OPINION OF ADVOCATE GENERAL STIX-HACKL

delivered on 20 March 2003 [1]

I — Introduction

1. The present proceedings concern recognition of a 'maîtrise en droit', obtained in France, for the purpose of enrolment in a register of trainee lawyers in Italy. The case concerns the interpretation of freedom of establishment, freedom to provide services, 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 (hereinafter 'Directive 89/48') [2] and Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (hereinafter 'Directive 98/5'). [3]

1 — Original language: German.
2 — OJ 1989 L 19, p. 16.
3 — OJ 1998 L 77, p. 36.

II — Legal framework

A — *Community law*

2. The relevant provisions in the present case are those relating to freedom of establishment and freedom to provide services and Directives 89/48 and 98/5.

1. Directive 89/48

3. Directive 89/48 introduced a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration. Article 2 provides that the directive is to apply to any national of a Member State wishing to pursue a regulated profession in another Member State in a self-employed capacity or as an employed person.

4. Article 1 of Directive 89/48 provides, inter alia:

'For the purposes of this directive the following definitions shall apply:

(a) diploma: any diploma, certificate or other evidence of formal qualifications or any set of such diplomas, certificates or other evidence:

— which has been awarded by a competent authority in a Member State, designated in accordance with its own laws, regulations or administrative provisions;

— which shows that the holder has successfully completed a post-secondary course of at least three years' duration, or of an equivalent duration part-time, at a university or establishment of higher education or another establishment of similar level and, where appropriate, that he has successfully completed the professional training required in addition to the post-secondary course, and

— which shows that the holder has the professional qualifications required for the taking up or pursuit of a regulated profession in that Member State,

provided that the education and training attested by the diploma, certificate or other evidence of formal qualifications were received mainly in the Community, or the holder thereof has three years' professional experience certified by the Member State which recognised a third-country diploma, certificate or other evidence of formal qualifications.

The following shall be treated in the same way as a diploma, within the meaning of the first subparagraph: any diploma, certificate or other evidence of formal qualifications or any set of such diplomas, certificates or other evidence awarded by a competent authority in a Member State if it is awarded on the successful completion of education and training received in the Community and recognised by a competent authority in that Member State as being of an equivalent level and if it confers the same rights in respect of the taking up and pursuit of a regulated profession in that Member State;

...

(c) a regulated profession: the regulated professional activity or range of activities which constitute this profession in a Member State;

(d) regulated professional activity: a professional activity, in so far as the taking up or pursuit of such activity or one of its modes of pursuit in a Member State is subject, directly or indirectly by virtue of laws, regulations or administrative provisions, to the possession of a diploma. The following in particular shall constitute a mode of pursuit of a regulated professional activity:

— pursuit of an activity under a professional title, in so far as the use of such a title is reserved to the holders of a diploma governed by laws, regulations or administrative provisions,

...'

5. Article 3 of Directive 89/48, which sets out the principles for the taking up and pursuit of a regulated profession, provides:

'Where, in a host Member State, the taking up or pursuit of a regulated profession is subject to possession of a diploma, the competent authority may not, on the grounds of inadequate qualifications, refuse to authorise a national of a Member State to take up or pursue that profession on the same conditions as apply to its own nationals:

(a) if the applicant holds the diploma required in another Member State for the taking up or pursuit of the profession in question in its territory, such diploma having been awarded in a Member State; or

(b) if the applicant has pursued the profession in question full-time for two years during the previous ten years in another Member State which does not regulate that profession, within the meaning of Article 1(c) and the first subparagraph of Article 1(d), and possesses evidence of one or more formal qualifications:

— which have been awarded by a competent authority in a Member State, designated in accordance with the laws, regulations or administrative provisions of such State,

— which show that the holder has successfully completed a post-secondary course of at least three years' duration, or of an equivalent duration part-time, at a university or establishment of higher education or another establishment of similar level of a Member State and, where appropriate, that he has successfully completed the professional training required in addition to the post-secondary course and

— which have prepared the holder for the pursuit of his profession.

The following shall be treated in the same way as the evidence of formal qualifications referred to in the first subparagraph: any formal qualifications or any set of such formal qualifications awarded by a competent authority in a Member State if it is awarded on the successful completion of training received in the Community and is recognised by that Member State as being of an equivalent level, provided that the other Member States and the Commission have been notified of this recognition.'

6. Article 4 of Directive 89/48 permits the host State to make the taking up of a regulated profession subject to certain conditions. It provides that the host State may 'require the applicant:

(a) to provide evidence of professional experience, where the duration of the education and training adduced in support of his application, as laid down in Article 3(a) and (b), is at least one year less than that required in the host Member State...'

2. Directive 98/5

7. Directive 98/5 applies to both self-employed and employed persons. The second recital states:

'Whereas, pursuant to 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, a lawyer who is fully qualified in one Member State may already ask to have his diploma recognised with a view to establishing himself in another Member State in order to practise the profession of lawyer there under the professional title used in that State; whereas the objective of Directive 89/48/EEC is to ensure that a lawyer is integrated into the profession in the host Member State, and the directive seeks neither to modify the rules regulating the profession in that State nor to remove such a lawyer from the ambit of those rules'.

