

# Regulating Legal Services in the European Union and Croatia

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## 1. Introductory Notes

Freedom to provide legal services throughout the European Union (“EU”) is a challenging legal issue.<sup>1</sup> When the European Community (“EC”) was founded in 1957,<sup>2</sup> the fundamental idea was to establish an economic union free of internal borders and restrictions, which was not an easy task.

The Treaty of Rome, and all other EU Treaties, including the Lisbon Treaty, incorporated rather general norms on freedom to provide services and freedom of establishment. Freedom of establishment includes the right to pursue certain activities as a self-employed person under the same conditions that apply to the nationals of the country where such establishment is effected. According to Article 3 of the EC Treaty,<sup>3</sup> the removal of any obstacle to free movement of persons and services in Member States is one of the major aims of the Community.<sup>4</sup>

The above norms were supplemented with the Treaty norms forbidding any kind of discrimination based on nationality.<sup>5</sup> These norms were for quite a time the legal basis that enabled lawyers coming from one Member State to practice law in another Member State. Lawyers often invoked that right in front of the European Court of Justice (“ECJ”) when a host Member State de-

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1. See also Laurel Terry *The Future Regulation of the Legal Profession: The Impacts of Treating the Legal Profession as “Services Providers”*, 2008 JOURNAL OF THE PROFESSIONAL LAWYER 189 (2008).

2. Most literature takes as the formal year that the European Community (currently EU) was established either 1957, when the presidents of six EU countries signed the first EC Treaty, (the so called Treaty of Rome) or 1951, when European Coal and Steel Community was established.

3. Treaty Establishing the European Community (Consolidated Version), OJ C 325, 24 December 2002. (TEC)

4. BRUNO NASCHIMBENE, *THE LEGAL PROFESSION IN THE EUROPEAN UNION*, KLUWER LAW INTERNATIONAL, 2009, Netherlands, p. 17.

5. One of the fundamental principles of EU law (first adopted by article 7 of Treaty of Rome, and later renumbered as article 12 of the Treaty Establishing the European Community (TEC, *supra* note 3) is the principle of nondiscrimination. Article 12 of TEC (now article 16d and 18 of TFEU—see note 10) prohibits any discrimination based on grounds of nationality. This principle is affirmed by Article 21 of the 2000 Charter for Fundamental Rights of the European Union.

nied them the possibility of practicing law in the country that was not their home country.

The ECJ confirmed this right in numerous cases, thereby establishing, though soft law, a formal position on the issue.<sup>6</sup>

But despite that, freedom to provide legal services throughout the EU is still often questioned by legal scholars, as well as practitioners. The problem, as many of them see it, involves not only the questions of when and under what conditions lawyers are entitled to provide legal services in a “host country,” but also issues of law, legal ethics, competence, legal tradition and more.<sup>7</sup>

Each and every European country has its own regulatory regime. Despite the soft harmonization that has been going on in Europe for years, legal regimes of Member States still significantly differ. That is why many argue that foreign lawyers don’t have the required competences and skills for practicing law in a foreign jurisdiction and that the current level of quality of legal services will be seriously disrupted if the freedom to provide legal services is expanded further.<sup>8</sup> But, all these arguments didn’t discourage EU institutions from their intention to liberalize the market for legal services in the EU. Freedom to provide legal services throughout the EU has been recognized for some time now. It is regulated through primary and secondary EU legislation, as well as through ECJ case law.

In this paper I will first analyze relevant EU legislation regulating the legal profession. I will also address landmark ECJ case law covering the freedom to provide (legal) services and the right to establishment. Then I will analyze Croatian legislation covering foreign lawyers.

Croatia, as a succession country, took over the obligation to harmonize its legislation with the *acquis communautaire*, the accumulated legislation, legal acts and court decisions that constitute the body of European Union law. As a consequence, it has to open the market for legal services to foreign lawyers. But, as in many other EU countries, Croatia has also used regulation to limit foreign lawyers in exercising their right.

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6. The role of the ECJ is often marked as a “vehicle for negative harmonization.” Negative harmonization occurs when a court strikes down national regulations that create obstacles to free movement. In such a case a court does not replace current national regulation with European regulation, which would be positive harmonization. The court, through its judgment, merely removes particular national regulation that is contrary to EU internal market rules. For more, see GARETH DAVIES, *EU INTERNAL MARKET LAW*, Cavendish Publishing, 2003, p. 145-150.

7. For a different discussion of that topic see Bjorn Fasterling, *The Managerial Law Firm and the Globalization of Legal Ethics*, 88 *JOURNAL OF BUSINESS ETHICS*, Spring, 2009., p. 21-34; H. Jurgen Hellwig, *The Legal Profession in Europe: Achievements, Challenges and Chances*, *GERMAN LAW JOURNAL*, vol. 4., No. 3., 2003., p. 263-276 ; K. Gronkek-Beoc, *The Legal Profession in the EU-A Comparative Analysis of Four Member States*, 24 *LIVERPOOL LAW REVIEW*, 2002., p. 109-130.

8. See, e.g., VIŠINSKIS, VIGINTAS ET AL, *LEGAL ENVIRONMENT WITHIN THE EU: FREE MOVEMENT OF LAWYERS AND LEGAL SERVICESS*, *BUSINESS THEORY AND PRACTICE*, 10 (1) 2009, p. 30-37.

In this paper I will show in which ways EU countries are protecting their market for legal services from foreign competition through national legislation. I will also try to justify such an approach, having in mind legislative peculiarities of EU Member States, language barriers, different legal tradition, etc.

## **2. Forms and Instruments of EU Law Relevant for Regulating the Legal Profession**

In the EU, as in any other jurisdiction, there are different sources of law. The major sources of law are EU Treaties.<sup>9</sup> They are often referred to as primary legislation. Treaties set broad policy goals and establish institutions that can, among other things, enact legislation in order to achieve those goals.

Secondary sources of EU law are regulations, directives and other legal instruments such as recommendations, opinions etc. Regulations are binding upon all the Member States and are directly applicable within all Member States.<sup>10</sup> They become law in all Member States the moment they come into force, without the requirement of any implementing measures, and automatically override conflicting domestic provisions. Directives, on the other hand, require Member States to achieve a certain result, while leaving them the discretion to choose the methods to achieve that result. For understanding and regulating the status of lawyers on the EU level, both primary and secondary sources of law are of equal importance.

In the earlier stage of EU integration, freedom to provide legal services was regulated by Treaty norms because there were no directives or regulations regulating lawyers' legal status. Regulation through directives started in 1977, when the so-called "Lawyers Directive" was enacted.

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9. The Treaty establishing the European Coal and Steel Community that was signed in Paris in 1951 is the first European Treaty. It established the Coal and Steel Community that is considered a predecessor of the European Community. The Treaty of Rome was the second EC Treaty. It was signed in Rome in 1957 and it established the European Economic Community. Most EU chroniclers would agree that the signing of the Rome Treaty marked the beginning of modern EU. The next EC Treaty was The Single European Act signed in Luxembourg in 1987. It provided the adaptations required for the achievement of the internal market. The Treaty on European Union was signed in Maastricht in 1992. The Maastricht Treaty changed the name of the European Economic Community to the European Community. It also introduced new forms of co-operation between the member State governments in field of defense and in the areas of justice and home affairs. By adding this intergovernmental co-operation to the existing Community system, the Maastricht Treaty created a new structure with three pillars. This is the European Union. The next EU Treaty was The Treaty of Amsterdam, entered into force in 1999. It amended and renumbered the EU and EC Treaties. After the Treaty of Amsterdam there was a Nice Treaty, signed in 2001, entered into force in 2003. It dealt mostly with reforming the institutions so that the Union could function efficiently after its enlargement to 25 Member States. The last EU Treaty is the Treaty of Lisbon, which was signed in 2007. It entered into force on 1 December 2009. For more, see [http://europa.eu/abc/treaties/index\\_en.htm](http://europa.eu/abc/treaties/index_en.htm).

