OPINION OF ADVOCATE GENERAL STIX-HACKL delivered on 23 March 2006 [1]

I — Introduction

1. The present proceedings concern access to the profession of director of voluntary public auctions in France and, in connection therewith, recognition of a degree of 'Bachelor of Arts in Fine Arts Valuation' awarded in the United Kingdom. The case concerns whether Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC ('Directive 92/51') [2] or 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 ('Directive 89/48') [3] is applicable and, in particular, the interpretation of the notion of professions providing legal advice for the purposes of these directives. I observe for the sake of completeness that these two directives have since been replaced by Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications [4] which is to be implemented by 20 October 2007.

II — Legal framework

A — *Community law*

2. 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. Directive 92/51 extends the directive on general higher-education diplomas to include professions which do not require a diploma as defined in Directive 89/48.

1 — Original language: German.
2 — OJ 1992 L 209, p. 25.
3 — OJ 1989 L 19, p. 16.
4 — OJ 2005 L 255, p. 22.

3. Under their respective Article 2, the directives are to apply to any national of a Member State wishing to pursue a regulated profession in a host Member State in a self-employed capacity or as an employed person.

4. Under Article 1(c) of Directive 89/48 and Article 1(e) of Directive 92/51, a regulated profession means the regulated professional activity or range of activities which constitute this profession in a Member State.

5. Under the second subparagraph of Article 1(d) of Directive 89/48 and the second subparagraph of Article 1(f) of Directive 92/51, where the first subparagraph does not apply, a professional activity is to be deemed to be a regulated professional activity if it is pursued by the members of an association or organisation the purpose of which is, in particular, to promote and maintain a high standard in the professional field concerned and which, to achieve that purpose, is recognised in a special form by a Member State and:

— awards a diploma to its members,

— ensures that its members respect the rules of professional conduct which it prescribes, and

— confers on them the right to use a title or designatory letters, or to benefit from a status corresponding to that diploma.

6. The third subparagraph of Article 1(d) of Directive 89/48 provides that a non-exhaustive list of associations or organisations which, when this directive is adopted, satisfy the conditions of the second subparagraph is contained in the annex. Whenever a Member State grants the recognition referred to in the second subparagraph to an association or organisation, it is to inform the Commission thereof, which is to publish this information in the *Official Journal of the European Communities*. In respect of the United Kingdom, the 'Royal Institution of Chartered Surveyors' is referred to in point 13.

7. Article 1(a) of the respective directives contains a legal definition of the term 'diploma'. For the purposes of Directive 89/48, diploma means any diploma, certificate or other evidence of formal qualifications or any set of such diplomas, certificates or other evidence which, inter alia, 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. As regards diplomas within the meaning of Directive 92/51, the second indent of Article 1(a)(i) states as one

of the conditions that the evidence of education and training must show that the holder has successfully completed either a post-secondary course other than that referred to in the second indent of Article 1(a) of Directive 89/48 of at least one year's duration or of equivalent duration on a part-time basis.

8. Article 3 of Directive 89/48, which sets out the principles for the taking-up and pursuit of a regulated profession, provides, where the taking-up or pursuit of a regulated profession is subject to possession of a diploma in a host Member State, inter alia that 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 those which apply to its own nationals, 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.

9. Article 3 of Directive 92/51 differs in terms of its scope. It essentially applies where the taking-up or pursuit of a regulated profession in a host Member State is subject to possession of a diploma, as defined in the two directives, and the applicant holds one of the two diplomas.

10. Finally, in their respective Article 3(1)(b), the two directives provide that applicants who do not have the necessary diploma inter alia may take up the profession in the host State instead on the basis of evidence of education or training or the pursuit of the profession in another Member State for at least two years.

11. Article 4 of the two directives permits the relevant host State to make the taking-up of a regulated profession subject to certain conditions. Under Article 4(1), the host Member State may require the applicant, one, to provide evidence of professional experience or, two, to complete an adaptation period not exceeding three years or take an aptitude test. Should the host Member State make use of the second possibility, it must give the applicant the right to choose between an adaptation period and an aptitude test. By way of derogation from this principle, for professions whose practice requires precise knowledge of national law and in respect of which the provision of advice and/or assistance concerning national law is an essential and constant aspect of the professional activity, the host Member State may stipulate either an adaptation period or an aptitude test.

B — *National law*

12. Articles L. 321-1 to L. 321-38 of the French Code de commerce govern voluntary

sales of chattels by public auction. Article L. 321-4 lays down in more detail the activity of the companies which organise such sales.

13. Article L. 321-8 provides that these companies must have among their directors, their members and their employees at least one person with the qualification required to conduct a sale or having a diploma or an authorisation recognised as equivalent in that respect, in the circumstances defined by decree in the Conseil d'État (Council of State).

14. Articles 16 to 25 of Decree No 2001-650 of 19 July 2001 implementing Articles L. 321-1 to L. 321-38 of the Code de commerce and relating to voluntary sales of chattels by public auction ('the decree') specify the qualifications required to conduct voluntary sales of chattels by public auction, and an order of 29 August 2001 prescribes the syllabus and the detailed rules for the examination for access to the traineeship required to conduct such sales.

15. Article 16 of the decree states inter alia:

'... no person may conduct voluntary sales of chattels by public auction unless that person satisfies the following requirements: ...

(3) ... that person must be the holder of either a national diploma in law and a national diploma in the History of Art, Applied Arts, Archaeology or the Plastic Arts, one of those diplomas being at least a university degree and the other certifying the attainment of at least a level of education and training corresponding to two years of higher education or of qualifications or diplomas, accepted in dispensation, the list of which is laid down by joint order of the Garde des sceaux, Ministre de la justice and the Ministre chargé de l'enseignement supérieur;

(4) that person has successfully undergone the examination for access to the training period provided for by section 1 of this chapter;

(5) that person has completed the training period mentioned in (4) above in the circumstances provided for by section 2 of this chapter.'