8. Article 1 of Directive 98/5 provides:

'1. The purpose of this directive is to facilitate practice of the profession of lawyer on a permanent basis in a self-employed or salaried capacity in a Member State other than that in which the professional qualification was obtained.

2. For the purposes of this directive:

(a) "lawyer" means any person who is a national of a Member State and who is authorised to pursue his professional activities under one of the following professional titles...'.

9. According to Article 2, any lawyer 'shall be entitled to pursue on a permanent basis, in any other Member State under his home-country professional title, the activities specified in Article 5'.

10. Article 5 defines the area of activity of lawyers. It provides that, 'a lawyer practising under his home-country professional title carries on the same professional activities as a lawyer practising under the relevant professional title used in the host Member State and may, inter alia, give advice on the law of his home Member State, on Community law, on international law and on the law of the host Member State. He shall in any event comply with the rules of procedure applicable in the national courts.'

B — *National law*

11. A person who wishes to be registered in Italy as a trainee lawyer must hold an academic qualification obtained in Italy or a diploma recognised by an Italian university.

12. The provisions relating to the taking up and pursuit of the profession of lawyer in Italy are contained in Regio decreto Legge No 1578, Ordinamento delle professioni di avvocato e procuratore (Royal Decree-Law No 1578 on the organisation of the professions of *avvocato* and *procuratore*) of 27 November 1933 (hereinafter 'Decree-Law No 1578'),[4] as converted into Law No 36 of 22 January 1934,[5] as amended.

4 — GURI No 281 of 5 December 1933.

5 — GURI No 24 of 30 January 1934.

13. Article 8 of Decree-Law No 1578/33 provides:

'Any person who successfully completes the academic study of law and the period of practical training provided for in Article 17 shall, on application and production of a certificate by the lawyer in whose chambers he has worked, be registered in a special register maintained by the Bar Council for the area where he resides, and shall be subject to the disciplinary powers of that Council.

One year after his registration in the register referred to in subparagraph 1, a trainee lawyer shall be authorised to practise at the bar of the courts for the district to which the local bar which maintains the register belongs, such authorisation to last no more than six years and to be restricted to proceedings that fell within the jurisdiction of the pretore prior to the entry into force of the Decreto legislativo (Legislative Decree) implementing Law No 254 of 16 July 1997.

Subject to those restrictions, in criminal proceedings before those tribunals trainee lawyers can be instructed to appear as duty defence lawyer, act as prosecutor and lodge appeals on behalf of a defendant or the prosecution.

A person shall not be entitled to practise at the bar or to pursue the activities referred to in subparagraph 2 above unless he has taken an oath in the following form before the President of Tribunals for the district in which he is registered as a trainee lawyer:...'

14. Article 17(1) of Decree-Law No 1578 provides:

'In order to be enrolled as a member of the Bar, a person must:

(1) be an Italian national or an Italian from a region not politically linked to Italy;

...

(4) hold a diploma in law ("laurea in giurisprudenza") issued or confirmed by an Italian university;

(5) after obtaining that diploma, have completed a period of practice ("periodo di pratica") of at least two consecutive years in the office of an avvocato, involving attendance at hearings in civil and criminal

proceedings before the Corte d'Appello (Court of Appeal) and the Tribunale (District Court), in accordance with detailed rules to be promulgated pursuant to Article 101; or, over the same period, have carried on legal representation and defence activities before the Preture within the meaning of Article 8;

...

(7) reside in the judicial district of the court to which the Bar at which enrolment is sought is attached.'

15. Legge No 146, Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alla Comunità europea, legge comunitaria 1993 (Law No 146 laying down rules for fulfilment of the obligations arising from Italy's membership of the European Community 1993) removed the requirement of nationality and provided in Article 10:

'Nationals of Member States of the European Community shall be treated in the same way as Italian citizens for the purposes of enrolment as a member of the Bar as referred to in Article 17 of Royal Decree-Law No 1578 of 27 November 1933 ... on the organisation of the profession of *avvocato*.'

16. Decreto Legislativo No 115 of 27 January 1992 concerning recognition of proof of professional training obtained within the European Community [6] (hereinafter 'Decree No 115/92') is intended to transpose Directive 89/48. Article 1 provides:

'1. Under the conditions laid down by the provisions of this decree, recognition shall be granted in Italy to diplomas issued in a Member State of the European Community certifying professional training and the holding of which is made a precondition for the pursuit of a profession by the legislation of that State...

2. Recognition shall be granted in favour of Community nationals for the purposes of pursuing in Italy, in a self-employed capacity or as an employed person, the profession corresponding to that for which they are qualified in the country which issued the diploma referred to in the preceding paragraph.

3. Diplomas shall be recognised if they certify that the applicant has successfully completed a post-secondary course of at least three years' duration... at a university or establishment of higher education or another establishment of similar level.'

6 — GURI No 40 of 18 February 1992, p. 6.

