These were the European Economic Community (EEC) and the European Atomic Energy Community (EURATOM). Like the Paris Treaty which established the ECSC these treaties were characterized by the creation of autonomous institutions possessing the power to develop the new structure independently of the participant states. In 1967 the Merger Treaty came into effect with the purpose of rationalizing their administration The Members of the Commissions of the EEC and EURATOM , of the High Authority of the ECSC and the Councils of all three communities were the same people ,albeit wearing different hats. Thereafter there were still formally three separate treaties and three European Communities but in practice they were administered on a day -to-day basis as one. The Treaty on European Union agreed at Maastricht in December 1991 established the 'European Community' (EC) as the formal legal title of what had been the European Economic Community ,but three separate communities continue to exist within the broader European Union structure invented at Maastricht.The EEC Treaty created procedures whereby legislation could be adopted in pursuance of activities by the three leading political institutions of the Community : the Commission ,the Assembly and the Council. The legislative procedures placed the Commission as the initiator in most cases and conferred on Assembly which

[4] Thody Philip ; An Historical Introduction to the European Union ; page 12

formally became the Parliament in 1987 ,limited powers of influence.[5] EEC was a political compromise not so much between advocates of inter state cooperation and advocates of federalism but rather between two groups of pragmatists.On the one hand there were those advocating the creation of a large market which in economic terms , would replace national markets beginning with the creation of a customs union.On the other hand there were those advocating the partial integration of certain sectors such as agriculture , nuclear energy and transport and the transfer to Community of a limited number of policy areas such as a common trade policy and competition policy .[6]

The preamble to the EEC Treaty of 1957 states a determination 'to lay the foundations of an ever closer union among the peoples of Europe' and a resolve to pool resources to preserve and strengthen peace and liberty. Monnet and Schuman believed in the development of a process of integration ,rather similar to a snowball that roles down a hill gathering more and more snow as its descent accelerates.They thought that integration in one particular sector of the economy would spill over into integration in other sectors. The internationalisation of the European and global economy carries with it certain inevitable consequences concerning joint regulation and decision-making.The great political debates of the end of one century and the start of the next often concentrate on the identification of matters that can be dealt with satisfactorily at national level and matters that have moved so far into the transnational domain that national political decision-making is inefficient ,even irrelevant. Environmental pollution provides a classic a example of a problem that does not respect national frontiers and that may ,accordingly require at least in part , a concerted response. In 1971 United Kingdom decided to enter into the EEC with the acceptance of the British Parliament by 356 votes to 244 with 22 abstentious. In 1973 the Community of six became the Community of nine.The United Kingdom was joined as a new Member by Denmark and the Republic of Ireland ; Norway's application was withdrawn after a referendum showed popular rejection of accession.The three new Member States were given transitional periods in which to

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[5] Thody Philip ; ibid , page 5
[6] Westlake Martin ; The European Union Beyond Amsterdam ;page 143

align their economies to the demands of the Community system.This involved for example the progressive reduction and elimination of tariff barriers and quota systems. The Community extended its geographical ambit eastwards in 1981 when Greece joined and in 1986 the total number of states reached twelve with the Iberian enlargement - the accession of Spain and Portugal.In 1987 Single European Act was put into force.The act sets out basic amendments on Institutions and envisaged four freedoms and harmonizes common foreign policy , environment policy ,health and consumer policy of the States. In 1991 the former of German Democratic Republic became part of the Community , albeit as an extension of the Federal Republic rather than as a thirteenth Member State .In 1991 the European Court ruled a draft agreement incompatible with the EC legal order in an opinion in which the court was strikingly assertive about its mission to protect the Treaty , a constitutional charter of a Community based on the rule of law .In 1992 Maastricht Treaty was put into force.A union citizenship is envisaged with the Treaty. Union citizenship is involved with national citizenship.According to us Member States want to eliminate the distinction based on nationality between each other because in order to achieve political integration completely national identification must be replaced with Union citizenship.The agreement was renegotiated and subsequently approved in an amended form by the Court.The Swiss people voted by referendum in December 1992 against their country's participation. This required further readjustment before the entry into force of the (European Economic Area) EEA at the start of 1994. The EC twelve and five (European Free Trade Association) EFTA states were party to the agreement. Part of the motivation for setting up the EEA was to enhance the economic advantages of integrated markets but several of the EFTA states perceived the EEA as a useful stepping stone to full EC membership.In the event Austria , Finland and Sweden spent only one year as Members of the EEA outside the Community .At the start of 1995 they became full Members raising the total membership to fifteen ,although their membership was of the European Union rather than merely of the Community, for as a result of the entry into force of the Maastricht Treaty admission only to the Union as a whole is possible.In 1997 Amsterdam Treaty was signed.Copenhagen

criterias are firstly regulated in a Treaty which is the constitution of the Member States.Three pillars were amended by replacing new name to the third pillar as judicial and police cooperation in civil and criminal matters.The asylum and immigration policies are moved to the first pillar. Closer cooperation enables the most ambitious Member States to deepen cooperation between themselves while leaving the door open to other Member States to join them at a later stage. The Commission published reports on progress towards accession by each of the candidate countries in November 1998 and intends regularly to produce documentation investigating the pace of reform needed to comply with the standards explained in Agenda 2000 , in particular the absorption of the acquis communautaire and the establishment of an internal administrative infrastructure which is capable in practice of bearing the load of the laws adopted on paper.Accordingly ,further enlargement seems probable early in the new century although a substantial amount of institutional reform seems necessary in order to prevent an enlarged structure collapsing under its own weight.The Amsterdam Treaty was a disappointment in this respect for several key decisions about reform of both Commission and Council were left for future resolution. The Amsterdam deadlock is put one indication that the path towards enlargement is not smooth.Economic conditions in Central and Eastern Europe compare badly with those in countries fortunate enough to escape Soviet domination. Nor is political stability yet universally assured in the applicant states.[7]

The EU is an supernational organization rather than being an intergovernmental organization. For this new concept transferring the authority ,also partial sovereignty to the Community is compulsory . The important matter is "dependence". This dependence occurs in three ways :

α)A Member State must apply the provisions of the Treaty as like legal or natural persons

β)A Member State must accept and put provisions into practice as a norm which are determined by the competent authority.

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[7] Thody Philip ,loc.cit page 4-8 / see also Pinder John ; The Building of the European Union : page 52- 76 see also İlkin Selim /Tekeli İlhan ;Türkiye ve Avrupa Topluluğu I ; page 36 etc.

γ)A Member State can use the authority with the control of Community and in custody although having this power [8]

The result was a system of partial and limited transfer of sovereignty memorably described by the ECJ : "Whereas the Member States have agreed to establish a Community for an indefinite period , provided with permanent institutions which are vested with actual powers as a result of the fact that the States have limited their powers or transferred them to the Community. [9]

2.Sources and Features of EU Law :

The law of EU is dogmatic but from one perspective it has case law characteristic. By making literal and historical interpretation for forming principles and putting regulations gives (European Court of Justice) ECJ responsibility for interpretation and being respectful to law.[10]The primary source is composed of Treaties whereas the secondary sources are composed Regulations ,Directives , Decisions , Recommendations and Opinions also the general principles that was consented by the Court of Justice,the court decisions given by the Court of Justice and consuetudinary law , agreements signed with non EU Members and finally the doctrines .[11] The primary sources can be listed as:

Treaty of Paris establishing the (European Coal and Steel Community) ECSC in 1951.The Preamble to the Treaty of Paris referred to the creation of an economic community as the basis for a broader and deeper community among peoples long divided by bloody conflicts.[12] The two treaties of Rome which were European Economic Community (1957) and the European Atomic Energy Community (1957) , Merger Treaty, First Budgetary Treaty (1970) ,Second Budgetary Treaty (1975) , Single European Act (1986), Accession Conventions of Member States,Convention on European Economic Area , Maastricht Treaty (1992) ,Amsterdam Treaty (1999) are the other fundamental primary sources of EU legislation.

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[8] Günuğur Haluk ; Avrupa Topluluğu Hukuku ; page 17-18
[9] Westlake ;loc.cit ; page 143 / Case 6/64 [1964] ECR 1159
[10] Tekinalp /Tekinalp , loc.cit ; page 66
[11] Tekinalp /Tekinalp ibid ; page 67 ; Kabaalioğlu Haluk ;Avrupa Birliği ve Kıbrıs Sorunu ; page 101
[12] Weatherill Stephen and Beaumont Paul , loc.cit : page 3

As a secondary legislation Regulation has general application that is binding in its entirety and is directly applicable in all Member States.Regulations must be published in the Official Journal of the Community and they come into force on the date specified in them or if no date is specified on the twentieth day following their publication.Thus regulations are the most powerful lawmaking tools available to the Community institutions.Without any intervention by national governments or legislatures , regulations become part of the national legal systems of each Member State.[13] Not all regulations create individual enforceable rights.Frequently regulations are not addressed to individuals but to Member States .In such cases, obligations created under regulations are imposed on Member States and function in the field of public as opposed to private law :Gibson v Lord Advocate 1975 SLT 133.Whether or not a particular regulation creates directly enforceable rights for individuals depends on two factors -the subject matter of the regulation and the nature of group to whom it is addressed.[14]

Directives do not necessarily apply to all Member States and rather than being directly applicable in those states , allows them the choice of form and methods of implementing it in their national laws[15].Directives are however binding on the Member States to which they are addressed as to the result to be achieved. There was no requirement in the EEC Treaty that directives should be published in the Official Journal simply that they be notified to those to whom they are addressed. At the Maastricht the EEC Treaty was amended to require the publication in the Official Journal of directives that apply to all Member States.[16] Since Maastricht directives that are addressed to all Member States take effect on the date specified in them or in the absence thereof on the twentieth day after publication. Failure on the part of a Member State to implement the directive completely or correctly within the stated time period may lead to individuals and

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[13] Weatherill / Beaumont , ibid , page 150 / Kabaalioğlu Haluk ; Avrupa Birliği ve Kıbrıs Sorunu ; page 107/ Tekinalp / Tekinalp ; loc.cit , page 71 / Doğan İzzettin ;Türk Anayasa Düzeninin Avrupa Toplulukları Hukuk Düzeniyle Bütünleşmesi Sorunu ; page 120

[14] Maclean Robert ;European Community Law ; page 83

[15] Weatherill / Beaumont loc.cit , page 151 / Kabaalioğlu Haluk ; op.cit , page 110/ Tekinalp / Tekinalp ; Avrupa Birliği Hukuku , page 72

[16] Article 254 (2) , ex 191(2)

legal persons being able to rely on the provisions of that directive in their dealings with that Member State.[17]

Thirdly Decisions are binding in its entirety upon those to whom it is addressed. They also come into effect when the requirement to notify them to those to whom they are addressed is complied with. Although not required by the EEC Treaty some of the more important decisions were published in the Official Journal .Since the entry into force of the Treaty on European Union decisions adopted under Article 251 (ex 189 b) EC must be and others may be published in the Official Journal.The Council can also delegate power to the Commission to take decisions on matters within the competence of the Council. In general terms it can be said that decisions unlike regulations are not intended to have general application but are directed at one or more Member States or one or more undertakings.[18]

Finally the EC Treaty provides for the making of recommendations and opinions in a number of situations and confers a general power on the Commission to make these provisions whenever it considers it necessary.[19] The Treaty is quite explicit that recommendations and opinions have no binding force.[20] These provisions cannot have direct effect in national courts as they are not binding but it is competent for a national court or tribunal to refer to the European Court a question[21] concerning the interpretation or validity.[22]

2.1 Historical Background :

The treaty establishing European Coal and Steel Community does not refer to any occupation and services. Article 69 (1) mentioned only the workers in Coal and Steel Community and guarantees the abolition of any discrimination based on nationality between workers of the Member states.In this legislation there is no distinction between the worker and the one who provide Services by himself.

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[17] Weatherill Stephen and Beaumont Paul , loc.cit . page 151
[18] Weatherill / Beaumont , page 152 / Kabaalioğlu Haluk ; Avrupa Birliği ve Kıbrıs Sorunu ; page 111/ Tekinalp / Tekinalp ; ibid . page 73
[19] ibid, page 153
[20] Article 249 (ex 189)
[21] Case 322/ 88 [1989] ECR 4407

Whereas a distinction is legislated in Article 96 and 97 with the treaty establishing European Atomic Energy Community (EURATOM).But these articles solely talked about the abolition of discrimination.Article 100 mentioned to the liberalization of payments for services.[23] According to the Rome Treaty mentioned in second paragraph of Article 7a the internal market comprises an area without internal frontiers which the free movement of goods , persons ,services and capitals is ensured with the provisions of treaty. Inside the internal market all restrictions that will obstruct free movements must be avoided. Free movement of services is related with services which will be done for gaining remuneration.Only the citizens who established in one of the Member States can benefit from it.The services which does not gain remuneration and does not include foreignness component could not make use of this freedom. According to Article 60 of the Rome Treaty services include activities of an industrial character ,activities of a commercial character ,activities of craftsmen and activities of the professions.While drawing up the Treaty some kind of services could not be envisaged such as radio,media and communication sectors. Article 58 of the Treaty is applied to companies for services.There is a close relationship between free movement of services and right of establishment and this situation can not be almost separated very easily.Sometimes this impossibility occurs in free movement of goods. Sending television signals or delivering goods with mounting is an example for it. Freedom of services also ensure liberalisation of banking and insurance services connected with movements of capital.[24]

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[22] Op.cit ; page 153

[23] Özkan Işıl ; Yabancıların Çalışma Hürriyeti ve Avrupa Topluluğunda Kişilerin Serbest Dolaşımı ; page 87

[24] Tekinalp / Tekinalp ; ibid ; page 358

§ II PART TWO

3.Freedoms in General :

By the Treaty establishing the European community , four kinds of basic freedom was guaranteed in internal market. According to article 7a second paragraph " The internal market shall comprise an area without internal frontiers in which the free movement of goods , persons , services and capital is ensured in accordance with the provisions of this Treaty" Although it would be difficult to decide which of the basic four freedoms of the EEC Treaty makes the greatest economic contribution to the achievement of the common market ,a strong claim can be made for the right of establishment and the related right to provide services.[25]The freedom to provide services constitutes together with the freedom of establishment ,the concrete expression the free movement of self employed persons and companies and firms formed in accordance with the law of a Member State and having their registered office ,central administration or principal place of business within the Community.[26] These two rights facilitate the optimal allocation of factors of production and the efficient operation of commercial and financial entities throughout the Community. The two rights are also essential to the free exercise of professions and crafts by individuals and firms throughout the Community. [27] Another important measure is respecting for each other's nationality in Member States.[28] In Micheletti v Gobierno en Cantabria case the court stated that it is not permissible for the legislation of a Member State to

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[25] Bermann A. George , Goebel J. Roger , Davey J. William , Fox M. Eleanor ; Cases and Materials on European Community Law ; page 542

[26] Mathijsen P.S.R.F. ; A Guide to European Union Law : page 206 ; see also Lasok & Bridge : Law and Institutions of the European Communities ; page 473

[27] Bermann A. George , Goebel J. Roger , Davey J. William , Fox M. Eleanor; loc.cit ; page 542

[28] Each State retains the right to regulate and control its own nationality but EC Member States must respect each other's nationality and can not adopt or give effect to rules which would deny another EC national from benefiting from EC acquired free movement rights.(Case C- 369/90 Micheletti v. Delegacion del Gobierno en Cantabria [1992] ECR I-4239

restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty. Once the persons presented a valid identity card or passport in order to establish their status as nationals of a Member State ,the other Member States were not entitled to challenge that status on the ground that the persons concerned might also have the nationality of a non-member country which , under the legislation of the host Member State overrides that of the Member State.

EC Council adopted in 1962 a General Programme for the Abolition of Restrictions on Freedom to Provide Services.The object of the programme was to remove restrictions on the movement of persons providing services and ensure their equal treatment with the nationals of the Member States ,on the provision of services and on the transfer of funds in payment for services rendered.[29]

The substantiation of freedom to provide services has dragged on for a long time for two main reasons . One was the difficulty in defining the equivalence of qualifications another the access to certain markets that were organised by national governments or by private groups sanctioned to organise and protect them.In the early 1970's several rulings of the Court in principle liberalised almost completely all services connected with agriculture ,manufacturing,craft and trade .There remained however quite a few problems regarding the service branches ,many of which persisted until 1985 ,when the programme to complete the internal market in services brought a solution by a combination of three elements :

α) liberalization- freedom for cross border trade in services

β)mutual recognition of the quality of home country's control

γ)harmonisation - minimum sets of European regulation[30]

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[29] Report on The Relations Between the Republic of Turkey and EC Arising from the Ankara Agreement and the Application for Membership ; page 169

[30] Molle Willem ; The Economics of European Integration ; page 324

3.1 Free Movement of Services

3.1.1 Definition :

Free means someone or something that is not restricted ,controlled or limited for example by rules , customs or other people[31] whereas ***movement*** means an act of going from one place to another or travelling about in a particular area or the fact or activity of someone or something changing position[32] and ***services*** is used for a job or type of work that an organization or person can do for you if you want or need them to do it.[33] Starting with the declarations of human civil rights in the 18th century ,fundamental rights and civil liberties have now become firmly anchored in the constitutions of most civilised States.This is especially true of the EU Member States whose legal systems are constructed on the basis of the rule of law and respect for the dignity ,freedom and right to self development of the individual.[34]

The court in Webb case identified the distinction between workers and service providers.In Webb the Court held that a business of supplying staff is dealt with under Article 49 (ex 59) ,even though persons are involved.[35] Similarly , a firm providing services in another Member State is entitled under the same Article to use its own employees.[36]

According to the Article 50 (ex 60) services will be considered to be services within the meaning of the treaty where they are provided for remuneration , in so far as they are not governed by the provisions relating to free movement for goods , capital and persons.'Services' includes activities of industrial character , activities of commercial character and activities of craftsmen as well as activities of professions.The person providing a service shall temporarily pursue his activity

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[31] Collins Cobuild English Language Dictionary page 577
[32] ibid ; page 945
[33] ibid ; page 1320
[34] Borchardt Klaus Dieter ; The ABC of Community Law ; page 13-14
[35] Case 279/80 [1981] ECR 3305, [1982] CMLR 406 ; for Article 49 (ex Article 59) see supra page 48,49
[36] Case C-113/89 [1990] ECR 1417

in the state where the service is provided ,under the same conditions as are imposed by that state on its own nationals.The temporary nature of the provision of services is to be determined in the light of its duration , regularity , periodicity and continuity.[37] Services which are of limited duration such as providing self employed tourist guide to the tour company are not governed by the provisions on the free movement of goods ,capitals and persons ,constitute activities carried on for remuneration within the meaning of Article 50 of the EEC Treaty.[38]

The free movement of services which covers Ams Articles 49 to 55 requires the removal of restrictions on the provision of services between Member States ,where either the provider is supplying services in a state in which that person does not maintain an establishment ,or the recipient is travelling to receive services in a Member State other than that in which the recipient is established.It is also possible for the service itself to move without the provider or the recipient moving , for example where the provision of the service takes place by telecommunication.[39]In Sacchi case the court stated that there was no reason to treat the transmission of such signals by cable television any differently.[40] It involves "the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period.[41] If a firm establish in an other Member State in order to avoid difficult conditions required in one Member State for providing services ,the firm will not benefit from free movement of services.The court had given a decision related with this situation in 1986 for a insurance company.[42] In Commission v. Germany case Germany require Community insurers to obtain an authorization and to maintain a permanent establishment in Germany in order to carry out the cross-border insurance operations permitted by the Directives.Germany contended that both

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[37] Case C-55 /94 [1995] ECR 4165 / see also Stavridis /Mossialos/Morgan/Machin :New Challenges to the European Union: Policies and Policy Making ; page 257 /Çelikel Aysel ; Ortak Pazarda Yabancıların Hukuki Durumu ; page 17

[38] Case C-180/89 [1991] ECR 709 ,Case C-154/89 [1991] ECR 659. Case C-198/89 [1991] ECR 727

[39] Craig Paul and Burca de Grainne ; EU law Text. Cases and Materials ; page 727 In Sacchi the Court held that the transmission of television signals is dealt with under Article 49 (ex 59) although the circulation of more tangible items ,such as films and recording equipment falls within Article 28-30 (ex 30-36) Weatheril / Beaumont ; page 675

[40] Case C-23/93 [1994] ECR 4795 ; Guide to The Case of Law of the European Court of Justice on Articles 59 et seq. EC Treaty

[41] Wyatt Derrick and Dashwood Alan ; European Community Law ; page 278

constituted appropriate conditions because they permitted the type of supervision of business operations necessary in order to protect adequately the interests of consumers ,in this case,the insured persons.The freedom to provide services as one of the fundamental principles of the Treaty may be restricted only by provisions which are justified by the public policy and which are applied to all persons or undertakings operating within the territory of the state in which the service is provided in so far as that interest is not safeguarded by the provisions to which the provider of a service is subject in the Member State of his establishment. As the German government argued, the insurance sector is a particularly sensitive area from the point of view of the protection of the consumer both as a policy-holder and as an insured person.This is so particular because of the specific nature of the service provided by the insurer ,which is linked to future events ,the occurrence of which or at least the timing of which is uncertain at the time when the contract is concluded.According to the Court , Community law on insurance does not as it stands at present ,prohibit the State in which the service is provided from requiring that the assets representing the technical reserves covering business conducted on its territory be localized in that state.German law required insurers to be authorized and established in Germany.This clearly restricted the ability of non-German insurers to operate in Germany.It deduced from its existing case law that regulation that has the effect of restricting the free movement of services may be lawful where objectively justified by the public policy ,taking account of the protection offered by regulatory controls exercised in the state of establishment of the supplier.It took the view that a State was able to verify the presence of assets and inspect accounts and other documents in the context of an authorization procedure ,which would be sufficient to achieve protection and which could be done without the added requirement of permanent establishment.[43] The factors that effects the service sector in a State will depend on developed transport network , the ratio of national currency of the State's, tourism , banking system , foreign investments in that State and technology trade.