16. Article 45 of the decree relates to the qualifications required by nationals, who wish to practise in France, of a State which is a member of the European Community or a party to the European Economic Area (EEA) Agreement, other than France. It states:

'Nationals of a Member State of the European Community or of a State party to the European Economic Area Agreement who

have successfully pursued a course of post-secondary studies, of at least one year or of an equivalent period in the case of part-time studies, which prepares them to carry on the activity of conducting voluntary sales of chattels by public auction and one of the conditions of access to which is completion of a course of secondary studies required to gain access to university or higher education and any professional training which may be required in addition to such course of post-secondary studies, shall be regarded as having the qualification required for that activity without having to fulfil the requirements of Article 16(3), (4) and (5) if they are holders of:

1. one or more diplomas, certificates or other evidence of formal qualifications entitling them to carry on the activity of conducting voluntary sales of chattels by public auction in a Member State or a State party which regulates access to the practice of the profession, issued:

   (a) either by the competent authority of that State certifying the attainment of education and training acquired mainly in a Member State or State party, or in another State in educational establishments which provide education and training which complies with the laws, regulations and administrative provisions of that Member State or State party;

   (b) or by a non-member or non-party State, provided that a certificate is supplied emanating from the competent authority of the Member State or State party which has recognised the diploma or diplomas, certificates or other evidence of formal qualifications certifying that the holder thereof has had professional experience of at least three years in that State; or

2. one or more diplomas, certificates or other evidence of formal qualifications certifying completion of regulated education and training, specifically oriented towards the practice of the profession, in a Member State or a State party which regulates neither access to nor the practice of that profession; or

3. one or more diplomas, certificates or other evidence of formal qualifications obtained in a Member State or State party which regulates neither access to or the practice of that profession nor the education and training leading thereto, if they establish full-time practice of the profession in that State for at least two years during the ten preceding years or for an equivalent period in the case of part-time practice, subject to the certification of such practice by the competent authority of that State.'

17. Article 48 of the decree confers power on the 'Conseil des ventes volontaires de

meubles aux enchères publiques' ('the Authority') to examine applications for recognition of diplomas, certificates or other evidence of formal qualifications of persons who satisfy the requirements of Article 45 and wish to establish themselves in France.

18. Article 49 of the decree states:

'If a person's education and training covers substantially different subjects from those in the syllabuses of the diplomas and for the professional examination mentioned in Article 19, or if one or more of the professional activities, practice of which is subject to the possession of such diplomas and to success in that exam, are not regulated in the Member State of origin or provenance or are regulated in a substantially different way, the person concerned must undergo, before the selection committee provided for by Article 20, an aptitude test the syllabus and detailed rules of which are laid down by order of the Garde des sceaux, Ministre de la justice.

The Authority shall prescribe the subjects in the syllabus referred to in the preceding paragraph on which, taking into account his or her initial education and training, the candidate is to be examined.

The Authority shall inform the candidates of the results of the aptitude test.

No one may sit the examination more than thrice.'

III — Facts, main proceedings and questions referred

19. Mr Price holds the degree of 'Bachelor of Arts with second class honours in Fine Arts Valuation', a degree recognised by the professional bodies in the United Kingdom and accredited by the Royal Institution of Chartered Surveyors (RICS) and the Incorporated Society of Valuers and Auctioneers. As is clear from the Court files, Mr Price is not, however, a member of the RICS.

20. On 8 January 2000, Mr Price submitted to the Authority an application for recognition of a diploma, certificate or other evidence of formal qualification referred to in Article 48 of the decree. Mr Price contended that he had practised in the United Kingdom for two years and had practised in France for several years.

21. By decision of 19 June 2003, the Authority authorised Mr Price to present himself for the aptitude test provided for by Article 49 of the decree and stated that he should be examined in the following subjects: legal matters, conduct of sales by public auction and professional regulations.

On 11 September 2003, the Authority rejected the internal appeal which Mr Price had brought against that decision on 21 July 2003.

22. By an appeal brought before the Cour d'appel de Paris (Court of Appeal, Paris) on 19 August 2003, Mr Price sought the annulment of the Authority's decision and a declaration that he 'satisfies the requirements to conduct voluntary sales of chattels by public auction'. Failing that, he asked the Cour d'appel to inquire of the Court of Justice of the European Communities whether the activity of voluntary sales of chattels by public auction comes within the scope of Article 4 of Directive 92/51 which permits the host State to retain the choice between an adaptation period and an aptitude test.

23. Since the Cour d'appel de Paris considered that an interpretation of Community law was necessary, it sought, by judgment of 23 March 2005 lodged at the Registry of the Court of Justice on 4 April 2005, a preliminary ruling on the following questions:

'(1) Does Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC apply to the activity of director of voluntary sales of chattels by public auction which is governed by Articles L. 321-1 to L. 321-3, L. 321-8 and L. 321-9 of the Code de commerce?

(2) If so, can the host Member State avail itself of the derogation from the second subparagraph of Article 4(1)(b) provided for by the third subparagraph of Article 4(1)(b) of the directive?'

IV — First question

24. By its first question, the national court asks whether Directive 92/51 applies to the activity of director of voluntary sales of chattels by public auction. Since the scope ratione personae of Directive 92/51 is not at issue because Mr Price is, as a British citizen, a national of an EU Member State and wishes to carry on the activity of director of voluntary public auctions in another Member State, namely France, it remains to be considered whether he falls within the scope ratione materiae of Directive 92/51. If that is not the case, Directive 89/48 may be relevant.

A — *The common conditions of application: regulation of the profession in the host State*

25. Directive 92/51 and Directive 89/48 can be applied only if the activity of director of voluntary public auctions in the host State France is covered by the term 'regulated profession' as defined in the respective directive.