17. Article 2 of Decree No 115 provides:

'For the purposes of this Decree, the following shall be considered to be professions:

(a) activities the pursuit of which requires enrolment in a register or list maintained by an authority or public body, where enrolment is conditional upon completion of professional training satisfying the requirements of Article 1(3);

(b) employment of public or private employees, where by virtue of laws, regulations or administrative provisions the taking up of such is conditional upon completion of professional training satisfying the requirements of Article 1(3);

(c) activities pursued with a professional title the use of which is reserved for persons who have completed professional training in accordance with the conditions laid down in Article 1(3);

...'

18. Article 6 lays down the conditions for recognition and provides for an aptitude test in respect of specified legal professions.

19. Article 11 designates, by professional groups, the authorities competent to entertain applications for recognition. As regards the legal professions, only the activities of a lawyer are regulated. Article 12 lays down how an application for recognition is to be made to the competent minister.

20. As is apparent from the judgment of the Court in Case C-145/99 *Commission* v *Italy*,[7] points 1, 4 and 5 of Article 17(1) of Decree-Law No 1578 (requirement of nationality) were repealed by Article 10 of Law No 146/94, and the provisions relating to possession of an Italian diploma in law and completion of a period of practical training were repealed by Decree No 115. As the Italian Government made clear at the oral hearing, although point 4 of Article 17(1) no longer applies to lawyers, it still applies to trainee lawyers.

21. In principle, Italian law distinguishes between two classes of trainee lawyers, namely mere trainees ('praticanti') and patrocinatori, the latter being authorised

7 — Case C-145/99 *Commission* v *Italy* [2002] ECR I-2235, paragraphs 33 and 36 ff.

to provide a broader range of services. A person is entitled to become a patrocinatore after one year in practice, and to be one for six years in all.

III — Facts, main proceedings and question referred

22. On 27 October 1999, Christine Valia Morgenbesser, a French national resident in Italy, applied to the Consiglio dell'Ordine degli Avvocati di Genova (Genoa Bar Council) for enrolment in the register of trainee lawyers. For that purpose, she presented documentation to show that she had obtained in France the academic qualification of 'maîtrise en droit' in 1996. Thereafter she had practised as a lawyer in Paris chambers for eight months, before commencing practice in chambers in Genoa in April 1998.

23. Her application was rejected by decision of 4 November 1999. In that decision, the Consiglio considered that the application was precluded by point 4 of Article 17(1) of Decree-Law No 1578 of 27 November 1933, in accordance with which enrolment required, inter alia, possession of a diploma in law issued or confirmed by an Italian university.

24. On 2 December 1999, Ms Morgenbesser appealed against that decision in accordance with the legislative provisions, alleging infringement of Decree No 115 transposing Directive 89/48, and of the EC Treaty rules on fundamental freedoms. She argued that point 4 of Article 17(1) should be regarded as implicitly repealed.

25. By decision dated 12 May 2000, her appeal was dismissed by the Consiglio Nazionale Forense (National Bar Council), on the ground that Ms Morgenbesser had not been entitled to pursue the profession of lawyer in France, and that she did not have the professional title necessary to entitle her to enrolment as a trainee lawyer.

26. Ms Morgenbesser's request for recognition in Italy of her academic qualification was rejected by the Minstero della Giustizia (Ministry of Justice), which declared itself not competent on the ground that it was an academic qualification in issue and not recognition of the exercise of the profession of lawyer. The University of Genoa made confirmation of her French qualification dependent on Ms Morgenbesser following a course, passing 13 examinations and submitting a thesis; Ms Morgenbesser was exempted from only six mandatory subjects and seven optional ones. Ms Morgenbesser appealed against the decision of the university to the Tribunale Amministrativo Regionale (Regional Administrative Court), Livorno. This case is currently pending before the Consiglio di Stato (Council of State).

27. Subsequently, she applied to the Corte suprema di cassazione (Supreme Court of Cassation) for a question to be referred to the Court of Justice for a preliminary ruling, in order to obtain a judgment on the interpretation of Articles 10 EC, 12 EC, 14 EC, 39 EC and 43 EC.

28. Ms Morgenbesser requests that she be enrolled in the register of trainee lawyers, notwithstanding that her academic qualification has not been approved in Italy, on the ground that the academic qualification she obtained in France ought to be recognised in Italy automatically.

29. By order dated 19 April 2001, which reached the Court Registry on 8 August 2001, the Corte suprema di cassazione refers the following question to the Court of Justice of the European Communities for a preliminary ruling:

'Irrespective of recognition and confirmation of equivalence, can a diploma issued to a Community national in a Member State (in this case, France) automatically be relied upon for the purposes [8] [of obtaining enrolment in the register of persons undertaking the necessary period of practice for admission to the bar] in another Member State (in this case Italy), by virtue of the rules of the EC Treaty... on freedom of establishment and the freedom to provide services (Articles 10 EC, 12 EC, 14 EC, 39 EC and 43 EC...) and by virtue of Article 149 EC...?'