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[42] Tekinalp / Tekinalp ; op.cit ; page 359

[43] Bermann / Goebel / Davey / Fox ; op.cit 553-557 ; Weatherill / Beaumont ; op.cit 684

Another major factor is the harmonization of consumer rights in States relating to protecting consumer rights while obtaining service in another state.[44]

Ams Article 49 (ex Article 59)

"Within the framework of the provisions set out below ,restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a state of the Community other than that of the person for whom the services are intended." [45]

This phrase makes clear the distinction between a right of establishment which permits movement to the State where the service or activity is to be performed or carried out ,and freedom to provide services which generally involves retaining an establishment in one State and effecting the service in another State.[46] [47]

There is a very close relationship between services and establishment. Services can be provided either by settled in a state or temporarily residing. The right of establishment mentioned in articles from Ams 43 to 48 is economically and legally speaking the right for a person or body or corporate or incorporate ,bearing the nationality of one state to cross into another state and establish himself or itself there either by undertaking work from a permanent base or by establishing an agency ,branch ,subsidiary etc.[48] As we said before the right of establishment is to be constructed with the freedom to provide services.The former entails settlement in a

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[44] Uluslararası Alanda Hizmet Sektörünün Gelişimi :Avrupa Topluluğu Örneği ;İKV yayını ;1989 sayı 82 ; page 65

[45] Weatherill Stephen ; Cases and Materials on EEC Law ; page 279

[46] Parry Anthony and Hardy Stephen ; ibid ; page 246

[47] Our interpretation is based on Lord Dennings declaration "The Treaty is quite unlike any of the enactments to which we have become accustomed ... it lays down general principles. It expresses its aim and purposes .All in sentences of moderate length and commendable style.But in lacks precision. It uses words and phrases without defining what they mean.A lawyer would look for an interpretation clause. but he would look in vain. All the way through the treaty there are gaps and lacunae. These have to be filled in by judges or by regulations or directives. One must divine the spirit of the treaty and gain inspiration from it." Brown Neville / Jacobs Francis ;The Court of Justice and European Communities ;page 268

[48] Parry Anthony and Hardy Stephen ; ibid ; page 238

Member State for economic purposes and connotes permanent integration into the host state's economy.The latter entails a person established in one Member State providing services in another ,as in the case of a doctor established in France visiting a client in Belgium.The distinction may not always be clear-cut ,because the provision of services may involve temporary residence in the host state. As in the case of a German firm of business consultants which advises undertakings in France or a construction company which erects buildings in a neighbouring country[49].And as a guarantee with the provision of Article 53 Member States could not introduce any new restrictions on the right of establishment in their territories of nationals of other Member States. It must be pointed out that [50] Ams Article 49 of the Treaty requires not only the elimination of all discrimination against a person providing services on the ground of his nationality[51] but also the abolition of any restriction ,even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.

Ams Article 43 (ex Article 52)

"Within the framework of the provisions set out below , restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited .Such prohibition shall also apply to restrictions on the setting –up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State."

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[49] Wyatt Derrick and Dashwood Alan : The Substantive Law of the EEC : page 182

[50] Case C-76/90 [1991] ECR 4221

[51] When United Kingdom joined the Communities in 1973 ,British nationality law contained no status of British citizen applicable only to those connected with British Isles themselves .Those who were British subjects by virtue of their connection with the British Isles had the status of citizens of the United Kingdom and Colonies as did those who had become British subjects as the result of a connection with an existing or sometimes a former colony. The British Nationality Act 1981 replaced citizenship of the United Kingdom and colonies with separate citizenships for those connected with the United Kingdom itself an existing colony and a former colony (British Overseas Citizenship) Jacobs F.G. ; Yearbook of European Law ; page 190

Ex Article 52 states the basic principle that restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State were to be abolished by progressive stages in the course of the transitional period. This progressive abolition was also to apply to restrictions on the setting up agencies, branches or subsidiaries in one Member State by nationals of another Member State.

The second paragraph makes it clear that freedom of establishment includes the right to take up self-employed occupations and to set up and manage undertakings , subject to applicable municipal laws of the host State .The persons who benefit from the freedom of establishment are ,it is clear, totally different from those benefiting from the provisions on free movement of labour ,for the former are essentially self-employed ,while the latter are essentially employees. [52]

In Gullung case the Court mentioned that Ams Article 43 (ex 52) must be interpreted as meaning that a Member State whose legislation requires lawyers to be registered at a bar may impose the same requirement on lawyers from other Member States who take advantage of the right of establishment guaranteed by the Treaty in order to establish themselves as members of a legal profession in the territory of the first Member State.[53]

The underlying objective of the elimination of discrimination that lies at the heart of both provisions is the promotion of market integration.This leads to the realization of economies of scale and the stimulation of competition within a common market.[54] As a general observation, establishment under Ams Article 43 involves a more permanent status in the host state than the provision of services under Article 49 and to a limited extent this is reflected in the tighter , although non-discriminatory , controls that may be permissibly exercised by a host state under Article 43 in contrast to Article 49.[55]

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[52] Parry Anthony and Hardy Stephen ; EEC Law ; page 239
[53] Case 292/86 ; loc.cit page ;141
[54] Weatherill Stephen and Beaumont Paul ; op.cit ; page 671
[55] ibid ; page 671

The "free movement of services" doctrine directly affects national welfare states though the scope of this influence remains relatively opaque.In principle each state may choose its own polices for social services. However ,the freedom of services doctrine may have considerable effects on national service delivery systems .The divergent characteristics of Member State policy structures become crucial .For example some Member States(Britain, Italy) have national health- care systems . Others (Germany ,France) have insurance systems where the state only supplies funds for goods and services which are bought from private providers.[56] According to us social services in Member States will be not a criteria for lawyers for movement because as a profession advocacy is accepted as providing a highly income in every Member State or America even in Turkey.

3.2 Legal Materials

The right to which the migrating individual is entitled are amplified by Directive 73 /148 ,which concerns rights of entry and residence , and runs parallel to Directive 68/ 360 in the field of workers.Directive 75 /34 confers a right to remain on terms equivalent to Regulation 1251 / 70 , although the Directive applies only to those permanently established under Ams Article 43 rather than those temporarily present in another state by virtue of Ams Article 49.However there is no parallel in relation to Article 43 and 49 to Regulation 1612/ 68 ,which secures equality in employment for the worker.The court has thus been obliged to fall back on the more general rule of non-discrimination found Ams Article 12 (ex 6) and has used this to secure equality in aspects beyond the narrowly defined right to live and work. [57] Directive 90/364 deals with right of residence and Directive 64/221 coordinates special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy ,public security or public health and another related directive with subject is the directive 90/ 365 which ensures the right of residence for employees and self-employed persons who have ceased their occupational activity.

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[56] Wallace William and William Helence : Policy Making in the European Union : page 197-198
[57] ibid ; page 674

Ams Article 12 (ex Article 6)

"Within the scope of application of AMS Treaty ,and without prejudice to any special provisions contained therein , any discrimination on grounds of nationality shall be prohibited."

Ams Article 46 (ex Article 56)

The provisions and measures taken in pursuance shall not prejudice the applicability of provisions laid down by law ,regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy , public security or public health .

4 . The Right of Establishment :

Establishment is defined by the Court of Justice as " becoming involved on a stable and continuous basis in the economic life" of a Member State.[58] Implicit in this definition is an indication of the difficulties of determining the presence of a prohibited restriction .On the one hand ,restrictions which impede such involvement by a national of a Member State in another Member State may be expected to be prohibited.On the other hand subjection to the same restrictions as nationals of the host Member State may be regarded as an integral element of such involvement.[59]

4.1 Right of Establishment of Natural Persons :

Article 52 draws a distinction between nationals of Member States and those already established in the territory of a Member State.The former are entitled to establish themselves in any Member State ,the latter are entitled to set up agencies

[58] Case 70/95 [1997]
[59] Evans Andrew ; A Textbook on EU Law ; page 311

and branches. [60] AMS Article 44 (ex Article 54) originally required the Council to draw up a general programme for the abolition of restrictions on establishment , which it did in 1961 and to issue directives to attain freedom for particular activities. Ams Article 47 (formerly 57) also requires the Council to issue directives for the mutual recognition of diplomas and other qualifications.Establishment must be directed at occupation.Political ,religious or cultural activities does not gives right for establishment.For instance a French citizen who has a residence in France can also have a place of employment in Germany. So an individual has a permanent residence in one state whereas being employed in an other state.[61] The 1961 General Programme made it clear that discriminatory restrictions were to be target of the Treaty provisions on establishment.It requires the elimination of restrictive laws and administrative practices which treat nationals of other Member States differently from nationals of the state concerned and lists examples such as attachment of licence conditions , periods of residence ,tax burdens and various other measures which make more difficult the exercise of activities by the self – employed or by companies.The programme also requires the elimination of restrictions on the powers which might attach to the exercise of such activities , such as the power to enter contracts , to acquire property ,to have access to credit , and to receive state aids.[62] Abolition was to be facilitated by secondary legislation prohibiting discrimination on grounds of nationality ,ensuring the mutual recognition of diplomas and certificates ,and other evidence of formal qualifications and co-ordinating national requirements governing the pursuit of non-wage earning activities.[63] The legislative process to facilitate enjoyment of establishment and service rights ,sector by sector ,concentrated in the 1960s and 1970s on agriculture ,the crafts and general business and commercial fields.Over 50 directives eliminated discriminatory rules , practices and conditions in such diverse fields as agriculture ,forestry ,fisheries ,mining of certain minerals,manufacturing of

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[60] Wyatt Derrick and Dashwood Alan ; page 183
[61] Tekinalp/ Tekinalp ;Op.cit, page 344
[62] Craig Paul and Burca de Grainne ; EU Law Text ,Cases and Materials ;page 734
[63] Wyatt Derrick and Dashwood Alan ; page 183

specific products ,the hotel,restaurant and tavern industries ,film production and distribution ,real estate brokerage and general wholesale and retail operations.[64]

Establishment in Turkey is regulated by the Act on Residence and Travel for Foreigners[65] .According to Art 1. "The persons who are not forbidden to enter to Turkey by laws and entered according to the provisions of Passport Act can enter and travel in Turkey".Foreigners can only travel under the conditions of law and must obey the restrictions on that matter.The Council of Ministers can take measures on restriction for travelling in certain areas for a foreigner or a foreign group.The Council of Ministers also applies restrictions according to retortion for foreigners for establishment and travelling.A foreigner who has entered Turkey and desire to stay more than one month must take establishment permission from the competent authorities during this duration.This permission is called residence permit.The persons who are not established less than a month must not take residence permit.If a foreigner wants to provide services in Turkey he/she must take residence permit after entering the State and before being employed.[66] There are also facilitating provisions for residence permit. Residence permit is not required for tourists for their stay for a period of a month.The governor of a province can extend this period to two months after the end of the month.The persons who are coming for competitions or conferences and et.seq. can stay in Turkey for four months without being required residence permit.Residence permit is not required for the diplomats and his/her family or the persons who have official mission in Turkey.[67] If the person is being employed in a job that is solely granted for Turkish citizens or if a person takes activities which is incompatible with Turkish morals and traditions or if a person can not prove his living on legal means or if a person has entered the State somehow although he/she is in a category of persons that are forbidden to enter or if the person infringes public policy and security while residing ; then the persons mentioned above could not have residence permit.Their request on

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[64] Bermann George, Goebel Roger , Davey William , Fox Eleanor ; op.cit ; page 547
[65] Yabancıların Türkiye'de İkamet ve Seyahatleri Hakkında Kanun : OG :24.7.1950 - 7564
[66] Çelikel Aysel ; Yabancılar Hukuku ; page 82 / see also Gülören Tekinalp ;Türk Yabancılar Hukuku ; page 41 -47

that matter will be rejected.The duration of the validity of residence permit will be for maximum five years. The residence permit is required from the nearest police station where he/she has been a resident in fifteen days. [68]

If a person moves his/her residence to another place then he/she must inform the place of new residence within forty eight hours to the nearest police department or gendarme.(Art 15)

4.2 Exceptions and Limitations :

In general , trade of services is restricted because of the need of maintaining national economy of the State or protecting the consumer ,public policy ,or guaranteeing national savings or balancing the payments or guaranteeing the public incomes.[69]

In order to prevent restrictions on free movement of services , Ex Article 63 (1) envisaged a General Programme similar to Ex Article 54 (1) related with establishment. The Council put into force these two Programmes on 18 December 1961.The first paragraph maintains the ones who will benefit from movement of services as "a natural" and "legal person".The natural persons are the ones who establish in the Union as a Union citizen.On that matter there was a difference between General Programme on establishment and services.The programme requires the elimination of restrictive laws and administrative practices which treat nationals of other Member States differently from nationals of the state concerned ,and lists examples such as attachment of licence conditions ,periods of residence ,tax burdens and various other measures which make more difficult the exercise of activities by the self-employed or by companies.This programme also requires the elimination of restrictions on the powers which might attach to the exercise of such activities such as the power to enter contracts ,to acquire property ,to have access to credit ,and to receive state aids.Directly and indirectly discriminatory restrictions alike were mentioned and a transitional system was permitted pending the subsequent mutual

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[67] Çelikel ; ibid ; page ;84
[68] Çelikel ;ibid ; page ,85
[69]Report on Uluslararası alanda hizmet sektörünün gelişimi ; page 68

recognition of diplomas and qualifications by legislative means.[70] Firstly Ex Article 59 looks for establishing in a state of the Community as a condition whereas envisaging none legislation related with overseas state citizens.The definition of legal persons in the two General Programme is identical with each other.But the Programme related with services does not mention to the firms that were established under the control of overseas state's law .Furthermore according to that Programme the firm which was established in a state of the Community must have a close relationship between one of the Member State's economy. This relationship must be **real** and **permanent**. This link is different from nationality.This classification is made just for the firms which intents to have a branch or agent in another Member State.In order to take advantage from the Programme related with services the person must be the one who guarantees providing this service or stated in a Member State of the Community as an **agent** or **branch**.In this situation the natural person could not send his worker to other Member State for providing service although he is a Union Citizen.[71]

Ams Article 45,46 and 55 (ex 55,56 and 66) contain derogations from the principle of free movement that run parallel to those applicable to workers under Article 45 to 48.[72] Directive 64/ 221 applies not only to workers ,but also to the self-employed and the recipient of services.It is clear that economic ends relating ,for example ,to raising revenue ,cannot justify restrictions on free movements.The Court has treated the maintenance of industrial peace through the settlement of a labour dispute as a mere economic concern ,which can not justify the agreed rules in so far as they restrict the exercise of fundamental freedoms guaranteed by the Treaty.Rules must be no more restrictive than is necessary to achieve the end in view.In Reyners v. Belgium case the Court insisted that the public service exception be **construed narrowly** .It could not cover the whole legal profession simply because it impinges on the state's administration of justice.Only activities involving a direct and specific connection with the exercise of official authority may be sealed off from

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[70] Craig Paul and Burca de Grainne ,op.cit , page 734
[71] Özkan Işıl ; Op.cit, Page 91-92
[72] The Treaty Establishing The European Community ; Article 55

migrants.[73] Especially the profession of law causes hesitation on that matter. Consultancy does not bring about problems but **profession of law in courts** accepted as semi official function.[74] In Reyners v Belgium case plaintiff was born in Brussels of Dutch parents ,had retained his Dutch nationality ,although resident in Belgium ,where he had been educated and been made docteur en droit belge according to a diploma issued by the central selection committee. It has not been possible for the plaintiff to be admitted to the practice of the profession of advocacy in Belgium ; the law of 25 October 1919 temporarily modifying the organization of the courts and the procedure before courts and tribunals provided that the oath or being inscribed on the roll unless he is a Belgian citizen . This provision has been replaced as by Article 428 of the Code Judiciare whereby : No one may hold the title of avocat nor practice that profession unless he is a Belgian, holds the diploma of docteur en droit ,has taken the oath prescribed by Law and is inscribed on the roll of the Ordre or on the list of probationers. Dispensation from the condition of nationality prescribed by the first paragraph of Article 428 of the code will be applicable for foreigners if being resident in Belgium for at least six years before the date of application for enrolment or can prove being a Member of a foreign Bar that not being disbarred for reasons casting doubt on integrity with regard either to his private or to his professional life or having a certificate issued by the Minister for Foreign Affairs stating that national law or an international agreement accords reciprocity . But there was no reciprocity between Holland and Belgium. The plaintiff has made several unsuccessful applications to the General Counsil of the ordre national des avocats for dispensation from the condition of nationality.[75] So he applied to the Counsil d'Etat of Belgium for the annulment of Article maintaining that this provision infringes Articles 52,54 ,55 and 57 of the EEC Treaty. The court stated that the rule of equal treatment with nationals is one of the fundamental legal provisions of the Community . As a reference to a set of legislative provisions effectively

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[73] Weatherill / Beaumont ; page 675

[74] Tekinalp / Tekinalp ; Op.cit , page 350

[75] Case 2/74 Reyners / Belgian state ; European Court reports (ECR) 1974 ; page 631 / Plender Richard and Usher John ; Cases and Materials on the Law of European Communities ; page 388

applied by the country of establishment to its own nationals , this rule is ,by its essence ,capable of being directly invoked by nationals of all the other Member States. In laying down that freedom of establishment shall be attained at the end of the transational period , Article 52 thus provides an obligation to obtain a precise result ,the fulfilment of which had to be made easier by ,but not made dependent on the implementation of a programme of progressive measures .The ECJ acknowledged ,however ,that the directives had not lost all interest since they preserve an important scope in the field of measures intended to make easier the effective exercise of the right of freedom of establishment.[76] Since the end of the **transitional** period Article 52 of the Treaty is a directly applicable provision despite the absence , in a particular sphere of the directives prescribed by Articles 54 (2) and 57 (1) of the Treaty. The exception to freedom of establishment must be applied to the activities[77] referred in Article 52 which has a direct and specific connection with the exercise of official authority ; it is not possible to give this description ,in the context of a profession such as that of Avocat to activities such as **consultation** and **legal assistance** or the **representation** and **defence of parties in court** even if the performance of these activities is compulsory or there is a legal monopoly in respect of it.

Public authority is interpreted narrowly as possible as it is in order to sustain free movement of services.At most restrictions occurred from public authority is based on sovereignty of the state.[78] Another kind of exceptions are public policy, security and health . Public policy exception in Article 46 (ex 56) is same as Article 39 (3) (ex 48/3). Therefore the interpretation and practice of the exception of Article 39 is parallel with Article 46 .So as we said before Directive 64/ 221 applies not only to workers but also to the self employed and the recipient of services.[79]According to Article 3 of the directive measures taken on grounds of public policy or of public security must be based exclusively on **the personal conduct of the individual concerned**.In that concern previous criminal convictions can

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[76] also see Karluk Rıdvan ;op.cit , page 125

[77] Services which directly affect production costs or the liberalization of which helps to promote trade in goods

[78] Tekinalp / Tekinalp ; ibid, page 350

not constitute grounds for taking of such measures.Also expiry of the identity card or passport used by the person concerned to enter the host country and to obtain a residence permit **could not justify expulsion from the territory**.Identity card or passport which are issued by the state must allow the holder of such document to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute.Finally diseases or disabilities occurring after a first residence permit has been issued could not justify refusal to renew the residence permit or expulsion from the territory. The prohibition on discrimination applies only within the scope of community law. Sport may be an economic activity, but in Walrave and Koch v Union Cycliste Internationale [80] the court refused to hold discrimination that is based on considerations of purely sporting interest to be subject to Community law. Selection for a national representative team is made on the basis of factors that do not fall within the sphere of economic activity envisaged by Article 2 (ex 2) of the Treaty .The same is not true of club football ,to which the court applied the basic prohibition against nationality discrimination with vigour in URBSFA v Bosman.[81] [82]According to the court a professional footballer could not be employed by a club of another Member State unless the latter club has paid to the former club a transfer ,training or development fee. Sporting associations and football clubs could field only a limited number of professional players who are nationals of other Member States.