26. According to Article 1 of the respective directives, regulated profession means the regulated professional activity or range of activities which constitute this profession in a Member State.

27. Article 1 of the respective directives 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.

28. 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.

29. According to the case-law of the Court of Justice, [5] a profession is 'regulated' where the right to take up this profession or pursue the activity is governed by legal provisions in the Member State concerned. 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 this profession is denied to those who do not. [6]

30. In France the business of companies conducting voluntary sales of chattels by public auction is governed by Articles L. 321-4 to L. 321-38 of the Code de commerce. Since under Article L. 321-8 such companies must have at least one person who holds the qualification required to conduct voluntary sales of chattels by public auction, Articles

5 — Case C-164/94 *Aranitis* [1996] ECR I-135, paragraphs 18 and 33, and Case C-234/97 *Fernández de Bobadilla* [1999] ECR I-4773, paragraph 16.

6 — *Aranitis* (cited in footnote 5), paragraph 19, and *Fernández de Bobadilla* (cited in footnote 5), paragraph 17.
See also, on this point, judgment of 2 October 2004 in Case C-402/02 *Commission* v *France*, not published in the ECR, regarding classification of regulated professions on the basis of measures regulating access to a profession.

L. 321-4 to L. 321-38 govern — albeit indirectly — the activity of such a director. Direct rules are contained in Article L. 321-9 which provides inter alia that only directors of voluntary sales of chattels by public auction are empowered to conduct such sales.

31. In France taking up the activity of director of voluntary sales of chattels by public auction is governed comprehensively by the decree. Article 16 et seq. of the decree in particular provide that the right to carry on this activity is subject to possession of a university diploma in law and another university diploma or success in an entrance examination and completion of a training period.

32. Even the possibility of granting access to EU citizens and nationals of EEA States set out in Article 45 of the decree imposes certain alternative conditions on carrying on the activity of director of voluntary sales of chattels by public auction.

33. Therefore, both the taking-up and the pursuit of the activity of director of voluntary sales of chattels by public auction in France is governed directly by legal provisions since the pursuit of this activity is restricted solely to those who hold certain qualifications. Consequently, this activity constitutes a regulated profession in the host State.

B — *Identification of the applicable directive*

34. In the proceedings it has been pointed out repeatedly that it is not Directive 92/51 cited by the national court, but Directive 89/48 that is applicable. What therefore needs to be considered below is which of the two directives applies to a situation such as that in issue in the main proceedings.

1. Defining the two directives on recognition

35. Before considering whether education and training for the profession of director of voluntary public auctions constitutes a diploma as defined in Directive 92/51, it is helpful first to determine the scope of the two directives.

36. For the activity of director of voluntary public auctions to fall with the scope ratione materiae of Directive 92/51, it would have to be a regulated profession in the host State under the first paragraph of Article 3 of Directive 92/51, in conjunction with Article 1(1)(e) thereof, and the taking up of this profession would have to require a diploma as defined in the first paragraph of Article 3 of Directive 92/51, in conjunction with Article 1(1)(a) thereof.

37. As evidenced by the third, fourth and ninth recitals in the preamble thereto, Directive 92/51 constitutes a complement to and an extension of the concept underlying Directive 89/48. According to the third recital in the preamble thereto, Directive 89/48 is limited to recognition of higher-education diplomas. According to the fourth and ninth recitals in the preamble, Directive 92/51 is therefore to establish a complementary system which covers 'the levels of education and training not covered by the initial general system, namely that corresponding to other post-secondary education and training courses and other equivalent education and training, and that corresponding to long or short secondary courses, possibly complemented by professional training or experience'.

38. Therefore, the level of education and training is decisive in defining the scope of the two directives on recognition. Viewed systematically, the two directives on recognition encompass a total of three levels of professional education and training: a secondary course, short courses of study and all courses of study listed in Annex C, and also academic qualifications obtained after at least three years' study. [7]

39. Since under Article 1(a) of Directive 92/51, it covers the first two levels of education and training and under Article 1(a) of Directive 89/48 it covers the third level of education and training, under Directive 92/51 there must be, in addition to the recognition provided for within each of the respective levels, recognition between these two stages (the so-called 'system of passerelle').

40. This crossover or permeability between the individual levels of education and training has given rise to the extremely complex system of recognition which is laid down in Article 3 of Directive 92/51. Thus, under Article 3 of Directive 92/51 several cases of recognition are possible which either fall within the scope of Directive 92/51 or Directive 89/48 or within the scope of neither directive. Below an attempt will be made to provide a systematic overview thereof.

7 — See, to this effect, Hildegard Schneider, *Die Anerkennung von Diplomen in der Europäischen Gemeinschaft*, 1995, p. 239.

41. First, the first paragraph of Article 3 of Directive 92/51 draws a distinction depending on whether the host State requires a diploma as defined in Directive 92/51 or Directive 89/48 for the pursuit of the relevant profession.

42. Second, it must be considered whether the relevant profession is actually regulated in the applicant's State of education and training (subparagraph (a) or (b) of the first paragraph of Article 3 of Directive 92/51). If that is not the case, under subparagraph (b) of the first paragraph of Article 3 the application of Directive 92/51 also depends on whether the applicant in the specific case has pursued the relevant profession for a particular period. If neither of the alternatives holds true, neither of the two directives on recognition is applicable, but the host State does remain bound by the fundamental freedoms.

43. If the profession is regulated in the State of education and training, it would then be necessary to consider whether the State of education and training requires a diploma as defined by Directive 92/51 or Directive 89/48 for access to this profession.

44. Finally, under subparagraph (a) of the first paragraph of Article 3 of Directive 92/51 it must be considered whether the applicant actually holds the diploma required by his State of education and training. On the other hand, if the applicant does not hold the required diploma, neither of the two directives but rather the fundamental freedom which covers the relevant professional education or training is applicable as in the case of insufficient professional experience (subparagraph (b) of the first paragraph of Article 3). [8] In that respect the principles laid down in Vlassopoulou, [9] which developed from the fundamental freedoms, in particular can be transposed.