10. P. CRAIG, G. DEBURCA, *EU LAW*, third ed. OxfordUniversity Press, 2003, p. 112.

## 2.1. Freedom of establishment and freedom to provide services in EU Treaties-reflection to legal profession

Basic Treaty norms regulating the freedom of establishment and the freedom to provide services are found in articles 43 to 48 of the Treaty on EU (currently articles 49 to 54 of TFEU) and articles 49 to 55 of the Treaty on EU (currently articles 56 to 64 of TFEU).<sup>11</sup> Articles 43 to 48 of the Treaty on EU govern the “freedom of establishment”.<sup>12</sup> Article 43 of the Treaty says that:

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 of subsidiaries by nationals of any Member State established in the territory of any Member State.

“The concept of establishment within the meaning of the Treaty is therefore a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons.”<sup>13</sup>

Article 44 of the Treaty on EU governs the EU Council’s powers concerning the right to enact legislation in order to attain freedom of establishment. Article 47 specifically mentions directives as one of the main legal instruments of harmonization.

Articles 49 to 55 deal with the “freedom to provide services.” Freedom to provide services refers to the right of a natural or legal person who has established headquarters, citizenship or residence in one of the member states of the EU to provide services, on a permanent or temporary basis in the territory of one of the Member States of the European Union, without restrictions and under the same conditions as citizens of that state.

Under Article 50, services shall be considered as such where they are normally provided for remuneration. In particular it refers to:

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11. The Treaty on the European Union and Treaty Establishing the European Community were replaced in 2007 by the Lisbon Treaty. The Lisbon Treaty has two integral parts: The Treaty of the EU (TEU) and the Treaty on the Functioning of the EU (TFEU). As mentioned above, the Lisbon Treaty introduced a number of novelties in connection to the institutions and functioning of the EU. As a result of the changed Treaty, new Treaty numbering occurred. Articles 43 to 48 of the Treaty on EU became articles 49 to 54 of the Treaty of the Functioning of the EU, while articles 49 to 55 of the Treaty on EU became articles 56 to 64 of the TFEU. In my paper I will use the earlier Treaty numbering because in most of the case law the old numbering is used. Both treaties are available at <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2010:083:SOM:EN:HTML>.

12. See also [http://ec.europa.eu/internal\\_market/services/principles\\_en.htm](http://ec.europa.eu/internal_market/services/principles_en.htm).

13. Case Reinhard Gebhard v. Consiglio dell’ Ordine degli Avvocati e Procuratori di Milano, Case C-55/94, par. 25.

- a) activities of an industrial character;
- b) activities of a commercial character;
- c) activities of craftsmen;
- d) activities of the professions.

Self-employed persons, such as lawyers, doctors, dentists etc., are also free to provide services. The persons providing services may, in order to do so, temporarily pursue the activity in the State where the services are provided, under the same conditions as are imposed by the State on its own nationals.<sup>14</sup>

It appears that freedom of establishment and the freedom to provide services cannot be clearly distinguished in all situations and that they often go together. It is often the case that a person or company seeks establishment in another Member State in order to provide services in that state.

In relation to the legal profession, freedom to provide services entails the right of a lawyer established and/or educated in one EU jurisdiction to provide services in another EU jurisdiction.

Here one can distinguish a few possible situations:

- 1) it is possible for a lawyer coming from one Member State to provide legal services in another Member State, on a temporary or permanent basis, without establishing an office or branch office in that “host state”;
- 2) it is possible that a lawyer who has a registered office in one Member State decides to register an office in another Member State, while keeping the activity in his “home state”; and
- 3) a lawyer wants to move from one Member State to another in which he wants to start practicing law under his home title or host state title.

The earlier cited articles of the Treaty on EU are supposed to cover all those situations. In relation to lawyers they have been interpreted in a way that Member States cannot refuse a foreign lawyer or forbid him to set up an office or branch office based on the fact that he or she is not a natural citizen of that country or based on the fact that he or she has foreign country qualifications.

But still, one should be aware that the legal profession is, in all EU countries, regulated through national legislation, which prescribes particular conditions for practicing law. In that sense, Member States’ national rules actually dictate conditions for practicing law in a particular Member State.

Some of the typical and frequent requirements imposed by Member States for practicing law are nationality, passage of a bar exam or similar exam, a certain length of time of practicing law before assigning to the Bar or other conditions. Those requirements created serious obstacles in exercising freedom of establishment and freedom to provide services for lawyers in an “internal market.”<sup>15</sup>

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14. Article 50 of the Treaty on EU, third paragraph.

15. The creation of an “internal market” (common market, single market) was the fundamental objective of the EU integration. The creation of an internal market started with the Treaty of Rome.

The problem was recognized in the 1970s when, as a response to the above problems, harmonization through EU directives first started.

### 3. Directive 77/249<sup>16</sup>

Directive 77/249 was the first European directive regulating cross-border legal practice. It was enacted in March 1977, soon after the ECJ brought its judgment in the famous *Reyners* case.<sup>17</sup> Reyners was a Dutch citizen. He was domiciled in Belgium and obtained a Belgian law diploma. He was denied the status of a Belgian advocat on the ground that he wasn't a Belgian citizen, which was one of the requirements for practicing law in Belgium.

Reyners appealed the decision at the Belgian Court, but his application was denied. On appeal, the Belgian Supreme Administrative Court, the Conseil d'Etat, asked the ECJ for a ruling on whether Article 43 (ex Article 52) had direct effect.

In its opinion, the Court stated that "the rule on equal treatment with nationals is one of the fundamental legal provisions within the Community." The Court went on to hold that "the rule of national treatment" is effective even if the Council fails in its obligation to pass these implementing directives. However, directives are still desirable and needed because they can "promote the effective exercise of the right of freedom of establishment."

*Reyners* was a major breakthrough for lawyers who were prevented from practicing in other Member States, particularly for its holding that Article 43 had a "direct effect" for professionals seeking to rely on the right of establishment. This meant that professionals no longer had to wait for the European Commission, the executive body of the European Union, to implement a directive. Instead, they could immediately receive the benefits of EU membership. *Reyners* was also significant because it established a "direct effect doctrine" that was reinforced in later ECJ cases.<sup>18</sup> Indeed, the direct effect doctrine achieved more freedoms for lawyers.

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Article 2 of that Treaty says that the "Community shall have as its task, by establishing a "common market" and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities . . ." From that statement it is obvious that a common market was a means to achieve economic and political goals set by the Treaty of Rome. The term "common market" was later replaced by the term "single market" and, after the Lisbon Treaty, with the term "internal market". Internal market is defined as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties."

16. Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, OJ L 078, 26. 03. 1977.

