The Freedom of Establishment of Lawyers in the European Union

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1. INTRODUCTION

The scope of many professional activities is nowadays no longer limited to one country only. This certainly holds true for lawyers. Legal work is more and more becoming characterised by cross-border transactions and disputes and by fast growing international law firms. Lawyers may therefore want to expand their professional activities by establishing themselves abroad and permanently provide legal services there. However, lawyers are often being confronted with legislative, administrative and professional requirements which render their international establishment much more difficult or *de facto* impossible.

Situated against this background and within a European Union context, Article 49 of the Treaty on the Functioning of the European Union (hereafter TFEU) is of fundamental importance. This Treaty article guarantees self-employed persons, thus including the overall majority of lawyers, the right to set up permanent economic activities in another EU Member State (primary establishment), as well as the right to establish a second professional base in another Member State (secondary establishment). Notwithstanding the prohibitions and requirements imposed by Article 49 TFEU, different national legislations, demanding professional requirements by national bar associations and the lack of sufficiently efficient EU legislation have proven to constitute obstacles to the effective exercise of the fundamental freedom of establishment.

This essay traces the historical developments and establishes the current legal situation in the field of the freedom of establishment of lawyers within the EU. In doing so, we first address what constitutes the freedom of establishment in general. We then examine the extensive case law of the European Court of Justice and the relevant secondary EU legislation, which have gradually shaped the scope, impact and practical consequences of this fundamental freedom. Finally, we assess whether the legislative and judicial efforts have indeed struck the right balance between enforcing the fundamental freedom of

establishment and, yet, at the same time providing sufficient safeguards for those seeking legal assistance that 'foreign' lawyers satisfy the appropriate professional conditions and qualifications in order to meet the clients' needs.

2. FREEDOM OF ESTABLISHMENT: GENERAL CONSIDERATIONS

2.1. NATURE AND DEFINITION

FUNDAMENTAL FREEDOM. – The European Union (and previously the European Community) is built on four fundamental freedoms. These are the free movement of goods, services, capital and persons. The latter freedom comprises, one the one hand, the free movement of employed workers (Article 45 TFEU) and, on the other hand, the freedom of establishment of self-employed natural and legal persons (Article 49 TFEU).[1] The freedom of establishment is in turn closely connected with the freedom to provide services as both freedoms concern the exercise of a self-employed economic activity.[2] In order to provide services, people will often wish to permanently set up professional bases in another Member State (MS). This has been made possible through the Treaty provisions on the freedom of establishment.

DEFINITION. – Freedom of establishment constitutes, in the words of the European Court of Justice (ECJ) in one of its *Factortame* judgments, "*the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period*".[3] This phrase contains the following elements that must be present for Article 49 TFEU to be applicable: (i) an economic activity (ii) pursued on a self-employed basis (iii) through a fixed establishment (iv) in another MS (v) for an indefinite period. Elements (ii), (iii) and (v) will be elaborated below. With regard to economic activity, it suffices to say that this means that, as is the case in the context of the free movement of services and workers, the work carried out must consist of *genuine and effective work* that cannot be considered as *purely marginal and ancillary* so that one job for one client does not suffice.[4] As with all other freedoms, the relevant Treaty provisions only apply if a cross-border element is at hand. This means that, in the case of the right of establishment, people

[1] J. STUYCK and K. GEENS, "Vrij verkeer van advocaten in de EEG", *SEW* 1993, (111) 112. This essay is limited to the freedom of establishment of natural persons.
[2] P.J.G. KAPTEYN and P. VERLOOREN VAN THEMAAT (eds), *The Law of the European Union and the European Communities*, Alphen aan den Rijn, Kluwer, 2008, 718.
[3] Case C-221/89 *R. v Secretary of State for Transport, ex p. Factortame (Factortame II)* [1991] ECR I-3905, para. 20.
[4] See a.o. Case C-268/99 *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie* [2001] ECR I-8615, para. 33; P.J.G. KAPTEYN and P. VERLOOREN VAN THEMAAT (eds), *The Law of the European Union and the European Communities*, Alphen aan den Rijn, Kluwer, 2008, 719 and D. CHALMERS, G. DAVIES and G. MONTI, *European Law*, Cambridge, CUP, 2010, 835-836.

must pursue an establishment in a different MS than their MS of origin.[5] Belgians can therefore not, in principle, rely on Article 49 TFEU when they seek to challenge Belgian provisions regulating the establishment of Belgian nationals in Belgium.[6]

SELF-EMPLOYED. – The second element in order for the freedom of establishment to be applicable, and this at the same time marks the distinction with the free movement of workers, is that people must be pursuing their economic activities on a self-employed basis. Some legal scholars, however, question the relevance of this distinction, thereby drawing attention to the 21st century reality characterised by a great flexibility of people moving from an employed occupation to self-employed activities.[7] This point of view certainly deserves further consideration and it should be observed whether future judicial and legislative developments will (further) blur the distinction. However, even though the distinction might be a rather historical one[8], important differences between free movement of workers and freedom of establishment remain. Firstly, the TFEU itself provides a different legal basis for the two situations. Secondly, the freedom of establishment, unlike the free movement of workers, encompasses legal persons.[9] Thirdly, the distinction is being reflected in the ECJ case law which has, regardless of a number of similarities such as the public authority exception[10] and the justification 'enquiry'[11], developed in a different way, depending on which freedom is at hand.[12] Lastly, it remains a remarkable distinction that current MS are allowed, and they have indeed done so, to set temporary restrictions on the free movement of workers (but not on self-employed persons) coming from MS who join the European Union.[13] Accordingly, the element of self-employment does matter for the sake of the current essay. As the Treaties are silent about

[5] Joined Cases C-54/88, 91/88 and 14/89 *Criminal Proceedings against Nino and others* [1990] ECR I-3537, para. 11 and R. WHITE, *Workers, Establishment and Services in the European Union*, Oxford, OUP, 2004, 36.
[6] With the exception of problems of reverse discrimination. These will, however, not be dealt with in this essay.
[7] D. CHALMERS, G. DAVIES and G. MONTI, *European Law*, Cambridge, CUP, 2010, 832.
[8] Ibid., 831-832 where the authors draw attention to the initial concerns that free movement of self-employed professionals (particularly lawyers) would distort the existing professional relationships, whereas no such concerns existed in the field of the free movement of employed workers, having regard to the positive labour market conditions at the time of the enactment of the EEC Treaty. It is noteworthy that the exact opposite view is nowadays being taken.
[9] D. CHALMERS, G. DAVIES and G. MONTI, *European Law*, Cambridge, CUP, 2010, 831.
[10] Article 45(4) (workers) and Article 51 TFEU (establishment).
[11] *Infra*.
[12] See, for example, the issue of direct effect whereby the ECJ has clearly confirmed the horizontal direct effect of Article 45 (free movement of workers) (Case C-281/98 *Angonese v Cassa di Riparmio di Bolzano SpA* [2000] ECR I-4139), whereas the horizontal direct effect of Article 49 (freedom of establishment) has not yet been entirely clarified.
[13] C. BARNARD, *The Substantive Law of the EU*, Oxford, OUP, 2010, 264 and D. WYATT and A. DASHWOOD, *European Union Law*, London, Sweet & Maxwell, 2006, 777. This has been the case in the Accession Treaties with the 10 countries which joined the EU in 2004 as well as with Romania and Bulgaria which joined in 2007. All these restrictions have now come to an end.

what must be understood by 'self-employed', the ECJ has established a definition of self-employment for the purposes of EU law.[14] The Court has defined self-employed people as those who are working "*outside any relationship of subordination, thereby bearing the risk of success or failure of their activities and being paid directly and in full for their activities*".[15] This definition is likely to cover the vast majority of practising lawyers. Lawyers generally exercise their professional activities as self-employed people (in the earlier days mainly as sole practitioners)[16], even though many of them are now working in large well-structured law firms, in which case the dividing line between employed and self-employed is not always easy to draw.