IV — The question referred

A — *Submissions of the parties*

30. Ms *Morgenbesser* submits that the activity of a trainee lawyer constitutes a 'profession' for the purposes of Directive 89/48, even where the activity consists in professional training with a view to pursuing the profession of lawyer in the future. She reaches this conclusion on the basis of Article 8 of Decree-Law No 1578, and submits that the area of activity of a trainee lawyer comprehends independent management of ongoing legal proceedings, giving clients legal advice and representing and defending them in specific legal proceedings, and that she is subject to the professional rules which apply to lawyers. Ms Morgenbesser also submits that there is an analogy with the case-law of the Court to the effect that a trainee is to be classified as a worker. [9]

31. Ms Morgenbesser is of the view that the necessity for prior recognition of her diploma by an Italian university (as laid

8 — That is, enrolment in a professional register.

9 — Case C-3/90 *Bernini* [1992] ECR I-1071 and Case 66/85 *Lawrie-Blum* [1986] ECR 2121.

down by point 4 of Article 17(1) of Decree-Law No 1578) infringes Directive 89/48. Specifically, the directive provides that a diploma awarded by one Member State to enable the pursuit of a profession may be relied upon in another Member State.

32. On the basis of the judgment in *Fernández de Bobadilla*,[10] Ms Morgenbesser submits that it is illogical to require a trainee lawyer to obtain recognition of his or her diploma by an Italian university and, in principle, to complete an additional period of qualification in accordance with Italian law, given that a trainee lawyer's area of activity is more restricted than that of a lawyer.

33. Should Directive 89/48 not apply, Ms Morgenbesser submits in the alternative that Article 43 EC has been infringed. If Directive 89/48 were applicable, the competent authority could not impose the additional condition that diplomas from other Member States be recognised by national authorities: instead, such diplomas would automatically be equivalent, provided they satisfied the requirements of the directive. The competent authority would be required to assess whether a diploma awarded by a different Member State satisfied the provisions of the host Member State relating to knowledge and qualifications. If they satisfied those provisions, recognition and enrolment in the professional register would follow.

34. On the basis of its understanding of national law, the *Consiglio dell'Ordine degli Avvocati di Genova* (Bar Council of Genoa) has concluded that trainee lawyers do not pursue a 'profession' within the meaning of Directive 89/48.

35. The Bar Council of Genoa also submits that, under the professional rules, trainee lawyers do not even pursue an economic activity within the meaning of the case-law of the Court; rather, they are merely trainees. Their activities are of limited duration and are carried out under supervision. Finally, the end product necessary for Directive 89/48 to apply, namely a completed period of training, is lacking.

36. The *Danish Government* submits that a trainee lawyer cannot automatically rely on a diploma awarded by another Member State in order to claim enrolment in a professional register.

37. It states that a person seeking registration in Denmark as a trainee lawyer has to obtain confirmation from the University of Copenhagen that the diploma he has been awarded in a different Member State

10 — Case C-234/97 [1999] ECR I-4773.

is equivalent. If the qualifications and knowledge evidenced by the foreign diploma are not equivalent, the Danish Justice Ministry is entitled to require an additional period of training with a Danish lawyer of up to two years, depending on the circumstances of the individual case. An assessment has to be undertaken in accordance with the principles laid down in *Vlassopoulou*. [11] However, this is far from implying that foreign diplomas have to be recognised automatically, as Ms Morgenbesser submits they should.

38. The Danish Government is of the view that Directive 89/48 does not apply to the present case, since it applies only to lawyers who are already qualified, and not to trainee lawyers. None the less, a period of practical training completed in a different Member State could be taken into account under Article 5 of the directive.

39. The *Italian Government* submits that the requirements for admission to the profession of lawyer in Italy (namely completion of academic legal studies, completion of two years' traineeship and passing of an examination) guarantee the professional quality of lawyers. Not even the provisions of the EC Treaty relating to freedom of establishment and freedom to provide services imply that a diploma is to be recognised automatically in another Member State. The Italian Government argues that the activity of a trainee lawyer is not to be regarded as a regulated profession for the purposes of Directive 89/48. Moreover, the case concerns recognition of an academic title, which is different from recognition of proof of professional qualifications.

40. The *Commission* states that, even if Directives 89/48 and 98/5 do not apply, effect has to be given to the general principles developed in *Vlassopoulou* and *Gebhard* [12] as regards the interpretation of Article 43 EC. The reference for a preliminary ruling asks whether, if Directive 89/48 does not apply, Article 43 EC itself prohibits certain national provisions, which, in the main proceedings, means in particular provisions requiring an assessment by a national university of whether diplomas awarded in other Member States are equivalent, attendance at courses, the passing of 13 examinations and the submission of a thesis.

41. The Commission maintains that, in this case, the administrative practice of the Italian universities in assessing whether diplomas awarded in other Member States are equivalent do not allow any distinction to be drawn by reference to the legal system the foreign diploma is from. That, it submits, is contrary to the judgment in *Vlassopoulou*, which requires the compet-

11 — Case C-340/89 [1991] ECR I-2357.