17. Case 2/74, *Reyners v. Belgium* (1974).

18. Direct effect is one of basic principles of Community law. It confers rights on individuals that they can invoke before the national and Community courts. Direct effect principle was established by the Court of Justice in the *Van Gend & Loos* case (1963). In this case, the Court ruled that "Community law not only imposes obligations on individuals but is also intended to confer upon

However, these freedoms were still limited in their application because the Council still needed to issue directives. The first such directive was Directive 77/249. As said in the Directive's title, it was enacted with the main purpose "to facilitate the effective exercise by lawyers of freedom to provide services."

What did Directive 77/249 in practice solve? First, it prohibited discrimination based on nationality in connection to legal services providers. In the preamble it says that "any restriction on the provision of services which is based on nationality or on conditions of residence has been prohibited. . . ." Since nationality was one of the main conditions for practicing law in most Member States, this provision had far-reaching consequences. It prevented Member States from imposing a restriction on foreign lawyers simply because of the fact that they are nationals of some Member State other than their home Member State.

The second important Directive achievement concerns establishment of a general principle of mutual recognition of professional licenses for lawyers from Member States. Mutual recognition of professional qualifications, was, and still is, a great problem in the European Union.<sup>19</sup> Since legal education between Member States significantly differs, Member States were reluctant to accept foreign professional qualifications as equal to host country national qualifications.

So the Directive's rule incorporated in article 3 of Directive 77/249, which says that "a [lawyer] shall adopt the professional title used in the Member State from which he comes, expressed in the language or one of the languages, of that State, with an indication of the professional organization by which he is authorized to practice . . . ", finally enabled foreign lawyers to move abroad and practice law. However, a foreign lawyer could practice law only under his or her home title, and not under the host Member State title since the Directive didn't solve the problem of mutual recognition of diplomas. Because of that and some other rules and limitations, Directive 77/249 was often strongly criticized.

The most controversial Directive rules were rules concerning the right of representation in front of national courts. In Article 4 of the Directive it says that ac-

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them rights which become part of their legal heritage. . . . And Article 12 of the Treaty must be interpreted as creating individual rights which national court must protect."

See also A. Dashwood, *The Principle of Direct Effect in EC Law*, JOURNAL OF COMMON MARKET STUDIES, Vol. 16, Issue 3, p. 229-245, September 1977.

19. Here we should point out the distinction between professional and academic recognition of professional qualifications in the EU. Academic recognition refers to the situation where a Member State is recognizing a foreign law degree for the purpose of future education. For example, a German university recognizes a foreign law degree for the sole purpose that a holder of the diploma can start a postgraduate program. The academic recognition is out of the EU competence. It is in competence of the Member States. Each and every Member State has its own rules and procedures for recognition of foreign law degrees. Professional recognition of qualification, on the other hand, is regulated by secondary EU legislation, in particularly by Directive 77/249, and later Directive 89/48/EEC. See F. Plimmer, *Mutual Recognition of Professional Qualifications: The European Union System*, Working paper series, 3rd FIG Regional Conference, Jakarta, Indonesia, 2004 ([http://www.fig.net/pub/jakarta/papers/ps\\_05/ps\\_05\\_2\\_plimmer.pdf](http://www.fig.net/pub/jakarta/papers/ps_05/ps_05_2_plimmer.pdf)).

tivities relating to the representation of clients in legal proceedings or before public authorities shall be pursued in each Member State under conditions laid down for lawyers established in that State

Furthermore, in Article 5 it said that Member States may require lawyers:

to be introduced, in accordance with local rules or customs, to the presiding judge and, where appropriate, to the President of the relevant Bar in the host Member State;

to work in conjunction with a lawyer who practices before judicial authority in question and who would, where necessary, be answerable to that authority, or with and “avoue” or “procuratore” practicing before it.

These rules had far-reaching consequences. The first one enabled Member States to impose obstacles through national legislation on foreign lawyers wishing to practice law in the host Member State. The second one limited foreign lawyers' activities to legal advising only.

So, despite the Council's best intention to move things from the “dead spot” in the field of legal services, freedom to provide legal services existed for years, more *de jure* than *de facto*. Besides that, Directive 77/249 also didn't deal with another important issue, freedom of establishment. This and the other problems were later addressed in another of the Council's directives.

#### 4. Directive 89/48/EEC<sup>20</sup> (Diploma directive)

Throughout the 1980s, Directive 77/249 was the only operative document governing migrant lawyers in the EU.<sup>21</sup> Only 12 years later, in December 1988, long expected Directive 98/48/EEC, or the “Diploma Directive”, was enacted.

Whereas Directive 77/249 simply governs the provision of services by lawyers, the Diploma Directive established the general system for the mutual recognition of Higher Education diplomas on the EU level. It is the first one from the series of so called “diploma directives.”<sup>22</sup> This Directive, together with those that followed, was another EU attempt to ensure the success of free flow of services, persons and capital on the internal market.

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20. Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher education diplomas awarded on completion of professional education and training of at least three years' duration, OJ L 019, 24. 01. 1989.

21. M. Podell, *When Zeal for EU Overcomes Common Sense: The Lawyers Directive*, 23. B.C. INTERN'L AND COMP. & L. REV. 57 ( 1999-2000) p. 58.

22. Directive 89/48/EEC is “framework document.” It deals with a general system for the mutual recognition of professional qualifications. Besides this Directive, a number of sectoral directives have been enacted, each regulating recognition of professional qualification for specific professions. For example, the professions of doctors, architects, dental surgeons, etc. are covered by sectoral directive. Directive 89/48/ EEC was supplemented in 1992 by Directive 92/51/EEC.

In general, Directive 89/48/EEC deals with the following. It adopts a general, rather than a sectoral approach, meaning that it applies to all “regulated professions”:

- to which access to a Single European Market it in some way restricted;
- for which at least three years of higher education is required, and
- for which a specific sectoral directive doesn’t already exist.

The term “regulated professions” refers to regulated professional activity or the range of activities that constitute a profession in a Member State.<sup>23</sup> The practice of law falls within the provisions of the Directive since it is a regulated profession that requires the possession of a diploma. In that sense, its connection to the lawyers’ Directive 89/48 was important because it established a specific framework by which attorneys and other learned professionals could attain permanent professional recognition by the controlling authority of any other EU host state.

Under Directive 89/48/EEC, host Member States were to choose one of two ways to admit a foreign EU lawyer to the bar: either by way of an aptitude test, which would measure the individual’s competence to practice law in the host State or by way of an “adaptation period” during which the individual would practice in the host State.<sup>24</sup>

Directive 89/48/EEC was repealed and replaced in 2005 with new Directive 2005/36/EC.<sup>25</sup> This Directive actually has replaced fifteen prior Directives in the field of recognition of professional qualifications. Therefore, as the Commission stressed, it constitutes the first comprehensive modernization of the Community system in some forty years in the field of mutual recognition of professional qualifications.<sup>26</sup>

This Directive, as well as previous Directives, also deals with the recognition of professional qualifications.<sup>27</sup> *Ratione personae*, it applies to all EU Member State nationals wishing to practice a regulated profession, including liberal professions, in a Member State other than the Member State in which they obtained their professional qualifications, on either a self-employed or employed basis.<sup>28</sup>

Professions covered include, among others: doctors, dentists, nurses, architects, opticians, teachers etc. Lawyers, who by definition, fall in the category of liberal professions, are excluded from the scope of this Directive.