ESTABLISHMENT V. SERVICES. – Another important characteristic of the freedom of establishment concerns the length of presence in the Host State. When, for example, lawyers are providing legal services in another MS on a purely temporary basis (eg representing a client before a foreign court), it is self-evident that those situations are governed by the freedom to provide services.[17] Establishment, as broadly defined by the ECJ[18], constitutes *a stable and continuous participation in the economic life of another MS*.[19] The Court has also indicated which factors should be taken into account in determining whether the economic activities are pursued on such a stable and continuous base.[20] These factors are to be found in paragraph 27 of the *Gebhard* judgment. They include the duration (how long?), regularity (how often?), periodicity (over what intervals of time?) and continuity (over what total period of time?) of the activities concerned.[21] It should be noted that the presence of any infrastructure such as a set of chambers or offices does not necessarily mean that the above-mentioned conditions of establishment are met, nor does that prevent the provisions on the free movement of services to be applicable.[22] The decisive criterion will ultimately be the temporary or permanent residence in the host MS.[23]

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[14] C. BARNARD, *The Substantive Law of the EU*, Oxford, OUP, 2010, 295.
[15] Case C-268/99 *Jany* [2001] ECR I-8615, para. 71.
[16] R. WHITE, *Workers, Establishment and Services in the European Union*, Oxford, OUP, 2004, 223.
[17] Case 33/74 *Van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299.
[18] M. JARVIS, "Freedom of establishment and freedom to provide services – lawyers on the move?", *EL Rev* 1996, (247) 247.
[19] Case 2/74 *Reyners v Belgian State* [1974] ECR 631, para. 21 and Case C-55/94 *Gebhard v Consiglio dell'Ordine delgi Avvocati e Procuratori di Milano* [1995] ECR I-4165, para. 25 and K. LENAERTS and P. VAN NUFFEL, *Constitutional Law of the European Union*, London, Sweet & Maxwell, 2005, 188. This case law has been transposed into the Recognition of Professional Qualifications Directive (Article 5(2)).
[20] P. CRAIG and G. DE BURCA, *EU Law. Text, Cases and Materials*, Oxford, OUP, 2011, 766.
[21] Ibid. and P.J.G. KAPTEYN and P. VERLOOREN VAN THEMAAT (eds), *The Law of the European Union and the European Communities*, Alphen aan den Rijn, Kluwer, 2008, 720.
[22] Case C-55/94 *Gebhard* [1995] ECR I-4165, para. 27 and D. WYATT and A. DASHWOOD, *European Union Law*, London, Sweet & Maxwell, 2006, 751.
[23] D. WYATT and A. DASHWOOD, *European Union Law*, London, Sweet & Maxwell, 2006, 751.

CONTENT. – Article 49 TFEU provides several rights for people who are exercising their fundamental right of establishment. These include the migration market access right to set up a permanent establishment in another MS (primary establishment) as well as to establish a second professional base in another MS (secondary establishment) (Article 49, para. 1 TFEU).[24] By exercising these rights, people have the right not to be discriminated against on grounds of nationality, neither directly nor indirectly, and to enjoy the same social and fiscal conditions as those who are nationals of the MS concerned (Article 49, para. 2 TFEU). As the ECJ's case law has shown, the prohibition of non-discrimination on grounds of nationality is at the heart of all these separate rights. The extensive case law on the prohibition of discrimination as well as on disproportionate market access restrictions will be discussed in depth.

2.2. DIRECT EFFECT

VERTICAL DIRECT EFFECT. – Direct effect concerns the question as to whether an individual can rely on a provision of EU law before a national court.[25] It has been acknowledged by the ECJ that the Treaty provisions on the freedom of establishment are directly effective.[26] This might to some extent be surprising, since not all of the conditions of direct effect (clear, sufficiently precise and unconditional), laid down by the ECJ in its landmark *Van Gend en Loos* judgment[27], seemed to be fulfilled in the case of *Reyners*. Although Article 52 of the former EEC Treaty (now Article 49 TFEU) contained a clear and sufficiently precise objective on the abolition of any restriction on the right of establishment, Article 54 provided for the enactment of general programmes and directives to abolish existing restrictions on the freedom of establishment. The ECJ, nevertheless, held that the clear and precise result that was to be attained by Article 52 was not made dependent on the implementation of secondary Union legislation so that the right of establishment provisions were held to be directly effective.[28]

HORIZONTAL DIRECT EFFECT? – The *Reyners* case concerned an action brought by an individual against the State. However, in many cases, the restrictions on the freedom of establishment of lawyers will be enshrined in professional rules adopted by competent national regulatory authorities, such as bar associations, which do not belong to the State. It is therefore of fundamental importance to know whether Article 49 et seq. TFEU can also be invoked against private organisations (horizontal direct effect). Although the ECJ has not yet explicitly

[24] J. STEINER and L. WOODS, *EU Law*, Oxford, OUP, 2009, 491 and P.J.G. KAPTEYN and P. VERLOOREN VAN THEMAAT (eds), *The Law of the European Union and the EuropeanCommunities*, Alphen aan den Rijn, Kluwer, 2008, 722.
[25] Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 13.
[26] Case 2/74 *Reyners* [1974] ECR 631, para. 26.
[27] Case 26/62 *Van Gend en Loos* [1963] ECR 13, paras 18-19.
[28] Case 2/74 *Reyners* [1974] ECR 631, para. 26.

confirmed the horizontal direct effect of the freedom of establishment, it has nevertheless confirmed that these provisions can be invoked against private organisations such as trade unions[29] and, more important for lawyers, against national bar associations[30]. These cases, however, concern private organisations which cannot be regarded as purely 'private' due to the fact that, and this particularly holds true for bar associations, these organisations have certain *quasi-legislative* competences in the field of the profession they are regulating.[31] We can nevertheless state that, as far as direct effect is concerned, the judicial protection of individual lawyers is guaranteed by granting them the right to invoke the relevant Treaty provisions against MS as well as against organisations that regulate the legal profession.

2.3. OFFICIAL AUTHORITY EXCEPTION (ARTICLE 51 TFEU)

DIRECTLY AND SPECIFICALLY CONNECTED. – Article 51 TFEU contains the only express exception to the fundamental freedom of establishment. It states that the Treaty provisions concerning the freedom of establishment do not apply to any activity that is connected with the exercise of official authority in the MS. EU law thus explicitly provides MS the opportunity to reserve public self-employed occupations for its own nationals. Several questions have been referred to the ECJ in order to clarify the notion of 'official authority'. As regards the legal profession, questions have been raised as to whether lawyers, who – as is the case in Belgium – occasionally sit as replacing judges, are to be regarded as public officials. In *Reyners*, the ECJ held that the scope of the Article 51 exception must be limited to those activities that are *directly and specifically connected with the exercise of official authority*.[32] The traditional activities of lawyers such as advising and representing clients do not constitute an exercise of official authority, despite the fact that some of these activities (eg sitting as a replacing judge) may involve direct cooperation with the Judiciary and despite the fact that lawyers have a monopoly in representing clients in court.[33] The same conclusion has been reached by the ECJ, thereby disagreeing with the Advocate-General, where it declared national rules, similarly enacted by six MS (among them Belgium), which allowed only nationals access to the profession of notary, incompatible with EU law.[34] Briefly, the Court did not agree with the arguments of the Belgian Government, which referred to the specific nature of the work carried out by

[29] Case C-438/05 *International Transport Workers' Federation v Viking Line* [2007] ECR I-10779.
[30] See, for example, Case 71/76 *Thieffry v Conseil de l'Ordre des Avocats à la Cour de Paris* [1977] ECR 765 and Case C-309/99 *J.C.J. Wouters, J.W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577.
[31] P. CRAIG and G. DE BURCA, *EU Law. Text, Cases and Materials*, Oxford, OUP, 2011, 768. See also J. STUYCK and K. GEENS, "Vrij verkeer van advocaten in de EEG", *SEW* 1993, (111) 116 who argue that bar associations are generally structured on a public law footing.
[32] Case 2/74 *Reyners* [1974] ECR 631, para. 45.
[33] Ibid., paras 51-52.
[34] Case C-47/08 *Commission v Belgium* [2011] ECR I-4105.

notaries and their specific status within the Belgian legal system.[35] It must, accordingly, be concluded that the exception of Article 51 TFEU has been interpreted restrictively by the ECJ in order to, as the Court has explicitly admitted, guarantee the *effet utile* of the EU Treaties.[36]

2.4. JUSTIFICATIONS

TREATY DEROGATIONS (ARTICLE 52 TFEU). – As is the case with all EU fundamental freedoms, an alleged breach of Article 49 TFEU can, under certain circumstances, be justified.[37] There might indeed be good reasons for giving priority to factors that outweigh a MS's compliance with the freedom of establishment. The classic distinction that has been drawn in this respect is whether the breach of the fundamental freedom has been caused by discriminatory or by non-discriminatory measures. The relevance of this distinction lies in the kinds of justification that can be invoked by national governments. If a discriminatory measure has caused the breach, governments can only rely on the exhaustive Treaty derogations of Article 52 TFEU.[38] These derogations are public policy, public security and public health.

IMPERATIVE REQUIREMENTS. – If the breach, on the other hand, has been caused by a non-discriminatory measure (including market access obstacles), governments have, in principle, an unlimited scale of imperative requirements to rely upon.[39] In the context of restrictions on the freedom of establishment of lawyers, imperative requirements may include consumer protection, the good administration of justice and the safeguarding of professional ethics, supervision and liability of lawyers. Cases in which these requirements have been invoked, whether or not successfully, will be extensively discussed.