12 — Case C-55/94 [1995] ECR I-4165.

ent authorities of the Member State to undertake an individual comparison of the diploma in question with the requirements laid down by national law.

42. In the alternative, the Commission submits that Directive 89/48 applies if the activity of a trainee lawyer is to be classified as a 'regulated profession'. At the oral hearing, however, the Commission made it clear that, in its view, only activities that were carried out regularly on a permanent and definitive basis could constitute a profession for the purposes of Directive 89/48.

B — *Analysis*

43. By its question, the national court asks whether a Community national can automatically rely upon an academic qualification obtained in a different Member State.

44. In substance, the question is whether a national provision which makes enrolment in a professional register subject to recognition by a national university is compatible with Directive 89/48 or, if that directive is not applicable, with Article 43 EC. In the case at issue in the main proceedings, attendance at a course, the passing of 13 examinations and the submission of a thesis were required.

45. In its question, the Corte suprema di cassazione refers inter alia to a number of provisions of primary law, namely Articles 10 EC, 12 EC, 14 EC, 39 EC, 43 EC and 149 EC. However, before considering primary law, it has to be examined whether the facts in the main proceedings fall within the scope of any provisions of secondary law representing a finalised harmonisation. Directives 89/48 and 98/5 are relevant. These directives require Member States to undertake an assessment of national transposition measures relating to equivalence of foreign diplomas. [13]

1. Directive 98/5

46. It must first be considered whether Directive 98/5 is applicable to trainee lawyers such as the plaintiff in the main proceedings.

13 — Jacques Pertek, *La reconnaissance des diplômes*, p. 68.

47. As stated in the second recital of Directive 98/5, only a lawyer who is fully qualified is entitled to establish himself in another Member State.

48. Article 1(1) of Directive 98/5 states that the purpose of the directive is to 'facilitate practice of the profession of lawyer on a permanent basis'. This directive therefore supplements Directive 89/48.

49. However, according to Article 1(2), Directive 98/5 applies only to persons authorised to pursue their professional activities under specified professional titles. As regards persons pursuing professional activities in France, only those authorised to pursue their activity under the title of 'avocat' come within the scope of the directive.

50. Thus, Directive 98/5 does not apply to persons still undergoing training, that is persons who have yet to fulfil all the conditions for taking up the profession of lawyer.

51. Since trainee lawyers in Italy are likewise not yet lawyers (as the designation 'praticanti' suggests), they do not fall within the scope of the directive. That applies in particular to persons who have not obtained all the qualifications necessary for taking up the profession of lawyer, such as the examinations which the home Member State requires trainees to sit, but have merely completed their academic qualification and obtained some practical experience.

52. Therefore, Directive 98/5 does not apply in a case such as the present.

2. Directive 89/48

53. It must next be considered whether Directive 89/48 is applicable. In the present case, this depends on whether the area of activity of a trainee lawyer in Italy constitutes a 'regulated profession' for the purposes of the directive.

54. According to Article 1(c) of Directive 89/48, 'regulated profession' means 'the regulated professional activity or range of activities which constitute this profession in a Member State'.

55. Article 1(d) of the directive provides that 'regulated professional activity' means 'a professional activity, in so far as the taking up or pursuit of such activity or one

of its modes of pursuit in a Member State is subject, directly or indirectly by virtue of laws, regulations or administrative provisions, to the possession of a diploma'.

56. The profession of trainee lawyer does not as such exist throughout the Community, but is defined by different Member States as comprising different activities: in this way, a profession can be subject to certain rules in only one Member State, in a number of Member States, or in all the Member States. The term 'regulated profession' [14] does not refer exclusively to possession of a diploma or academic title, [15] but is characterised by the fact that it can also depend on other evidence of qualifications.

57. It is for the Member States concerned to decide whether to regulate an activity (that is, to make it subject to certain national provisions). [16]

58. That does not affect the fact that the term 'regulated profession' is to be given an autonomous Community interpretation. At the same time, the question whether specific activities constitute a profession for the purposes of Directive 89/48 needs to be answered by reference to Community law.

59. According to the case-law of the Court of Justice, [17] a profession is 'regulated' where the right to take up or pursue the activity, and thus the profession, is governed by legal provisions. Such legal regulation can be direct or indirect. It is direct where the laws, regulations or administrative provisions of the host Member State include provisions whereby the professional activity concerned is expressly restricted to persons who fulfil certain conditions and entry to the profession is denied to those who do not. [18]

60. Before examining whether the activities of a trainee lawyer in Italy constitute a regulated profession for the purposes of Directive 89/48, it is helpful first to consider the profession of lawyer more closely. The activities of trainee lawyers in Italy can then be compared and analysed on that basis.

14 — As regards the term, see Jacques Pertek, *Les avocats en Europe*, 2000, p. 95.

15 — Jacques Pertek, *General recognition of diplomas and free movement of professionals*, 1992, p. 19.

16 — Scordamaglia, 'La direttiva Cee sul riconoscimento dei diplomi', in *Problematica del diritto delle Comunità europee*, 1992, p. 267, at 275.