Directive 2005/36/EC applies to lawyers only if they wish to practice law under host Member State title. Otherwise, provisions of Directive 77/249/EEC and Directive 98/5/EC or the so called “Lawyers Directive” apply.

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23. Article 1(c) of the Directive 89/48/EEC

24. Podell, *supra* note 21, p. 58

25. Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications OJ L 255/22, 30. 09. 2005 (Directive 2005/36/EC).

26. See [http://ec.europa.eu/internal\\_market/qualifications/future\\_en.htm](http://ec.europa.eu/internal_market/qualifications/future_en.htm).

27. Directive 2005/36/EC, Article 1.

28. Directive 2005/36/EC, Article 2.

## 5. Directive 98/5/EC (Lawyers Directive)<sup>29</sup>

The Lawyers Directive is perhaps the most significant EU Directive for regulating the legal profession in the EU. It was enacted in February 1998 (nine years after the Council adopted the Diploma Directive), with the main purpose “to facilitate practice of the profession of lawyer in a Member State other than that in which the qualification was obtained.”

Since, as indicated in the Directive Preface, only a few Member States permitted lawyers from another Member State to practice law on their territory,<sup>30</sup> it was necessary to undertake further measures to overcome existing obstacles to freedom to provide legal services.

So compared to the Diploma Directive, which established a specific framework by which attorneys and other learned professionals could attain permanent professional recognition by the controlling authority of any other EU host state, the Lawyers Directive goes a step further. It allowed host lawyers to begin practicing immediately in the host State, subject only to the requirement of registration with the competent authority.

There are two principal provisions in the Directive—article 3 and article 10. Article 3 allows lawyers qualified in one Member State to practice law under their “home title” permanently in another EU Member State. In that case the foreign lawyer just has to register with the competent authority of the host Member State. The competent authority is entitled to ask for evidence of registration within the Bar of the home Member State or of other competent authority of the home Member State.<sup>31</sup> The practice permitted includes home law, European Union Law, international law and most significantly, host Member State law. In other words, a French lawyer could practice German law in Germany or *vice versa*.

Article 10 entitles lawyers who have been practicing for three years in another Member State to integrate into the legal profession of the host Member State. The phrase “to integrate into the [legal] profession of the host Member State” means to have the same treatment as a host Member State’s lawyers.<sup>32</sup> That is possible only if a lawyer concerned has “effectively and regularly pursued”<sup>33</sup> law in the host Member State for a period of at least three years. So, a lawyer who practiced law in the host Member State for at least three years could, according to the Directive, avoid the aptitude test requirement and obtain the host state professional title.

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29. Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained. In legal literature this Directive is also often referred as “Establishment Lawyers Directive.”

30. *Id.* at para. 6.

31. *Id.* at article 3(2).

32. *Id.* at article 10.

33. Effective and regular pursuit means actual exercise of the activity without any interruption other than resulting from the events of everyday life. Article 10(1) of the Directive 98/5/EC.

This is one of the most significant achievements of Directive 98/5/EC because it facilitates the ability of lawyers to attain permanent membership in a foreign EU Bar. According to the Directive, an affected lawyer has to furnish the competent authority in the host Member State with a proof of such effective and regular pursuit of an activity. The lawyer shall do so by providing the competent authority in the host Member State with any relevant information and documentation, notably on the number of matters he has dealt with and their nature. However, if such an activity doesn't include the law of the host Member State of Community law, the lawyer may be required to take an aptitude test limited to the law of procedure and the rules of professional conduct of the host Member State.

Although Directive 98/5/EC represents a significant shift from the previous restrictive practice introduced in Directive 77/249, according to which Member States could request an aptitude test before approaching to the Bar, this Directive still imposes a number of restrictions on lawyers. First, it applies to fully qualified lawyers only. Trainee lawyers do not fall within the scope of the provisions of the Directive.

Second, at the end of a three year adaptation period, the lawyer may request full admission to the Bar from the competent authority in the host State. This means that Member States are actually retaining control over who can be admitted to the Bar. The competent authority may choose to admit or not to admit an applicant to the Bar. There is no automatic recognition.

Third, the Directive doesn't deal with harmonization of the legal education systems of Member States, which is still one of the most significant obstacles to free movement of lawyers.<sup>34</sup>

Finally, the Directive is not a regulation, and therefore it relies on national legislatures of Member States to create and implement laws. Member States were often facing significant pressure from their respective Bars or other associations, which were reluctant to grant foreign lawyers easy access to their Bar associations. Therefore, they either obstructed the enactment of legislation granting simple and

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34. When we talk about the harmonization of legal education in Europe we should mention the Bologna Process. The Bologna Process is named after the Bologna Declaration, which was signed in Bologna, Italy in 1999 by ministers in charge of higher education from 29 European countries. Today, the Process unites 47 countries, all part of the European Cultural Convention. The overarching aim of the Bologna Process is to create a European Higher Education Area based on international cooperation and academic exchange of European professors and students. But this is not to be achieved through "standardization" or "unification" of European higher education, but through creating convergence in higher education, which will enable easier movement of professionals on European economic area. See also <http://ec.europa.eu/education/policies/educ/bologna/bologna.pdf>; Guy Neave, *The Bologna Declaration: Some of the Historical Dilemmas Posed by the Reconstruction of the Community in Europe's System of Higher Education*, EDUCATIONAL POLICY, January 2003, vol.,17., p. 141-164; Cardoso, A., Portela, M., Sá, C., Alexandre, F., *Demand for Higher Education Programs: The Impact of the Bologna Process*, CESifo, Venice Summer Institute, 2007, available at: [http://repositorium.sdum.uminho.pt/bitstream/1822/7074/1/Cardoso\\_Portela\\_Sa\\_Alexandre\\_2007\\_CESifo.pdf](http://repositorium.sdum.uminho.pt/bitstream/1822/7074/1/Cardoso_Portela_Sa_Alexandre_2007_CESifo.pdf).

easy access to the Bar or they “left things open”, meaning that they didn’t regulate some issues at all, leaving it to the national courts or the ECJ to decide.

## 6. Directive 2006/123/EC (Services Directive)

The last EU Directive, which at least to some extent impacted legal services in the EU, is Directive 2006/123/EC, or the Services Directive.<sup>35</sup> It was adopted in December 2006. It came into force three years later in December 2009, after a long implementation period.

This Directive presents another Commission attempt to facilitate cross-border services, (not legal services only). As the Commission said, the main objective of the Directive is “to create a genuine internal market for services.” The phrase “to create a *genuine* internal market for services” can be understood as the Commission’s dissatisfaction with the way the cross-border services market in the EU functioned in the past, but also as the Commission’s recognition of the failure to establish goals in relation to the freedom of services in the internal market.

Since services constitute about 70% of the GNP of Member States, the Commission’s concerns and efforts in removing obstacles to freedom to provide services in the internal market are quite understandable.<sup>36</sup> The success of the European economy depends, to great extent, on the performance of the internal market. If we accept that freedom to provide services and freedom of establishment are the underlying themes of the internal market, then we can understand why the Commission is so persistent in its efforts to eliminate obstacles to freedom to provide services on the internal market.

What are the weakest points of past EU policy in connection to the services (or obstacles to freedom to provide services) we can actually read out from the Directive’s objectives. In general, these objectives are:

- 1) to simplify the procedures and formalities applicable to accessing a services activity;
- 2) (in order to do that) to review their existing “national authorization schemes” and to make them compliant with Articles of the Directives;<sup>37</sup>
- 3) to screen “requirements list for evaluation” for accessing services and make them comply with the general requirements for authorization schemes;
- 4) to set up “points of single contact” as single interlocutors for services providers in order to make information on national requirement and procedures for providing services in particular Member States easily accessible, etc.