PROPORTIONALITY. – Even in the event that MS are able to establish the existence of derogations or imperative requirements, the restrictive measure at stake must still pass the proportionality test, which is identical to the test adopted for the other freedoms. As confirmed in the *Gebhard* judgment, this means that the measure must apply in a non-discriminatory manner[40], must serve a public (non-economic) purpose, must be suitable for the attainment of

[35] See paras 81-124 of the judgment. For an extensive case analysis, see the case note of A.A.M. SCHRAUWEN in *SEW* 2011, 493-498.
[36] Case 2/74 *Reyners* [1974] ECR 631, para. 50. This noticeably narrow interpretation has made some authors question the actual relevance of Article 51 TFEU (J. STUYCK and K. GEENS, "Vrij verkeer van advocaten in de EEG", *SEW* 1993, (111) 122).
[37] Case C-55/94 *Gebhard* [1995] ECR I-4165, para. 37.
[38] P. CRAIG and G. DE BURCA, *EU Law. Text, Cases and Materials*, Oxford, OUP, 2011, 765-776 and D. WYATT and A. DASHWOOD, *European Union Law*, London, Sweet & Maxwell, 2006, 801.
[39] P. CRAIG and G. DE BURCA, *EU Law. Text, Cases and Materials*, Oxford, OUP, 2011, 776 and D. WYATT and A. DASHWOOD, *European Union Law*, London, Sweet & Maxwell, 2006, 802.
[40] This must, in this context, be narrowly understood as non-discrimination on the grounds of nationality (K. LENAERTS and P. VAN NUFFEL, *European Union Law*, London, Sweet & Maxwell, 2011, 257).

the pursued objective and must be strictly necessary (*i.e.* there must be no less restrictive measures available).[41] Again, we will come back to the proportionality requirements when we discuss the relevant ECJ case law.

2.5. RELATIONSHIP ESTABLISHMENT – EU COMPETITION LAW

RESTRICTIONS ON FREEDOM OF ESTABLISHMENT DISTORT FREE COMPETITION. – To conclude this first chapter, it is worth briefly emphasising the close relationship between the right of establishment (as well as the free movement of services) and the rules on EU competition law, in particular Article 101 TFEU. The situation in which some, but not all, MS allow foreign lawyers to permanently practise in those MS as well as the divergent conditions under which foreign lawyers may do so, are likely to distort free and fair competition between European lawyers. This has also been acknowledged by the EU legislator in the preamble of the Lawyers' Establishment Directive (1998).[42] As will be demonstrated below, a number of cases before the ECJ dealt with restrictions on the free exercise of the legal profession whereby the provisions on the right of establishment and those on competition have been invoked simultaneously.[43]

3. THE ECJ CASE LAW: DRIVING FORCE BEHIND LAWYERS' ESTABLISHMENT

3.1. DIRECTLY DISCRIMINATORY MEASURES

3.1.1. General considerations

EXPRESSION OF A GENERAL PRINCIPLE. – The prohibition of discrimination on grounds of nationality, enshrined in Article 18 TFEU, constitutes a general principle of EU law which lies at the heart of all EU legislation.[44] Consequently, all four freedoms contain a specific expression of the non-discrimination principle. This also holds true for the freedom of establishment.

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[41] Case C-55/94 *Gebhard* [1995] ECR I-4165, para. 37.

[42] Recital 6 of the European Parliament and Council Directive 98/5/EC of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification is obtained [1998] OJ L 77/36.

[43] See, for example, Case C-309/99 *J.C.J. Wouters, J.W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577. For an overlap between EU competition law and the free movement of services: Joined Cases C-94/04 and C-202/04 *Federico Cipolla and Others v Rosaria Fazari, née Portolese and Roberto Meloni* [2006] ECR I-11421. The latter case concerned minimum prices for legal fees. The ECJ held that this constituted a restriction on the free movement of services which could be justified on the grounds of consumer protection and the good administration of justice. The Court, however, left it for the national court to assess the proportionality of the restrictive measure.

[44] Case 2/74 *Reyners* [1974] ECR 631, para. 15.

The ECJ has stated that Article 49 TFEU constitutes the embodiment of the general principle of non-discrimination in the field of the freedom of establishment.[45] As will be demonstrated later on, both directly and indirectly discriminatory measures are caught by Article 49 TFEU. Directly discriminatory measures have a different burden in law and in fact. They can only be upheld by relying on the express derogations of Article 52 TFEU. Indirectly discriminatory measures have the same burden in law, but a different burden in fact. They can be saved by relying on the express derogations and/or imperative requirements. Indirectly discriminatory measures have been the subject of most disputes before the ECJ. However, particularly in the earlier days, the ECJ has played a decisive role in abolishing national rules that directly discriminated against on the grounds of nationality. The following case of *Reyners* has been the very first case about direct discrimination against foreign lawyers.[46]

3.1.2. Direct discrimination on grounds of nationality

ONLY BELGIANS AT THE BELGIAN BAR. – The *Reyners* case concerned a Dutch national who was born, raised and educated in Brussels.[47] He had obtained his law degree at the University of Brussels but was refused admission to the Brussels Bar because he lacked the Belgian nationality, a requisite imposed by the then standing Belgian Judicial Code. The facts of the case elicited the statement from the Advocate-General that he could not understand why the freedom of establishment of lawyers had not yet been attained and how this fundamental freedom could even be denied to those practising the legal profession.[48] The Court, after having rebutted the argument put forward by a number of national governments that the profession of lawyer constituted an exercise of official authority, ruled, though rather implicitly[49], that the Belgian rule constituted a direct discrimination running counter to the fundamental principle of non-discrimination on grounds of nationality.[50]

3.2. INDIRECTLY DISCRIMINATORY MEASURES.

3.2.1. General considerations

WIDE RANGE OF MEASURES CAUGHT. – Indirectly discriminatory measures are, as we have mentioned earlier, measures which, although they do not unlawfully distinguish between nationals and non-nationals *de iure*, place

[45] Ibid., para. 16. See also K. LENAERTS and P. VAN NUFFEL, *Constitutional Law of the European Union*, London, Sweet & Maxwell, 2005, 184.
[46] A similar case concerning the direct discrimination of lawyers on grounds of nationality is Case 38/87 *Commission v Greece* [1988] ECR 4415.
[47] Case 2/74 *Reyners* [1974] ECR 631.
[48] Case 2/74 *Reyners* [1974], Opinion of AG MAYRAS, ECR 658.
[49] It did so in answering the question of direct effect of Article 49 TFEU. See paras 15-16, 24 and 26.
[50] Case 2/74 *Reyners* [1974] ECR 631, paras 15-16, 24, and 26.

nationals of other MS *de facto* in a more difficult or less favourable position than nationals of the MS concerned.[51] A great number of rather practical requirements have proven to constitute indirectly discriminatory measures. We will discuss the most relevant cases in which these obstacles have been dealt with below. The ECJ has thereby tried to strike a balance between, on the one hand, the effective application of the fundamental freedom of establishment (liberalisation of the European legal market) and, on the other hand, upholding national rules which are meant to adequately regulate the legal profession and which are justified by reasons of public interest.[52] Some of the most common practical requirements which the ECJ has declared incompatible with EU law (eg the recognition of professional qualifications), have later on been the subject of harmonising Union legislation intended to provide a clear legislative framework, thus avoiding further disputes.[53] While earlier case law still suggested that non-discriminatory measures fell outside the scope of Article 49 TFEU, the ECJ rapidly shifted towards an approach in which all restrictions that disfavour non-nationals constitute a breach of Article 49, unless they can be justified and are proportionate.[54] As we will elaborate further on, the ECJ has thereby gradually adopted the market access approach that goes beyond a purely discrimination approach and which has noticeably widened the scope of Article 49 TFEU.[55] Consequently, the Court decided along the lines of the case law which it had adopted in the area of the other fundamental freedoms.[56] This approach boils down to the principle that "*any measure which is liable to hinder or make less attractive the exercise of a fundamental freedom*" is caught by Article 49 TFEU and can only be saved if justified and proportionate.[57] This sentence clearly reminds of the landmark *Dassonville* formula which entailed the real start of the integration and liberalisation of the internal market.[58]

3.2.2. Diplomas and other qualifications

MUTUAL RECOGNITION OF LAW DEGREES. – The legal profession is a heavily regulated one and significant differences still exist between MS in terms of

[51] C. BARNARD, *The Substantive Law of the EU*, Oxford, OUP, 2010, 299 and K. LENAERTS and P. VAN NUFFEL, *Constitutional Law of the European Union*, London, Sweet & Maxwell, 2005, 184.
[52] See, for example, Case 71/76 *Thieffry v Conseil de l'Ordre des Avocats à la Cour de Paris* [1977] ECR 765, para. 12; R. WHITE, *Workers, Establishment and Services in the European Union*, Oxford, OUP, 2004, 225 and J. STEINER and L. WOODS, *EU Law*, Oxford, OUP, 2009, 508.
[53] See, for example, the RPQ Directive (2005) and the Lawyers' Establishment Directive (1998).
[54] P. CRAIG and G. DE BURCA, *EU Law. Text, Cases and Materials*, Oxford, OUP, 2011, 773-774; C. BARNARD, *The Substantive Law of the EU*, Oxford, OUP, 2010, 316 and R. VAN DER VLIES, "Europese harmonisatie en het vrij verkeer van advocaten", *RW* 2000-2001, no. 1, (1) 3.
[55] J. STEINER and L. WOODS, *EU Law*, Oxford, OUP, 2009, 501 and 504.
[56] Cases concerning the other freedoms in which the market access approach has been adopted: Case C-110/05 *Commission v Italy (trailers)* [2009] ECR I-519 (goods) and Case C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR I-1141 (services).
[57] Case C-55/94 *Gebhard* [1995] ECR I-4165, para. 37.
[58] Case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 837, para. 5.