17 — Case C-164/94 *Aranitis* [1996] ECR I-135, paragraphs 18 and 33, and *Fernández de Bobadilla* (cited above, footnote 10), paragraph 16.

18 — *Aranitis* (cited above, footnote 17), paragraph 19, and *Fernández de Bobadilla* (cited above, footnote 10), paragraph 17.

61. Directive 89/48 refers to the profession of lawyer as the 'final product'. If, in a Member State, access to the profession of lawyer requires an additional period of introductory practical training after the examination, under the supervision of a fully qualified lawyer, 'the professional training required in addition to the post-secondary course' for the purposes of Directive 89/48 is not completed until it is certified that that training has been concluded. That is what constitutes the 'final product'.

62. In France and Italy, the Member States concerned in the present case, the profession of lawyer is a regulated profession, and those entitled to use the professional title have a monopoly right to pursue it. [19]

63. Even in the Member States in which a period of practical training is required, it is subject to different provisions. Thus, in most Member States it is regulated by the relevant professional body, but in others it is regulated and assessed by State authorities. Where practical training is necessary for the pursuit of a specific profession, a university qualification on its own, without the necessary practical training, cannot be regarded as the final product. Thus, it does not fall within the scope of the directive. [20]

64. Since entitlement to take up and pursue the profession of lawyer in Italy depends on passing an 'esame in abilitazione' in addition to completion of practical training, possession of an academic qualification is not enough for that purpose. [21]

65. In Italy, practical training can take different forms. One is provision of quasi-independent legal advisory services in civil and criminal proceedings. This activity lasts at most six years.

66. On that basis, if one applies the (admittedly broad) criteria the Court has laid down as regards the term 'regulated activity' [22] to the activities of trainee lawyers in Italy, it is apparent that their activities are to be regarded as regulated, since the taking up and pursuit of those activities is subject to certain legal provisions. That applies not only to the activities of those who have a 'patrocinio' but also for those who are merely trainees.

19 — Jacques Pertek, 'Les professions juridiques et judiciaires dans l'Union européenne', *Droit administratif et droit communautaire.*

20 — Hildegard Schneider, *Die Anerkennung von Diplomen in der Europäischen Gemeinschaft*, p. 172.

21 — See Jacques Pertek, *General Recognition of Diplomas and Free Movement of Professionals*, 1992, p. 7.

22 — See the case-law cited in footnotes 17 and 18.

67. However, the fact that trainee lawyers pursue a regulated activity does not mean that they pursue a 'regulated profession' within the meaning of Directive 89/48.

68. The fact that the activities of trainee lawyers in Italy are limited in terms of time suggests that they are not to be regarded as a regulated profession for the purposes of Directive 89/48. A trainee lawyer carries out his activities only during the period of his training. The activities are merely an expression of the fact that the training for the profession of lawyer includes practical activities.[23] However, theoretically separating these activities from the training and regarding them as a profession fails to understand that the activity of a trainee lawyer — at least, of a 'patrocinatore' — constitutes merely a stage on the route to the profession of lawyer.

69. In her submissions, Ms Morgenbesser relied on the scope of the services trainee lawyers are authorised to provide, but this is limited by comparison with qualified lawyers, and is therefore another reason for not regarding trainee lawyers as belonging to a regulated profession for the purposes of Directive 89/48.

23 — See, to the contrary, Görlitz, *Gemeinschaftsrechtliche Diplomanerkennungspflichten und Zugang zum deutschen Vorbereitungsdienst*, Europarecht, 2000, p. 836, at 843 ff., who classifies the German traineeship at least as professional activity.

70. Finally, Article 6 of Decree No 115 also suggests that the activities of a trainee lawyer should not be regarded as a regulated profession within the meaning of Article 1 of Directive 89/48. Article 6 of Decree No 115 lists a number of legal professions, but 'trainee lawyer' is not included. This implies that the Italian legislature did not intend to classify the activities of trainee lawyers as a profession. Thus, even if one were to leave classification as a profession to the Member State concerned — though I do not suggest one should — the applicable national law indicates that the activities of trainee lawyers do not constitute a profession for the purposes of Directive 89/48.

71. The fact that the register in which trainee lawyers in Italy are enrolled is a 'registro' and not an 'albo', like the register for lawyers, cannot be decisive. Although this is a legitimate choice of designation by the Member State, it is not definitive.

3. Primary law obligations

72. Since neither Directive 89/48 nor Directive 98/5 is applicable to the activity of trainee lawyers in the present case, the provisions of primary law must be considered.

73. The question refers to Articles 10 EC, 12 EC, 14 EC, 39 EC, 43 EC and 149 EC. It is necessary to consider the specific provisions of the Treaty before the general ones (namely Articles 10 EC, 12 EC and 14 EC).

74. Although there is an abundance of case-law as regards the profession of lawyer, including in Italy, this is the first case concerning the position of a trainee lawyer, that is to say of a trainee. This suggests one should start with the case-law of the Court on the activities of trainees.