It is clear from above that Directive 2006/123/EC, contrary to others Directives explored in this paper, doesn’t make an attempt to harmonize national laws

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35. Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market OJ L376/36, 27. 12. 2006.

36. This data is published by the Commission in preface of Directive 2006/123/EC, para. 4.

37. Directive 2006/123/ EC, articles 9-13.

in the area of services. It is more a vehicle of negative integration that merely creates conditions for some future harmonization of Member States.<sup>38</sup> And secondly, the Directive is a residual one: it only applies if no other, more specific directive, regulation or other EC act applies.

What are the impacts of this Directive on the legal services providers? Lawyers are not excluded from the scope of Directive 2006/123/EC.<sup>39</sup> This means that obligations imposed upon the Member States to simplify registration requirements and other administrative measures apply to the legal profession too. The expected outcome should be a more simplified process of registration than now, which is more or less universal for all Member States, within the one (national) body in charge for registration and other administrative requirements (single point of contact).

The idea is in theory good. It strives to reconcile differences in connection with registration procedures and formalities and to equalize the level of quality in services between Member States. But the question is can that in reality be achieved by means of a single regulatory measure, particularly, having in mind that the Directive contains rather general norms and it applies to a wide range of services activities, or more precisely, to all services besides those explicitly excluded.

## **7. Role and influence of European Court of Justice on shaping EU market for legal services**

The European Court of Justice<sup>40</sup> was always seen as an important factor of EU integration. Through its judgment on the interpretation of the Treaties' norms and directives, the ECJ significantly influenced the development of EU law as a whole. It is seen as having undertaken the task of giving flesh and substance to an "outline" Treaty, and as having developed a particular vision of the kind of Europe it sought to promote.<sup>41</sup>

In connection with the legal profession, that vision is, at least where the ECJ is concerned, "a market for legal services without borders." This conclusion can be drawn from numerous judgments in which the ECJ regularly acted *in favorem* integration. Some of the ECJ landmark decisions significantly influenced future legislative activities in connection with the legal profession. Although, when speaking about the ECJ one should have in mind that the ECJ has an essential role as a body in charge of interpretation, rather than application of EU laws.

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38. Siniša Rodin, *Scope of the Services Directive 123/2006*, ZBORNIK PRAVNOG FAKULTETA U ZAGREBU, 59, (1) 2009. p. 35.

39. Services that are excluded from the scope of the Directive 2006/123/EC are: non-economic services of general interest, financial services, electronic communication services and networks, services in the field of transport, services of temporary work agencies, healthcare, audiovisual and radio broadcasting services, gambling activities, social services relating housing, childcare etc, private security services and services provided by notaried and bailiffs.

40. See [http://europa.eu/institutions/inst/justice/index\\_en.htm](http://europa.eu/institutions/inst/justice/index_en.htm).

41. P. GRAINNE, C. DE BURCA., *supra* note 10, p. 87.

But, nevertheless, in connection to the legal profession, the EJC, on occasion, pushed the boundaries of its powers to interpret legislation to its limits, and thereby engaged in law-making. In my further discussion I will refer to relevant ECJ case law that most significantly shaped Community attitude towards freedom to provide legal services and freedom of establishment of lawyers.<sup>42</sup>

**7.1. *Van Binsbergen*<sup>43</sup> (Case 33/75)—right of establishment in connection to the right to provide legal services**

Kortman, was a Dutch attorney, engaged by a client, van Bisbergen, to represent him in a Dutch administrative proceeding. The Dutch authorities refused to allow Kortman to continue to act in the matter after he became a Belgian resident, because Dutch law required legal representatives to reside in the Netherlands. Kortman appealed this decision.

The question put by the national court to the EJC seeks to determine whether the requirement that legal representatives be permanently established within the territory of the state where the services are to be provided can be reconciled with the prohibition, under articles 59 and 60 of the Treaty, which forbids all restrictions on freedom to provide services within the Community. Said in another way, the ECJ was requested to interpret articles 59 and 60 of the EU Treaty in relation to a provision of national law (Dutch law) whereby only a person established in the territory of the state concerned is entitled to act as a legal representative before certain courts or tribunals.

The Court was also asked whether articles 59 and 60 of the EU Treaty are directly applicable and create individual rights that national courts must protect. In its opinion the Court stated that: Article 59 and 60 of the EEC Treaty must be interpreted as meaning that the national law of a Member State cannot, by imposing a requirement as to habitual residence within the State, deny any person established in another Member State the right to provide services, where the provision of services is not subject to any special condition under the national law applicable.

Concerning the second question, the ECJ concluded that Articles 59 and 60 have direct effect and may therefore be relied on before national courts, at least in so far as they seek to abolish any discrimination against a person providing services by reason of his nationality or of the fact that he resides in a Member State other than the one in which the services are to be provided.

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42. See Guide to the Case Law of the European Court of Justice on articles 43 *et seq.* EC Treaty, European Commission 1/ 17 2001 ([http://ec.europa.eu/internal\\_market/services/docs/infringements/art43\\_en.pdf](http://ec.europa.eu/internal_market/services/docs/infringements/art43_en.pdf)).

43. Case 33/74, *Van Bisbergen v. Bestuur van de Bedrijfsvereniging voor de Metallnijverheid* (1974) ECR-1299.

### 7.2. *Klopp*<sup>44</sup> (Case 107/83)—right of establishment

The next important case, dealing with the problem of establishment, concerned a German lawyer named Klopp, who not only had the necessary German qualifications but also fulfilled all the requirements for admission to the Paris Bar. In fact he was dually qualified in Germany and in France. Nevertheless, his admission to the French Bar was refused on the ground that he wanted to retain professional residence in Germany as well as establish himself in Paris. This double residency was considered contrary to the French rule requiring an advocate to have only one professional residence.

The ECJ held that to maintain this rule in a transfrontier context would prevent lawyers from other Member States from exercising their right of establishment by integrating into the legal profession of another Member State. Having and retaining a professional residence in Germany could not be a reason for refusing the applicant's admission to the Paris Bar. Furthermore, the Court declared that the existence of a second professional residence in another Member State did not present any obstacle to the application of rules of professional conduct in the host Member State.

This decision of the ECJ was not only important for lawyers with dual qualification who wanted to establish themselves in two Member States. Indirectly, it also had influence on the internal application of the one office requirement, *unicité de cabinet*, which existed not only in France but also in other Member States.

After the Court's ruling it seemed to be quite anomalous to prohibit a national lawyer from having two offices on national territory while he might be allowed to have two offices in two different Member States provided that he fulfilled the professional qualification requirements. Such a form of reverse discrimination seemed not to be acceptable anymore. Most Member States have therefore abolished this requirement.

### 7.3. *Vlassopoulou*<sup>45</sup> (Case 340/89)—recognition of professional qualification

*Vlassopoulou* is a good illustration of the reluctance shown by Member States in implementing the Diploma Directive. A Greek lawyer received a doctorate in law from a German University. After working for several months with a German law firm located in Germany, she received permission to deal with foreign legal affairs concerning Greek law and Community law. When she later applied for admission as a *Rechtsanwalt* (German lawyer), the Ministry of Justice refused her application on the ground that she did not have the qualifications that were necessary for admission to the profession of *Rechtsanwalt*. Germany insisted that she follow the normal admission procedure, which included successfully completing two State exams and an apprenticeship training period.