45. Therefore, for Directive 92/51 to apply to the main proceedings in the present case referred for a preliminary ruling, one of the following three situations would have to exist:

— either the host State and the State of education and training require a diploma as defined in Directive 92/51 and the applicant also holds such a diploma (subparagraph (a) of the first paragraph of Article 3 of Directive 92/51);

— or one of the two States requires a diploma as defined in Directive 92/51 and the other requires a diploma as defined in Directive 89/48 and the applicant holds the diploma required by the State of education and training

8 — See, with regard to this situation, Martin Wasmeier, 'Aktuelle Fragen im Zusammenhang mit der Anerkennung von Berufsabschlüssen', *Europäische Zeitschrift für Wirtschaftsrecht* 1999, p. 746 (749).

9 — Case C-340/89 [1991] ECR I-2357.

(the so-called 'system of passerelle' under subparagraph (a) of the first paragraph of Article 3 of Directive 92/51); [10]

— or the host State requires a diploma as defined in Directive 92/51, the relevant profession is not regulated in the State of education and training but the applicant has the required professional experience (subparagraph (b) of the first paragraph of Article 3 of Directive 92/51).

46. In order to establish whether one of these situations exists in the main proceedings, it must be considered which diploma the host State requires, whether the profession is regulated in the State of education and training, and which diploma the State of education and training requires.

2. Conditions in detail

(a) The type of diploma required by the host State

47. In order to establish what kind of diploma the host State France requires for the activity of director of voluntary public auctions, it is necessary to examine the provisions of French law laying down the conditions for carrying on this activity. In order to answer this question, an interpretation must be placed on the relevant French rules on access to the profession of director of voluntary sales of chattels by public auction. However, it is essentially not for the Court of Justice to do so within the framework of preliminary ruling proceedings pursuant to Article 234 EC. In order to provide the national court with an answer which will be of use to it, certain indications as to national law will be given below.

48. The qualifications required for the conduct of voluntary sales of chattels by public auction are laid down in Article 16 of the decree. First, one must hold a national diploma in law *and* a national diploma in the History of Art, Applied Arts, Archaeology or the Plastic Arts, the former being at least a university degree (that is to say three years' study at a higher-education establishment) and the latter at least education and training corresponding to two years' higher education. Therefore, a total of at least five years' university education is required. In addition, a two-year training period must be completed following an entry examination.

49. Consequently, Article 16 of the decree makes the pursuit of the profession of director of voluntary sales of chattels by

10 — See the report from the Commission to the Council and the European Parliament on the application of Directive 92/51/EEC in accordance with Article 18 of Directive 92/51/EEC (COM(2000) 17 final, paragraph 201 et seq.).

public auction subject to several conditions, three of which concern education and training (university study, qualifying examination and training period). In this respect these three conditions are listed consecutively as numbers. It can be concluded from the wording that the university degree forms part of the training for director of voluntary public auctions and not merely a general qualification in the same way as the training period.

50. A teleological argument also supports this interpretation. The spirit and purpose of the provision is inter alia to ensure that only those persons who have already completed the relevant university education may undergo the two-year training period. Therefore, the training period constitutes a type of specialisation which is preceded by a general legal education and an art education. Consequently, the university education forms a necessary and indispensable part of the education and training for a director of voluntary public auctions.

51. The fact that the 'final product' is to be taken as a basis is also spelt out by the Court's case-law. For example, in *Morgenbesser* [11] the Court held in relation to the profession of lawyer that a French national who completed her legal studies with a 'maîtrise en droit' but did not undergo subsequent professional training as a lawyer cannot rely on Directive 89/48. Therefore, practical training must also be demonstrated in addition to the academic qualification. Only when this practical training has been completed is the overall education and training as a lawyer regarded as complete. In this connection there is a 'final product', that is to say only both parts of the education and training together can be recognised as complete education and training under Directive 89/48 and not merely the practical education and training under Directive 92/51. [12]

52. In *Burbaud* [13] the Court confirmed this finding in relation to the profession of hospital administrator and at paragraph 35 held that Mrs Burbaud's qualification was awarded on completion of post-secondary education of at least three years' duration. This means that the Court regarded the law degree and the subsequent training as complete education and training.

53. This case-law concerning the final product must be transposed to the profession of director of voluntary sales of chattels by

11 — Case C-313/01 [2003] ECR I-13467, paragraph 54.

12 — See Schneider (cited in footnote 7), p. 172 et seq.; Sabine Regelin, 'Berufliche Befähigungsnachweise und ihre Anerkennung', in Oetker/Preis (edit.), *Europäisches Arbeits- und Sozialrecht*, p. 49; Ulrich Müller-Bernhardt, 'Anerkennung von Hochschuldiplomen im Gemeinschaftsrecht', *Recht der Jugend und des Bildungswesens*, 1989, p. 130 (134).

13 — Case C-285/01 [2003] ECR I-8219.

public auction at issue in the present case. If in the case of the profession of hospital administrator the Court regards university education and training lasting three years and additional post-secondary education and training lasting two years as a diploma as defined in the directive on higher-education diplomas, this would have to apply *a minore ad maius* in the case of the profession of director of voluntary sales of chattels by public auction since the education and training for this profession requires, in addition to a post-secondary training period, not only one but two university qualifications (education in law and history or archaeology or art) and consequently this education and training would a fortiori have to constitute a diploma as defined in Directive 89/48.

54. Education and training for the profession of director of voluntary sales of chattels by public auction consists — in principle — of university education of at least five years and professional training of two years.