legal education and requirements for admission to the bar.[59] It is therefore not surprising that a large number of questions have been raised before the ECJ with respect to the cross-border utilisation of professional qualifications.[60] The freedom of establishment would indeed seriously be hampered if MS could deny EU citizens to practise their profession in another MS, thereby solely relying on the non-recognition of foreign diplomas and other qualifications.[61] Here, the principle of mutual recognition comes into play.[62] However, having regard to the sensitive position of lawyers in the national legal systems and the corresponding interests of governments and bar associations, the transposition of the principle of mutual recognition to the legal profession is far from evident. Two judgments of the ECJ concerning the recognition of legal diplomas and qualifications deserve to be discussed in more detail. Whilst the first case (*Thieffry*) still remained silent on the principle of mutual recognition[63], the ECJ, in the second case (*Vlassopoulou*), overtly established the importance of the principle of mutual recognition in relation to diplomas and qualifications of lawyers. In the aftermath of these cases, the EU legislator acknowledged that the enormous diversity across the EU as regards (legal) education and professional qualifications constituted a serious obstacle to the freedom of establishment. Above all, the case law called for harmonising measures, as envisaged by Article 53 TFEU. The competent EU legislative bodies therefore adopted several directives on the mutual recognition of diplomas, training and other professional experience obtained outside the Host State. Some of these directives have a general scope (RPQ Directive 2005)[64], others are specifically addressed to a particular profession.

THIEFFRY. – The case of Jean Thieffry[65] concerned a Belgian national who had obtained a doctorate of law at the University of Louvain (Belgium) and had practised as a lawyer at the Brussels Bar for thirteen years. He then intended to establish himself in Paris to exercise his profession at the Paris Bar. In doing so, he had his Belgian law diploma recognised by the University of Paris I as an equivalent to the common French university degree. He had furthermore obtained a certificate of aptitude, required by French law in order to gain

[59] R. WHITE, *Workers, Establishment and Services in the European Union*, Oxford, OUP, 2004, 223 and R. WAGENBAUER, "The Mutual Recognition of Qualifications in the EEC" in F.G. JACOBS (ed), *European Law and the Individual*, Amsterdam, North-Holland Publishing Company, 1976, (95) 102.
[60] J. LONBAY, "Picking over the Bones: Rights of Establishment Reviewed", *EL Rev* 1991, (507) 507.
[61] D. KRAUS, 'Diplomas and the recognition of professional qualifications in the case law of the European Court of Justice' in M. HOSKINS and W. ROBINSON (eds), *A True European. Essays for Judge David Edward*, Oxford, Hart Publishing, 2003, (247) 248.
[62] C. BARNARD, *The Substantive Law of the EU*, Oxford, OUP, 2010, 306.
[63] This may not be surprising because the ECJ established the principle of mutual recognition only in the 1979 *Cassis de Dijon* case (Case 120/78 *Rewe Zentral v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, para. 14).
[64] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications [2005] OJ L 255/22.
[65] Case 71/76 *Thieffry v Conseil de l'Ordre des Avocats à la Cour de Paris* [1977] ECR 765.

access to the bar. However, he was refused admission to the Paris Bar solely because he did not possess a degree in French law. The ECJ, once more rebutting the argument of the lack of concrete directives in the field of the right of establishment[66], held that the refusal to admit Mr Thieffry to the Paris Bar constituted an unjustified restriction to the freedom of establishment.[67] The Court based its decision on the fact that the applicant held a diploma which had previously been recognised as an equivalent university degree as well as the fact that he had passed the French bar exams which proved his professional qualifications and experience.[68] It further rebutted the relevance, at least in the context of the freedom of establishment, of the distinction, drawn by several governments and the Commission, between the academic and civil effect of the recognition of foreign diplomas. The Court decided that the French legislation which provided for the recognition of university degrees for academic purposes only was incompatible with Article 49 TFEU.[69]

VLASSOPOULOU.[70] – The facts of the current case are rather similar to those of *Thieffry*. Mrs Vlassopoulou was a Greek lawyer who had practised at the Athens Bar. After having studied law in her home country, she obtained a doctorate in law from a German university. She subsequently started working as a lawyer at the German Bar where she dealt independently with Greek law and EU law and, under the supervision of native German lawyers, with German law. After five years, she applied for admission as a German lawyer (*Rechtsanwältin*) at the local bar. Despite her having obtained a German doctorate in law and having gained experience as a practising lawyer at the German Bar, her application was dismissed on the grounds of her not having followed the 'traditional route' to the bar (law degree from a German university, completion of a preparatory training period and passing the First and Second State Exam).[71] The ECJ first noted that, in the absence of harmonising EU legislation[72], MS are allowed to lay down rules on the requirements of diplomas and professional qualifications for gaining access to the bar.[73] In doing so, MS have to comply, however, with the requirements of Article 49 TFEU. These requirements do not only include the prohibition of discrimination on grounds of nationality, but also the abolishment of any obstacle which might hinder non-nationals in the exercise of their right of

[66] Ibid., para. 17. The Court stated that, in the absence of Union legislation, MS have a positive obligation to secure the freedom of establishment (para. 16).
[67] Ibid., para. 19
[68] Ibid.
[69] Ibid., paras 25-27.
[70] Case 340/89 *Vlassopoulou v Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg* [1991] ECR I-2357.
[71] R. WHITE, *Workers, Establishment and Services in the European Union*, Oxford, OUP, 2004, 227.
[72] At the time of the judgment, the Mutual Recognition Directive had not yet entered into force (*infra*).
[73] Case 340/89 *Vlassopoulou* [1991] ECR I-2357, paras 9-11.

establishment.[74] AG VAN GERVEN stated in his opinion that, as a consequence of this obligation, MS must take into account the previously acquired qualifications.[75] The Court followed its AG by laying down a so-called 'comparison test' which MS (in practice: the competent bar associations) have to carry out when dealing with bar admission applications by EU citizens who have acquired their legal education in another MS.[76] If the test reveals that the foreign qualifications correspond to the national qualifications, MS are obliged to recognise the diploma. If the qualifications are insufficient, several conditions are imposed by the ECJ. Firstly, MS must provide the applicant the opportunity to demonstrate that he or she, nevertheless, has acquired the lacking knowledge and qualifications. Secondly, if the preparatory professional training is lacking, MS have to assess whether the acquired practical training in either the Home or the Host State satisfies the national requirements.[77] Lastly, the whole test must be carried out in compliance with the "*effective protection of fundamental rights of Union subjects*".[78] This means that any decision refusing the bar admission must be subject to judicial review and that proper reasons must be delivered by the competent authority in the event of a negative decision. To sum up, MS are no longer allowed to simply ignore the knowledge and experience which have been acquired by qualified foreign lawyers applying for admission to the bar. On the contrary, they have to compare these qualifications with the national requirements.[79]

IMPORTANCE OF *VLASSOPOULOU*. – *Vlassopoulou* can undoubtedly be considered as the principal judgment in the ECJ's case law regarding the recognition of professional qualifications.[80] Hence, it is a highly interesting and important case in many regards. Firstly, whereas the *Thieffry* judgment still remained silent on the principle of mutual recognition, the ECJ now took the opportunity to unambiguously establish the principle of mutual recognition with respect to the freedom of establishment of lawyers by adopting the comparison test.[81] Accordingly, the Court transposed its case law in the area of the free movement of goods and services, where it had already clearly established the principle of mutual recognition, to the freedom of

[74] Ibid., para. 15 and P. CRAIG and G. DE BÚRCA, *EU Law. Text, Cases and Materials*, Oxford, OUP, 2011, 772.
[75] Case 340/89 *Vlassopoulou* [1991], Opinion AG VAN GERVEN, ECR I-2371, para. 11.
[76] Case 340/89 *Vlassopoulou* [1991] ECR I-2357, paras 16-22.
[77] A partial recognition of qualifications is possible: Case C-345/08 *Krzysztof Peśla v Justizministerium Mecklenburg-Vorpommern* [2009] ECR I- 11677.
[78] Case 340/89 *Vlassopoulou* [1991] ECR I-2357, para 22.
[79] J. LONBAY, "Picking over the Bones: Rights of Establishment Reviewed", *EL Rev* 1991, (507) 514; D. CHALMERS, G. DAVIES and G. MONTI, *European Law*, Cambridge, CUP, 2010, 847 and D. WYATT and A. DASHWOOD, *European Union Law*, London, Sweet & Maxwell, 2006, 811.
[80] D. KRAUS, 'Diplomas and the recognition of professional qualifications in the case law of the European Court of Justice' in M. HOSKINS and W. ROBINSON (eds), *A True European. Essays for Judge David Edward*, Oxford, Hart Publishing, 2003, (247) 250.
[81] C. BARNARD, *The Substantive Law of the EU*, Oxford, OUP, 2010, 306 and J. STEINER and L. WOODS, *EU Law*, Oxford, OUP, 2009, 518.