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44. Case 107/83, *Ordre des Avocats au Barreau de Paris v. Klopp* (1984) ECR 2971.

45. Case C-340/89, *Vlassopoulou v. Ministerium für Justiz, Bundes und Europaangelegenheiten Baden-Württemberg* (1991) ECR I-2357.

The applicant thereafter brought an action in Federal Court in Germany, which referred it to the ECJ for a preliminary ruling. Mrs. Vlassopoulou argued that although Article 43 of the EC Treaty allows Member States to formulate national requirements, these requirements should not hinder the efforts of non-nationals to establish themselves by insisting on burdensome and restrictive national rules.

The ECJ agreed with Mrs. Vlassopoulou's argument. It stated that Germany could require non-nationals to meet certain qualifications necessary for the practice of law before being admitted (even where those qualifications hindered the establishment of non-nationals). However, the Court went on to hold that Germany could not ignore the training and educational credentials of the applicant when evaluating whether to grant her admission to the legal profession.

Therefore, Germany was obliged to recognize the foreigner's knowledge and experience and allow the foreigner to prove that she had the knowledge that she allegedly lacked. *Vlassopoulou* showed that Member States were obligated in all cases to compare a foreign applicant's qualifications with those required of their own nationals. Where the applicant's qualifications were equivalent to those required of its own nationals, then the host State had to accept the applicant's diploma. Where the equivalence was only partial, then the host State could require that the applicant demonstrate that she possessed the necessary qualifications, either through professional experience or by taking courses. If refused acceptance, the applicant was entitled to a reasoned explanation and could contest the decision in a national court.

#### **7.4. *Gebhard*<sup>46</sup> (Case 55/94) and *Neri*<sup>47</sup> (Case 153/02)— national rules on law practice**

The case *Gebhard v. Consiglio dell' Ordine degli Avvocati e Procuratori di Milano* raised very important questions about the national restrictions on cross-border legal services and establishment. Reinhard Gebhard was a German national qualified only as German *Rechtsanwalt*. He had been admitted to the German bar and had maintained his registration there. In fact, however, he had been in residence in Italy and had practiced law there for several years.

After having practiced for more than ten years in association with an Italian law firm, he started his own business. A complaint to the Milan Bar Council then was made by some Italian professionals, including those with whom he had previously worked. In this complaint it was stated that he had used the title *avvocato* on his letterhead, had appeared under the title *avvocato* before the local courts and had practiced from a law firm established under his own name.

The Milan Bar Council imposed on Gebhard the sanction of suspension from pursuing his professional activity for six months. Gebhard appealed against this

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

47. Case C-152/02, *Valentina Neri v. European School of Economics* (2003) ECR I-13555.

decision to the *Consiglio Nazionale Forense* and argued, in particular, that the Lawyers' Services Directive 77/249/EEC of 22 March 1977 entitled him to pursue his professional activities from his own chambers in Milan.

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

The Court finally held that:

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

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

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

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

The Court definitely accepted the *Gebhard* decision that, in an internal market, nondiscriminatory national restrictions fall under the scope of the establishment provisions and can only be justified by overriding requirements in the general interest as long as these national provisions fulfill the proportionality test. With this judgment the development towards the prohibition of nondiscriminatory restrictions in

case of freedom of establishment came to a final conclusion. The *Gebhard* formula has been used since consistently in various contexts.

A more recent case concerning the recognition of diplomas that the Court decided on the basis of the *Gebhard* formula was the case of *Neri*.<sup>48</sup> The case dealt with Ms. Neri, who had registered for a four-year University course leading to a diploma in international political sciences at Nottingham Trent University (NTU). NTU is a registered and recognized University in the United Kingdom.

The actual courses are delegated to the European School of Economics (ESE), a British private company, which has seats in many Member States. Diplomas were conferred by NTU. In order to avoid high costs associated with staying in the United Kingdom, Ms. Neri decided to follow the courses at the ESE in Genova.

Only after her registration and payment of the fee to the ESE, the Italian authorities informed Ms. Neri that the ESE was not allowed to organize University courses in Italy. Diplomas conferred by the ESE, although recognized in the United Kingdom, would not be accepted if they were granted after a period of study in Italy. In other words, Ms. Neri would not encounter any problems if she followed the courses in the United Kingdom, whereas in case of studies in Italy neither the courses nor her diploma would be recognized. After being informed of the implications of the Italian rules, Ms. Neri requested her money back from the ESE.

In the ensuing court case the *Giudice di Pace di Genova* referred preliminary questions to the European Court of Justice, inquiring about the possible violation of the rights derived from the free movement of persons, the freedom of establishment and the free movement of services, the Diploma Directive 89/48/EEC and Decision 63/266, which lays down principles with regard to vocational training. Although the *Giudice* posed three very detailed questions, the ECJ decided to answer only the first one. The ECJ ruled that the problem as it was put before the national court had to be examined from the ESE's perspective.

Consequently, the case had to be dealt with under the freedom of establishment provisions. After concluding that, according to article 43, all obstacles to the freedom of establishment should be removed, the ECJ ruled that as Italian nationals were not able to have their foreign credentials recognized when conferred after a study period in Italy, this constitutes a substantial hindrance to the ESE's activities in Italy.

Italy argued that its practice was objectively justified by the need to assure high quality education. In its view it would be impossible to exercise quality control by allowing the aforementioned scheme. Although the ECJ did not explicitly accept quality control as a defense in principle, it declared this defense not applicable in this case considering the hindrance was not proportionate.

The proportionality test failed for several reasons: First, Italy did recognize the same courses when followed abroad, and second, no form of diploma recognition was available to those Italians following courses at the ESE in Italy. These

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48. Case C153/02, *Valentina neri v. European School of Economics* (2003) ECR-I 13555.

facts led the ECJ to the conclusion that the hindrance could not be objectively justified and that the Italian practice was therefore in violation of article 43 EC. Further questions of the national court with regard to Directive 89/48/EEC and Decision 63/221 were left unanswered.

### **7.5. Morgenbesser<sup>49</sup> (Case 313/01)—free movement of qualified lawyers and trainees**

*Morgenbesser* is one of the most interesting cases with regard to the recognition of diplomas and free movement of lawyers. In this case the ECJ gave a potentially revolutionary ruling. This ruling, as well as possible ensuing decisions, might change legal academic and professional education in Europe considerably.

Christine Morgenbesser, a French national, had studied law in France and received her *Maîtrise en droit* in 1996. Thereafter she worked in a Paris law firm for eight months. It must be noted at this point that she was not qualified as an *avocate* in France. In April of 1998 she moved to Italy and worked in a law firm in Genova.

In October 1999 she filed a request with the Genova Bar Association in order to be registered in the register of *practicanti*. *Practicanti* are those lawyers who are in the process of qualifying as *avvocato* in Italy. The Genova Bar Association denied her request on the grounds that she did not have a law degree conferred by an Italian University, a requirement that was compulsory for all those who sought registration as *practicanto*.

Consequently, Ms. Morgenbesser asked the University of Genova to recognize her French law degree as equivalent to an Italian degree. The University of Genova informed Ms. Morgenbesser that her degree would be recognized upon following courses for two years, passing thirteen exams and writing a dissertation. Ms. Morgenbesser appealed both decisions.