55. The profession of director of voluntary sales of chattels by public auction is a profession requiring education and training which is structured in a similar way as that for the profession of hospital administrator. In the case of both professions a university education in law is followed by practical training which prepares those concerned for the specific requirements of the respective profession and which does not involve only legal education and training.

56. However, the objection which could be raised regarding comparability with the profession of lawyer, namely that the education and training for that profession, unlike the profession of director of voluntary sales of chattels by public auction, involves homogeneous legal education and training which is divided into a theoretical and a practical section, would consequently not be relevant in the case of the profession of hospital administrator.

57. If the normal case of education and training set out above is taken as a basis, the profession of director of voluntary sales of chattels by public auction falls within the scope of Directive 89/48.

58. None the less, Article 17 of the decree provides that those applicants who have relevant professional experience of at least seven years and also pass an aptitude test do not require, in derogation from Article 16, any education or training as defined in Article 1 of the decree — and consequently a diploma as defined in Directive 89/48 — to pursue the profession of director of voluntary public auctions. However, since this provision is merely a derogation from the basic rule laid down in Article 16 of the decree and accordingly does not constitute an independent rule on access to the profession of director of voluntary public auctions, it is irrelevant to the question whether there is a diploma as defined in Directive 89/48.

59. Therefore, if Article 16 of the decree is taken as a basis as regards the requirements imposed in France, the conclusion must be that the host State, that is to say France, requires a diploma as defined in Directive 89/48 for pursuit of the profession of director of voluntary public auctions.

60. However, this applies only if Article 45 of the decree is not taken as a basis since this provision requires completion of a course of post-secondary studies of at least one year. Therefore, this French provision requires only a diploma as defined in Directive 92/51. In terms of its scope ratione personae, Article 45 applies to the nationals of specific States. Since Mr Price also numbers among them, this provision would be applicable to him.

61. Directive 92/51 is applicable if one of the two situations exists. Either the host State, that is to say France, requires only a diploma as defined in Directive 92/51 (applicability of Article 45 of the decree) or the case is governed by Article 3 Directive 92/51. First, this includes the so-called 'passerelle' case where the host State requires a diploma as defined in Directive 89/48 but the State of education and training requires only evidence as defined in Directive 92/51. This means that Directive 92/51 can be relevant also where Article 16 of the decree is applied. Second, Article 3 of Directive 92/51 provides for application thereof also where the host State requires a diploma as defined in Directive 92/51 but the profession is not regulated in the State of education and training and the applicant has the necessary professional experience.

(b) Requirements in the State of education and training

62. In order to establish whether the State of education and training requires a diploma as defined in Directive 92/51 for pursuit of the profession of director of voluntary auctions, it would first be necessary to consider whether this profession is actually a regulated profession in the State of education and training.

(i) Is the profession regulated in the State of education and training?

63. First of all it should be noted that the profession of director of voluntary sales of chattels by public auction does not exist under this name in the United Kingdom. There the same activity is carried on by a so-called 'valuer/auctioneer: fine arts'.

64. The profession of 'auctioneer' is not subject to any particular rules on access. For example, neither an examination nor licence nor membership of a professional organisation is required. Therefore, it follows that the profession of 'valuer/auctioneer: fine arts' in the United Kingdom is not a regulated profession.

65. None the less, membership of certain establishments brings with it certain advantages in the economic sphere. The recognised institutions in the United Kingdom include, for example, the RICS, the Society of Fine Art Auctioneers and the National Association of Valuers and Auctioneers. On certain conditions the RICS confers the title of 'chartered surveyor' or 'chartered arts and antiques surveyor'.

66. The second subparagraph of Article 1(f) of Directive 92/51 takes account of this particular case and therefore provides that a professional activity regulated by professional associations is to be deemed to be a State-regulated activity where their rules are recognised by the relevant Member State.

67. Directive 92/51 does not specify which professional associations and organisations meet these criteria. However, the second subparagraph of Article 1(d) of Directive 89/48 contains an identical rule. An annex to this directive contains a list of professional associations and organisations which satisfy the conditions. Point 13 states 'Royal Institution of Chartered Surveyors'.

68. However, there remains the question whether the list of professional associations and organisations which satisfy the conditions of the second subparagraph of Article 1(d) of Directive 89/48 can be applied by analogy in the case of the second subparagraph of Article 1(f) of Directive 92/51.

69. Several arguments militate in favour of an affirmative answer to this question. As its name suggests, Directive 92/51 is intended to supplement Directive 89/48 on general higher education. It is to be interpreted and construed only in connection with that directive. [14] This militates in favour of the analogous application of the provisions of Directive 89/48 to situations which fall within the scope of Directive 92/51.

70. Such analogous application should probably occur in particular where Directive 92/51 governs a particular area substantively in the same way as Directive 89/48. This is so in the present case because both directives

14 — Fifth recital in the preamble to Directive 92/51.

contain the same rules on regulation of professions by professional associations and organisations. It is therefore logical to apply the list of such associations to both directives.

71. The fact that the RICS draws up recognised professional rules for professions which fall within the scope of Directive 89/48 further militates in favour of the applicability of this list also to Directive 92/51. This should be the case a fortiori of professions which fall within the scope of Directive 92/51 because the conditions for taking up those professions are less stringent.

72. Therefore, the first condition for the application of the first paragraph of Article 3 of Directive 92/51 is fulfilled only where the profession of 'chartered surveyor' or 'chartered arts and antiques surveyor' and not 'auctioneer' is taken as a basis.

(ii) Conditions laid down in the State of education and training

73. In so far as the following assessment of the conditions laid down in the State of education and training concerns the application of the directive to a specific situation, it is a matter for the national court.

74. If there is a regulated profession in the United Kingdom, it is first necessary to consider whether a diploma as defined in Directive 92/51, that is to say at most a university degree following a course lasting no more than two years, is required in the United Kingdom.