Advocacy ; because of being a self-employed occupation ,establishment of legal persons is not discussed in detail.In some circumstances law firms could establish in another State.This could be formed by merging or providing the profession as a law firm in different States.

The European Court confirmed that freedom of establishment is a fundamental principle of the Community ; that Article 43 is directly effective ; that it covers companies within the meaning of Article 48 that wish to establish subsidiaries in

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[79] Tekinalp / Tekinalp ; ibid, page 351
[80] Case 36/ 74 [1974] ECR 1405
[81] Case 415/93 [1995] ECR 4921
[82] Weatherill Stephen & Beaumont Paul , Op.cit , page 676

other Member States and that it applies to restrictions on migration out of as well as into Member States.However the Court denied the existence of a precise parallel between natural and legal persons.Companies are creatures of law and in the present State of Community law, creatures of national law.The Court stated that Article 43 does not confer on companies incorporated under the law of a Member State a right to transfer their central management and control and their administration to another Member State while retaining their status as companies incorporated under the legislation of the first Member State. [83]

4.3 Right of Establishment in Secondary Legislation :

There are five directives as a secondary legislation related with the right of establishment. The first directive [84] dated 25 th of February 1964 concerns the movement and residence of foreign nationals which are justified on grounds of public policy , public security or public health.But these grounds could not be invoked to service economic ends. The basis of directive is Article 46 (2) (ex 56) and General Programmes 3 concerning the abolition of restrictions on freedom of establishment and on freedom to provide services .It relates to all measures concerning entry into the territory ,issue or renewal of residence permits or expulsion from the territory taken by Member States on grounds of public policy , security or health.Directive will also applicable to the spouse and to Members of the family. **Article 3 is the main article in the Directive**. As we mentioned before these exceptions must be based exclusively on the personal conduct of the individual concerned. Article 5 which was about residence permit governs granting or refusing first residence permit as soon as possible and in any event not later than six months from the date of application for the permit.According to the Directive the person must be informed of the grounds of public policy, public security or public health upon which the decision taken in his case based, otherwise this will be contrary to the interests of the security of the state involved. According to Directive

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[83] ibid ;page 678
[84] Council Directive 64/221 / EEC of 25 February 1964

committing a crime in the past , lasting the validity of identity card or passport will not grant right to deport.

The second directive 73/148 dated 21 May 1973 concerns the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services.The basis of the Directive is Article 44 (ex 54) and Article 52 (ex 63).This Directive abolishes restrictions on the movement and residence for

α) nationals of a Member State who are established or who wish to establish themselves in another Member State in order to pursue activities as self-employed persons or who wish to provide services in that State

β) nationals of Member States wishing to go to another Member State as recipients of services

γ) the spouse and the children under twenty one years of age of such nationals , irrespective of their nationality

θ) the relatives in the ascending and descending lines of such nationals and of the spouse of such nationals which relatives are dependant on them ,irrespective of their nationality. These people mentioned above could benefit from the right of residence under the circumstances of being dependant on that member as a family of a nation or spouse of that national or who in the country of origin was living under the same roof. [85] Members of the family also enjoy the same right as the national on whom they are dependent.[86]

Another obligation for Member States is about residence permit for self-employed ones. Member State must grant the right of permanent residence to nationals of other Member States who establish themselves within its territory in order to pursue activities as self employed persons when the restrictions on these activities have been abolished pursuant to the Treaty.[87] A valid residence permit could not be with drawn from a national solely on the grounds that he is no longer in employment because he is temporarily incapable of work as a result of illness or accident. Directive also guarantees the validity of residence depending to the period of

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[85] Council Directive 73/148 EEC of 21 May 1973 , Article 1
[86] Ibid, Article 2

services that are provided.The right of residence for persons providing and receiving services can have equal duration with the period during which the services are provided. If the period exceeds three months the Member State in the territory of which the services are performed will issue a right of abide as **proof of the right of residence**.Where the period does not exceed three months ,the identity card or passport with which the person concerned entered the territory will be a sufficient to cover his stay. These provisions are similar with the European Convention on Establishment. However the Member State may require from the person to report his presence in the territory.Article 4/ 3 is related with the ones who are not a citizen of a Member State.A member of the family who is not a national of a Member State will be given a residence document which can have the same validity as that issued to the national on whom he is dependent.According to article 8 Member States could not detract the provisions of this Directive based on public policy, public security or public health. In Micheletti case the court stated that , Member State could not restrict the right to enter the territory for the ones who has both Member State and non-member country nationalities.[88]

Directive 75/34 deals with the right to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity.[89] Article 2 regulates the conditions for the ones who will benefit from that Directive.
Any person who ,at the time of termination of his activity ,has reached the age laid down by the law of that State for entitlement to an old-age pension who has pursued his activity in that State for at least the previous twelve months and has resided there continuously for more than three years (If the law of that Member State does not grant the right to an old age pension to certain categories of self employed workers ,the age requirement will be considered as satisfied when the beneficiary reaches 65 years of age) or any person who having resided continuously in the territory for more than two years ceases to pursue his activity as a result of permanent incapacity to work (If the spouse of the self employed

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[87] Ibid . Article 4
[88] see also page 26-27

person is a national of the Member State concerned or has lost the nationality of that State by marriage then the conditions as to length of residence and activity mentioned above will not be applied) or any person who ,after three years continuous activity and residence in the territory and pursues his activity in another Member State while retaining his residence in the territory of the first state to which he turns as a rule each day or at least once a week has the right to remain permanently in that host State. This provision will continue to apply even after the death If the person concerned has acquired the right to remain in the territory of that State in accordance with article 2. In case of death of the self employed person during his working life or before having acquired the right to remain in the territory of that State , the members of his family has the right to remain permanently in that host State if the deceased had resided continuously in that State for at least two years or his death resulted from an accident at work , occupational illness or the surviving spouse is a national of that State or has lost such nationality by marriage to the person concerned. (Art.3). Continuity of residence can be attested by any means of proof in use in the State of residence. Duration is not affected by temporary absences not exceeding a total of three months per year nor by longer absences due to compliance with the obligations of military service. Periods of inactivity due to circumstances outside the control of the person concerned or of inactivity owing to illness or accident do not affect the duration negatively.(Art 4)

A general rule is repeated as " Member States may not derogate from the provisions of Directive save on grounds of public policy, public security or public health " in article 9.

Another Directive[90] which is related with the right of residence mentions to the document called "Residence permit for a national of a Member State of the European Communities"which was limited to five years on a renewable basis is similiar with the second Directive Article 4 .But in this Directive Member States has given a right for requiring revalidation of the permit at the end of the first two years of

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[89] 75/364 EEC Directive ,[OJ 1875 , L14 / 10]
[90] Council Directive 90/ 364 /EEC of 28 June 1990

residence when it was deemed as necessary.This directive grants the right of residence to one step further by the implementation of Article 1 of the 73/148 Directive. According to 90/364 Directive ; Member States will grant the right of residence to nationals of Member States who do not enjoy the right of residence permit under other provisions of Community law and to members of their families if they themselves and the members of their families are covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence. The last Directive is on the right of residence for employees and self-employed persons who have ceased their occupational activity.[91] With that Directive Member States will grant the right of residence to nationals of Member States who have pursued an activity as an employee or self-employed person and to members of their families if they are recipients of an invalidity or early retirement pension or old age benefits ,or of a pension in respect of an industrial accident or disease of an amount of sufficient to avoid becoming a burden on the social security of the host Member State during their period of residence and provided they are covered by sickness insurance in respect of all risks in the host Member State.The resources of the applicant will be deemed sufficient where they are higher than the level of the resources below which the host Member State may grant social assistance to its nationals who are his or her spouse and descendants who are dependants and also dependant relatives in the ascending line of the holder of the right of residence and his or her spouse.

4.4 Providing Services :

Ams Article 50 explains the difference of movement of services from the other freedoms.Services are provided for remuneration whereas not governed by the provisions relating to freedom of movement for goods ,capital and persons.In order to benefit from this freedom similar to other freedoms one must have a resident in

[91] Council Directive 90/365 /EEC of 28 June 1990

a Member State.Services provided without wage[92] and has no link with foreign element will draw the outside border of this freedom. [93] If the right of establishment entails the pursuit of an economic activity from a fixed base in a Member State for an indefinite period ,the freedom to provide services by contrast entails the carrying out of an economic activity for a temporary period in a Member State in which either the provider or the recipient of the service is not established.[94] In Gebhard , it was seen that the ECJ acknowledged that the provision of services did not necessarily cease to be temporary simply because the provider might need to equip herself with the necessary infrastructure (for example an office of chambers) to perform those services. [95] Further ,the Court has ruled that if someone directs most or all of his or her services at the territory of a particular Member State but maintains his or her place of establishment **outside that state** in order to evade its professional rules ,that person **may be treated** as being established within the Member State and thus covered not by Article 49 (ex 59) but by Article 43 (ex 52). [96]

The court stated that the possibility for a national of a Member State to exercise his right of establishment and the conditions for the exercise of that right must be determined in the light of the activities which he intends to pursue on the territory of the host Member State . and added that where the taking up of a specific activity is not subject to any rules in the host State a national of any other Member State will be entitled to establish himself on the territory of the first State and pursue that activity there.On the other hand where taking up the pursuit of a specific activity is subject to certain conditions in the host Member State ,a national of another Member State intending to pursue that activity must in principle comply with them.

National measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions:

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[92] Representative in a cycling sport
[93] Tekinalp/ Tekinalp ,ibid , page 358
[94] Craig Paul and Grainne de Burca , page 762
[95] Case 55/94 [1995] ECR 4165 ; Craig Paul and Grainne de Burca , op.cit, page 762

α) They must be applied in a non discriminatory manner

β)They must be justified by imperative requirements in the general interest

γ)They must be suitable for securing the attainment of the objective which they pursue

θ) They must not go beyond what is necessary in order to attain the aim.[97]

4.5 The effect of Article 49 (ex 59)

The area of provision of services was subject to even greater problems of control and discipline than that of establishment. Articles 49 and 50 (ex 59 and 60) would not be found to have direct effect ,and that the only satisfactory solution was the adoption of directives as provided under Articles 52 (ex 63) and 47 (ex 57).In Van Binsbergen v Bestur van de Bedrijfsvereniging voor de Metaalnijverheid case a Dutch national acting as legal adviser to Van Binsbergen in respect of proceedings before a Dutch social security court, transferred his place of residence from the Netherlands to Belgium during the course of the proceedings.He was told that he could no longer represent his client since under Dutch law,only persons established in the Netherlands could act as legal advisors .A reference was made to the ECJ to determine whether Article 49 had a direct effect[98] whether the Dutch rule was compatible with it.The provisions of Article 49 ,the application of which was to be prepared by directives issued during the transitional period,therefore became unconditional on the expiry of that period. The provisions of Article 49 abolish all discrimination against the person providing the service by reason of his nationality or the fact that he is established in a Member State other than that in

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[96] Craig Paul and Grainne de Burca , page 764

[97] Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano ; page 4201

[98] The doctrine of direct effect constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights , albeit within limited fields and the subject of which comprise not only Member States , but also their nationals .Independent of the legislation of Member States ,Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights that become part of their legal heritage .These rights arise not only when they are expressly granted by the Treaty but also by reason of obligations that the Treaty imposes in a clearly defined way upon individuals as well as upon Member States and upon the institutions of the Community (Tiersky Ronald ; Europe Today ; page 311)

which the service is to be provided.[99]Therefore at least as regards the specific requirement of nationality or of residence ,Articles 49 and 50 impose a well defined obligation ,the fulfilment of which by the Member States cannot be delayed or jeopardized by the absence of provisions which were to be adopted in pursuance of powers conferred under Article 52 and 55 (ex 63 and 66).The court identified two reasons for the Treaty provisions on the adoption of Directives : first negative function to abolish restrictions and secondly a positive function to facilitate the freedom to provide services.[100] The ECJ found the residence requirement in issue in Van Binsbergen to be **a particularly straightforward infringement** of that Treaty provision given that the precise aim of the provision was to abolish state restrictions on the freedom to provide services which were imposed on non-resident providers.

5. Free Movement For Lawyers

5.1 Definition :

A lawyer is a person who is qualified to advise people about the law and represent them in court.[101] Whereas **solicitor** is a legal practitioner in the United Kingdom(UK) .The position and the rights duties obligation and privileges are now regulated by statute.The UK still has a distinction on the one hand between the ordinary lawyer who is a man of affairs and a generalist who (in England especially) does not essentially appear in courts ,and on the other hand the **Barrister or Advocate**.However ,the distinction is becoming blurred with the creation of the **Solicitor Advocate**[102] a legal practitioner admitted to practice under the provisions of the Solicitors Act 1974. Practising solicitors must process a practising certificate .Solicitors form the larger part of the English legal profession, undertaking the general aspects of giving legal advice and conducting

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[99] Craig Paul and Grainne de Burca , page 765 ;Weatherill Stephen and Beaumont Paul , page 672;

[100] Ibid ; page 765

[101] Collins Cobuild English Language Dictionary ; page 817

legal proceedings.They have rights of audience in lower courts but **not act as advocates in the Supreme court or the House of Lords unless they have acquired a relevant advocacy qualification under the terms of the Courts and Legal Services Act 1990** .A solicitor may be sued for professional negligence and owes the duties of a fiduciary trustee to his client ;these include the duty to preserve the confidentiality of the client's affairs.[103]

Legal work can be broadly defined as work done on behalf of clients as

α) ascertaining or defending legal rights before courts ,tribunals ,public authorities and private (arbitration) bodies ;

β) drafting legal documents and dealing with all necessary legal formalities in connection with them ;

γ) advising on legal rights and duties;

θ) handling and negotiating a variety of transactions with a significant legal element.[104]

In order to provide service as a Lawyer in other Member States ,the diplomas should be recognised by the host state. Member States required different measures for recognition so by Council Directives legal harmonization is sustained.

5.2 Mutual Recognition of Diplomas and the Co-ordination of National Qualifications

Paragraphs (1) and (2) of Ams Article 47 (ex 57) provide ,respectively ,for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for the coordination of the provisions laid down by law,regulation or administrative action in Member States concerning the taking up and pursuit of activities as self-employed persons.

The general Programme contemplated transitional measures ,whereby access to non wage earning activities might be allowed on proof of " actual and legitimate exercise of the activity in the country of origin."A recent example of such a transitional regime is provided by Directive 75/369 , dealing with the activities of

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[102] Stewart W.J and Burgess Robert ; Collins Dictionary of Law , page 363
[103] Martin A. Elizabeth ;Oxford A Dictionary of Law , page 375

itinerant trades people ,such as fairground operators. The Directive provides that where ,in the case of its own nationals , a Member State requires documentary evidence of good repute ,or of never having been declared bankrupt ,it must accept in the case of nationals of other Member States appropriate equivalent documentation issued in their country of origin. Where no such documentation is issued ,the host State must accept a declaration on oath or a solemn declaration made before and duly certified by a competent judicial or executive authority in the appropriate country of origin. Where in a Member State the pursuit of the activities in question is subject to the possession of general ,commercial or professional knowledge and ability, that Member State must accept as sufficient evidence of such knowledge and ability the fact that the activity in question has been previously carried on in another Member State .The period required is either two or three years depending on whether it was completed in an employed or self employed capacity and on whether or not the relevant experience was preceded by a course of training. The Directive applies also to employees no doubt because differences in national vocational requirements are as capable of constituting an obstacle to the free movement of workers as they are of hindering the peregrinations of the self employed. [105]

5.3 Limitations and Freedoms :

The difficulty for non nationals seeking to establish themselves or provide services in another Member State is ,that they may not be able to **satisfy the conditions** laid down in that State for the practice of the particular trade or profession which they wish to exercise.The relevant conditions are those prescribed by trade or professional bodies ,normally reinforced by law relating to :

α)the education and training required for qualification for the job and

β) rules of professional conduct

Both of these vary greatly in scope and content and quality from State to State. The need to comply with these conditions has thus provided a potential barrier to

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[104] Adamson Hamish ; page 7

[105] Wyatt Derrick and Dashwood Alan ,Op.cit ; page 192-193

freedom of movement for the self employed ; it has also hindered the free movement of workers ,since they too may wish to work as employees in a trade or profession which is subject to a regulation at national level. Because of these difficulties the Treaty provided for the abolition of existing restrictions on freedom of establishment and freedom to provide services to be achieved in progressive stages during a transitional period. During the first stage Council ,acting on a proposal from the Commission was to draw up a general programme on the abolition of restrictions on freedom of establishment and on to the freedom to provide services. In addition these institutions were required ,during the first stage to issue Directives for the mutual recognition of diplomas and certificates and other evidence of formal qualifications and before the end of the transitional period to issue Directives for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking up and pursuit of activities as self employed persons. The general programmes were adopted in 1961.Although not binding they provide **valuable guidelines in the interpretation of the Treaty** and have been invoked on a number of occasions by the court .National professional bodies have understandably been reluctant to compromise on long established principles and practices and although many Directives have been passed in areas ranging from wholesaling to hairdressing to medicine ,progress has been slow. The architects Directive alone took seventeen years to pass.[106]

Even though Directives have not been passed ensuring mutual recognition of diplomas ,certificates and other evidence of formal qualifications in a particular trade or profession ,it will be discriminatory ,in breach of Article ex 52 and ex 59 and ex 60 together with Article 7 to refuse permission to practice to a person whose qualifications have been recognised in some way as equivalent to those required in the State in which he seeks to practice.[107]

The structure of the Directive can only be summarized as : it aims to control the ability of States to exclude nationals from other Members States from the pursuit

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[106] Steiner Josephine ; Textbook on EEC Law ; page 207

[107] ibid ; page 207 / Weatherill Stephen and Beaumont Paul , page 698

of professional activities on the basis that they are **inadequately qualified.**Where an individual has in his or her home state acquired a higher education qualification of at least three years duration in principle that person is entitled to move to another state in order to pursue there the profession covered by the qualification issued in the home state.As a means of maintaining standards , there are defined circumstances where the host State may require the production of evidence of professional experience or may impose the need for an adaptation period.The migrant may choose to sit an aptitude test rather than fulfill the adaptation period although the choice lies with the State and not the individual where the profession requires precise knowledge of the law of the host State.[108]
In Thieffry v Counseil de l'Ordre des Advocats a la Cour de Paris[109] ,Article 177 proceedings ,the court held that the French Bar Council could not refuse to allow Thieffry ,a Belgian national with a Belgian law degree to undertake practical training for the French Bar ,since his Belgian degree had been recognised by the University of Paris and he had acquired a qualifying certificate in France for the profession of advocacy .The court Stated that when a national of one Member State desirous of exercising a professional activity such as the profession of advocate in another Member States has obtained a diploma in his country of origin which has been recognized as an equivalent qualification by the competent authority under the legislation of the country of establishment and which has thus enabled him to sit and pass the special qualifying examination for the profession in question the act of demanding the national diploma prescribed by the legislation of the country of establishment constitutes even in the absence of the Directives provided for in Article 57 ,a restriction incompatible with the freedom of establishment guaranteed by Article 52 of the Treaty.[110] Similarly in Patric v Ministre des Affaires Culturelles [111] ,Article 177 proceedings the court held that Patric , an Englishman ,who had been trained as an architect in England ,was entitled to invoke Articles 52 and 7 in order to practice architecture in France

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[108] Weatherill Stephen and Beaumont Paul , page 698
[109] Case 71/76 Thieffry v Conseil de l'ordre des avocats a la Cour de Paris
[110] Case 71/76 ; page 780
[111] Case 11/77 [1977]ECR 1199

,since although no diplomatic convention ensuring recognition had been agreed ,as was required by French law ,and no EEC Directives relating to architects had at that time been passed ,his English qualifications had been recognised as equivalent to the corresponding French degree under a Ministerial Decree of 1964.Where a Directive has been issued for the mutual recognition or harmonization of qualifications in a particular profession that profession may no longer insist on compliance with its own requirements by persons who have qualified in another Member State according to the terms of the Directive.[112]

Where qualifications obtained in a particular Member State have not been subject to harmonization or recognised in another State ,it will not be discriminatory ,in breach of EC law ,for a State or a professional body to refuse a person possessing these qualifications permission to practice .As the Commission pointed out in 1985 in its White Paper on the completion of the internal market ,this constituted a serious barrier to freedom of establishment and the freedom to provide services ,as well as to the free movement of workers ,in the single market.[113] In place of the endless fruitless search for common rules and standards , the Commission was to adopt an approach similar to that which it was apply to goods also.This was to be based on:

α) the harmonisation of essential safeguards and standards applicable to activities as a whole ;

β) within that framework ,acceptance of the standards of other Member States on a basis of mutual trust and recognition ,on the principle of home country control and supervision.[114]

Because of the problems outlined above and progress on harmonisation for the purpose of mutual recognition of qualifications had been so slow ,the Community decided ,following agreement by the Heads of State at Fontainebleau in June 1984 ,on a new approach. Instead of attempting to harmonise by profession ,known as the sector or vertical approach , the Commission was henceforth to adopt a general or horizontal approach based not on harmonisation but on the mutual

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[112] Steiner Josephine ; Textbook on EEC Law ; page 209
[113] ibid ; page 210

recognition of qualifications and applicable not to individual professions but to all areas of activity for which a higher education diploma was required .Directive 89/48[115] based on these principles was approved in December 1988.The Directive applies only to regulated professional activities ,although it is sufficient if they are regulated only in one State in the Community.It does not attempt to modify the rules applicable to particular professions in individual Member States ,nor does it apply to professions which were already subject to separate Directives providing for the mutual recognition of diplomas. Like the prior harmonisation Directives will apply to workers as well as the self employed.The starting point for the principle of mutual recognition is a higher education diploma awarded on completion of professional education and training of at least three years duration, or the equivalent period part time.Where in the host state ,the taking up and pursuit of a regulated profession is subject to the possession of a diploma ,the competent authority of that State may not refuse to authorise a national of a Member State to take up and pursue that profession on the same conditions as apply to its own nationals , provided the applicant holds a diploma required in another State for the pursuit of the profession in question ,or has pursued that profession for at least two years in a State which does not regulate that profession(Article 3)

Where the applicant's education and training is at least one year shorter than that which is required by the host State ,or where there is a shortfall in the period of supervised practice required by the host State ,the applicant may be required to provide evidence of professional experience. This may not exceed the shortfall in supervised practice ,nor twice the shortfall in duration of education and training, required by the host State ; in any event ,it may not exceed **four years**. The host State may also require an adaptation period not exceeding **three years**:

α)where matters covered by the applicant's education and training differ substantially from those covered by that of the State ; or

β)where the activities regulated in the host State are not regulated in the applicant's State of origin ; or

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[114] Steiner , page 215

[115] OJ LO19 , 24.1. 1989

θ) where the profession regulated in the host State comprises activities which are not pursued in the State from which the applicant originates,
provided in the latter two situations ,the difference corresponds to specific education and training required in the host State and covers matters which differ substantially from those covered by the evidence of formal qualification(Article 4).