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

Ms. Morgenbesser argued in the first place that her situation fell under Directive 89/48/EEC since she regards the profession of *practicanto* to be a regulated profession. Subsequently, she invoked the *Vlassopoulou* doctrine. The Court did not agree with her primary submission and came to the conclusion that activities as *practicanto* were too closely intertwined with the profession of *avvocato*, con-

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49. Case C-313/01, Christine Morgenbesser v. Consiglio dell'Ordine degli Avvocati di Genova, (2003) ECR I-13467.

stituting a necessary step in order to qualify as an *avvocato*, and that it could not be regarded as a separate profession. Accordingly, Directive 89/48/EEC was not applicable to the underlying situation.

The ruling did not end there though. Since Ms. Morgenbesser did not qualify as a *produit fini*, that is she was not fully qualified in any regulated legal profession, neither in her home Member State nor in Italy, the Court reverted to the general rules for diploma recognition that it had developed in previous years. The Court recalled the *Vlassopoulou* judgment according to which the free movement of persons is impaired when a national authority fails to take knowledge gained in another Member State into account, irrespective of whether the situation concerned the free movement of workers or the freedom of establishment. Ms. Morgenbesser therefore had the right to have the knowledge she had gained in France, proven by her *Maîtriseen droit*, taken into account when applying for registration.

The Court once more stipulated that when comparing the qualifications of the applicant and the qualifications required, the national authority was only allowed to look at the level of the qualification. With regard to diplomas concerning national law a Member State is allowed to conduct a comparison taking into account established differences between the legal systems of the Member States. When the national authorities conclude that the diplomas do not concur, the host Member State may require proof that the candidate has gained the additional knowledge by means of practical experience or study.

The Court therefore concluded that the national authority was not allowed to refuse to register Ms. Morgenbesser in the register of *practicianti* on the sole ground that she did not have a diploma conferred, ratified or recognized by an Italian University. In its judgment, the Court often referred to the *Vlassopoulou* ruling. The way in which the Court came to its reasoning in *Morgenbesser*, as well as the reasoning itself, was very similar to the *Vlassopoulou* judgment.

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

## 8. Croatian Law on Legal Profession

The legal profession in Croatia is regulated by the Law on the Legal Profession,<sup>50</sup> dated January 1994 (last amended in 2009). According to the Law, the right to practice law in the territory of the Republic of Croatia is limited to per-

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50. Law on the Legal Profession, Official Gazzete 9/94, 117/08, 50/09, 75/09 (the Law), available at [www.pak.hr/lgs.axd?t=16&id=2729](http://www.pak.hr/lgs.axd?t=16&id=2729).

sons who are enrolled in the list of attorneys. The right to be enrolled in the list of attorneys shall be given to a person fulfilling the following conditions:

- 1) that the person is of Croatian citizenship;
- 2) that the person possesses business capacity;
- 3) that the person's health conditions are such as to allow the performance of law practice activities;
- 4) that the person has graduated from a Law School in the Republic of Croatia;
- 5) that upon graduation, the person has completed at least three years of apprenticeship in a law office or has had a law-related job in judicial bodies or has worked for at least five years in other law-related employment;
- 6) that the person has an active knowledge of the Croatian language;
- 7) that the person has passed the Bar Examination in the Republic of Croatia;
- 8) that no investigation and criminal procedure are being conducted against the person as an ex officio prosecution;
- 9) that the person is not employed;
- 10) that the person is dignified and worthy of law practice;
- 11) that the person does not do other work that is incompatible with legal practice.

Pursuant to these rules it is obvious that the practice of law in Croatia is reserved only to individuals holding Croatian citizenship, who are educated in Croatia and who are enrolled in the list of attorneys held by the Croatian Bar Association. It means that foreigners are not legally in a position to practice law in Croatia.

Of course, that does not mean that they cannot come to Croatia and present themselves as attorneys from a foreign jurisdiction. Also, I do not see any obstacles for them to come to Croatia and give legal advice and services, although they cannot do this permanently. However, the restriction has no exceptions where representation in courts and other governmental bodies is concerned. Foreigners, and even Croatian citizens, who are attorneys but are not enrolled in the list of attorneys held by the Croatian Bar Association cannot represent clients as attorneys in front of the court and other governmental bodies.<sup>51</sup>

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51. Croatia adopted this very strict and I would say unjustified approach concerning attorneys. According to the Croatian Law only attorneys who are enrolled in the list of attorneys held by the Croatian Bar Association are entitled to provide legal representation. In-house lawyers can represent a company only in civil law cases up to a certain amount of money. Law professors, on the other hand, even when they have passed the bar exam and are enrolled in the Croatian Bar Association, are not entitled to represent parties in front of the court. They can only give legal advice for remuneration. In other European countries (for example in Hungary, Bulgaria) the situation is quite different. It is not a rare case that law professors are at the same time attorneys at law or judges. According to my personal opinion I don't find these two professions as opposing. On the contrary, it is quite logical and useful that a legal expert in some field of law is using his knowledge in practice, if he or she wishes to do so.

On the basis of the previous facts and the legal regulation of this topic, it is obvious that foreigners cannot be founders of a law firm in Croatia, they cannot be founders of joint law offices and they cannot practice law as individual attorneys, unless they are Croatian citizens and enrolled in the register of attorneys held by the Croatian Bar Association.

In practice, foreign individuals also can't participate in any kind of organization of legal counseling in Croatia. Foreign legal entities can't in anyway participate in any legal status of an organization of attorneys in Croatia because legal persons are not even mentioned as possible founders of organizations of law counselors.

Currently, the only possible way for cooperation is one in which a Croatian law office may affiliate itself by virtue of a written contract with other domestic or foreign law offices in order to carry out activities of common interest and to provide mutual services. These contracts are institutions of the Law on Obligations and they do not have any statutory effect on the organization of law offices in Croatia. So a foreign and a Croatian partner can find a possible solution for cooperation in presenting legal services in Croatia through an agreement on affiliation or cooperation.

It is important to state that law offices have the obligation to submit to the Bar Association a copy of the contract on affiliation. The Bar has the duty to warn law offices about the flaws or non-compliances of this contract with the Law or by-laws of the Bar Association or the Attorneys' Code of Ethics.

But, the current situation in the field of legal services is going to change in the near future. Pressured by EU requirements, the Croatian legislature already brought new regulations for foreign lawyers. But these new rules are going to enter into force the day when Croatia becomes a full member of EU. These new rules take into consideration all relevant EU regulations on freedom of establishment and freedom to provide legal services, as well as ECJ case law. As in other EU countries, these rules will mark the beginning of a new era in the area of legal services.