75. On the other hand, Directive 89/48 would have to be applied if the requirements on 'chartered surveyors' or 'chartered arts and antiques surveyors' are taken as a basis. Whether the conditions relating to 'chartered surveyors' and/or 'chartered arts and antiques surveyors' are fulfilled is for the national court to judge.

76. If it is concluded that the State of education and training, that is to say the United Kingdom, requires a diploma as defined in Directive 92/51 for pursuit of the profession of director of voluntary public auctions, the relevant applicant would also have to hold a required diploma as defined in Directive 92/51 for Directive 92/51 to apply to the profession of director of voluntary sales of chattels by public auction.

77. If the profession of 'auctioneer' is taken as a basis, the profession is not regulated and therefore neither of the two directives applies.

(iii) Fulfilment of the conditions by Mr Price

78. It would then be necessary to consider, in the light of the facts in the case, what kind of diploma the applicant in the main proceedings holds and what time he has spent in practice. The relevant information, such as membership of a recognised institution, cannot be found in the Court files or is disputed, in particular the two years' practice in the State of education and training, that is to say the United Kingdom.

79. However, since such consideration constitutes application to the facts in the case, it is also a matter for the competent national authorities. While it is for the Court of Justice to give to the national court the information on interpretation which is necessary to decide the dispute, it is for the national court to appraise the facts of the case in the light of the criteria adopted by the Court of Justice. Application of the rules of Community law, like the rules for their implementation in a specific case, remains the task of the national court. [15]

15 — Case C-446/98 *Fazenda Pública* [2000] ECR I-11435, paragraph 23, and *Burbaud* (cited in footnote 13), paragraph 58.

C — *Interim conclusion*

80. Therefore, the answer to the first question must be that Directive 92/51 is to be interpreted as being applicable to the activity of director of voluntary sales of chattels by public auction under French law only if the profession is not regulated in the United Kingdom and the applicant fulfils the conditions laid down in subparagraph (b) of the first paragraph of Article 3 of Directive 92/51 or a diploma as defined in this directive is required for the profession in the United Kingdom. Whether these conditions are fulfilled is a matter for the national court.

V — Second question

81. By its second question, the national court asks whether, in the event that Directive 92/51 can be applied to the activity of director of voluntary sales of chattels by public auction, the host Member State can reserve the right to decide between the so-called 'adaptation instruments' (adaptation period or aptitude test) rather than leaving the choice to the applicant. The same question also arises if Directive 89/48 can be applied.

82. In substance, the question is whether the profession of director of voluntary sales of

chattels by public auction is a profession the pursuit of which requires a precise knowledge of national law and in respect of which the provision of advice and/or assistance concerning national law is an essential and constant feature of this professional activity because if it is the host State can limit the applicant's choice between an aptitude test and an adaptation period pursuant to the respective Article 4(1)(b) of the two directives.

A — *Admissibility of the second question*

83. In view of the content and wording of the second question, it is appropriate to examine its admissibility.

84. The Court of Justice has consistently held that it may refuse to rule on a question referred for a preliminary ruling by a national court where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. [16]

85. In the present case it is necessary to examine the connection between the interpretation of Community law and the actual facts of the main action. For an answer to be given to the second question as worded by the national court, Directive 92/51 must actually be applicable.

86. Since it is only during subsequent stages of the proceedings before the national court that it will become clear whether Directive 92/51 is applicable to the facts in the main action, it is uncertain whether the requirements laid down by case-law, whereby an answer to the question referred for a preliminary ruling must be necessary to decide the main proceedings, are satisfied.

87. However, according to the Court's case-law, the admissibility of questions referred for a preliminary ruling should not be viewed too strictly. The decisive factor is whether the interpretation of Community law can be useful and helpful to the national court. 'Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling.' [17]

16 — Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 39; Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 19; Case C-373/00 *Adolf Truley* [2003] ECR I-1931, paragraph 22 et seq.; and Case C-380/01 *Schneider* [2004] ECR I-1389, paragraph 22.

17 — See, in particular, Case C-415/93 *Bosman and Others* [1995] ECR I-4921, paragraph 59; *PreussenElektra* (cited in footnote 16), paragraph 38; *Canal Satélite Digital* (cited in footnote 16), paragraph 18; and Case C-153/00 *der Weduwe* [2002] ECR I-11319, paragraph 31.

88. In the present case it should be noted that an interpretation of the notion of profession providing legal advice under the directive is useful to the national court because one of the two directives is applicable.

B — *The notion of 'profession providing legal advice' for the purposes of the directives*

89. First of all, it is necessary to consider whether the profession of director of voluntary public auctions is a profession the pursuit of which requires a precise knowledge of national law. It is then necessary to examine whether the provision of advice and/or assistance concerning national law is an essential and constant feature of the professional activity.

90. Where there are differences in terms of the duration or content of education and training between the State of origin and of education and training, on the one hand, and the host State, on the other, the host State can, pursuant to Article 4 of Directive 92/51, impose additional requirements on the applicant in order to ensure his appropriate adaptation to the new professional environment.

91. Where the content of the education and training differs, that is to say where the theoretical and practical matters covered by the education and training which the applicant has received differ substantially from those of the host State and therefore are not covered by his diploma, the host State can specifically require an adaptation period or an aptitude test to offset this pursuant to the first indent of the first subparagraph of Article 4(1)(b) of Directive 92/51. This also applies where the regulated professional activity is more comprehensive in the host State than it is in the State from which the applicant comes and account is taken of this difference in the scope of the activity concerned through specific education and training in subjects not covered by the applicant's diploma (second indent of the first subparagraph of Article 4(1)(b) of Directive 92/51).