Instead of the adaptation period the applicant may opt for an aptitude test. However ,for professions whose practice requires precise knowledge of national law and in which the giving of advice on national law is an essential and constant aspect of that activity ,a State may stipulate either an adaptation period or an aptitude test.The requirements of periods of professional experience and adaptation cannot be applied cumulatively .Thus the **total period can not exceed four years**.In addition the host State may allow an applicant to undertake in the host State ,on a basis of equivalence ,that part of his training which consists of supervised professional practice.(Article 5)
Member States were required to implement the Directive by 4 January 1991.Thus provisions which are sufficiently clear ,precise and unconditional were directly effective from that date at least against a public body an agency of the State.Since professional bodies normally operate subject to statutory authorisation and control it is submitted that this factor should constitute a sufficiently public element for the purposes of enforcement of the Directive. The Directive thus represents a significant breakthrough removing many of the existing and substantial barriers to the free movement of the employed and the self employed.[116] Should there be problems over establishing direct effects or in the case of claims arising before 4 January 1991 , the court has held that professional bodies of a Member State in deciding whether to allow persons who do not satisfy their own State's professional requirements must take into account the applicant's qualification and compare them with the "**home**" requirements in order to assess whether they are in fact equivalent. Applicants are entitled to be given reasons for decisions and must have an opportunity to

[116] ibid ; page 211- 212

challenge them in judicial proceedings.[117] In Vlassopoulou v Ministerium für justiz,Bundes –und Europaangelegenheiten Baden-Württemberg [118] case, involved a Greek lawyer wishing to become established in Germany .Under German rules she was inadequately qualified. The court insisted that the German authorities must cooperate with the Greek authorities in reviewing the adequacy of Vlassopoulou's Greek qualifications .This duty of good administration is derived from Article 10 (ex 5) of the Treaty and runs parallel to the approach taken in the field of the free movement of goods ,where cooperation in checking the safety of goods is demanded by the court.Requiring States to work together is likely to improve the integration of the market for legal services and also improves the position of individuals such as Vlassopoulou.The Court stated that if those diplomas correspond only partially ,the national authorities in question are entitled to require the person concerned to prove that he has acquired the knowledge and qualifications which are lacking.In this regard the said authorities must assess whether the knowledge acquired in the host Member State either during a course of study or by way of practical experience is sufficient in order to prove possession of the knowledge which is lacking. If the completion of a period of preparation or training for entry into the profession is required in the host Member State , the national authorities must decide whether professional experience acquired in the Member State of origin or in the host Member State may be regarded as satisfying that requirement in full or in part. [119] The decision in Vlassopoulou follows Klopp[120] in tentatively suggesting that a Cassis de Dijon style approach should then be applied to the national rules.This is confirmed by Gebhard [121] in which Vlassopoulou is cited.If the object is met by the home State's qualifications ,then that should suffice to guarantee access to the market of the host State.The court has not robbed the State of the basic power to exclude a migrant from its market as inadequately qualified but it has developed the law in such a way that adequacy of qualifications must be assessed the reasons for

[117] ibid ; page 212
[118] Case 340/89 [1991] ECR 2357
[119] ibid ; page 2358
[120] Case 107/83 [1984] ECR 2971

perceived inadequacy must be laid bare and they must be subject to the possibility of challenge.[122]

5.4 The Directive 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 :

Recognition of higher education diplomas is only for Member States.Third countries is not included in this system.But in practise Member States recognize diplomas that was gained in third countries in a condition of reciprocity.[123] The general principles of the directive can be listed as below :

α This system will be applied only for Member States.Citizens of third countries can not benefit from this system.

β System envisaged conditions for all activities of professions which are provided for remuneration in general. The other activities of profession are not in this concept.

γ This system is solely applicable for the professions that will based on education of training at least three years duration. Therefore the second supplement directive (92/51 EEC) on recognition of diplomas is not related with the profession of advocacy.In order to be lawyer ,One must graduate from a university lasting at least three years duration.

Θ Once the competent authority in a Member State recognised a diploma given from an University in a Member State , graduates who are having this diploma will benefit from that recognition automatically.

ε The competent authority will recognize after the examination of equivalence of the diplomas.[124]

The aim of the Directive was to speed up the process of giving effect to freedom of establishment for the professions in the Community and make it

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[121] Case 55 / 94 [1995] ECR 4165
[122] Weatherill Stephen and Beaumont Paul ; page 695
[123] Avrupa Topluluğunda Yerleşme ve Hizmet Edinme Serbestisi ; page 29
[124] ibid ; page 34

easier for professionals qualified in one Member State to practise in other Member States .[125] Art 1. gives the features of definition of diplomas.A diploma can be awarded by a competent authority ,designated in accordance with State's own laws,regulations or administrative provisions or can be awarded within a completion of a post-secondary course of at least three years duration or awarded by having professional qualifications required for taking up or pursuit of a regulated profession in a Member State. As a definition of "Diploma" covers not only professional qualifications obtained by alternative routes such as a part-time and non university courses of study where the final professional qualification is equivalent to that obtained by graduates.This means for example that English solicitors who have qualified by way of non-law graduate or non-graduate entry are within the Directive and can take advantage of it to seek re-qualification in other Member States.[126]

The Directive allows Member States to require an incoming professional to undergo an adaptation mechanism[127] to compensate for objective differences between his /her training or sphere of activity and those applicable to equivalent activity in the host State.This can take the form of either an aptitude test or an adaptation period. Except Denmark every Member State applies aptitude test.

For professions whose practise requires precise knowledge of national law and in respect of which the provision of advice and/or assistance concerning national law is essential and constant aspect of the professional activity the choice may be made by the host State. Where the aptitude test is chosen the competent authorities must compare education and training required in the host State with that received by the migrant and draw up a list of subjects not covered by the migrant's qualifications.Where the competent authority of the host State chooses to impose an aptitude test ,it will not be able to require an adaptation period in addition.Conversely ,if the host State chooses to impose an adaptation period ,it

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[125] Adamson Hamish ; Free Movement of Lawyers ; page 61

[126] Adamson Hamish ; ibid ;page 62

[127] Adaptation period is defined in part (f) as the pursuit of a regulated profession in the host Member State under the responsibility of a qualified member of that profession ,such period of supervised practise possibly being accompanied by further training This period of supervised practise shall be the subject of an assessment.

can not impose an aptitude test.[128] The duration of the adaptation period must not exceed three years.

Art.4.1(a) enables a host State to require a migrant to show evidence of up to **four years practise** as a fully qualified professional or requires to have education and training not exceeding twice the shortfall where it relates to post secondary studies and/or to a period of probationary practise carried out under the control of a supervising professional person and ending with an examination or professional practise not exceeded the shortfall where it relates to professional practise acquired with the assistance of a qualified member of profession if his/her professional training is shorter by at least a year than that required in the host State. However this can not be imposed in addition to the adaptation mechanism such as aptitude test or adaptation period. Adaptation period may not exceed three years.

In order to practise the profession evidence of fitness, good character or repute ,freedom from bankruptcy is required. Art 6 provides for acceptance by the host State authorities of the required evidence of these matters in the form of certificates or appropriate declarations from the applicant's home State. Such requirements can not be more onerous than those imposed on nationals of the host State. Where the competent authorities of the Member State of origin or of the Member State from which the foreign national comes do not issue the documents referred above ,such documents shall be replaced by a declaration on oath or by a solemn made by the person concerned before a competent judicial or administrative authority or by a notary or a qualified professional body of the Member State where he comes.

According to Art 7 the competent authorities of the host Member State can recognize the right of nationals of who fulfil the conditions for taking up and pursuit of a regulated profession in their territory to use the professional title of the host Member State corresponding to that profession.

Art.8 requires the procedure for examine applications under the Directive to be completed as soon as possible and the outcome to be communicated not later

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[128] Adamson ; ibid ;page 63

than four months after presentation of all the documents. A reasoned decision is required and there must be a right of appeal to a Court under national law.[129] According to Art 9 each Member State must designate competent authorities to carry out the assessment of applications for recognition from foreign professionals.

5.5 Criticize of the Directive :

According to Perterk there is a reluctance to acknowledge that activity which is regulated within the meaning of the directive ; there are still obstacles to free movement ,the origin of which is to be found in public regulations.

Secondly there is the problem of putting the general system's basic principle for instance mutual trust into full effect .The tendency in most of the Member States is to reverse the principle and the exception. This means on the one hand that countervailing and controlling measures are generally considered justified. This implies on the other hand that these measures are extremely strict.

Thirdly there is a clear preference in the Member States to use an aptitude test as the corrective measure required of the applicants .This result in a wide interpretation of the derogation from the rule allowing the applicant to choose between an adaptation period and a test ; it is doubtful whether some professions such as the profession of commissaire-priseur in France may truly be considered as a legal profession within the definition of the Directive.

Finally another danger is linked to the choice of the competent authority.If the designated competent authority is the body which represents the profession , the fear may exist of a tendency towards protectionism or even hostility against migrants arriving to compete with the members of the profession.[130]

Most of the Treaty provisions on free movement of persons ,the directives in the field of recognition of qualifications do not themselves cover non-community nationals.Nor do they apply to qualifications obtained outside the community although under Directive 89/48 a diploma awarded within the community may in

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[129] ibid ; page 64

certain circumstances take into account education received outside the community.However at the same time as the adoption of Directive 89/48 the Council passed a recommendation encouraging the Member States to recognize diplomas and other evidence of formal qualifications obtained in non-member countries by community nationals.[131] With Council recommendation 89/49 governments of Member States must take account of the special position of nationals of Member States who hold diplomas ,certificates or other evidence of formal qualifications awarded in third States and could allow to take up and pursue regulated professions within the community by recognising these in their territory.[132]

5.6 Related Cases :

The court stated in Borrell v Colegio ofical de Agentes case that in the absence of harmonization of the conditions of access to a particular profession the Member States are entitled to specify the knowledge and qualifications needed in order to pursue it and to require the production of a diploma certifying that the holder has the relevant knowledge and qualifications .[133]
If there is only partial equivalence between the diplomas or qualifications ,the authorities of the host State are entitled to require the person concerned to show that he/she has acquired the knowledge and skills which are lacking by requiring him to pass an examination in case of necessity.

Consequently , a Member State which receives a request to admit a person to a profession to which access, under national law ,depends upon the possession of a diploma or a professional qualification must take into consideration the diplomas, certificates and other evidence of qualifications which the person concerned has acquired in order to exercise the same profession in another Member State by

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[130] op.cit ; Craig and Burca ; page 741
[131] ibid ; page 742
[132] Council Recommendation 21 December 1988. 89/49 EEC [OJ 1989 .L19/24]
[133] Case 104/91 [1992] ECR 3003

making a comparison between the specialised knowledge and abilities certified by those diplomas and the knowledge and qualifications required by national rules.[134]

That examination procedure must enable the authorities of the host Member State to assure themselves on an objective basis that the foreign diploma certifies that its holder has knowledge and qualifications which are ,if not identical at least equivalent to those certified by the national diploma. That assessment of the equivalence of the foreign diploma must be effected exclusively in the light of that diploma having regard to the nature and duration of the studies and practical training to which the diploma relates.[135]

Another action is brought on 21 April 1999 by the commission of the European Communities against Italy[136] .The applicant claims that the court should declare that: by maintaining in breach of Article 59 EC Treaty , a general prohibition whereby lawyers established in other Member States and practising in Italy in exercise of the freedom to provide services do not have available to them the infrastructure needed by them to provide their services ,by making enrolment as a lawyer on an Italian register conditional upon the possession of Italian citizenship, the possession of qualifications acquired only in Italy and maintenance of a residence in an Italian judicial district ,by applying in a discriminatory manner against lawyers from other Member States the "offsetting measures" (aptitude test) provided for in Article 4 of Council Directive 89/48 /EEC , and by incompletely transposing Directive 89/48 notwithstanding the absence of implementing rules laying down arrangements for the aptitude test for lawyers from other Member States ,Italy has failed to fulfil its obligations under Article 52 and 59 of the EC Treaty and of Directive 89/48 EEC.[137]

In Österreich case the court stated that rules of a Member State on the taking into account of previous periods of employment for the determination of contractual teachers'

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[134] European Commission ; Guide to the case law , page 42 / from the same case
[135] ibid. em , page 42
[136] Case C 145/99
[137] OJ L019 24.1.1989 , Official Journal of the EC

and teaching assistants' pay infringe Article 39 of the EC Treaty (ex 48) and Article 7(1) of Regulation No 1612/68 where more onerous requirements are imposed with regard to periods completed in other Member States than with regard to periods completed in comparable institutions in that Member State and added where a Member State is required to take into account periods completed in certain institutions in other Member States, those periods must be taken into account without any temporal limitation; the periods to be taken into account therefore include any such periods completed before the accession of a Member State to the European Union.[138]

Another action deals with Article 39 of the EC Treaty (ex 48).Article 39 is implemented as mentioned below. Art 39 does not preclude the terms of a collective agreement which applies to a public body in a Member State and restricts the right to practice within that body as a profession of **restorer** which is not regulated for the purposes of Council Directives 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration and 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48 solely to those in possession of a qualification awarded by an educational establishment in that Member State or of any other foreign qualification which has been officially recognised by the competent authorities of that Member State and also Art 39 none the less requires the authorities of the host Member State which are competent to grant official recognition to foreign diplomas or to validate them or, if no such authorities exist, the public body itself, to consider, as regards the diplomas awarded in another Member State, the extent to which the knowledge and qualifications certified by the diploma awarded to the person concerned correspond to the knowledge and qualifications required by the host Member State's own legislation. Where they correspond only in part, it is for the competent national authorities or, where appropriate, the public body itself, to assess whether the knowledge acquired by the person concerned during a course of study or by way of practical experience is sufficient to show possession of knowledge to which the foreign diploma does not attest.

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[138] Case C-195/98 , 27 January 2000

5.7 Activities Connected with the Exercise of Official Authority:

Ams Article 45 (ex 55) provides that right of establishment shall not apply ,so far as any given Member State is concerned to activities which in that State are connected, even occasionally ,with the exercise of official authority. Article 55 also applies to the provisions of services.(Article 55 / ex 66)

It was invoked in Reyners case . One of the arguments raised by the Belgian government in defending the Belgian's Bar's rule restricting the profession of advocacy to Belgian nationals.1970 a regulation granted right to practise the profession referring to a condition of reciprocity whereas there was not a reciprocity between Belgian and Netherlands. Reyners sued for the annulment of this regulation and asked if the profession of advocacy fell within ex Article 55 and was it connected with official authority. The Court disagreed. Ex Article 55 applied only to activities connected with the exercise of official authority ; it did not apply to professions or occupation as a whole. The derogation ,the Court held was aimed at the exercise of prerogative power .Whilst the exercise of judicial power would represent an exercise of official authority ,the activities of an advocate would not.[139]

5.8 Recognition of Higher Education Diplomas in Turkish Legal System :

Higher Education Act [140] article 7 which lists the functions of Higher Education Committee has given right to this Committee to determine the equivalence of the higher education diplomas obtained from the foreign universities for recognition. There is a special directive in that subject named as "Directive on equivalence for foreign higher education diplomas"[141]The objective of this

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[139] ibid , page 218 / Tekinalp/Tekinalp. page 350
[140] Yüksek Öğretim Kanunu : Kanun no: 2547 RG:6 Kasım 1981 - 17506
[141] Yurtdışı Yükseköğretim Diplomaları Yönetmeliği ; RG: 14.07.1996 - 22696

Directive is to determine the conditions and procedure for recognition higher education diplomas.

The examination consists of :

α)Whether the diploma is original or not (whether a scraping or rubbing out is made)

β)Whether documents belong to the applicant or not

γ)Whether the diploma has obtained from the well known universities or not

θ)Comparison of the foreign education programme with the Turkish education programme

After the examination , the authorized committee decides to accept or refuse the application. If it is accepted , a document of equivalence will be presented.

If an hesitation is occurred in the level or content of the education the committee will decide to take an aptitude test for the applicant.If the education programme does not require attendance to the lectures , the committee will not recognise this kind of higher education diplomas.

The aptitude test for the ones who has graduated from the law faculty must have taken in the law faculties of İstanbul or Ankara or Dokuz Eylül universities.

When Turkey becomes a Member to the Union Bar Associations could require taking aptitude test from the lawyers who want to practice the profession in Turkey.The subjects of the test could be composed of Civil Law ,Administrative law and Criminal law.

As we see ; recognition of high education diplomas is similar with the directives. A candidate could take aptitude test but this was not a must in our legislation. This will be appreciated by the committee but in Directives except Denmark every Lawyer must take the aptitude test.

Turkey also ratified "European Convention on the Equivalence of Periods of University Study ".According to the convention the period of study could be recognised by the home university if a large number of students ,among other students of modern languages have spent a period of study abroad and if examinations was passed and courses was taken by such students. Article 1 of the convention denotes the term of "universities" as universities and institutions regarded as being similar in character to universities by the Contracting party in whose territory that are situated. Article 2 regulates the recognition the period of study , spent by a student of modern languages in a university of another Member country of the Council of Europe as equivalent to a similar period spent in his/her home university if the authorities of the first mentioned university have issued to such a student a certificate attesting that he/she has completed the said period of study to their satisfaction. The length of the period will be determined by the competent authorities of the Contracting Parties. According to Article 4 Contracting parties shall endeavour to determine by means of unilateral and bilateral arrangements ,the conditions under which an examination passed or a course taken by a student during a period of study in a university of another Member country of the Council of Europe may be considered as equivalent to a similar examination passed or a course taken by a student in his/her home university. Each contracting party will encourage the favourable consideration and application the principles mentioned in Article 2,4.[142]

[142] Participant States of the Convention is composed of Austria,Belgium,Croatia,Czech Republic, Denmark,Finland,France,Germany,Iceland,Ireland,Italy,Liechtenstein,Luxembourg,Malta,Netherlands, Norway,Poland,Portugal,Romania,Russia,Slovakia,Sweden.Switzerland, United Kingdom.
Belgium, Greece , Netherlands, Switzerland , United Kingdom put declarations to the Convention.

6.Requirements from Lawyers for Practising the Profession in Member States[143]

6.1 University Qualifications in France :

Since 1977, the intending advocates must first obtain a university law degree called Maitrise which requires four years of study .The first three years entitle the successful candidate to the degree of Licence en droit.The four year programme for the degree guarantees a comprehensive knowledge of French law and procedure and also contains some elements of non-legal subjects such as economics.