75. According to the Court's case-law on trainees, their activities can also fall within the scope of the law on free movement of workers. A condition for that, however, is that the activity must be 'effective and genuine', and not 'purely marginal and ancillary'. [24] The condition can be satisfied notwithstanding that productivity, [25] working time or remuneration is low. [26] Likewise, the source of the remuneration is not decisive; nor is the fact that under national law the employment relationship concerned is '*sui generis*'. [27]

76. The present case concerns a very specific set of facts, involving not the admission of a fully qualified trainee lawyer from one Member State to the legal professional examinations of another Member State, but the completion of professional legal training commenced in another Member State.

77. Thus, the case concerns admission to practical training in the host State and the question whether and, if so, on what conditions the host State is under an obligation to admit persons with a university qualification from a different Member State to practical training.

78. As has already been mentioned, practical training is within the scope of the provisions relating to free movement of workers, and given an employment relationship they accordingly apply to practical training, such as that of Italian trainee lawyers. It follows that the taking up of such practical training also falls within the scope of this fundamental freedom.

79. Since it appears from the facts in the main proceedings that the activities are not

24 — Case 344/87 *Bettray* [1989] ECR 1621, paragraph 13, and *Bernini* (cited above, footnote 9), paragraph 14. In general, see Case C-268/99 *Jany and Others* [2001] ECR I-8615, paragraph 33; and see Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, paragraphs 53 and 54.

25 — *Bettray* (cited above, footnote 24), paragraph 15.

26 — *Lawrie-Blum* (cited above, footnote 9), paragraph 21, and *Bernini* (cited above, footnote 9), paragraph 16.

27 — *Bettray* (cited above, footnote 24), paragraphs 15 f.

pursued in a way which causes them to fall within the law on the freedom to provide services, the question is whether free movement of workers or freedom of establishment applies. During the proceedings before the Court, it was frequently stated that Ms Morgenbesser's case concerned freedom of establishment, and this is therefore the freedom to be considered first in the following analysis. This approach is also suggested by the parallels in this regard with the facts in *Gebhard*. [28]

80. It is therefore necessary to consider the interpretation of Article 43 EC concerning freedom of establishment.

81. As the Commission submitted, the principles developed in the case-law concerning free movement of workers and freedom to provide services as regards recognition of diplomas or other professional qualifications may be applied to freedom of establishment. [29] The particular matter at issue is the obligation under primary law to recognise diplomas and assess their equivalence.

82. As a matter of principle, a distinction must be drawn between two types of system for recognising diplomas and other qualifications.

83. The first system, which is provided for by the specific or vertical directives, provides for automatic recognition following a purely formal assessment of whether the diploma for which recognition is sought is included in the list of diplomas that must be recognised.

84. The second system — and in the present proceedings only this type of system can apply — requires a substantive assessment of the evidence submitted. The assessment consists essentially of a comparison of the qualifications acquired in the home State with those required in the host State. Thus, what is assessed is whether the abilities (knowledge and qualifications) are equivalent, particularly as regards duration and content of training.

85. The starting point [30] for that case-law is generally accepted as being the judgment in *Vlassopoulou*, [31] though the principle is

28 — Cited above, footnote 12.

29 — In this connection, the Commission relied on Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 97, even though it concerns the converse situation, namely the possibility of applying the principles relating to freedom of establishment to free movement of workers.

30 — See Case 222/86 *Heylens* [1987] ECR 4097 on the question as to whether there is a primary law obligation deriving from the fundamental freedoms requiring an objective assessment of knowledge and qualifications obtained in a different Member State, to be undertaken by means of an assessment of equivalence which is subject to judicial review.

31 — Cited above, footnote 11, paragraph 16.

older in its application to the legal professions. [32] In *Vlassopoulou*, the Court had to consider the case of a Greek lawyer who sought admission to the German legal profession in reliance specifically on knowledge of German law acquired through courses of study and practical professional experience in Germany, but who had been refused on the ground that she did not have the State exam.

86. The present case concerns recognition of a university degree obtained in the home State and of a period of practical training completed there.

87. In this connection, it is appropriate to recall that the Court has consistently held that the exercise of the right of establishment guaranteed by Article 43 EC would be hindered 'if the national rules in question took no account of the knowledge and qualifications already acquired by the person concerned in another Member State'. [33]

88. From that it follows that 'the competent national authorities must assess whether the knowledge acquired by the candidate, either during a course of study or by way of practical experience, is sufficient to show possession of knowledge which is lacking'. [34] Thus, the host State has to enact and apply a suitable procedure.

(a) Recognition of an academic qualification

89. In this context, therefore, the first question to be considered is whether a 'maîtrise en droit' obtained in France falls within the host State's obligation to take matters into account. The specific point is not recognition of the academic title as such, but recognition of academic diplomas for professional purposes.

90. Even though the 'maîtrise en droit' obtained in France is not a diploma guaranteeing direct admission to the profession of lawyer, it is none the less a diploma that certifies certain knowledge and qualifications.

32 — Case 71/76 *Thieffry* [1977] ECR 765, paragraphs 19 ff., and *Gebhard* (cited above, footnote 12), paragraph 38.