establishment.[82] Secondly, having laid down this principle, the Court immediately provided MS and national bar associations with concrete guidelines on how to deal with questions on the recognition of foreign law diplomas and professional qualifications acquired in another MS.[83] Thirdly, this case underlines the market access approach of the ECJ which means that even non-discriminatory measures which restrict the exercise of the right of establishment are prohibited by Article 49 TFEU unless they are justified and proportionate.[84] Finally, the conditions and concrete steps set out by the ECJ have paved the way for a number of directives on the recognition of professional qualifications. Initially, the EU legislator focused on sectoral harmonisation in the form of specific directives concerning the recognition of qualifications for doctors, dentists, etc.[85] However, such a specific directive has never been adopted for the legal profession. Later on, a general Mutual Recognition Directive of 1989 (now replaced by the RPQ Directive of 2005[86]) has been enacted for which the *Vlassopoulou* judgment likewise turned out to be the direct source of inspiration.[87] In cases that do not fall within the scope of the latter directive, the principles of *Vlassopoulou* still apply.[88]

3.2.3. Secondary establishment

TERRITORIAL RESTRICTIONS. – So far, we have discussed national rules restricting the right of non-nationals to establish themselves permanently as lawyers in another MS, thereby leaving their Home State. Article 49, para. 1 TFEU also deals with the situation whereby people wish to establish themselves in the Host State without, however, abandoning their Home State's professional base (secondary establishment). The leading case in the field of

[82] Though the explicit reference to free movement of goods and services was only made by the Advocate-General: Case 340/89 *Vlassopoulou* [1991], Opinion AG VAN GERVEN, ECR I-2371, para. 12.
[83] C. BARNARD, *The Substantive Law of the EU*, Oxford, OUP, 2010, 307.
[84] P. CRAIG and G. DE BURCA, *EU Law. Text, Cases and Materials*, Oxford, OUP, 2011, 772 and J. STEINER and L. WOODS, *EU Law*, Oxford, OUP, 2009, 518. For a very broad interpretation of Article 49 TFEU underlining the market access approach of the ECJ: Case C-55/94 *Gebhard* [1995] ECR I-4165, para. 37.
[85] D. KRAUS, 'Diplomas and the recognition of professional qualifications in the case law of the European Court of Justice' in M. HOSKINS and W. ROBINSON (eds), *A True European. Essays for Judge David Edward*, Oxford, Hart Publishing, 2003, (247) 249.
[86] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications [2005] OJ L 255/22.
[87] P. CRAIG and G. DE BURCA, *EU Law. Text, Cases and Materials*, Oxford, OUP, 2011, 773; C. BARNARD, *The Substantive Law of the EU*, Oxford, OUP, 2010, 307 and R. WHITE, *Workers, Establishment and Services in the European Union*, Oxford, OUP, 2004, 227.
[88] D. WYATT and A. DASHWOOD, *European Union Law*, London, Sweet & Maxwell, 2006, 811; P. CRAIG and G. DE BÚRCA, *EU Law. Text, Cases and Materials*, Oxford, OUP, 2011, 773; C. BARNARD, *The Substantive Law of the EU*, Oxford, OUP, 2010, 307 and D. KRAUS, 'Diplomas and the recognition of professional qualifications in the case law of the European Court of Justice' in M. HOSKINS and W. ROBINSON (eds), *A True European. Essays for Judge David Edward*, Oxford, Hart Publishing, 2003, (247) 250. For the application of the *Vlassopoulou* principles, see, for example, Case C-19/92 *Dieter Kraus v Land Baden-Württemberg* [1993] ECR I-1663.

lawyers' secondary establishment is *Klopp*.[89] The case concerned a German lawyer at the Düsseldorf Bar who wished to establish himself as a practising lawyer (*avocat*) in Paris while remaining at the German Bar and retaining his office in Düsseldorf. He subsequently obtained a doctorate of Law at the University of Paris and passed the local Bar examinations. The Paris Bar Council, nevertheless, rejected his application on the grounds that French law stated that lawyers at the Paris Bar could only have one professional office which, moreover, had to be within the region of Paris. Accordingly, lawyers at the Paris Bar (irrespective of their nationality) could establish themselves but at the cost of abandoning their professional base in their MS of origin, or even in their French hometown[90].[91] The ECJ stated that this rule, which applied equally to nationals and non-nationals[92], in principle breached Article 49 TFEU but it subsequently followed the reasoning of the French government that the rule could be justified on the grounds of the good administration of justice, namely the fact that lawyers must maintain sufficient contact with their clients and the local judicial authorities.[93] However, the national rule did not pass the proportionality test. The ECJ decided that less restrictive measures were available in order to ensure the professional ethics of lawyers, thereby referring to the *modern methods of transport and communication to facilitate contact between lawyers, clients and judicial authorities*.[94] In this judgment, the ECJ made clear that the fundamental right of secondary establishment outweighs the public interest restrictions.[95] This is undoubtedly an important step towards a full protection of the freedom of establishment, which, as Article 49 TFEU proclaims, not only covers primary establishment and whereby mere equal treatment may not always suffice.[96] It is, accordingly, unlikely that future (severe) restrictions will be upheld, having regard to the importance conferred by the ECJ on the right of secondary establishment and the tough proportionality test.[97]

[89] Case 107/83 *Ordre des Avocats au Barreau de Paris v Klopp* [1984] ECR 2971. A fairly similar case is Case C-145/99 *Commission v Italy* [2002] ECR I-2235 in which the ECJ did not uphold the Italian obligation to reside in the judicial district of the court to which the bar belonged.

[90] The French rule even had the strange result that French lawyers at the Paris Bar could not simultaneously have an office in Paris and in another French city (L. GORMLEY, "Freedom to Practise at the Bar in More than One Member State", *EL Rev* 1984, (439) 440).

[91] C. BARNARD, *The Substantive Law of the EU*, Oxford, OUP, 2010, 298-299 and L. GORMLEY, "Freedom to Practise at the Bar in More than One Member State", *EL Rev* 1984, (439) 440.

[92] P. CRAIG and G. DE BURCA, *EU Law. Text, Cases and Materials*, Oxford, OUP, 2011, 774.

[93] Case 107/83 *Klopp* [1984] ECR 2971, para. 20.

[94] Case 107/83 *Klopp* [1984] ECR 2971, para. 21.

[95] L. GORMLEY, "Freedom to Practise at the Bar in More than One Member State", *EL Rev* 1984, (439) 441.

[96] Case 107/83 *Klopp* [1984] ECR 2971, para. 19; L. GORMLEY, "Freedom to Practise at the Bar in More than One Member State", *EL Rev* 1984, (439) 441 and P. CRAIG and G. DE BÚRCA, *EU Law. Text, Cases and Materials*, Oxford, OUP, 2011, 774.

[97] D. CHALMERS, G. DAVIES and G. MONTI, *European Law*, Cambridge, CUP, 2010, 844.

3.2.4. Use of professional and academic titles

AVOCAT, AVVOCATO … OR BARRISTER? – There are still important differences between the national legal systems within the EU. This is certainly being reflected in the different titles being used to denominate those who exercise the profession of 'lawyer'. Consequently, numerous cases concerning the use of professional titles have been brought before the ECJ. In *Gebhard*, a German lawyer who was a member of the Stuttgart Bar moved to Italy where he worked for several years as a collaborator and later as an associate member in a chambers of lawyers.[98] He subsequently established his own set of chambers in Milan and used the Italian title of *avvocato* ever since. The Milan Bar Council suspended him because he used the Host State's professional title whilst not being registered with the local bar association. The ECJ acknowledged that MS are entitled to lay down the conditions for the use of professional titles and that non-nationals must, in principle, comply with these rules.[99] But national measures which are "*liable to hinder or make less attractive the exercise of a fundamental freedom*" must pass the justification and proportionality test.[100] The Court left it up to the national court to take a final decision on whether the national rule at issue met these conditions.