In addition to Maitrise , the entending advocate must obtain the certificate of aptitude for the profession of advocate(CAPA).The rules require the candidate for the CAPA to follow a one-year course of study of both theory and practice ,after the passing of an examination.The programme consists of practical courses in oral expression, interviewing clients and preparing opinions , drafting of procedural requirements and pleadings , drafting of other legal documents and finally studying the rules of professional conduct.

During the year ,the candidate also undertakes periods of training in the office of an advocate or other practising lawyer , or accountant , or in legal departments of a commercial company , or court ,or with a trade-union ,or with a central or local government department in France or abroad.

The entrance examination comprises both written and oral tests.In addition the certificate for the CAPA is ,of course ,only granted after a further examination at the conclusion of the course.Once he has obtained his certificate ,the intending advocate must undertake the period of practical training (stage).Admission to the stage is dependent on evidence of good character ,the stagiaire must also show that he is going to serve his stage in the office of an advocate situated in the area of that particular Bar.He then takes the oath of admission to the Bar and

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[143] These informations are based on web site of Insitute of European Law ; www.iel.bham.ac.uk

becomes an avocat stagiaire under the supervision of the centre of professional training of the regional Court of Appeal. The centre provides the practical course of tuition in the rules and customs of the profession ; it arranges for each staigiaire to attend court hearings and generally ensures that he receives an effective training. The period of training of a stagiaire is usually for a minimum period of two years , and a number of alternatives are allowed for where the training may take place.During his training , a stagiaire is entitled to do all acts which a full member of the profession can do.He may plead in court or give advice in chambers without restriction , although naturally subject to the supervision of his principal. Finally the stagiaire receives his certificat de stage at teh completion of his period of practical training, provided the governing body of the centre considers that he has satisfactorily fulfilled the requirements. The certificate is not subject to his passing any additional professional examinations.

6.1.1 Eligibility :

The applicant will send his application to the chairman of the Conseil National des Barreaux with the following documents:

α)A notice précising the name of the regional Bar school from which he wishes to get assured.

β)All documents justifying of his identity ,nationality and residence.

γ)All documents relating to university and professional qualifications. Such documents will have to be certified. They will have to be translated in French by a language expert registered to the courts of appeal.

6.1.2 Aptitude Test :[144]

Test takes place twice a year.

The Conseil National des Barreaux will decide whether or not the applicant will be allowed to take the aptitude test only four months after reception of his full application. If the decision is positive ,the applicant will have to take the following papers.

α) Civil law

β) Criminal law

γ) Administrative law

θ) Commercial law

ε) Labour law

η) Community and European law

ν) Professional rules of conduct

λ) Judicial organisation

μ) Civil procedure

π) Criminal procedure

ρ) Administrative courts and procedure

6.2 Qualification Process in Germany:

Lawyers in Germany have to go through the same two phase legal education whether they are to become higher civil servants , public prosecutors , Rechstanwalte. Article 5 of the Richtergesetz makes it clear that the object of all the different forms of legal education is to obtain the qualification necessary to hold judicial office.The holding of this qualification is a necessary prerequisite for entry to all branches of the legal profession.Article 5 is applicable to the whole of Germany and it prescribes the necessity of passing two state examinations.Legal studies must have been pursued for at least three and a half

[144] French implementation of Directive 89/49 EEC / Loi n 90-1259 du 31.12.1990 Ref: Jo du 5.1.1991 / Decret n91-1197 du 27.11.1991 "organisant la profession d'avocat" Jo du 28/11/1991 Arrete: Arrete du 7.01.1993 (Jo du 29.01.93)

years which must include the essential features of Civil Law,Criminal Law and Public and Procedural Law including the relevant connections to European Law ,the approach adopted by legal science ,account being taken of the philosophical , historical and sociological aspects of this discipline.Additionally a period of three months must be spent in practical study.

6.2.1 First State Examination :

The examination consists of written tests (Klausur, taking five hours), oral tests (one hour) and in a number of the Laender ,written homework (Hausarbeiten). Four or six weeks are given for the completion of such homework. As one might expect,the combination of the different tests varies from land to land. The number of written examinations is less in those Lander which like Nordrhein-Westfalen ,require homework.In those which do not ,such as Baden-Württemberg ,Bayern, Rheinland-Pfalz and Saarland, eight written papers are required.

Success in the first exam leads to a Referendarzeit or Vorbereitungsdienst organized by the state.This is a traineeship which must be completed before sitting the second examination.

6.2.2 Second State Examination :

The examination consists of written papers and an oral examination which are concerned with what was learned during the compulsory and optional placements. The oral examination is based upon all the stages of training received. The written examination is taken after the compulsory stages of training. The oral examination is to take place after all these stages have been completed. The grading of results takes place in accordance with the system for the First State Examination . Arrival at the final grade involves a number of complex operations. The failure rate is only about %10 which would seem to reflect the greater maturity and motivation of the students.Once a person has passed the second state

examination ,he is called Assessor. He is then free to choose his profession as Rechtsanwalt,Notar or Richter.

Having successfully passed the state examinations and completed the Referendarzeit the following stages remain to be completed in order to qualify fully as a German Rechsanwalt.One must file an application for admission to a court of appeal (Oberlandesgericht) in the State in which one proposes to reside.One will then be admitted to a court of first instance for civil matters.There are certain requirements which must be fulfilled before one can be admitted.

6.2.3 Rules of Conduct and Etiquette :

It is noteworthy that in two important decisions of 14th July 1987

α)The Federal Constitutional Court was not empowered to issue binding rules for the conduct of etiquette of Rechtsanwaelte.

β)The Court found that the rules which had been promulgated by this body for such conduct and etiquette could not be used as a means of interpreting and particularising the general provisions of Paragraph 43 of the Bundesrechtsanwaltsordnung.

The latter provision stipulates that a Rechtsanwalt must exercise his profession conscientiously and that both within and outside the course of such exercise , he must show himself worthy of the respect and trust demanded of a Rechtsanwalt.

Admission to Court is refused when the candidate has been guilty of :

α)Unworthy conduct, which makes him appear unfit to exercise the profession of a Rechtsanwalt

β)A clear breach of the duty of a candour when applying for admission as a Rechtsanwalt

γ) Use of a "doctoral" qualification which has not been earned

θ) Dishonest concealment of income from the revenue authorities

ε) Alcoholism

η) Opposing the democratic order in a manner which laid him open to criminal sanctions

ν)Conducting an activity which is not compatible with the profession of a Rechtsanwalt or with the reputation of those who exercise the profession

6.2.4 Geographical Limitations :

The requirement for Rechtsanwalte of residence within the jurisdiction of a regional court of appeal and the prohibition on establishing outside the locality of the court to which they were admitted has been challenged before the Constitutional Court which ruled in September 1989 that partnerships that overlapped districts were not necessarily incompatible with German law as long as legal analysis applied in the relevant practice gave rise to the conclusion that the member retained the centre of their activities in their own offices.

6.2.5 Mobility in Germany :

The law indicates as follows :

1. Citizen of any of the contracting parties to the European Economic Area are entitled to apply.

2.Those citizens who have obtained a diploma can practice in Germany if they succeed in a qualifying examination and if they are registered in the list of lawyers of the appropriate Bar association

6.2.6 Details of the Aptitude Test :

The test is composed of Civil Law and either Public Law or Criminal Law or Civil Law II taking five hour each .

Civil Law consists of :

α) The general part of Civil Code

β) The law of obligation and of things

γ)Related procedural law , including jurisdiction and organisation of the courts and general principles of law relating to execution and insolvency

Public Law consists of :

α) Fundamental human rights entrenched in the Constitution

β) General principles of administrative law, including procedure

γ)Construction law and law relating to public order and security

θ)Administrative litigation law

Criminal Law consists of :

α) General doctrine of criminal law

β) Special part of the penal code

γ) Criminal procedure

Civil Law II consists of :

α) Family law and law of succession

β) Related procedural law or

θ)Commercial law

γ) Employment law

ε) Public law (if not already chosen) or

η) Criminal law (if not already chosen

6.2.7 Oral Examination :

Candidates will be admitted to the oral examination if they have passed at least one of the written examination papers. The oral will comprise a two hour period for preparation , a short presentation followed by discussion.

If a candidate has failed a written paper that subject will be added to those to be taken in the oral examination [145]

6.3 Lawyers in Denmark :

Once certified by the Minister of Justice an advocate is free to practice law before the lower "district" courts (Byret).The advocate can only practice by himself after one year either as an articled clerk to another advocate or as an advocate employed by or carrying on a business jointly with another advocate.All advocates must be members of the "Danish Bar and Law Society"
A special test in advocacy must be passed before the right of appearance before the High Court(Landsret) and Maritime and Commercial Court of Copenhagen as regards some cases is granted.The right of audience before the Supreme Court (Hoejesteret) is granted to those with at least five years experience of practise as advocates having a right to appear before the High Court which must also attest to the advocacy experience of the advocate.

The intending advocate will have to complete a law degree and follow a professional training as well as comply with rules regarding good character not be bankrupt etc.

6.3.1 University Qualification:

There are only two universities that provide law Degrees ,the University of Copenhagen and the University of Aarhus.

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[145] German Implementation of Directive 89/48 EEC
As amended by Article 37 and 38 of the EWR-Ausführungsgesetzes of 27.4.1993 (Ref: BGBI page 512)As amanded by Article 2 of the Verordnung zur Verbesserung der beruflichen Stellung auslandischer Rechtsanwalte of 29.1.1995 (Ref: BGBI page 132) / see also Avukatlık Mesleği Sempozyumu ; Yılmaz Ejder ; page 277-290

6.3.2 Professional Training and Examination :

Before the end of 1996 ,once one had fulfilled this three year post graduate legal training the individual could get his practising certificate from the Ministry of Justice. Since 1 January 1997 the rules require that the series of professional training courses are taken and a professional law exam is passed , unless specially exempted by the Minister of Justice.

6.3.3 Mobility for lawyers :

No rules relating to aptitude test for lawyers have been established. This means that anyone who applies for permission to become an advocate will be considered on a discretionary basis by the Danish authorities. The ministry of Justice is the competent authority under Directive 89/48 /EEC[146] but applications should be made to Ministry of Industry and Commerce.

6.4 Lawyers in Belgium :

The advocate practices in all areas of legal work .Only advocates have the right to plead in court with a small number of statutory exceptions. They give legal advice and represent clients before tribunals. A defendant may represent himself or with the permission of the judge a close number of his family may represent him.

6.4.1 Professional Qualification :

In conformity with the normal continental practice ,the law graduate must undergo a period of practical training before he can be accepted as a fully qualified advocate.The duration of the stage is for a continues period of three years without interruption except for some exceptions.Normally the stagiaire becomes apprenticed to an advocat who has himself been inscribed on the Roll for at least ten years.

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[146] Relevant Legislation Lov nr.291 of 8/5/91 , lovtidende a 1991 s.1087
Bekendtgoerelse nr. 292 of 8/5/91 , lovtidente a 1991 s. 1087

The stagiaire must attend regularly at the office of his principal and will work under the supervision of the principal.There is a minimum programme of lectures and practical exercises to be attended by every stagiaire.Apart from compulsory attendance at the above programme of courses, the stagiaire is under three specific obligations : regular attendance at the office of his principal ,regular attendance at hearings of the various courts , conduct of legal aid cases.The only requirement of an examination during the stage is that the stagiaire must at the end of the second year of the stage take a practical examination both written and oral.

6.4.2 Aptitude Test :

The new law (arrete royal) adopted on 2 May 1996 stipulates that an applicant invoking the Directive to practice as an advocate must pass an aptitude test.There is an appeal board to receive appeals from applicants who fail the aptitude test.The purpose of the test is to check the professional knowledge of the applicant in order to assess his aptitude to exercise the profession of advocate in Belgium.It is to be held at least once a year.It is conducted in French ,Dutch or German.The test consists of an oral and a written part.The candidate has also to provide evidence of sufficient knowledge of another foreign language and of accountancy principles.The candidate will pass the test if he gets at least %60 for each subject.If the candidate fails he can continually reset the papers he failed until he gets a pass.

The exam consists of the following subjects :

α) Public law

β) Administrative law

γ) Civil law

θ) Criminal law and procedure

ε) Commercial law

η) Private judicial law

ν) Private international law

λ) International institutions and human rights

μ) Tax law

π) Labour law

ρ) Professional ethics

6.4.3 Eligibility :

The applicant must have a diploma ,certificate covered by article 1 of Directive 89/48 EEC[147] , must be of good reputation, must give evidence that he has not previously been declared bankrupt and give evidence of absence of any previous professional negligence or previous criminal offence ,give evidence of his previous academic record and must success to an aptitude test when his original law studies are different from the Belgian law system.

6.5 Lawyers in Spain :

The legal profession of abogado (advocate) is a free and independent profession.In spain parties in legal actions are commonly required to take on two legal professionals one for defence and one for the representation of the parties before the courts.Representation is carried out by Procuradores (procurator) .It is impossible to be an advocate (abogado) and procurador at the same time.Advocates are permitted to have common offices of up to 20 members , subject to registration with the local colegio.

No one can exercise the profession of advocate (abogado) without previously being inscribed in a College of Advocates (Colegio de Abogados). Before taking up pursuit of the profession an oath to observe the constitution and juridical order must be taken .Once inscribed on the roll (lista de colegiados) the new advocate is immediately vested with all the rights and duties of a full member of the profession.

Directive 89/48 has been implemented by Real Decreto 1665/91. Recently a government regulation specifically provides for the accession to the profession for

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[147]Implementation of Directive 89/48 Royal Decree of 2.5.96 (Ref: Belgisch Staatsblad /Moniteur Belge of 15.5.1996)

lawyers of other European Countries.The Orden 30 April 1996 n.10212 provides that the potential candidate has to applied to the Minister of Justice by passing an aptitude test also with other required documents.

6.5.1 Details of the Aptitude Test :

The aptitude test is taking place at least once a year.The Examining Commission is formed by six members designated by the Minister of Justice and by the Minister of Education.

To become an abogado , the candidate will be requested to solve a practical case concerning one of the following subjects :

α) Constitutional Law and Administrative Law
β) Spanish Constitution
γ) State Organization
θ) Civil Liberties
ε) Basic Principles of Administrative Law
η) Judicial Review
ν) Civil Law and Commercial Law
λ) Law of the Obligations
μ) Family Law
π) Basic elements of Civil Procedural Law
ρ) Contracts
τ) Company Law
φ) Criminal Law
χ)Criminal Procedural Law
ψ) Judicial Organization
ω) Rules of Ethic

The Examination Commission has the right to ask questions on the case assigned as well as on Judicial Organization and on the Rules of Ethics.[148]

6.6 Lawyers in Sweden :

There is one type of "official" lawyer in Sweden, the Advokat. Advokater have no solid monopoly, except for their title.The non advokat jurists practice in offices known as juridiska byraer.Many jurists will practice as in house counsel.Others will become advokater after gaining the necessary experience.It is to be noted that even those with no law degree and who thus have no legal training ,can practice 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

6.6.1 Eligibility :

Applications to become an Advocate should be made to the Swedish Bar Association. Requirements include:

1.EEA citizenship

2.EEA residence

3.Passed the Candidate jurisdiction

4.Five years practice of law

5.Integrity

6.Otherwise suitable

6.6.2 Exemptions:

Applicants can be granted an exemption from the test (or parts of the test) by the Board of the Bar Association if they can show knowledge of Swedish law and practice.

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[148] Implementing Legislation Real decreto 1665 /1991 (5 October 1991)
Orden de 30 April 1996, no.10212

Danish, Finnish, Icelandic and Norwegian lawyers qualified from these jurisdictions who have three years experience of legal practice in Sweden are excepted from requirements 3 above.

For other EEA States candidates must pass an aptitude test.This is run by the Faculty of Law of the University of Stockholm for the Swedish Bar Association.

6.6.3 Details of the Aptitude Test:

The aptitude test is to be organised by the Faculty of Law of the University of Stockholm which will provide both preparatory courses and materials.

The subjects that could be taken:

α) Civil and Criminal Procedure

β)Rules of Professional Conduct

γ) Introductory Course in Swedish Law

There will be both written and oral tests. The test will be taken in the Swedish Language.[149]

6.7 Lawyers in Austria :

Essentially there is only one main type of legal practitioner , referred to as the Rechtsanwalt (for man) or Rechtsanwaltin (for a woman). The Rechtsanwalt gives legal advice to clients and can represent them in court.The professional title Rechtsanwalt (lawyer) is protected by law.It can be used only by persons who are registered in the list kept by the Rechtsanwaltskammer.The Rechtsanwalt has a

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[149] Relevant Legislation Directive 89/48 EEC
Legislative Texts : Law 1992 :1511 amending the Code of Judicial procedure
Chapter 8 sections 1 and 8 of the Code of Judicial procedure
Paras 4 and 45 of the Statute of the Swedish Bar Association
Higher Education Ordinance 1993

monopoly over the giving of legal advice,though other professionals within the sphere of their competence are entitled to give such advice.[150]

Access to the Profession of Rechtsanwalt :

α) Austrian nationality

β) Personal qualifications

γ) Master of law or Doctor's degree

θ) Professional stage requirements

ε) Examination for lawyers

Details of the Aptitude Test :

İt is composed of written and oral exams.

The written exam includes two tasks :

1.Civil Law

α) With the help of court records ,work out a written appeal against a decision at first instance or

β) Work out a reply to a complaint and a decision on the basis of written information of a complaint.

2.Criminal law or Administrative law

α) Criminal law ; he will have to work out a written appeal against a decision at first instance, with the help of court records

β) Administrative law; he will have to work out a written appeal on the basis of a decision or a complaint to the constitutional or administrative court.

The oral exam is taken before a Commissioner for Examiners two of whom are lawyers and two are judges of the Court of Appeal an applicant who fails may repeat the test twice.

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[150] Austrian implementation of Directive :89 / 48 EEC
EWR-Rechtsanwaltsgesetz 1992 – EWR-RAG 1992
Ref: BGBI 1993/21

Oral Exam includes:

α) Civil law,including the fundamental of labour law and social security law

β) Commercial law

γ) Deontology

θ) Criminal law (optional)

ε) Constitutional law (optional)

η) Administrative law (optional)

ν) Tax law (optional)

6.8 Lawyers in Greece :

All practitioners are lawyers without distinction between functions .The Dikigoros (lawyer) can give advise and assistance on any aspect of Greek Law.The dikigoros can be considered a rough equivalent of an English barrister and solicitor combined.

The regulation of the legal profession is based on the codified Decree law 3026/1954. The law is divided in four parts : The first part lays down the conditions for the admission to the legal profession, the second concerns lawyers remuneration . The third concerns the organization of the law societies and the fourth consists of transitional provisions.

Reserved activities comprise appearance before civil law and criminal and administrative courts, conveyancing and in principle ,attendance at all major contracts executed before a notary public, as well as appointment as a bankruptcy trustee.Lawyers distinguish their titles within the profession through the following categorisation :

α) Lawyer at the First Instance Court

β) Lawyer at the Appeal Court

γ) Lawyer at the Supreme Court

When admitted the lawyer is attached only to a Court of First Instance after four years of actual practice he or she may qualify to appear before the Appeal Court and after a further four years the Supreme Court

6.8.1 Examination :

The examinations are conducted in the seat of each of the 13 Courts of Appeal. The trainee must sit the exams in the Court of Appeal in the area of which the Law Society where he conducted his stage is located.

Examinations are usually held twice a year. A trainee must take part in the first or the second examination following the completion of his training period. If he fails to do so, he needs to require permission from the Disciplinary Council.

Examinations are both written and oral. First the candidate sits written examinations successful completion of which entitles him to take an oral test.

The subjects examined are the following :

α) Civil law

β) Civil procedure

γ) Commercial law

θ) Criminal law

ε) Criminal procedure

The grade is 0-10 .To pass is the written exam the candidate must achieve a grade of six in the subject of civil law and civil procedure and an average of six in the other subjects. To complete the oral exams successfully an average mark of six should be achieved. The examiners Committee is chaired by an Appeal Judge and consists of a Public Prosecutor of the Court of Appeal and three dikigoroi.

The exams generally refers to "the practical application of the law" and in particular the examiners must be satisfied not only as regards the theoretical knowledge of the examinees but also their ability to subsume correctly the facts under the relevant legal principals. To this effect a candidate is asked not only problem -questions ,but also to draft legal documents.

In accordance with Presidential Decree 52 of 1993 implementing Directive 89/ 48 /EEC[151] practicing lawyers from the EC Member States , without any age

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[151] Implementing Legislation (Directive 89/48)
Presidential Decree no.52 , 28.01.1993 - O.J n.20, 18.02.1993

restriction, may apply for registration with the Greek Bar. There is also another qualification route for nationals of any Member State of the EU who have obtained their law degree and have practiced the legal profession in their country of origin whether within or outside the EU. Under Law 1366 of 1983 (article 22) they may sit an exam organized by a Greek University Law Faculty. Provided that their degree is recognized as equivalent to that of a Greek Law Faculty they would be eligible for registration with a Bar of Lawyers in Greece as local lawyers.