33 — *Vlassopoulou* (cited above, footnote 11), paragraph 15, and Case C-319/92 *Haim* v *Kassenzahnärztliche Vereinigung Nordrhein* [1994] ECR I-425, paragraph 26.

34 — *Fernández de Bobadilla* (cited above, footnote 10), paragraph 33.

91. It is clear from the consistent case-law of the Court that account must be taken of the 'nature and duration of the studies' [35] and of all 'diplomas, certificates and other evidence of qualifications'. [36] However, since the Court has not made any further distinction by reference to the nature of the evidence, and has not, for example, limited recognition to specified diplomas only, it must be assumed that a wide range of evidence is to be recognised.

92. The judgment in *Kraus*, [37] which concerned postgraduate studies, shows that host States are obliged to take into account even academic titles.

93. It is for the national court and, as the case may be, the competent national authorities to assess, in the light of all the relevant documents and the foregoing considerations, whether Ms Morgenbesser's diploma is to be recognised as equivalent to a corresponding Italian diploma. [38]

(b) Recognition of practical training

94. It must next be considered whether practical training completed in the State of origin is to be taken into account.

95. It is clear from the consistent case-law of the Court that professional experience acquired in the State of origin, [39] and even completed 'practical training', [40] is to be taken into account. That applies also in a case such as the present, in which the person concerned has not completed all the training required by her State of origin to become a lawyer.

(c) Assessment of equivalence — comparison

96. However, in assessing equivalence (that is in comparing qualifications and practical experience), Member States are entitled to take into account objective differences as regards both the legal framework applicable in the home Member State for the profession in question and the profession's area of activity there.

35 — *Vlassopoulou* (cited above, footnote 11), paragraph 17 and Case C-104/91 *Borrell and Others* [1992] ECR I-3003, paragraph 12; and see *Heylens* (cited above, footnote 30), paragraph 13.

36 — *Borrell* (cited above, footnote 35), paragraph 11; Case C-238/98 *Hocsman* [2000] ECR I-6623, paragraph 23; and Case C-31/00 *Dreessen* [2002] ECR I-663, paragraph 24.

37 — Case C-19/92 [1993] ECR I-1663, paragraphs 20 ff.

38 — See *Hocsman* (cited above, footnote 36), paragraph 39.

39 — *Vlassopoulou* (cited above, footnote 11), paragraph 21; *Haim* (cited above, footnote 33), paragraph 28; and *Hocsman* (cited above, footnote 36), paragraph 23.

40 — *Vlassopoulou* (cited above, footnote 11), paragraph 17, and *Borrell* (cited above, footnote 35), paragraph 12; see also *Heylens* (cited above, footnote 30), paragraph 13.

97. If that comparative examination results in the finding that the knowledge and qualifications certified by the foreign diploma correspond to those required by the national provisions, the Member State must recognise that diploma as fulfilling the requirements laid down by those provisions. If, on the other hand, the comparison reveals that the respective knowledge and qualifications correspond only partially, the host Member State is entitled to require the person concerned to show that he has acquired the knowledge and qualifications which are lacking. [41]

98. In any event, therefore, the Member States must take appropriate account at the substantive level of those foreign qualifications which at least partially correspond to domestic requirements, which themselves comply with Community law.

99. They are not permitted to give an absolute, unconsidered refusal to undertake a substantive comparative assessment, on the basis of formal criteria such as, for example, the requirement to have a degree from an Italian university, as has happened in the present case.

100. Accordingly, the host Member State has to put in place and apply a procedure that complies with these principles. If the procedure in force in the host State does not fulfil the requirements of Community law, then every competent authority, including for example the authority having jurisdiction in the present case over enrolment in the register of trainee lawyers, must itself consider whether a diploma an applicant has acquired in a different Member State, in conjunction with any professional experience he has, is to be regarded as equivalent to the requisite qualifications. [42]

101. It follows that a certificate of studies obtained in a different Member State need not be granted automatic recognition, but that a Community citizen is entitled to rely on it in a recognition procedure.

102. In the light of that conclusion, it is not necessary to consider the interpretation of Articles 10 EC, 12 EC, 14 EC, 39 EC and 149 EC.

41 — *Vlassopoulou* (cited above, footnote 11), paragraph 19; *Borrell* (cited above, footnote 35), paragraph 14; *Fernández de Bobadilla* (cited above, footnote 10), paragraph 32; and *Hocsman* (cited above, footnote 36), paragraph 36.

42 — See *Fernández de Bobadilla* (cited above, footnote 10), paragraph 34.

V — Conclusion

103. For the foregoing reasons, I propose that the Court should answer the question as follows:

Article 1 of 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 is to be interpreted as meaning that the activities of an Italian trainee lawyer are not to be regarded as a 'regulated profession'.

Article 43 EC is to be interpreted as meaning that in a case such as the present the competent authorities of the host State are to take into account all diplomas, certificates and other evidence of qualifications, as well as any relevant experience the person concerned has obtained in the State of origin, by comparing the professional learning and skills attested by that evidence and experience with the knowledge and qualifications required in the host State.