ACADEMIC TITLES. – A similar approach has been adopted by the ECJ regarding the use of academic titles obtained abroad. In the case of *Kraus*, a German lawyer had, after having finished his law degree in Germany, obtained a postgraduate law degree (LL.M) in Scotland before taking the German professional training required to become a lawyer in his native country. He subsequently challenged the German rule that provided for prior administrative authorisation (including the payment of a fee) of foreign higher education titles.[101] The ECJ recognised the value of a postgraduate degree, which generally does not constitute a requisite for access to the legal profession, and decided that the restrictive German rule fell within the scope of Article 49 TFEU.[102] Although the Court held that the national measure restricted the exercise of the freedom of establishment, the rule was nevertheless found to pursue the legitimate aim of consumer protection (protecting the public against abuse of academic titles which have been awarded outside Germany).[103] The Court continued by applying the proportionality test. It held that, in order to pass that test, the national administrative procedure had to be: (i) solely intended to verify whether the diploma had been properly awarded, (ii) easily accessible and without excessive costs for the applicant, (iii) capable of

[98] Case C-55/94 *Gebhard v Consiglio dell'Ordine delgi Avvocati e Procuratori di Milano* [1995] ECR I-4165.
[99] Ibid., paras 35-36.
[100] Ibid., para. 37.
[101] Case C-19/92 *Dieter Kraus v Land Baden-Württemberg* [1993] ECR I-1663.
[102] Ibid., paras 18-23.
[103] Ibid., paras 34-35 and D. VOILLEMOT, "L'inscription de l'avocat communautaire auprès d'un Barreau d'accueil: Conditions et contentieux" in B. FAVRAU (ed), *L'avocat dans le droit européen*, Brussel, Bruylant, 2008, (177) 179.

judicial review, (iv) the reasons underlying a negative decision must be stated and (v) penalties for the use of title without prior authorisation must not be disproportionate.[104] It was for the national court to decide whether these cumulative conditions were met.

3.2.5. Compatible restrictions

COMPATIBLE RESTRICTIONS. – The above discussed case law shows the ECJ's tendency to further liberalise the legal profession by declaring a wide range of restrictive measures contrary to Article 49 TFEU. However, not all national measures that (might) hinder the right of establishment are incompatible with Article 49 TFEU. In a number of cases, the Court did not see anything wrong in restrictive national measures. This is the case for the common requirement of registration with the competent authority before being granted permission to practise at the bar. It the case of *Gullung*, the ECJ decided that such a requirement is compatible with the freedom of establishment, provided the obligation to register is equally being applied to both nationals and non-nationals.[105] The same requirement can self-evidently be imposed on lawyers who want to pursue their activities under the professional title of the Host State.[106] An interesting case to mention is that of *Wouters,* in which a Dutch rule that prohibited multi-disciplinary partnerships (MDPs) between lawyers and accountants was challenged.[107] This rule clearly constituted a restriction on the freedom of establishment of lawyers and accountants. It may also have infringed the relevant EU competition rules (*in casu* Article 101(1) TFEU). The Court, however, decided that the Dutch rule was in accordance with both Article 49 and Article 101(1) TFEU because the restriction could be justified on the grounds of proper practice of the legal profession in the Netherlands, having particular regard to the independence and confidentiality of lawyers (an equally high threshold of independence and confidentiality did not exist for accountants).[108] This judgment might be very important for the legal and business world as more and more economic players are looking for 'holistic' business solutions which are provided in so-called 'one stop shops' (MDPs).[109]

[104] Case C-19/92 *Dieter Kraus* [1993] ECR I-1663, paras 38-41.
[105] Case 292/86 *Gullung v Conseil de l'ordre des avocats du barreau de Colmar et de Saverne* [1988] ECR 111, para. 29.
[106] Case C-359/09 *Donat Cornelius Ebert v Budapesti Ügyvédi Kamara* [2011] ECR I-269.
[107] Case C-309/99 *J.C.J. Wouters, J.W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577.
[108] Case C-309/99 *Wouters* [2002] ECR I-1577, paras 100, 103 and 123. Questions have been raised as to whether a total ban on partnerships between lawyers and accountants could be regarded as proportionate (E. DEARDS, "Closed shop versus one stop shop: the battle goes on", *EL Rev* 2002, (618) 622).
[109] For some further critical comments: *infra*.

4. EU LEGISLATION FACILITATING LAWYERS' ESTABLISHMENT

4.1. GENERAL CONSIDERATIONS

TWO RELEVANT DIRECTIVES – The above-discussed case law of the ECJ has significantly contributed to the abolition of many restrictions on the exercise of the right of establishment of lawyers. However, the case law also revealed the need for harmonising Union legislation, in particular in relation to the recognition of qualifications and the multiple aspects of registration at the bar (including the use of professional titles). The Union legislator has picked up the message of the European Court by adopting directives on the mutual recognition of professional requirements[110] and the freedom of establishment of lawyers[111]. Together with the advanced ECJ case law, these directives have proven to have effectively facilitated the free establishment of lawyers within the EU.[112]

MUTUAL RECOGNITION OF QUALIFICATIONS. – As far as the mutual recognition of qualifications (diplomas and other professional qualifications) is concerned, this specific issue is now regulated by the extensive and complex Recognition of Professional Qualifications (RPQ) Directive of 2005.[113] The Directive, which consolidates and replaces all previous directives in this area[114], provides for more, though not guaranteed, automatic recognition of higher education qualifications and more flexible and detailed decision making procedures. In principle, MS are obliged to recognise professional qualifications obtained in another MS. However, where the (higher) education and training period in the Home State is shorter than the equivalence in the Host State or where education and training substantially differ, the Host State can require the applicant to provide evidence of professional experience, something which will most probably take place through the completion of an aptitude test or adaptation period.[115] An utterly interesting case dealing with the Recognition Directive 89/48/EEC is *Koller*.[116] After having obtained his master's degree in law in his native country, an Austrian national went to Spain to take additional

[110] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications [2005] OJ L 255/22.
[111] European Parliament and Council Directive 98/5/EC of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification is obtained [1998] OJ L 77/36.
[112] J. STUYCK and K. GEENS, "Vrij verkeer van advocaten in de EEG", *SEW* 1993, (111) 111.
[113] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications [2005] OJ L 255/22.
[114] The first legislative initiative was the 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 [1989] OJ L 19/16.
[115] K. LENAERTS and P. VAN NUFFEL, *European Union Law*, London, Sweet & Maxwell, 2011, 265.
[116] Case C-118/09 *Robert Koller* [2010] ECR I-13627.

courses. Accordingly, the Spanish authorities recognised his Austrian law degree as equivalent to the degree required in Spain to practise at the bar as *abogado*. After one month, he returned to Austria and applied to take the aptitude test to become a lawyer there. His application was rejected on the grounds that, unlike in Austria, no practical experience was required in Spain to start practising as a lawyer. The Austrian authorities held that the applicant *de facto* wished to circumvent the five years' practical experience requirement, an argument that was subsequently set aside by the Austrian Constitutional Court. The national bar association nevertheless demanded for a reference to the ECJ. The latter held that by having two official diplomas, Article 3 of the Directive grants the applicant access to the profession of lawyer in Austria.[117] Consequently, the national authorities could not deny him to take the aptitude test on the ground that he had not completed the practical experience period.[118] Admittedly, the specific purpose of an aptitude test is to assess whether the applicant possesses the appropriate legal and professional capabilities.[119] We nonetheless share the Austrian concerns that this judgment might induce (law) graduates to move to another MS, pass the necessary examinations there, rapidly return to their MS of origin and so avoid the national compulsory training period.[120]

4.2. LAWYERS' ESTABLISHMENT DIRECTIVE

GENERAL CONSIDERATIONS. – In 1998, the EU adopted a specific directive on the freedom of establishment of lawyers.[121] So far, lawyers are the only profession for which a specific directive on establishment has been adopted.[122] The Directive aims for further removing barriers in order to facilitate the establishment of qualified[123] lawyers in another MS. It does so, not by dealing with harmonising professional qualifications, but by tackling a number of practical obstacles such as the use of a professional title (Home State or Host State title), registration requirements and rules of professional conduct, which

[117] Case C-118/09 *Koller* [2010] ECR I-13627, para. 38.
[118] Ibid., para. 39.
[119] P. CRAIG and G. DE BÚRCA, *EU Law. Text, Cases and Materials*, Oxford, OUP, 2011, 778.
[120] For some further critical comments: *infra*.
[121] European Parliament and Council Directive 98/5/EC of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification is obtained [1998] OJ L 77/36.
Regarding the provision of services, the Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services [1977] OJ L 78/17 already dealt with some of the issues (titles, rules of professional conduct, etc.) which are now also regulated for those lawyers who pursue permanent practise in the Host State.
[122] D. VOILLEMOT, "L'inscription de l'avocat communautaire auprès d'un Barreau d'accueil: Conditions et contentieux" in B. FAVRAU (ed), *L'avocat dans le droit européen*, Brussel, Bruylant, 2008, (177) 177.
[123] The directive does not apply to trainee-lawyers who have not yet completed their professional training period (Case C-313/01 *Morgenbesser v Consiglio dell'Ordine degli avvocati di Genova* [2003] ECR I- 13476). These people, though, enjoy the protection provided by the ECJ case law (cf. *Vlassopoulou*).

might impede the integration of a non-national lawyer in the legal environment of the Host State.[124]