6.9 Lawyers in Italy :

Avvocato :that is ,a person (formerly first a Procuratore Legale , who had practiced that legal profession for at least six years) who is admitted to the albo (roll or register) of the avvocati.
To appear in front of the superior jurisdictions (Court of Cassation , Court of Auditors ,Constitutional Court , Council of State , the avvocato must possess some qualifications.Each legal professional can undertake the defence of the party without any limitations with regard to the subject matter he normally deals with.

The object of the professional activity is the assistance and counselling in judgement and in any other circumstance out of judgement of any interested party.It may be performed by professionals entered into the register as an Avvocato.If this is not so,there could exist an offence ,the unlawful practice of the profession under art 238 of the Criminal Code , whose provisions dictate a penalty of six months of detention or a fine from 20.000 Liras to one million.

6.9.1 Professional Examinations :

The exams take place in the month of December of each year in all the appellate Courts. The board of examiners is appointed by the Ministry of Justice ; in each board there are two lawyers , two magistrates , a university professor in law. The tests are written and oral.

The written exam is composed of:

α) Civil law and Civil procedure

β) Business law

γ) Criminal law and Criminal procedure

θ) Administrative law

The subjects of the oral tests are :

α) Roman law

β) Civil law, business law

γ) Criminal law

θ) Constitutional law

ε) Administrative law

η) Employment law

ν) Ecclesiastical law

λ) Procedural law

μ) Procedural criminal law

The commission is appointed by the Ministry of Grace and Justice and comprises three magistrates , three avvocati , and a university professor with tenure. The candidates that pass the written test are admitted to the oral test.Lastly one can be registered in a special register in order to become qualified to dealing with the superior jurisdictions ,this can again be obtained either by seniority or by passing another test.

The state exam can be taken every year in Rome , at the Grace and Justice Ministry by avvocati with 5 years of experience. An avvocato who has practiced

his profession with another cassationist solicitor can be admitted to the exam provided that he can prove he worked with praise and good results in cases handled by the Court of Cassation . There are three written tests - drafting recources for the Court of Cassation in civil , criminal and administrative matters - and one oral test . This consists in a discussion related to a subject under dispute in front of a Court.

Recent regulations and interpretations coming from the European Community , are modifying the forensic profession in Italy , permitting the other European lawyer colleagues , though still with some limitations , to practice the legal profession also in Italy.[152]

The request for an aptitude test must be addressed to the Forensic National Council ,thereupon the commission of examiners ,comprising two magistrates ,two lawyers and a university professor in jurisprudence shall convene within 60 days to fix the examination date.

A further step towards the complete liberalization of the profession in the Community countries has been the Directive 89/48 /EEC adopted in Italy with Decree Law no. 115/92 , which permitted the recognition of the professional qualifications obtained in other countries of the Community , in fact admitting foreign colleagues to practice the legal profession of avvocato in Italy.
The adaptation of the Directive in Italy has been so far ,incomplete , as the needed relevant regulations have never been promulgated .Till today ,therefore , the Ministry has permitted to operate to professionals through decrees issued ad personam.The EC Commission has brought an Article 169EC enforcement action against Italy.

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[152] The first regulation in the subject matter has been the Directive 77/249 /EEC adopted in Italy into the Law dated 9 February 1982 no.31 , which permitted the free rendering of services by part of a legal foreign professional not residing in Italy registered in the Official register of the legal professionals of his country , only in non-judicial counselling .

6.10 Lawyers in Portugal :

Advocates (advogados) have very wide, and nearly exclusive ,powers of representation in Courts and of legal consultancy.
The main provisions regulating the profession of Advogado are contained in the Decree law no:49/84 of 16 March 1984 .The profession of Advocacy is self regulating .

Article 36 of the Code of Civil Procedure of 1961 , applicable to both advocates and solicitadores ,dictates that: the mandate conferred by the party by verbal declaration in the records of the law suit grants powers to holder of the mandate to represent him in all acts and procedure of the principal procedure and respective incidents , even if front of the Superior Court , without prejudice to the dispositions which require the grant of special powers to the mandate article 32(1) of the Code of Civil Procedure makes it obligatory to use an advogado :

α) In Court cases of the competence of courts with "alcada" in which ordinary appeal is admissible

β) In legal action in which appeals are always admissible independently of the value of the case

γ) In appeals and in legal action proposed in superior Courts

6.10.1 Aptitude Test :

The written exams will be on the following subjects:

α) Civil law and civil procedural law

β) Criminal law and criminal procedural law

γ) Judicial organization

θ) Commercial law or administrative law

ε) Rules of Ethics

The exams committee is formed by at least five lawyers plus judges of the superior courts and academics.[153].

6.11 Lawyers in Luxembourg :

The full title of an avocat used to be more correctly called an Avocat –Avoue. A further distinction is made between the fully qualified Avocat who is styled Avocat Inscrit as compared with the trainee lawyer (Avokat - Stagiaire).

6.11.1 Professional Examination :

It is composed of written and oral exams.

The written examination:

The first part of this examen de fin de stage judiciaire consists of a written examination dealing with the following practical topics:

α) The practice of civil and commercial law in Luxembourg

β) Administrative law

γ) Social and labour law

θ) Luxembourg private and international law

ε) Special criminal law and criminal procedure

η) The organisation and Jurisdiction of the civil,criminal and administrative courts

ν) Civil and commercial procedure

λ) Rules of professional conduct

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[153] Directive 77/249 /EEC was implemented by Decree law 119/86 which amended the Estatuto da Ordem dos Advogados by adding six new articles allowing EC lawyers the same rights as Portuguese lawyers providing that the act in concert with such a lawyer for Court appearances and inform the College of Advocates.Directive 48/89 has been implemented with Decree law no.289/91. This instrument defines to whom the directive shall apply , the list of professions included and the competent national authority. More recently law no.33/1994 has modified the Portuguese Bar Statute and added article 172 which specifically recognizes the right for EC

The written paper will require a drafting in both French and German of legal opinions , discussion of legal problems and the drafting of legal documents .The written examination is assessed by a jury of examiners.

The oral examination :

The second part of examination involves an oral interrogation on topics raised in the written examination .This takes place in front of the jury of examiners and part of the oral examination will be conducted in the Luxembourg language.[154]

6.12 Lawyers in Netherlands :

The advocat is the only one mentioned in the 1977 Legal Services Directive.Most advocates are also procureur , the exercise of which profession is compatible with that of advocate.

6.12.1 Aptitude Test :

The aptitude test must be taken in the Dutch language.The intending Advocaat will be required to take a maximum of four subjects. In some circumstances the Bar Council will grant exemptions to applicants with appropriate knowledge and experience. The exam may be written or oral or a mixture of the two as determined by the General Council for each subject.[155]

The subjects for the aptitude test are as follows :

α) Civil law including law of civil procedure

β) Rules of professional conduct

The candidate must choose either criminal law or administrative law .

The applicant will also have to choose one subject out of the following :

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lawyers to practice in Portugal

[154] Implementation of Directive 89/48 /EEC
Loi du Aout 1991 (Memorial A 58 du 27.8.1991)

[155] Relevant Legislation : Bulletin of Acts 1994, 30 – The Recognition of EC Higher Education Diplomas Act Strct. 1994 ,249 –Advocatenblad 1995 ,page 79- Aptitude Test Regulation of 25 November 1994 as amended Strct.1996 ,197

γ) Employment law

θ) Divorce law

ε) Company law

η) Tax law

ν) Bankruptcy law

6.13 Lawyers in Finland :

The position is very similar to that of Sweden. The legal profession is unified - no distinction is drawn between lawyers undertaking different areas of work.All practising members of the "official" legal profession are known as advocates in Finnish this translates as asianajaja (singular) and asianajajat(plural) and they are subject to statutory regulation under the Finnish Bar Association(F.B.A) .Under the Advocates Act 1958 the professional title is protected and the FBA is empowered to supervise activities of asianajajat/advokater.Only members of Finnish Bar Association can use title.

All professional lawyers are in private practice.Lawyers employed "in house" can not be advocates as such as employment is considered as contravening doctrine of independence of advokater .Lawyers can practice in partnership or since April 1992 in a limited company (with unlimited responsibility to the client).

6.13.1 Aptitude Test :

The test is a written one which is not an open book exam.The questions are determined and the results are graded by the Chair of the subject concerned.The test covers a wide range of areas within the subject.The test is sat either Finnish or Swedish.The granting scale is pass or fail. If the test consists of several subjects the candidate has to pass all parts of the test.

The test can be composed of all the subjects mentioned below or of the subjects depending on the previous studies and work experience of the candidate

α) The structure and sources of the Finnish legal system

β) Private law

γ) Criminal law

θ) Law of judicial procedure

ε) Public law

The test is organised twice a year at the Faculty of Law of the University of Helsinki.

Once the candidate has passed the written test at the University of Helsinki he must also pass the test in Legal Ethics set up the Finnish Bar Association.[156]

6.14 Lawyers in United Kingdom:

In England the legal profession consists of two groups ,Barristers and Solicitors.The qualification process for each is different and is dealt with by seperate professional bodies;The Bar Council (for Barristers) and the law Society (for Solicitors)

Solicitors : The solicitor is the first point of contract for individuals or organisations seeking legal advice and may be called upon to deal with a wide verity of problems ,some involving EC law or the inter-action of English law with foreign and international law.Range of areas include ; conveyancing, family matters ,company and commercial work.

6.14.1 Mobility for Solicitors:

Lawyers wishing to become qualified as an English solicitor are required to pass a test known as the Qualified Lawyer's Transfer Test which is controlled by the law society.There is a three stage process which is as follows:

α) Applying to the Law Society for a Certificate of Eligibility to take the Qualified Lawyers Transfer Test

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[156] Implementation of Directive 89/48/EEC :
Laki asianajajista annetun lain muuttamisesta/ Lag om andring av lagen om advokater (Act of Amendment of the Advocates Act 8.1.1993)

β) Applying to the College of Law to take the test

γ) Applying to the Law Society for admission to the Roll of Solicitors.

6.14.2 Aptitude test for Barristers :

Barristers are defined as a consultant offering specialised services as an advocate and an adviser in all matters involving litigation and the practice of the courts.A barrister does not normally deal directly with members of the public but is instructed by a solicitor.

It is composed of five sections including oral examination.The first part involves the law of Contract and the law of Tort and the law of Property which is a two hour exam requiring two problem questions to be answered on each subject out of a choice of eight. The pass mark for that section is 40%.
The second section deals with the English Legal system ,constitutional and Administrative law and criminal law .The examination on land law and Equity and Trusts and criminal law requires two questions to be answered on each subject out of a choice of four that lasted two hours.The examination on Evidence and either Criminal or Civil Procedure law requires five questions to be answered at least two from evidence law and two questions from Criminal or civil procedure law lasted three hours.The pass mark is 40%.
Oral examination is composed of criminal or civil matters depending on applicant's choice.The second part of the oral examination is testing the knowledge of deontological rules.[157]

6.14.3 Aptitude test for Northern Ireland:

The aptitude test consists of three written papers and one oral paper.The test is run by the Institute of Legal Studies of Queens University including law of contract,tort,criminal law,law of evidence ,practice and procedure and rules of

[157] Implementing Legislation :Statutory Instrument No 824 of 1991 "Professional Qualifications"

professional conduct and law of property and company law and constitutional law. [158]

6.15. Lawyers in Scotland :

There are two types of lawyers ,Solicitors and Advocates which correspond to the system in England and Wales of Solicitors and Barristers.

6.15.1 Aptitude Test for Scotland :

The test shall be conducted in English and consist of a written examination in Constitutional and Administrative law and the second part consists of Trust and Succession ,Property and Conveyancing and Bankruptcy and Diligence which will be selected by the candidate.An oral examination will be on criminal law and either on law of delicate or criminal law.

7. Council Directives for Lawyers

There are two directives on that subject. One of them deals with facilitating the effective exercise of freedom to provide services for lawyers whereas the other concerns the practice of the profession of lawyer on a permanent basis in other Member State in which the qualification was obtained.

The activities of Lawyers in EU could be explained under three group :

α) A lawyer in a host Member State can provide service for clients in another Member State related with his national legislation and EU legislation.

β)A Lawyer who registered himself to another Bar of the Member State can provide service for clients related with his national legislation and also national legislation which he has been.

γ) A Lawyer can provide service for clients in another Member State related with his national legislation and EU legislation.

17.4.1991

[158] Implementing Legislation:Solicitors &Barrister –Statutory Instrument No 824 of 1991 "Professional Qualifications" 17.4.1991; Solicitors Admission and Training Regulations 1990 ; 24.10.1990

The one who has passed the aptitude test or practiced for a period could register to a Bar and practice the profession but if he/she requires to register to other Bar in a Member State would a Member State have right to require from the lawyer to take the aptitude test again ? This question will be asked if the duration of the aptitude test is lasted or the subjects of the aptitude test has changed after he/she has taken it. In that situation a Bar that is to be registered could ask a lawyer to take the aptitude test again .We think once a lawyer has taken the test then it will be granted as vested right.On the other hand if the subjects of the aptitude test has changed by including new subjects or requiring oral examination then he/she must have to take the aptitude test again whenever he/she requires to register an other Bar in that Member State but this subject must be compulsory and required also from host State's nationals.

This kind of thought is based on the provisions of USA's legislation. In USA once a lawyer has been practising for several years ,it is difficult to devote the time and the study necessary to pass the Bar examination in a second State.Moreover as Professor Wolfram has validly noted , a lawyer's exam taking skill may atrophy with the passage of time while any failure in taking the second Bar exam may have harmful reputational consequences.About half the States (including New York) and the District of Columbia will waive the Bar examination and accept lawyers from other jurisdictions in a procedure commonly known as admission on motion.Usually this procedure is open only to lawyers who have practiced for at least five years.Some States further require the newly admitted lawyer to practice full time and maintain an office within the State.[159]

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[159] Goebel Roger ;Legal Practising Rights of Domestic and Foreign Lawyers in the United States; page 420-421 / Maclean Robert ; European Community law Casebook ; page 149-150

7.1 Council Directive 77/249 [160]

The Directive was the subject of Case 427/85 Commission v. Federal Republic of Germany where the Federal Republic was found to be in a breach of the terms of the Directive by requiring in the circumstances of that case the involvement of a German lawyer in addition to the lawyer from another Member State.[161] Germany is failed to fulfil its obligations by requiring to act in conjunction with a lawyer established on German territory even where under German law there is no requirement of representation by a lawyer also by not allowing the lawyer providing services to appear in the oral proceedings unless he is accompanied by the said German lawyer.

With this Directive basic principles were set forth for the exercise of profession. Notwithstanding to Article 59 of Rome Treaty by this Directive Lawyers could exercise their profession temporary in other Member State. According to Directive Lawyer must use the professional title expressed in the same language in the Member State from which he comes. For instance the one who uses Barrister as a title in England could not able to use different title in another Member State.He must have to use Barrister title in all Member States.As an activity Lawyers could be a representative of a client in legal proceedings or before public authorities under the same conditions laid down for Lawyers established in that State without requiring residence or registration to a a professional organization in that State.But the competent authority of the host Member State can request the person providing the services to establish his qualifications as a lawyer.

The practice of this Directive is restricted by Article 5 and 6. Member States could require to work in conjunction with another lawyer in the host Member State while practices before the judicial authority where necessary in pursuing of activities relating to representation of a client. According to Article 6 Member

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[160] Council Directive 77/249 22 March 1977

[161] Rawlinson William / Cornwell-Kelly Malachy ; European Community Law ; page 173

State could be able to exclude lawyers who are in the salaried employment of a public or private undertaking from pursuing activities relating to representation.

A major problem is considered and set forth in the Directive .Which provisions will be applicable to the one in case of providing services in two different Bar of the Member States. Article 4 envisaged this problem.Lawyer should remain subject to the conditions and rules of professional conduct of the Member State from which he comes without prejudice to respect the rules whatever their source , which govern the profession in the host Member State ,especially those concerning the incompatibility of the exercise of the activities of a lawyer with the exercise of other activities in that State ,professional secrecy ,relations with other lawyers, the prohibition on the same lawyer acting for parties with mutually conflicting interests and publicity.

With this Directive unfortunately the definition of legal services and kinds of restrictions that could be set forth can not been given. These subjects will be interpreted by each Member State.
In Gullung case it is stated that a person who is a national of two Member States and who has been admitted to a legal profession in one of those States may rely in the territory of the other State upon the provisions of Directive 77/249/EEC facilitating the effective exercise by lawyers of freedom to provide services where the condition for application of that Directive as defined are satisfied.According to Court Directive must be interpreted as meaning that its provisions may not be relied upon by a lawyer established in one Member State with a view to pursuing his activities as a provider of services in the territory of another Member State where he had been barred from access to the profession of lawyer in the latter Member State reasons relating to dignity ,good repute and integrity.[162] In Gullung case it was stated that a person who is a national of two Member States and has been admitted to legal profession in one of them could rely on the Directive in the

[162] Case 292/86 Calude Gullung v Conseils de l'ordre des avocats du barreau de Colmar et de Saverne

other state whereas a lawyer established in one State could not rely on the Lawyer's Services Directive to provide services in another Member State where he/she has been barred from access to the profession of lawyer for reasons relating to dignity ,good repute and integrity.

According to Art.1 Member States could reserve to prescribed categories of lawyers the preparation of formal documents for obtaining title to administer estates of deceased persons ,and the drafting of formal documents creating or transferring interests in land. Article 3 grants right to lawyers using the same professional title from which he comes with an indication of the professional organization by which he is authorized to practise.

A lawyer will remain subject to the conditions and rules of professional conduct of the Member State from which he comes without prejudice to respect for the rules , whatever their source ,which govern the profession in the host Member State ,especially those concerning the incompatibility of the exercise of the activities of a lawyer with the exercise of other activities in that state such as professional secrecy, relations with other lawyers, the prohibition of conflicting interests and publicity. According to Directive latter rules will be applicable only if they are capable of being observed by a lawyer who is not established in the host Member State.

Article 5 which is the main provision of the Directive influences negatively this freedom by requiring working in conjunction with a lawyer who practises before the judicial authority (in accordance with local rules or customs to the presiding judge or to the president of the relevant Bar) from Lawyer's in representation of a client in legal proceedings in a host Member State. So lawyers will have no freedom in representation of a client but this corporation brings liability for each lawyer together.

Another restriction is regulated for the lawyers who are in the salaried employment of a public or private undertaking in a home Member State. From pursuing activities to the representation in legal proceedings is prohibited for them

In order to benefit from this Directive the competent authority of the host Member State could request to establish his qualifications as a lawyer. In the event of non-compliance ,the competent authority of the host State could determine in accordance with its own rules and procedures for the consequences of such non-compliance by obtaining any appropriate professional information related with that person.

7.2 Council Directive 98/5 [163]

By the implementation of this Directive ; provisions on the profession of advocacy were improved in detail. It is composed of 18 Articles. According to this Directive , lawyers can practice the profession on a permanent basis in a self employed or salaried capacity both in the home and host Member State (Art 1) whereas providing service as a salaried lawyer is prohibited in 77/249 Directive (Art.6)

In order to practice in a Member State other than the home Member State where the professional qualification was obtained , lawyers must have to register to the competent authority. A certificate will be given for his registration which can not be more than three months old. Similar to the 77/249 Directive Lawyers will have to practice in a host Member State under his home country professional title according to Article 4 of Directive 98/5 EC.

As an area of activity lawyers can practice their profession under the relevant activities where registered title is used.This activity includes giving advice on the law of the home Member State , on community law ,on international law and on the law of the host Member State. A restriction is set forth for lawyers who practices in other Member States on preparing deeds for obtaining title to administer estates of dead persons and creating or transferring interests in land under a home country professional title.(Art 5)This provision is similar with Art 1 in 77/249/EEC directive.

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[163] Council Directive 98/5 16 February 1998

Besides another restriction is related to the representation or defence of a client in legal proceedings.For the pursuit of these activities in legal proceedings and insofar as the law of the host Member State reserves them to lawyers practising under the professional title of that State ,the latter could require lawyers practising under their home country professional titles to work in conjunction with a lawyer who practices before judicial authority in question and where necessary be answerable to that authority or within an **aveou** practising before it. This provision has similar content with the Article 5 of the 77/249 Directive.This provision restricts the effective of the Directive because lawyer has succeeded aptitude test in order to provide the service of advocacy in that State which determines a lawyer has same qualification as the one in host Member State.[164]

The new Directive gives right to use the same title of the Lawyer's of the host Member State to the Lawyer's that benefits from freedom of providing services under some circumstances. If a lawyer practises effectively and regularly activities for a period of at least three years in the host Member State in the law of that State including Community law can have the right to use the same title for lawyers in that host Member State. The proof of such effective regular pursuit for a period of at least three years could be provided by any relevant information and documentation that he /she has dealt with .The directives takes one step further in like treatment for using the same title by accepting effective and regular pursued of a professional activity for a period of at least three years but for a lesser period in the law of that Member State. But in this circumstances the abovementioned period must be fulfilled by attending lectures and seminars on the law of the host Member State ,including the rules regulating professional practise and conduct.Member State could refuse to allow the lawyer the benefit of the provisions on like treatment as a lawyer of the host Member State in case of considering that this would be against public policy because of disciplinary proceedings ,complaints or accidents of any kind.