92. The host State which makes use of this possibility to offset the difference must give the applicant the right to choose between an adaptation period and an aptitude test. However, under the first indent of the third subparagraph of Article 4(1)(b) of Directive 92/51, the directive permits a derogation from this principle for professions the pursuit of which requires precise knowledge of national law and in respect of which the provision of advice and/or assistance concerning national law is an essential and constant aspect of the professional activity. In that case the host State can make the choice.

93. This derogation in respect of professions providing advice has the same wording as the corresponding provision in Directive 89/48. Consequently, it would appear logical to refer to the history of this provision in relation to Directive 89/48.

94. In this regard it should be pointed out that the Commission proposal made no provision for either the aptitude test as an adaptation instrument or the derogation in respect of professions providing legal advice. It was discussions in the Council and parallel discussion amongst the legal professions which gave rise to this rule. [18]

95. Although the Commission considered that this extension of the system was inconsistent with the basic philosophy of the directive, [19] which consists in mutual trust in the quality of education and training, it was accepted because of concerns on the part of the Member States. The spirit and purpose of this system is to give the Member States an opportunity to establish whether the applicant has the knowledge of national law required to pursue the relevant profession since, on account of the different national legal systems, it is not possible to assume as readily as it is in the case of other professions that a person from one Member State who is qualified for a profession will also be able to pursue his profession successfully in another Member State.

96. Consequently, a special rule governing certain professions, which derogates from the idea underlying the directive, namely the basic comparability of academic qualifications, was adopted by the introduction of this provision.

97. A further aspect of the history militates in favour of a broad interpretation of the derogation. During the second reading, the European Parliament sought to amend the common position of the Council in so far as it wished to limit the condition relating to knowledge of national law to legal professions in the narrow sense. [20] However, the Council did not incorporate this amendment proposed by the Parliament.

98. On the other hand, the fact that it is not an equivalent alternative but a derogation militates in favour of a strict interpretation of the provision.

18 — See, to that effect, Schneider (cited in footnote 7), p. 195.

19 — See, to that effect, Schneider (cited in footnote 7), p. 197.

20 — Decision concerning the common position of the Council on a proposal from the Commission with a view to adoption of a directive on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (OJ 1988 C 309, p. 44).

99. Therefore, in the light of the foregoing, it is not sufficient for some kind of legal knowledge to be required for the pursuit of the relevant profession. Similarly, it will not be sufficient for knowledge to be required only in a few, very limited, legal fields. Otherwise almost all business activities would be covered by the derogation and that cannot have been the intention of the Community legislature. Nor can it be decisive that a particular system of liability applies to the profession concerned.

100. Therefore, overall, a strict test must be applied as regards the scope and depth or thoroughness of knowledge. This concerns both the required legal knowledge itself and the amount of advice and/or assistance involved in the activity.

101. When Directive 89/48 was implemented, all the Member States exercised their choice in respect of the legal professions and opted for the aptitude test as an adaptation instrument. This may be explained by the fact that this alternative is the more stringent of the two possible adaptation instruments and makes it more difficult for an applicant to take up the relevant profession in the host State.

102. Therefore, in view of the general tenor of Directive 92/51, this derogation laid down in the third subparagraph of Article 4(1)(b) should not be interpreted too broadly.

103. Finally, it should be noted that Article 4 of Directive 92/51 must, as a provision of secondary law, be interpreted in the light of superior law. This includes general legal principles in addition to the relevant fundamental freedom. On that point, particular note should be taken of the requirements of the principle of proportionality which the Member States have to satisfy both when implementing Directive 92/51 and applying national provisions. Consequently, these provisions of superior law may give rise to additional restrictions which further limit the Member States' freedom of action.

C — *The legally relevant features of voluntary sales of chattels by public auction in France*

104. The conduct of voluntary sales of chattels by public auction is governed in France by Articles L. 321-1 to L. 321-4, L. 321-8 and L. 321-9 of the Code de commerce.

105. Those provisions govern only voluntary sales of chattels by public auction and do not apply to judicial sales, defined as being sales of chattels by public auction required by law or judicial decision, which remain the monopoly of judicial auctioneers ('commissaires priseurs judiciaires').

106. Voluntary sales of chattels by public auction cover only second-hand goods or new goods resulting directly from the seller's production, if the seller is neither trader nor artisan and where the goods are sold retail or in lots.

107. Such voluntary sales are as a rule carried out by companies having commercial form whose objects are limited to the valuation of movable property, and to the organisation and conduct of voluntary sales of chattels by public auction. Such companies act as agents for the owners of the property. They are not empowered to buy or sell directly or indirectly for their own account movable goods put up for sale by public auction. That prohibition applies also to the directors, members and employees of the company.

108. Such companies may carry on their business only after obtaining the Authority's approval and must lodge sufficient guarantees concerning their organisation, their technical and financial means, and the trustworthiness and experience of their directors as well as the appropriate provisions for ensuring security of transactions for their clients. They are obliged to appoint an auditor and a deputy auditor.

109. They must also have among their directors, their members and their employees at least one person with the qualification required to conduct a sale or having a diploma or an authorisation recognised as equivalent in that respect, in the circumstances defined by decree in the Conseil d'État (Article L. 321-8 of the Code de commerce). Criminal sanctions are provided for by Article L. 321-15 of the Code de commerce to ensure compliance with certain provisions, particularly those relating to approval and the qualification requirement.

D — *Profession of director of voluntary sales of chattels by public auction*

110. A Member State may apply the derogation laid down in the third subparagraph of Article 4(1)(b) of Directive 89/48 or Directive 92/51, that is to say retain the right to choose between an adaption period and an aptitude test, only where the pursuit of the profession concerned requires precise knowledge of national law and the provision

of advice and/or assistance concerning national law is an essential and constant aspect of the professional activity. Therefore, below it is necessary to examine whether the profession of director of voluntary sales of chattels by public auction satisfies these conditions.