UNDER HOME TITLE. – The Directive provides two different ways of gaining access to the Host State's legal market.[125] The first way is to practise under the professional title obtained by the lawyer in his MS of origin (Home title).[126] This right is available to any qualified lawyer within the EU.[127] Some 'evident' requirements are imposed: registration with the competent national authority (*ie* the bar association) through the mere presentation of a certificate of enrolment with the Home State authority[128] and obeying the rules of professional conduct of the Host State[129] (including the Host State's disciplinary proceedings if need be)[130]. However, a much more fundamental restriction is imposed on Home title lawyers as regards the area of professional activity in which they are allowed to practise. In terms of providing legal advice to clients, they can do so in all areas of law, including the Host State's domestic law.[131] On the other hand, in the event that the Host State reserves representation and defence of clients in court for lawyers practising under the professional title of that MS, foreign lawyers will be obliged to work in conjunction with a local lawyer who practises under the Host State title.[132]

UNDER HOST TITLE. – The second way to establish oneself as a lawyer in another MS is to practise under the professional title of the Host State (Host title).[133] Everyone who has *effectively and regularly* (*i.e.* without any uncommon interruption) practised in the Host State on the domestic law of that MS for at least three years can apply for admission (under the Host and/or Home title) at the local bar without having to pass an aptitude test nor

[124] R. WHITE, *Workers, Establishment and Services in the European Union*, Oxford, OUP, 2004, 235.
[125] L. DUPONG, "Liberté d'établissement et pratique linguistique du pays d'accueil" in FAVRAU, B. (ed), *L'avocat dans le droit européen*, Brussel, Bruylant, 2008, (49) 51; C. BARNARD, *The Substantive Law of the EU*, Oxford, OUP, 2010, 317 and D. WYATT and A. DASHWOOD, *European Union Law*, London, Sweet & Maxwell, 2006, 832.
[126] Article 2. The Home title must be displayed in (one of) the official language(s) of the Home State in order to avoid confusion with the Host State's professional title (Article 4(1)). Confusion is nevertheless likely to exist between French, Luxembourg and French-speaking Belgian lawyers as the title of "*avocat*" is used in those three countries.
[127] Article 2, para. 1.
[128] Article 3. The national authorities are allowed to require this certificate not to be older than three months in order to have the most updated information about the applicant (Article 3(2)).
[129] Article 4.
[130] Article 7.
[131] Article 5(1).
[132] Article 5(3).
[133] Article 10. The use of both Host and Home title is also permitted (C. BARNARD, *The Substantive Law of the EU*, Oxford, OUP, 2010, 317 and R. VAN DER VLIES, "Europese harmonisatie en het vrij verkeer van advocaten", *RW* 2000-2001, no. 1, (1) 8).

undergoing an adaptation period.[134] It is thus easier to fully integrate into the Host State's legal system after having completed three years of local practice since there are no restrictions on the area of activity in which lawyers pursue their career (*i.e.* providing legal advice or representing clients in court).[135] However, questions may arise as to whether, say, an Italian who has practised as a corporate lawyer for three years in England and then decides to shift to criminal law, has gained sufficient knowledge of and experience in English criminal law in order to successfully represent clients before the English criminal courts.[136] It must finally be noted that Article 10(4) contains a so-called safeguard clause which provides national authorities the competence to refuse the admission to the bar if admission were contrary to that MS's public policy. In this context, one might particularly think of the 'disciplinary history' of the lawyer seeking admission.[137]

LINGUISTIC CONCERNS. – The Lawyers' Establishment Directive definitely entails an important step towards a further liberalisation of the European legal market. MS are now, in principle, obliged to grant non-national lawyers admission to the bar provided they have been admitted to the bar in their MS of origin (application of the principle of mutual recognition) or that they have gained legal experience for at least three years in the Host State. All this has made the Directive a controversial piece of legislation and has led to serious concerns in some MS.[138] This has predominantly been the case in Luxembourg, particularly in relation to language requirements. The Luxembourg law, which transposed the Lawyers' Establishment Directive, required lawyers wishing to establish themselves in Luxembourg under their Home title to pass an oral examination in order to verify their proficiency in the language of the statutory provisions (French) as well as the administrative and court languages (French, German and Luxembourg). As a reaction to this language requirement, several actions were brought before the ECJ. The first case concerned an action by the Commission against Luxembourg for failure to fulfil its obligations under the Lawyers' Establishment Directive.[139] The other case, which the Court simultaneously dealt with, concerned a British barrister who had practised in Luxembourg for many years and therefore refused to take the compulsory oral language examination.[140] In both cases, the

[134] Article 10(1) and C. BARNARD, *The Substantive Law of the EU*, Oxford, OUP, 2010, 317. It is of course not forbidden to take this aptitude test (R. VAN DER VLIES, "Europese harmonisatie en het vrij verkeer van advocaten", *RW* 2000-2001, no. 1, (1) 8).
[135] R. WHITE, *Workers, Establishment and Services in the European Union*, Oxford, OUP, 2004, 236.
[136] In that sense, D. WYATT and A. DASHWOOD, *European Union Law*, London, Sweet & Maxwell, 2006, 833-834. These authors state that lawyers and law firms will therefore often find it necessary to take an aptitude test in the Host State (Ibid., 835).
[137] R. VAN DER VLIES, "Europese harmonisatie en het vrij verkeer van advocaten", *RW* 2000-2001, no. 1, (1) 8.
[138] R. WHITE, *Workers, Establishment and Services in the European Union*, Oxford, OUP, 2004, 236.
[139] Case C-193/05 *Commission v Luxembourg* [2006] ECR I-8673.
[140] Case C-506/04 *Wilson v Ordre des avocats du barreau de Luxembourg* [2006] ECR I-8613.

applicant and the Commission submitted that the language requisite was not provided for by the Directive in respect to Home title lawyers. The Luxembourg government, on the contrary, put forward some, at first sight, understandable justifications. It submitted that a proof of sufficient linguistic knowledge was necessary in order for lawyers to properly communicate with clients and the administrative and professional authorities.[141] The government further argued that provision of legal advice on Luxembourg law required knowledge of the language as this enabled lawyers to read and understand legal texts.[142] It concluded by submitting that tax and traffic law matters are generally dealt with in German and that most Luxembourg nationals only speak their mother tongue when consulting a lawyer.[143] The ECJ, however, entirely ruled in favour of the Commission and the applicant and declared the Luxembourg statutory provisions incompatible with the Directive. The ECJ thereby referred to the Directive's objective, proclaimed in recital 6 of its Preamble, which aimed for the complete harmonisation[144] of the different national registration conditions that gave rise to many obstacles and inequalities to the freedom of establishment of lawyers.[145] One of the conditions the Directive had not opted for was the prior testing of the linguistic knowledge of lawyers.[146] The ECJ in that regard drew attention to provisions in the Directive which sufficiently ensured consumer protection and the proper administration of justice: the use of the Home title to avoid confusion (Article 4)[147], representing clients in court in conjunction with a local lawyer (Article 5(3))[148] and complying with the rules of professional conduct of the Host State (Articles 6 and 7), one of which is the obligation not to handle cases of which lawyers are not competent (including linguistic incompetence)[149]. The ECJ, well aware of the realities of the changing economic world, concluded by stating that in order to successfully conduct cross-border transactions and international disputes, and thus to meet the principal needs of consumers, knowledge of the Host State's language is not as important as when exclusively handling domestic law matters.[150]

[141] Case C-193/05 *Commission v Luxembourg* [2006] ECR I-8673, para. 29.
[142] Ibid., para. 30.
[143] Ibid., paras 31-32.
[144] As a consequence of this maximum harmonisation, MS are not allowed to impose requirements apart from those enacted in the Directive.
[145] Case C-193/05 *Commission v Luxembourg* [2006] ECR I-8673, paras 34, 36 and Case C-506/04 *Wilson* [2006] ECR I-8613, paras 64, 66.
[146] Case C-193/05 *Commission v Luxembourg* [2006] ECR I-8673, para. 39 and Case C-506/04 *Wilson* [2006] ECR I-8613, para. 69.
[147] Case C-193/05 *Commission v Luxembourg* [2006] ECR I-8673, para. 42.
[148] Ibid., para. 43.
[149] Ibid., para. 44.
[150] Ibid., para. 45.