[164] see also page 107-108 for other justification

A lawyer practising under the relevant professional title[165] can give advice on the law of home Member State ,on community law ,on international law and on the law of the host of Member State. Host State can exclude the right to prepare deeds for obtaining title to administer estates of deceased person and creating or transferring interests in land for lawyers practising under a home country professional title.

8. Application of rules on professional conduct:

This is an important subject concerning conflict of laws in international private law.A lawyer who practices advocacy in a host Member State as well as in another Member State must be responsible for the rules of professional conduct. The problem occurs in the conflict of laws which will be applied for professional conduct. According to Turkish law the relationship between lawyer and client depends on proxy so the characteristic duty is the duty of lawyer.The applicable law will be the law that the lawyer represents his client and the place which is effected by that representation . [166]

Whereas Directive envisaged this problem in Article 6. A lawyer practising under his home country professional title is subject to the same rules of professional conduct as lawyers practising under the relevant professional title of the host Member State without prejudice to the rules of professional conduct to which he is subject in his home Member State.

On the other hand having lawyers undergo these rules have advantages such as representation in professional associations in the host Member State. Lawyers practising under their home country professional titles are granted appropriate representation in the professional associations of the host Member State which involve at least the right to vote in elections to those governing bodies. This is an important right given with this Directive because in 77/249 Directive this kind of

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[165] Professional title or profession governed by the competent authority with whom a lawyer has registered in the host State.

[166] Tekinalp Gülören ,Milletlerarası Özel Hukuk Bağlama Kuralları, page 96 and 289 /Gülören Tekinalp ;Türk Devletler Hususi Hukukunda Temsil Yetkisi ;page 57 /Nomer Ergin ; Devletler Hususi Hukuku; page 259

right had not granted. Another difference is regulated in practising as a salaried lawyer in the employ of another lawyer ,an association or firm of lawyers or a public or private enterprise.This right is not granted in the first directive but the second directive permits practising as a salaried lawyer .

8.1 Professional Indemnity Insurance :

Article 6.3 makes specific provision to avoid lawyers practising under home title being required to cover the same risks more than once under professional indemnity insurance and membership of a professional guarantee fund which could be assumed that the intention of the legislator was to cover all the wide variety of arrangements to provide cover ,compensation or indemnity for professional default of all kinds which exist in the Member States ,regardless of the particular form the competent authority in the host Member State could take ,and include combinations of arrangements such as indemnity funds and compensation of guarantee funds for solicitors which are not covered in home Member State. [167]

8.2 Disciplinary Proceedings :

Under Article 7(1), where a lawyer practising under his home-country professional title fails to fulfil the obligations in force in the host Member State, the rules of procedure, penalties and remedies provided for in that State are to apply.

Host Member State will apply the rules of procedure ,penalties and remedies whenever a failure occures by the lawyer practising under his home country professional title. Where the penalty applied to a lawyer of the host State would be striking off or disbarment or suspension for a period from the role or professional list ,then by analogy the penalty for the lawyer practising under home title would no doubt be removal or suspension from the register provided for in Article 3, resulting in removal or suspension of his right to practice under the Directive. Article 7(4) further provides that the competent authority in the home Member State shall decide what action to take, under its own procedural and substantive rules, in

[167] Adamson , op.cit , page 109

the light of a decision of the competent authority in the host Member State concerning a lawyer practising under his home-country professional title Article 7(5) provides that the temporary or permanent withdrawal by the competent authority in the home Member State of the authorisation to practise the profession shall automatically lead to the lawyer concerned being temporarily or permanently prohibited from practising under his home-country professional title in the host Member State.

Furthermore, it should be noted that, quite apart from the applicable rules of professional liability, the rules of professional conduct applicable to lawyers generally entail, like Article 3.1.3 of the Code of Professional Conduct adopted by the Council of the Bars and Law Societies of the European Union (CCBE), an obligation, breach of which may incur disciplinary sanctions, not to handle matters which the professionals concerned know or ought to know they are not competent to handle.

It is not however in the power of the host State authority to remove or suspend the lawyer's right to practice under his home title in his home State or elsewhere. Removal or suspension from the register under this Directive might not of itself prevent the lawyer from subsequently providing services on a temporary basis in the host State under the Lawyers services Directive.[168]

In the accession of Turkey to the EU ; lawyers who wants to practice the profession in our State will submitted to Act of Lawyers for disciplinary proceedings.Article 135[169] lists kinds of disciplinary proceedings. These are :

α) Stimulation: A notice for behaving more carefully while practising the profession.

β) Condemnation : A notice for his negligence in the practice of profession and in behaviours.

γ) Dismissing : prohibition of practising the profession at least three months whereas without exceeding three years.

θ) Dismissing from the profession :removal from the registered Bar with his title and licence for profession.

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[168] Adamson , loc.cit, page 111

[169] Avukatlık Kanunu , Legislation Number : 1136. Date of Acceptance : 19.3.1969 , Date of publish: 7.4.1969 ;Official Gazette :13186

According to Directive Article 7.2 Host Member State will inform the competent authority in the home Member State by furnishing all relevant details as soon as possible before initiating disciplinary proceedings against a lawyer practising under his home country professional title. This provision will apply mutatis mutandis where disciplinary proceedings are initiated by the competent authority of the home Member State. Host Member State's authority could cooperate throughout the disciplinary proceedings with the competent authority in the home Member State without prejudice to the decision making power of its also could take the necessary measures to ensure that the competent authority in the home Member State can make submissions to the bodies responsible for hearing any appeal.(Art 7.3) The competent authority in the home Member State could decide what action to take under its own procedural and substantive rules ,in the light of a decision of the competent authority in the host Member State concerning a lawyer practising under his home country professional title.

This cooperation will not prevent the conflict of provisions in both Member States but sustains a detailed information of lawyer's background and dossier.This background will influence the degree of penalty that will be applicable to him or her.This also leaves the way open for authorities in different States to take differing views on the gravity of the matter.Where the host State authority has terminated or suspended the lawyer's right to practice there under home title ,the home State authority may or may not decide to do likewise as regards his right to practice in the home State and elsewhere.[170]

The temporary or permanent withdraw of the competent authority in the home Member State for the authorisation to practice the profession could automatically lead to the lawyer being temporarily or permanently prohibited from practising under his home country professional title in the host Member State without prerequising for the decision of the competent authority .(Art 7.5)

There is a difference in salaried practice between two Directives on that subject.The 77/249 Directive gives right to Member States to exclude lawyers who are in the salaried employment of a public or private undertaking from pursuing

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[170] ibid, page 112

activities relating to the representation in legal proceedings whereas the latter Directive envisaged practising as a salaried lawyer who is registered in a host Member State under his home country professional title in an association or firm of lawyers or in a public or private enterprise depending on reciprocity.

So as employment of lawyers in private practice is concerned ,it would not seem to be the intention of the Directive to prevent , say a firm of English solicitors with a branch office in Belgium from a bringing an assistant solicitor to work in the branch office ,but rather to face them with the choice of either treating the assistant solicitor in Belgium as a paralegal employee without the status of lawyer or giving him the status in Belgium of "collaborateur" on a technically non-salaried basis as is customary in Belgian Law firms.[171]

8.3 Statement of Reasons and Remedies :

Article 9 requires that decisions not to register a lawyer under Article 3 or to cancel registration and decisions imposing disciplinary measures under Article 7 , must give reasons and that a remedy must be available against such decisions before a court or tribunal in accordance with national law.[172]

A remedy could be given against such decisions before a court or tribunal in accordance with the provisions of domestic law.(Art 9)

8.4 Like Treatment as a Lawyer of the host Member State

According to Article 10 a lawyer practising under his home country professional title who has effectively and regularly pursued for a period of at least three years an activity in the host Member State gained admission to the profession of lawyer (without being required to meet the condition of an adaptation period not

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[171] ibid , page 113
[172] ibid , page 114

exceeding three years or of an aptitude test) in the host Member State will be exempted from the conditions set out in Article 4(1) (b) of Directive 89/48 EEC . Article 4(1)(b) deals with the completion of an adaptation period not exceeding three years and taking an aptitude test. This provision suggested two ways in taking measures for adaptation. Member States would prefer either adaptation period or aptitude test for the professional activities in the host State which are not in the profession regulated in the Member State from which the applicant originates or comes and that difference corresponds to specific education and training required in host Member State and covers matter which differ substantially from those covered by diploma or by the evidence of formal qualifications adduced by the applicant.

The expression "effective and regular pursuit" is defined as actual exercise of the activity without any interruption other than that resulting from the events of everyday life.

The inclusion in the definition of the words "without any interruption other than that resulting from the events of everyday life" is no doubt intended to allow for short absences for illness, usual holiday leave and perhaps maternity leave ,but is rather odd since there is no suggestion elsewhere in Article 10 that the period of three years has to be unbroken. The Commission's explanatory memorandum to its original proposal for the Directive states that the definition is taken from the judgment of the ECJ in Van de Bill[173].

The continues of duration could not be interrupted by working in another Member State for a short period of time. In that situation the periods that break down duration must be added to the total time until achieving three year duration.

Proving the Effective Regular Pursuit for a Period of Three Years :

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[173] Case 130/88

α) The lawyer could provide the competent authority in the host Member State with any relevant information and documentation

β) The competent authority of the host Member State could verify the effective and regular nature of the activity pursued and could if needed be request the lawyer to provide orally or in writing ,clarification of or further details on the information and documentation mentioned above.

The competent authority in the host Member State could give reasons for its decision where proof is not provided by the requirements laid down in Article 10. That decision could be subject to appeal under domestic law.

This formula consists partly of a modified version of the wording in Article 10.1 and partly of new elements altogether. The result is very obscure. The first item requires the authority to take into account not only the effective and regular professional activity pursued but also the additional elements of knowledge and experience and attendance at lectures or seminars. The authority is not expressly enabled to make any particular requirements on these matters and it is not made clear what weight should be given to them.

Item (b) is even more obscure .It seems to hinge on an "assessment" which implies a qualitative judgment of the regular and effective activity which is simply a question of fact and also of the lawyer's capacity to continue the activity which is a matter of judgment but not relevant to the issue of admission to the host State profession. The lawyer can after all continue the activity he has pursued whether or not he is admitted to the host State profession since he retains the right to do under home title However that may be ,it is stated that the assessment shall be carried out by means of an interview ,which suggests the need for a sort of oral test of competence of some kind ,although this is then undermined by the final words "in order to verify the regular and effective nature of the activity pursued" which reintroduce pure questions of fact.[174]

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[174] ibid, page 119

With reference to Article 10.2 Lawyer practicing under his home country professional title in a host Member State could apply to have his diploma recognized at any time in accordance with Directive 89/48 EEC with a view to gaining admission to the profession of lawyer in the host Member State and practicing it under the professional title corresponding to the profession in that Member State.

In the case of Grand Duchy of Luxembourg v European Parliament , Duchy of Luxembourg alleges infringement of Art 43 for annulment. Articles 2, 5 and 11 of Directive 98/5, which concern respectively the right of migrant lawyers to practise under their home-country professional title, their area of activity and joint practice of the profession is questioned for infringement Art 43. The plea of infringement of the second paragraph of Article 52 of the Treaty falls into two parts alleging, (i) introduction of a difference in treatment between nationals and migrants and, (ii) prejudice to the public interest in consumer protection and the proper administration of justice.

The Grand Duchy of Luxembourg argues that the second paragraph of Article 52 of the Treaty establishes a principle that a migrant self-employed worker is to be treated in the same way as his national counterpart. That national treatment rule means that equal treatment, or non-discrimination, must be measured by reference to the legislation of the host Member State and not to that of the home Member State, or Member State of origin, of the migrant self-employed worker. Further, the right of establishment may not be granted in breach of overriding principles governing the self-employed professions, common to the laws of the various Member States. Whereas the applicant claims that, while harmonisation may justify dispensing with any assessment of knowledge of international law, Community law and the law of the Member State of origin, no such dispensation can be contemplated as regards the law of the host Member State. The knowledge to be acquired in the field of national law, unlike the knowledge imparted in other training contexts, is not identical or evenbroadly the same from one Member State to another. Moreover, the special characteristics of knowledge of national law are recognised by Directive 89/48. The applicant stated that In its submission, by abolishing all requirement of prior training in the law of the host Member State and by permitting migrant lawyers to practise that law, Directive 98/5 unjustifiably discriminates

between nationals and migrants which is unjustified and contrary to Article 52 of the Treaty, which does not authorise the Community legislature to abolish a requirement of prior training in a directive which does not purport to harmonise training conditions.

According to Parliament and Council , it must be stated that the prohibition of discrimination laid down in Article 52 of the Treaty is only the specific expression of the general principle of equality which, as one of the fundamental principles of Community law, must be respected by the Community legislature and which requires that comparable situations should not be treated differently unless such difference in treatment is objectively justified (see, to this effect, Case C-280/93 *Germany* v *Council* [ECR] I-4973, paragraph 67, and Case C-27/95 *Woodspring* v *Bakers of Nailsea* [1997] ECR I-1847, paragraph 17). Thus, Article 5(2) of Directive 98/5 permits, subject to certain conditions, the host Member State to exclude lawyers practising under a home-country professional title from the activity of preparing deeds for obtaining title to administer the estates of deceased persons or for creating or transferring interests in land. Similarly, the first subparagraph of Article 5(3) allows the host Member State, in certain circumstances, to require lawyers practising under their home-country professional title to work in conjunction with either a lawyer practising under the professional title of that State before the judicial authority in question or with an 'avoué practising before it. The second subparagraph of that article authorises the Member States to lay down specific rules for access to supreme courts, such as the use of specialist lawyers also Article 4 provides that a lawyer practising under his home-country professional title is required to do so under that title, so that consumers are informed that the professional to whom they entrust the defence of their interests has not obtained his qualification in the host Member State and that his initial training did not necessarily cover the host Member State's national law.

The court found no inconsistency between, on the one hand, the recitals referring to the objective of the migrant lawyer's obtaining the professional title of the host Member State after a certain period and, on the other, the decision by the Community legislature to authorise practice under the home-country professional title without any time-limit. The two ways of practising the profession are subject to different bodies of rules, the second being subject to its own restrictions in relation to removing the requirement to

provide evidence of prior qualification in the national law of the host Member State. In addition, as has been pointed out, a Community measure intended to make it easier to exercise freedom of establishment does not require any temporal limitation of its effects. So the application is dismissed for that reasons. [175]

8.5 Exceptions to the requirements in Article 4(1) (b)

According to Article 10.3 If a lawyer has practiced the profession of advocacy in the host Member State dealing with its legal system effectively and regularly for a period of at least three years the competent authority of the host Member State should have granted the right to practice under the professional title to the profession in that Member State **without having to meet the conditions referred to in Article 4(1) (b) of Directive 89/ 48 EEC** .

While granting this right the competent authority should take into account the any attendance at lectures or seminars on the law of the host Member State including the rules regulating professional practice and conduct.

Another requirement for the above situation is set out in 10.3(b) .The lawyer could provide the competent authority of the host Member State with any relevant information and documentation in particular on the matters he has dealt with. The competent authority assesses the lawyer's effective and regular activity in the host member state and his capacity to continue the activity that he has pursued by means of interview. In case of not granting authorization where proof is not provided by the requirements laid down above the competent authority must give decision with reasons .This decision will be subject to appeal under domestic law.

The competent authority of the host Member State could refuse to allow the lawyer in benefiting the provisions of this article if it considers that this would be against public policy in particular because of disciplinary proceedings , complaints or incidents of any kind.

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[175] Case C-168/98 , 7 November 2000

According to Article 10(5) The application will preserve the confidentiality of any information received from the applicant.

The very important provision is related about professional titles. According to the Article 4 of 98/5 EEC Directive a lawyer who is accepted to the profession of advocacy in host Member State is entitled to use his home country professional title ,expressed in the official language or one of the official languages of his home Member State .

We think this kind of obligation for lawyers is a kind of restriction because client will have prejudice on the lawyer before requiring his representation related with his/her case. The client will think that the lawyer carrying his/her own nationality will represent or defence him/her in the court much better than the one who is a lawyer both in the host and home Member State. Unfortunately this kind of thoughts will not reflect the truth because the one who practices his profession in the host Member State has passed the written and oral exams of the Bar that he/she is registered. This certifies that he/she has the same legal knowledge and ability in representation the client. As a question we can think how can a client will know whether a lawyer is a national of other Member State or not if he/she wants to handle his case or be represented only by a lawyer having the same nationality with him/her . According to rules of conduct and ethics a Lawyer must not mislead his/her client. If a lawyer accepts representation by concealing his/her nationality to a client then he/she will be responsible for that behaviour and its results. Besides lawyer must behave responsibly in his /her private life also. "In other professions you could not be witness this kind of intervention to his/her private life. This reason is based on the highest level of trusting and morality to a lawyer because of his profession." [176] Under the rules of professional conduct, lawyers are in any event obliged not to handle cases when they know or ought to know that those cases fall outside their competence and that any breach

[176]Karacabey Haldun;Avukatın Özel Hayatı Bakımından Mesleki Yükümlülükleri ve Disiplin Suçu ; page 160

of that rule constitutes a disciplinary offence. So a lawyer could not conceal people in his/her working life and private life.

So if a lawyer wants to practice the profession he/she could not use the title of "**AVUKAT**" which is the title used by only Turkish lawyers.

8.6 Joint Practice :

One or more lawyers who belong to the same grouping in their home Member State and who practice under their home country professional title in a host Member State may pursue their professional activities in a branch or agency of their grouping in the host Member State. If the fundamental rules governing that grouping in the home Member State are incompatible with the fundamental rules laid down by law, regulation or administrative action in the host Member State ,the latter rules would prevail insofar as compliance therewith is justified by the public interest in protecting clients and third parties.

Member States will encourage lawyers for joint practice. The host Member State will take measures necessary to permit joint practice between a several lawyers from different Member States practicing under their home country professional titles or one or more lawyers from the host Member State. In order to achieve this success each Member State will afford two or more lawyers from the same grouping or the same home Member State who practice in its territory under their home –country professional titles access to a form of joint practice .Lawyers that practice jointly in the host Member State will be governed by the laws , regulations and administrative provisions of that State.

According to Article 11(4) a lawyer who wishes to practice under his home country professional title must have inform the competent authority in the host Member State of the fact that he is a Member of a grouping in his home Member State and furnish any relevant information on that grouping.

8.7 Exceptions for Joint Practice:

A host Member State could refuse to allow a lawyer registered under his home country professional title to practice in its territory in his capacity as a member of his grouping in case of practising under its own relevant professional title within a grouping in which some persons are not members of the profession.If the fundamental rules governing a grouping of lawyers in the home Member State are incompatible with the rules in force in the host Member State ,the host Member State could oppose the opening of a branch or agency within its territory .

Article 11(5) deems the persons who are not members of the profession if

α) The capital of the grouping is held entirely or partly

β) The name under which it practices is used

γ) The decision making power in that grouping is exercised ,de facto or de jure by persons who do not have the status of lawyer within the meaning of Article 1.

8.8 Name of the Grouping :

The lawyers that practice under their home country professional titles in the host Member State could employ the name of any grouping to which they belong in their home Member State.

In Turkish legal system joint practice of lawyers is not regulated in Lawyers Act so we must make amendments on that subject in order to harmonise our Act to the Directive.

According to Article 14 the Directive has entered into force since 14 March 2000.

Member States should bring into force the laws,regulations and administrative provisions necessary to comply with this Directive and also should forthwith

inform the commission.But Belgium and Greece could not implement this Directive till the end of the period and for that infringement ECJ sentenced to pay compensation for these Member States.[177]

In order to facilitate the application of the Directive and to prevent misapplying of the provisions ,the competent authorities of each Member State must collaborate closely and preserve the confidentiality of the information they exchange.