In short, according to the new regulations, foreign attorneys will be able to practice law in Croatia. But the Law is offering them few possibilities. An attorney from another country who acquired the right to carry out legal practice in his or her country of origin (a member state of the EU) may carry out in the Republic of Croatia:

1. legal operations;
2. legal profession under the title of the profession of his/her country of origin;
3. legal profession under the title "attorney".<sup>52</sup>

In the first case, an attorney from a member state is entitled to carry out in Croatia "legal operations." The term "legal operations" refers to the activities of counseling services only. This means that a foreign attorney can't represent a Croa-

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52. Law on the Legal Profession, Article 5 a.

tian or a foreign party in front of the Croatian Courts or other administrative bodies. He or she can only give legal advice (legal counseling) on his or her country of origin's law, on European Union law, on international law and on the Republic of Croatia's law.<sup>53</sup>

In this case a foreign attorney is not obliged to enroll in the list of foreign attorneys in Croatia. He or she just must notify the Croatian Bar Association (CBA) in writing that he or she possesses the acquired capacity for the execution of the legal profession as well as evidence of the professional indemnity insurance of his or her country of origin.<sup>54</sup>

Upon such notification, the CBA shall issue consent to the attorney for the execution of legal operations. When carrying out the operations, the attorney must respect the rules of the Attorney Code of Ethics of the Croatian Bar Association.<sup>55</sup>

The attorney uses the title of his or her country of origin given in the official language of that country, along with the indication of professional organization that issued his or her license to practice law in the home country.<sup>56</sup> In connection with disciplinary liability, the foreign attorney is liable according to Croatian law as he or she was enrolled in the list of attorneys.<sup>57</sup>

In the second case, the situation is quite different. In this case, a foreign attorney is allowed to carry out legal profession in Croatia, but not under the Croatian title "advocate." Instead the foreign attorney is using his or her country of origin title. He or she is entitled to carry out legal profession in the form of a law firm or a joint law office under the profession of his or her country of origin. In order to do that, the foreign attorney must enroll in the list of foreign attorneys by CBA.

The application for enrollment is accompanied by a certificate of citizenship, an evidence of professional indemnity insurance, as well as the certificate and evidence of membership in the legal association in the country of origin. The decision whether or not to enroll a foreign attorney is in hands of the CBA. If the CBA decision is positive, and after a foreign lawyer is enrolled to the Bar, a foreign attorney is entitled to provide counseling services as well as represent parties in front of Croatian Courts, with one significant limitation. In case of representation, a foreign attorney must act together with a Croatian attorney.<sup>58</sup> This rule has far-reaching consequences in practice. It is a *de facto* obstacle imposed on foreign attorneys wishing to practice law in Croatia.

Let us imagine a situation where a foreign attorney is having office in Croatia. In performing his business activity the attorney is limited to legal counseling only. If the attorney wants to represent a party in front of the court, he or she must

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53. *Id.* at Article 36 c (1).

54. *Id.* at Article 36 e (1), (2).

55. *Id.* at Article 36 f (1).

56. *Id.* at Article 36 f (2).

57. *Id.* at Article 36 f (3).

58. *Id.* at Article 36 c (2).

engage a Croatian attorney. The question is, what client would in real life engage such an attorney? I can't think of many such clients. This means that this *de jure* possibility works out in theory only. In practice, this would be a real limitation. But the truth is that this rule is also frequently used in other EU jurisdictions in order to retain control over foreign attorneys' activities.

And finally, the last option prescribed by the Law for foreign attorneys, is to practice in Croatia under the Croatian title "attorney." The main features of this approach are that the foreign attorney has the same rights and obligations as a Croatian attorney. The foreign attorney can do all the legal work, including a representation in front of Croatian Courts. This situation resembles the most genuine EU idea on freedom to provide legal services and freedom of establishment-literally speaking "the dream came true."

But is this in practice so? Only partially. Why? Because the Law on the Legal Profession, which regulates who and under what conditions someone can carry the Croatian title "attorney" says that "an attorney from a member state of the European Union who is enrolled in the list of foreign attorneys may carry out legal profession in Croatia under the title 'attorney'":

1. if he or she fulfilled a number of (more or less technical) requirements<sup>59</sup> and
2. if he or she passes the examination on the legal system in the Croatia.

This means that a foreign attorney has to pass the Croatian bar exam, which is not an easy task. This rule again, is not a Croatian invention. Other EU countries also imposed similar requirements on foreign attorneys wishing to practice law in their countries with the main justification that it is necessary in order to keep the high standards and level in providing legal aid.

I can again agree to some extent to this justification. But then we shouldn't pretend that obstacles to freedom to provide legal services are removed and that the European dream of a free market for legal services is coming true, because it is not. Truly speaking, the situation with the EU market for legal services is now better than it was 30 or 40 years ago, but it still far away from ideal.

The only real improvement in current Croatian legislation concerning foreign lawyers is incorporated in article 36d(1) of the Law on the Legal Profession, which says that

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59. Those requirements are: that the person is a citizen of a member state of the EU or another country signatory of the Agreement of the European Economic Area; that the person possesses business capacity; that no investigation and criminal procedure are conducted against the person *ex officio* prosecution; that the person is worthy of carrying out the legal profession; that the person doesn't perform other jobs that are incompatible with the legal profession; that the person has concluded a contract on the legal profession indemnity insurance; and that the person has submitted a statement confirming that he or she is in possession of equipment and premises required for execution of the legal profession.

an attorney from a member state of the European Union who is enrolled in the list of foreign attorneys may carry out his or her legal profession in the Republic of Croatia under the title of the profession of his or her country, if he or she has been carrying out his or her legal profession for at least three years and *may be enrolled as an attorney in the list of the Croatian Bar Association.*

In other words, a foreign attorney who has been carrying out legal profession in Croatia for at least three years may ask to be enrolled as an “attorney” in the list of the Croatian Bar Association. In order to be enrolled the attorney must prove his or her competence and knowledge. Competence and knowledge are proven by presenting the list of cases on which the attorney has worked, with the indication of business number, contents, timeline and scope of work, as well as of the phases of the procedure and the submitted excerpts of the pleadings and minutes, in the form that guarantees the confidentiality of personal data.<sup>60</sup>

An attorney in case, may, when carrying out his or her legal profession use the title of the profession of his country of origin along with the Croatian title “attorney.”

## 9. Conclusion

This paper explores developments and trends in the field of legal services in the EU and Croatia. The liberalization of the legal profession, which in the EU started fifty years ago, resulted in significant changes. Legal services providers in the EU are now able to move almost freely throughout whole EU.

This trend complies with the demands of globalization and internationalization of the legal profession, which require that lawyers have broad knowledge of different legal systems and international relationships.

However, this process of “Europeanization”,<sup>61</sup> globalization etc., of the legal profession in Europe did not go smoothly. European countries were more reluctant to accept the liberalization in the field of legal services than liberalization of other services. This was often justified by differences that exist among EU Member States in legal education, legal tradition in different EU countries, language problems etc.

Although no one can deny that all those differences exist, the fact is that Europe and the world are changing, and that European people can’t be hostages of their own history or tradition. The European Union was created fifty years ago. This, once politically generated process, deeply and systematically changed “European society.” Together with the changes, a number of new opportunities and challenges emerged as well.

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60. Law on the Legal Profession, Article 36 d (2), *available at* [www.pak.hr/lgs.axd?t=16&id=2729](http://www.pak.hr/lgs.axd?t=16&id=2729).

61. The term “Europeanization“ is often used to describe situations when some area of law or some field of law is strongly influenced or subordinated to process of harmonization.

“European market for legal services” is still an open challenge. A number of legislative and other efforts, presented in this paper, have already produced concrete results. Freedom to provide legal services in the EU is technically established.

Though the door for the market for legal services in Europe is slightly open, we must push hard to open it wider. In that sense, we must admit that the process of Europeanization of legal services and the legal profession is still not finished. But, also the process of building European society is not finished. As European society becomes more and more mature, obstacles to freedom to provide legal services will be less and less significant.