5. PERSONAL OPINION

CHANGING LEGAL ENVIRONMENT. – Law not only becomes more and more complex but also more and more internationalised and 'Europeanised'. Furthermore, globalisation and the expanding European internal market bring with them many cross-border transactions and disputes.[151] This urges both businesses and individual consumers to look for lawyers who are able to respond to these challenges.[152] But it is also a fact that cannot be ignored by legislators, in particular by the European Union. Firstly, on a EU level, MS and bar associations will be urged to open their national doors and welcome lawyers from different legal backgrounds whose experience in other legal systems might be of considerable importance to successfully meet the clients' expectations. Secondly, also on a global level, the EU has acknowledged the importance of legal services in the rapidly expanding economic world. The legal profession therefore forms part of a number of trade agreements concluded between the EU and non-EU countries, in particular the emerging economies.[153] To present only one single example, the Trade Agreement between the EU and South Korea enables European law firms to establish offices in South Korea and provides EU lawyers the opportunity to permanently provide legal services in that country under their Home title.[154]

CASE LAW: RECONCILING LIBERALISATION AND PUBLIC INTERESTS. – In order for lawyers to be able to permanently practise in another MS of the European Union, an effective and comprehensive protection of the freedom of establishment is of crucial importance. The right of establishment should enable non-nationals to equally gain access to the profession of lawyer in a particular MS under the same conditions as nationals of that MS. Article 49 et seq. TFEU indeed provide non-national lawyers the right to establish themselves in another MS. However, the above-discussed cases have demonstrated that MS and national bar associations are often reluctant to welcome foreign lawyers at the bar. They (have) do(ne) so by adopting wide ranging restrictive measures that directly or indirectly discriminate against non-nationals or constitute an excessive obstacle to their right of

[151] See, in that sense, recital 5 of the Preamble to the Lawyers' Establishment Directive and J. LONBAY, "Picking over the Bones: Rights of Establishment Reviewed", *EL Rev* 1991, (507) 515.
[152] J. LONBAY, "Lawyers bounding over the borders: the draft Directive on lawyer's establishment", *EL Rev* 1996, (50) 51.
[153] Recent examples: Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2011] OJ L 127/6.
See also, DRAFT EU-Singapore Free Trade Agreement (Version to be initialled), September 2013, Appendix 8-B-1 (Singapore Schedule of Specific Commitments), 8-12. To be consulted via *http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151749.pdf*. The liberalisation of the legal market as stated in the draft of the EU-Singapore free trade agreement reaches less far than the existing EU-South Korea free trade agreement.
[154] *The EU-Korea Free Trade Agreement in practice*, Luxembourg, Publications Office of the European Union, 2011, 16. To be consulted via *http://trade.ec.europa.eu/doclib/docs/2011/october/tradoc_148303.pdf*.

establishment. These measures have often been adopted in order to protect public interests such as consumer protection and the proper administration of the national legal system. It must indeed be acknowledged that, given the sensitive position of lawyers in the national (legal) systems, a proper protection of those seeking legal assistance must be ensured. However, the ECJ has consistently adopted a scrutinised approach, something that should be welcomed, towards such national restrictive measures. It has done so, in the absence of harmonising Union legislation, in order to fully guarantee the exercise of a lawyer's right of establishment. This case law has proven to be the true incentive towards a more accomplished internal market. That internal market cannot be regarded as fully accomplished as long as legal services can be provided across borders, but the provider of those services cannot permanently practise in the MS in which he or she would like to. The internal market, which so much lies at the heart of the European Union, provides economic players the opportunity to conduct business all across the EU. As lawyers certainly have an important role to play in the European economic life, it is vital to be constantly aware of restrictions on their right of establishment. The ECJ will often be the actual guardian of that fundamental right.

EU LEGISLATION: FINAL STEP TOWARDS INTEGRATION? – As a reaction to the increasing case law of the Court, the EU legislator has enacted a number of legislative initiatives. Among them, the important Lawyers' Establishment Directive of 1998. This Directive has provided a clearer legal basis, in particular in terms of the requirements MS are allowed to impose on non-national lawyers. The Directive has also made a useful distinction between the establishment of Home title and Host title lawyers. We submit that this distinction, with the different restrictions attached to each of both situations, provides sufficient safeguards for the concerns of the MS. Consumers are certainly protected by the strict requirements for Home title lawyers. All in all, we find it hard to think of many cases in which, say, a British citizen seeking legal advice on a matter of English property law would consult a lawyer practising in London under his Italian Home title. Consequently, the concerns of some MS about the Home title lawyers' lack of linguistic knowledge in practice seem to be far-fetched. If, on the other hand, a British company seeks legal advice on a matter of EU competition law, it is conceivable that the company will consult a non-British lawyer. In these kinds of situation, the lawyer's knowledge of the Host State's language will not play an important role, if any at all. This holds true even more for, say, an Italian lawyer in London, advising an Italian company in the UK on a matter of Italian domestic law. There is no compelling reason to require that lawyer to have a good knowledge of the English language. As for Host title lawyers, it seems proportionate to require these lawyers to have at least three years' experience in the Host State's law before being fully equalised to 'purely' domestic lawyers. Given, on the one hand, the credibility and professional authority

attached to this title[155] and, on the other, the complexity of the law and the specificities of each legal system, an 'adaptation' period of three years will, once more, protect the interests of consumers.

SOME FINAL REMARKS. – Throughout the course of this essay, we have come across a number of remarkable judgments and contentious legislative provisions which will probably be subject of future debate and litigation. Hence, they deserve some final comments. We would like to address the professional training period for lawyers and the issue of multi-disciplinary partnerships (MDPs). The RPQ Directive (2005) aims at more and more automatic recognition of higher education diplomas and other professional qualifications. Consequently, as the case of *Koller*[156] demonstrates a MS can no longer refuse qualified lawyers, including its own nationals who have qualified in another MS, from taking the aptitude test to become a lawyer at the bar in those MS. This even holds true in the event that the MS in which lawyers have obtained their qualifications, does not require lawyers to complete a training period before being granted admission to the bar. Even though the aptitude test will assess the legal and professional competences of the lawyer concerned, this situation generates a number of problematic consequences, not the least the situation of 'inequality' between law graduates. There now seem to be two categories of lawyers: those who must fulfil a training period before being admitted to the bar and those who, according to the legislation of the MS in which they have acquired certain qualifications, must not. Consequently, this distorted situation requires consideration among EU Member States and European bar associations in order to avoid not only (deliberate) circumvention of national rules[157], but, above all, to achieve a common playing field for law graduates which should in turn ensure the optimal functioning of the internal market. Notwithstanding the fact that education remains by its very nature a prerogative of national legislators, a minimum degree of harmonisation in the field of (legal) education will in future seem inevitable in view of facilitating the recognition of foreign qualifications and safeguarding the above mentioned level playing field.
As far as MDPs are concerned, this has been a 'hot topic' within the legal world and will probably continue to be so. In the case of *Wouters*, the ECJ gave its consent to national legislation that prohibited an integrated practice of lawyers and accountants for reasons of the proper practice of the legal profession. In absence of relevant secondary Union legislation, the ECJ justified its decision mainly by referring to the higher level of independence and confidentiality of lawyers compared to that of accountants. An important question that arises concerns uniformity and legal certainty. According to ECJ case law, MS are allowed to prohibit MDPs if they consider the cooperation of lawyers with other professions to be contrary to the independence and

[155] J. LONBAY, "Lawyers bounding over the borders: the draft Directive on lawyer's establishment", *EL Rev* 1996, (50) 55.
[156] Case C-118/09 *Robert Koller* [2010] ECR I-13627.
[157] Argument put forward by the Austrian authorities (para. 18).

confidentiality of lawyers. Leaving aside the correctness of this justification, such margin of discretion for MS creates a situation in which MDPs are allowed in one MS, but are prohibited in another. Consequently, ECJ case law leads to a fragmentation of the European market and increases legal uncertainty amongst economic players, in particular where national legislation remains silent on whether or not cooperation is permitted. Again, a clear (harmonising) legislative initiative on the EU level is desirable.

6. CONCLUSION

Law is no longer limited to domestic law only. The growing importance of EU law, international law and human rights make the work of a legal practitioner more challenging, but it also induces lawyers to work across national borders. The legal market is no longer limited to national clients only. Businesses expand and consumers move all around Europe. For all these reasons, some lawyers and law firms will wish to establish a professional office in another MS of the EU.

Together with the free movement of services, the freedom of establishment provides EU lawyers the right to exercise their profession in MS other than their MS of origin. Starting from the basic Treaty provisions (Article 49 et seq. TFEU), both secondary Union legislation and comprehensive case law of the European Court of Justice have so far established the scope of the freedom of establishment of lawyers. As far as the ECJ case law is concerned, we have examined some of the most important judgments in the field of lawyers' establishment. This case law demonstrates the numerous restrictive measures that have been adopted by MS. Ranging from direct discrimination on the grounds of nationality (*Reyners*) over the obstinate refusal to recognise higher education diplomas (*Thieffry* and *Vlassopoulou*) and issues concerning the use of professional (*Gebhard*) and academic titles (*Kraus*) to territorial restrictions on the right of secondary establishment (*Klopp*). Having regard to the constantly increasing case law of the ECJ, the competent Union legislative bodies have adopted two important directives which aim to facilitate the integration of non-national lawyers in the Host Member State. The Recognition of Professional Qualifications Directive (2005) must provide more and stricter recognition of diplomas and other professional qualifications of lawyers. However, many differences still exist between MS regarding the length and content of the legal education. The Lawyers' Establishment Directive (1998) undeniably entails a further step towards a level playing field with regard to the permissible requirements for foreign lawyers seeking to establish themselves in another MS. Different requirements can be imposed, depending on whether lawyers want to practise under the professional title of their Home State or under the Host State's professional title. Notwithstanding the clear provisions of this Directive, continuous attention should nevertheless be paid to national measures that disproportionately restrict the access of

foreign lawyers to the bar. Only then, an internal European legal market can be fully attained.