[177] Kömürcü Mehmet - Kömürcü Recep ; Avrupa Topluluğunda Avukatlık Mesleğinin Düzenlenişi , page 18;Ankara Barosu Dergisi , Issue 4 ,Year 56 , 1999

§ III PART THREE

9. Legislation on Freedom to Provide Services in Ankara Agreement

According to article 13 and 14 , parties agreed on removing barriers on establishment and on providing free movement of services within the provisions of Treaty of Rome . Article 10 , gives right to parties to put forth the barriers on establishment and providing services for consideration to the Association Council. Association Council could advice in order to prevent this barriers. Also in Art.19 of Ankara Agreement free movement of services is mentioned related with movement of goods ,capital and workers.According to Article ; Turkey and Member States agrees in payment in his/her national currency for the commerce on goods,services and capital where the provider is resident and whenever these freedoms are sustained with each other .The customs Union agreement regulates free movement of services too.Art. 41 prohibits putting new restrictions on establishment and free movement of services. Art 41 renewing the article 13 of the Ankara Agreement as removing barriers on establishment and services by determining the time ,list and procedure for putting into practice.

10. Profession of advocacy in our legal system :

In order to be a lawyer ,One must carry out positive provisions. These provisions can be listed as :[178]

α) Being a Turkish citizen

β) Graduating from one of the law faculties in Turkey or taking the aptitude test composed of the legal subjects if the One has graduated from a foreign law faculty[179]

γ) Completing the apprenticeship period

θ) Having domicile in a region where requiring registration to the Bar

In the **Draft of Lawyers Act** passing examination is required as a supplement condition for being a lawyer.According to the draft , examination will be carried out by the Turkey Bars Associations .The examination committee will be composed of five members and three substitute members. The members of the examination committee will be composed of lawyers who is practising the profession at least fifteen years.The candidates that will take the examination will be considered from the list of apprentice by the executive committee of the Bar where is required to be registered.If an apprentice fails four times in the examination he/she will has no right to take the examination again throughout his life.The apprentice must have to use all of the rights for taking the examination in a period of three years after completing the internship period unless there are rightful excuses which will be accepted by the Turkey Bars Association .The exam will test the legal knowledge of the applicant's and the capacity of the adaptation of the rules to the cases .The exam will be made twice in a year.The dates of the examination will be determined by equal separations of a year if it is possible.The details of the examination will be carried out by a Directive which will be performed by the Turkey Bars Association.[180]

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[178] Avukatlık Kanunu No:1136 RG:7.4.1969 - 13186 ; Article 3
[179] Avukatlık Kanunu Yönetmeliği ; article 2 and 3
[180] Draft of Lawyer's Act , article 30

According to the President of the Istanbul Bar the apprenticeship must be considered mostly according to the performance in apprentice education center and the content of the examination must be in the level of the lectures taken in the Centre.[181]

A jurist named ,Aday shares the same thoughts as the President of the Istanbul Bar .According to his opinion the examination system will not influence the apprentice positively.[182]

We think that examination must have to be required for the apprentices but the contents of this examination must be limited only by the procedural law of civil and criminal and administrative laws because that is the only way for the client in order to be sure for being represented properly in the court. In Turkey most of the lawyers do not apply the law of procedure properly (as it is written in the articles) in the courts and that causes overweight to the Courts.

There are also negative provisions which will not be suitable for being a lawyer:[183]

α) One must not be sentenced for shameful offences or must not be fined for penal servitude for one year or more

β) If One has not a right for being a judge or civil servant or lawyer because of fining a disciplinary offence.

γ) Known as having lack of good conduct and having misbehaviour

θ) Having another opportunity which is incompatible with the profession of advocacy

ε) if the conduct of ability is restricted by court decision

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[181] İstanbul Barosu Başkanlığınca hazırlanan Avukatlık Yasa Tasarısı ve İstanbul Barosu Önerileri, page 10-11

[182] Aday Nejat ;Avukatlık Hukukunun Genel Esasları ; page 26

[183] Article 5

η) Going bankrupt

ν) Having certificate of insolvency

λ) Having physical disability which obstructs the practice of profession

μ) A person who has fined for a five year penal servitude or condemned for bribing or robbery or swindling or embezzling or forgery or for fraudulent bankruptcy could not accepted to register to any Bar in Turkey as a lawyer.

10.1 Practicing of Profession :

The application must have to be accepted by the executive committee of the Bar. Application will be addressed to the Bar by petition. The application must be answered in a month by the executive committee of the Bar. The application will be refused if the application is not be considered in a month. The applicant will apply to the Turkey Bars Association in 15 days if the application is refused or not answered in a month. The association will make the decision about application in a month if not it will be considered as a refuse. The application for the profession of advocacy whether accepted or refused by the association must have presented to Minister of Justice in one month. With the ratification of this decision by the Minister of Justice , it will become definite.[184] A lawyer who has registered in a Bar can provide his/her profession in different cities rarely but not always.Establishment which is one of the important freedom for lawyers must be considered exceptional because if localization is not regulated ,lawyers can not adjust themselves to the dates of cases easily because of rushing from one place to another.[185]

10.2 Apprenticeship :

The applicant must apply by petition to the Bar where he/she requires to be registered.This application is listed for objections in 15 days in a common

[184] Aday Nejat ; loc.cit ; page 30

[185] Özkan Sungurtekin Meral ; Avukatlık Mesleği Avukatın Hak ve Yükümlülükleri ; Page 50

place of the Bar where every lawyer can easily see.The objections must be proved by evidence in order to be taken into consideration.

When the duration for objection is lasted the candidate will begin the apprenticeship period. One of the lawyer that is elected by the Chairman of the Bar will have to draw up a report about the candidates manner , good conduct and etc.This report must have been delivered in fifteen days to the Bar.

If the executive committee refuses the application ,the decision will be sent to the applicant and one copy will be sent to the public prosecutor for investigation. In draft the public prosecutor is removed from the process.(Art.20)

In case of sanction of the decision by the public prosecutor the applicant will apply to Turkey Bars Association in a period of fifteen days.The training period is composed of two sections. The first section will last six months in courts whereas the next period of six months will be worked in Lawyer's office. In order to continue the second part of apprenticeship the public prosecutor must have delivered the information to the Bar for continuing the next step. [186]

10.3 Lawyer's Activities :

Article 35 of the Lawyer's Act implements this subject. Lawyer can represent the client in courts,arbitration and in the presence of authorities that have jurisdiction power and can bring a suit for his client or defend or give legal opinions on legal materials. The draft enlarges the rights of lawyers based on power of attorney in notaries and the land registration office.

Lawyers could reconcile the disputes between his/her client with the other side.If the lawyer resolves the dispute and formulates with a statement signed by both parties then this record will effect as a written judicial decree in the Office of execution. (Art 35- 35/a)

According to the Istanbul Bar's proposal lawyers could arrange their proxy by themselves without intervening the notary to the process.

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[186] Aday Nejat ; loc.cit ; page 31

10.4 Having an Office :

Every lawyer must have office where he/she is registered in a period of three months. A lawyer can not have more than one office.The lawyers who are working together can not have a separate office. This provision is regulated in Article 43. According to Draft a Law office can not have a branch in other cities of the country.

10.5 Working as a Partnership in a Law Office :

Lawyers can unify their works as a partnership. In that situation the law office does not have legal personality. The disciplinary committee of the İstanbul Bar stated that in 144/9 dated decision "Being a merchant is incompatible with the profession of advocacy" and the partners of the firm called "Yasa Uluslararası Hukuk Ticaret ve Temsilcilik Hizmetleri" have been responsible for infringing the law. [187]

The draft gives right to lawyers for practising their profession as having legal personality. This personality will be submitted to tax laws for natural persons. The name of this partnership will be composed of all of the name/surname of the lawyers .In that circumstances the word "partnership" must be mentioned with the name together. Foreign investment can benefit from these provisions only by providing their services in foreign law and international law. This limitation comprises Turkish lawyers who wish to work in that partnership. This kind of partnership is not required to be registered to the Bar. The practise of this provision will base on reciprocity. Partnership will gain its legal personality by the ratification of the Board of Directors of the Bar. Partnership will determine the ratios of the participants. (Draft Art. 44).The share of the partnership could be transferred only to other shareholders or to anyone who is a lawyer. The shareholder's share must be paid in case of retirement or insolvency by other shareholders otherwise the partnership will be liquidated after a three month duration. This partnership will be responsible for

actions and damages together by each lawyer .The assets of this partnership is composed of solely salaries gained from representing clients.

The law firms merging with foreign law firms which is submitted to legislation on stimulation of foreign capital could only consult in foreign laws and international law. This provision must be amended for EU citizens in case of being a Member State.

10.6 Prohibition of Advertising :

According to Art. 55 lawyers could not make advertisement for gaining new clients by any kind of action. The draft regulates the same prohibition for law firms .In Turkey in some cases advertisement can be acceptable for instance lawyer can advertise the address of firm when he/she moves the office to another place. But in Switzerland lawyer can advertise whenever he/she has a new office or moves his/her office or wants to inform clients of his/her resignation from the partnership.[188]The shape of advertisement is also important. The notice must not attract attention as a commercial advertisement. In Switzerland ,one can not advertise the address of the office in one of a whole page of a newspaper.[189]

The legal grounds of the prohibition of advertisement of lawyers can be listed in five conditions:

α) Prohibiting the risk of being commercial

β) Prohibiting the risk of suffering professional conduct

γ) Prohibiting the risk of preferring advertisement in stead of ability

θ) Prohibiting the risk of providing the profession expensive

ε) Prohibiting the risk of independency of the lawyer[190]

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[187] Özkan ; Op.cit ; page 131

[188] Özkan ; Op.cit; page 454/ see also Avukatlık Mesleği Sempozyumu ;Ersoy Yüksel ; Page 183 -195

[189] Özkan ; ibid; page 458

[190] Özkan ;ibid ;page 466

11. Differences Between Lawyers Act and EU Legislation

Art. 3 of Lawyers Act prohibits the practice of profession who is not a Turkish citizen. This prohibition is regulated because of public policy criterion.[191] [192] We are faced with the problem of public policy in Turkish Citizenship Act (Art 29) .The provision considers the waiving of nationality by the permission of Council of Ministers.The ones who have Turkish nationality from the beginning of birth could obtain a domicile,travel,work and acquire movables and immoveable same as Turks without infringing public policy and security [193] so the one who was once a Turkish citizen could not practice the profession in Turkey as a lawyer because of the obstacle of public policy.Directive permits practising the profession as a salaried lawyer whereas it is prohibited in our legislation.(Art 11) According to Directive a lawyer must have a professional indemnity insurance for practicing in a Member State but in our legislation this kind of insurance has not envisaged.

11.1 Approximation of Laws :

We prefer to use the phrase "approximation" instead of "harmonization" because Turkey is not a Member State at present. As a candidate State we must amend our legal system by a method of harmonizing but in a position of becoming a Member State we will adopt our legislation.

Art. 3 must be amended as granting right for the practice of profession to European Union citizens .

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[191] Sevig Raşit Vedat ; Türkiye'nin Yabancılar Hukuku, page 103

[192] Çelikel Aysel ;Yabancılar Hukuku , page 119 / Tekinalp Gülören ; Türk Yabancılar Hukuku , page127

[193] Türk Vatandaşlık Kanunu ; Kanun No: 403 Kabul Tarihi :11.2.1964 RG: 22.2.1964 - 11638

Article 3 should be modified by requiring extra condition which will be related with speaking Turkish language .Article 4 of the 89/48 EEC Directive regulates the aptitude test which is composed of subjects that may cover both theoretical knowledge and practical skills required for the pursuit of the profession. So in integration process we should also require speaking Turkish language. Speaking Turkish covers understanding and disposing the Turkish language in Courts and defending, representing clients in Courts , giving legal advice , writing and reading legal petitions.

Article 8 must be amended as granting right for lawyers employed as salaried in public or civil institutions.

Professional indemnity insurance must be regulated in our legislation for approximization of laws. In our legislation lawyer will be responsible for infringing the proxy agreement or for acting negligent in hearings because of misapplying provisions or being inadequate in legal knowledge or for his negligence. For proving this responsibility there must be a close relationship between damage and his manner. Infringement of proxy agreement must have cause damage to the client and the duration of prescription must not be barred to the status of limitations. According to Art.40 the requests for damages will be extinguished in a period of five years of prescription in all circumstances and somehow will be lost after a one year duration has elapsed from the beginning period of this requirement.[194]

Article 35 of Lawyer's Act which regulates the activities of lawyers must be amended as including EU citizen lawyers.

Article 80 which deals with composition of general assembly of Bar should be amended as including EU citizen lawyers as well.

Another important amendment should be envisaged for joint practice of lawyers.In our legal system lawyers can practice their profession together in

[194] Aday Nejat ; page 160

the office but can not practice as a partnership whereas in draft this matter is regulated.(Art 44) The 98/5 of EEC Directive regulates this right in article 11 and 12 .So we can obtain the right to practice the profession as partnership.

Article 66 should be amended also. A lawyer who has a nationality of any Member State should have to register to the Bar where he/she would practice the profession. According to article 3 of the 98/5 EEC Directive a lawyer who wishes to practice in a Member State other than in which he obtained his professional qualification should register to the competent authority in that state.

Article 67 , deals with the prohibition of practising the profession of advocacy **constantly in different territory** where he/she is not registered.
In integration process we should give right to EU citizen lawyers to practice their profession in other Member States and Turkey together where they are registered to each Bar.

This right is granted with the European Court of Justice in Klopp case.
Mr. Klopp who is a German national and a member of the Düsseldorf Bar applied , to take the oath as an advocate and to be registered for the period of practical training at the Bar in Paris where he plans to establish chambers whilst remaining a member of the Düsseldorf Bar and retaining his residence and his chambers in Düsseldorf. Besides ' Mr Klopp was awarded a doctorate by the Faculty of Law and Economics of the University of Paris and also he passed the examination for the Certificat d'Aptitude a la Profession d'Avocat .(Qualifying certificate for the profession of avocat) but the Paris Bar Council rejected his application on the ground that although Mr Klopp satisfied all the other requirements laid down for admission to the profession , he did not fulfil the provisions of Article 83 of Decree No 72-468 ["An advocate shall establish his chambers within the

territorial jurisdiction of the regional court with which he is registered"] and Article 1 of the international Rules of the Paris Bar ["Apart from his principal chambers he may establish a second set of chambers within the same geographical area"] which provide that an advocate may establish chambers in one place only which must be within the territorial jurisdiction of the regional court with which he is registered.[195]

The court made interpretation of Article 52 of the Treaty of Rome as: whether in the absence of any Directive of the Council of the European Communities ,coordinating provisions governing access to and exercise of the legal profession ,the requirement that a lawyer who is a national of a Member State and who wishes to practice simultaneously in another Member State must maintain chambers in one place only a requirement imposed by the legislation of the country where he wishes to establish himself and intended to ensure the proper administration of justice and compliance with professional ethics in that country ,constitutes a restriction which is incompatible with the freedom of establishment guaranteed by Article 52 of the Treaty of Rome.[196]

In view of the special nature of the legal profession ,however the second Member State must have the right in the interests of due administration of justice to require that lawyers enrolled at a Bar in its territory should practice in such a way as to maintain sufficient contact with their clients and judicial authorities and abide by the rules of the profession.Nevertheless such requirements must not prevent the nationals of other Member States from exercising properly the right of establishment guaranteed them by the Treaty.

In that respect it must be pointed out that modern methods of transport and telecommunications facilitate proper contact with clients and the judicial authorities . Similarly , the existence of a second set of chambers in another

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[195] Case 107/83 Ordre des Avocats au Barreau de Paris v Onno Klopp[1984] ECR I-2971, Page 2971

[196] Case 107/83; ibid , page 2986

Member State does not prevent the application of the rules of ethics in the host Member State.[197]

According to the Court even in the absence of any Directive coordinating national provisions governing access to and the exercise of legal profession , Article 52 et seq. of the EEC Treaty prevent the competent authorities of a Member State from denying on the basis of the national legislation and rules of professional conduct which are in force in that State , to a national of another Member State the right to enter and to exercise the legal profession solely on the ground that he maintains chambers simultaneously in another Member State.[198]

Turkey must adopt the two Directives related with lawyers to its legislation. Turkey has freedom in choosing the method of regulating these provisions.

Article 141 of Lawyer's Act deals with Disciplinary proceedings which should be amended as written below :
"If a disciplinary proceedings was proceeded against a lawyer who has a nationality of a Member State the executive committee of the Bar would have informed the Bar where the foreign lawyer was registered also. The disciplinary committee of the Bar could cooperate with the other Bar which he/she was registered in other Member State." [199]

The Article 13 of the 98/5 EEC Directive should have amended as :
A lawyer who was practising the profession of advocacy in Turkey dealing with Turkish law as a citizen of a Member State for at least three years effectively and regularly could register to the Bar under the title of AVUKAT without having to meet the conditions referred to in Article 4 (1) (b) of Directive 89/48 EEC.

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[197] Case 107/83 ; ibid , page 2990
[198] Case 107/83 ; ibid , page 2991

The following article on that subject should be amended as:
If a lawyer who was practicing the profession of advocacy in Turkey as a citizen of a Member State for at least three years effectively and regularly whereas the period of practicing Turkish law is less than three years he/she could use the "AVUKAT" title referring to the condition of graduating from the vocational education course and passing from the oral examination in front of five lawyers.[200]

In regular reports for candidate countries that was regulated by the Commission it considers only banking and insurance sectors under the paragraph of free movements of services.[201]

[199] Budak Ali Cem ; has not been published Article
[200] Budak Ali Cem ; has not been published Article

CONCLUSION :

The practice of profession of advocacy is depending on freedom of establishment , providing services and recognition of diplomas. Providing services is one of the major freedoms which is regulated in article 49-55 in the Amsterdam Treaty. The subject is dealing with two directives on providing the profession of advocacy in Member States and a directive focused on recognition of higher education diplomas. Recognition of diplomas facilitates practicing the profession of advocacy. Graduating from a three year education programme is adequate for providing service freely but requiring an aptitude test based on foreign language prerequisite for its system .This system is only applicable for diplomas given in one of the Member States. As a third country for Member States , Turkish citizens can not benefit from this system. Freedom to provide services can be obstructed by public policy , public health or public security. Although as a profession advocacy is directly interconnected with public policy ; Member States granted this right for their citizens in order to sustain harmonization of EU legislation in legal level. Restrictions based on nationality and establishment could not be regulated in legislation of Member States .

In this study we determined that some restrictions for lawyers still exists. Member States , except Denmark , prefers aptitude test instead of requiring professional training. The first barrier is applying aptitude test in order to act as a lawyer but this test is highly difficult because it requires every legal subject and to dispose fluent speaking of that language. Another barrier is found in using the title .The lawyer who has taken aptitude test must practice under the home country professional title in the host Member State. This restriction is softened by Article 10 of the 98/5 Directive. If a lawyer practices

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[201] 1998 ve 1999 Yılı Aday Ülkeler İlerleme Raporları

under his home country professional title effectively and regularly in the host Member State in the law of State and Community law for a period at least of three years then he/she will have the right to practice under the same title that is used by the national lawyers in the host State. The directives envisaged the law that will be applicable for rules of professional conduct which prevents the confusion on that matter. The 98/5 Directive is more liberal than Directive 77/249.The 98/5 Directive gives right for joint practice whereas it is prohibited in our lawyer's act but the draft recognizes this as well. Another further step is taken by granting to practice as a salaried lawyer in the employment of another lawyer in the host State. Lawyers practicing under their home country professional title is granted to have the right to vote in elections.

In approximization process we must require Bar examination for candidates who are requiring to be a lawyer and practice in Turkey. In our opinion , the examination must consist only for procedural law for civil and public law. Professional indemnity insurance must be regulated in our legal system for lawyers.

The system of recognition of higher education diplomas envisages simple procedure according to our equivalence system because according to the directive the competent authority can not refuse taking up or pursuing a profession if the holder has successfully completed a higher education of at least three years of duration.

Another major freedom is sustained by giving right to have offices in different Member States. But a lawyer can not rely on Lawyer's directive to provide services in another Member State where he/she has been barred from access to the profession of lawyer for reasons relating to good reputation, dignity and integrity. This kind of right shows the liberal character of the directives.

In our study we also discussed whether there is again a need of taking an aptitude test again in case of registering to another Bar of a Member State while removing his/her registration from the other Bar in the same Member

State. We accepted requiring to take the aptitude test only if the subjects of the aptitude test has been changed after he/she has taken it.

The steps in Directives based on a basic principle of the Community. "Less but better action". Granting rights for lawyers are still in the process of development. Political integration will be sustained with the practice of legislation by lawyers from different States. Without the application of provisions effectively , Treaty provisions will remain solely on paper in writing , granting rights based on good will.

As a conclusion if Turkey requires to be considered as a Member State he must approximize its legislation to EU legislation which is the third pillar of Copenhagen criteria. European Community Law and one of the languages spoken in Member States must be compulsory courses for law students in Turkey. This will improve free movement of services for Turkish lawyers otherwise they will miss the world trend in a global sphere where internet and communication systems are highly developed. Integration to EU is not a must for Turkey but on the other hand there is no other alternative for us in the Middle East. Turkey must amend its legislation similar to the developed countries because of it has qualified human resources and plays an important role in Middle East and not just for the purpose to become a Member to EU.