1. Requirements relating to knowledge

111. As regards the activity of director of voluntary sales of chattels by public auction, it is clear from the provisions of French law that the valuation of the relevant goods for auction includes the organisation and conduct of the auction. In this respect the director acts as agent for the owner of the goods to be auctioned.

112. It could be concluded from this description of the activity that the director of voluntary public auctions must have knowledge of French law relating to sales of chattels by public auction since he carries out and conducts the auction and that he must, as agent for the owner of the goods for auction, also provide the owner with legal advice.

113. However, these conclusions are based only on one possible interpretation of the relevant provisions of the French Code de commerce which is by no means binding. The German Handelsgesetzbuch (Commercial Code), for example, contains provisions on the activity of an auctioneer similar to those of the French Code de commerce, but in Germany this is not a profession providing legal advice.

114. Therefore, to define the activity of director of voluntary sales of chattels by public auction, it is also necessary to apply other provisions relating to the pursuit of this profession, for example those rules which govern the education and training for director of voluntary sales of chattels by public auction in France.

115. The objective of the education and training for a profession is essentially to prepare for practice of that profession. Consequently, the content of the profession can normally be inferred from the content of the education and training, and vice versa. Therefore, in the present case, it will be necessary to consider whether an essential part of education and training for the profession of director of voluntary sales of chattels by public auction consists of legal education and training.

116. Education and training for directors of voluntary sales of chattels by public auction is governed by Decree No 2001-650 and an order. As was stated in the legal appraisal of the first question, education and training pursuant to Article 16 of the decree consists of a university section and a training period. The university section in turn encompasses a diploma in law and a second course of at least two years.

117. The content of the examination for access to the traineeship is laid down in Articles 4 and 5 of the order. This encompasses a law examination and an art examination both lasting four hours. The annex to the order lists the subjects which form the subject-matter of the law examination. To be precise, they are civil law, commercial law and the law relating to voluntary sales of chattels by public auction.

118. Under Article 21 et seq. of the decree, the training itself consists of a practical and a theoretical section. In that respect the practical section must be completed with a company which conducts voluntary public auctions or a judicial auctioneer.

119. It is clear from all these provisions that a large part of the education and training for director of voluntary sales of chattels by public auction consists in legal education and training, namely the diploma in law, the content of the examination for access to the traineeship and the training itself. It follows therefore that the pursuit of this profession in France requires a precise knowledge of French law.

2. The activity

120. It is clear from the wording of the third subparagraph of Article 4(1)(b) of Directive 92/51 that the decisive factor is the activity of providing legal advice and not whether the profession concerned constitutes a legal profession in the narrow sense.

121. Had the Community legislator intended all *legal* professions to be covered, a more general wording would have been used when drawing up the directive such as, for example, legal professions which require a precise knowledge of national law. That would have to hold true a fortiori if the intention had been to include *all* professions the pursuit of which requires knowledge of law.

122. In order to assess whether the profession of director of voluntary public auctions

is caught by the third subparagraph of Article 4(1)(b) of Directive 92/51, it is therefore necessary to establish what proportion of the overall activity is taken up by the provision of legal advice or assistance.

123. Even if a comparison with other Member States' systems showed that the comparable profession encompassed little or no legal activity, that would not militate against classification of the relevant profession in France.

124. This follows firstly from the history of this profession, that is to say what it developed from. The profession 'commissaire priseur' has its origin in the period following the French Revolution. This historical development explains why — unlike in other countries — this profession in France is governed by specific rules and inter alia requires a precise knowledge of French law and encompasses activity providing legal advice.

125. As a result of infringement proceedings concerning this profession's monopoly on the conduct of auctions in France, which were brought against France by the Commission, the profession of 'commissaire priseur' was split into the professions of 'commissaire priseur judiciaire' and director of voluntary sales of chattels by public auction. Accordingly, the latter conducts voluntary sales of chattels by public auction. Judicial sales, on the other hand, which are defined as being sales of chattels by public auction required by law or judicial decision, remain the monopoly of judicial auctioneers ('commissaires priseurs judiciaires'). The French system is indeed more than just a historical remnant. That fact is demonstrated by the duties still associated therewith which will be examined below.

126. However, it should first be noted that the fact of being subject to rules of the profession and the associated (disciplinary) responsibility is not sufficient. A high level of expert knowledge and the associated advice is likewise not sufficient. Nor is mere knowledge of the law and compliance therewith, in particular as regards civil law. What is required instead is that relevant advice constitutes part of the professional activity.

127. The Court files show that the director of voluntary sales of chattels by public auction provides both sides, that is to say the seller and the buyer, with advice and assistance. In particular, he has to explain the legal situation regarding the protection of

cultural goods. The seller must also be informed of possible legal problems concerning the origin of the goods. Information must also be provided on intellectual property, tax law, in particular turnover tax, and insurance law in connection with the transportation of goods.

128. In connection with auction the director has to explain the legal issues associated with the State's right to apprehend, to organise a sale in the event of failure to pay on the part of the highest bidder, and to draw up a record of the auction having legal effect.

129. The predominance of the legal part of the activity is reflected in the fact that Article 56 of Law No 71-1130 of 31 December 1971 [21] treats this profession in the same way as legal professions.

130. Consequently, the complaint that France classified the profession of director of voluntary sales of chattels by public auction as 'providing legal advice' contrary to Community law during the implementation of the directive and that therefore this derogation has been misused would appear to be exaggerated. [22]

131. First, it is necessary to recall the actual purpose of these directives. The purpose of the directives on the recognition of diplomas is not — unlike in the case of certain sectoral directives — to harmonise Member States' law on regulating professions but rather to ensure the mutual recognition of diplomas. Certain conditions are clearly attached to such recognition where education and training differs from Member State to Member State and this fact has an effect on the pursuit of the profession in the relevant host Member State. At the same time this ensures that the particular features of the legal system of the relevant Member State, which — as in France in the present case — often have a significant historical and cultural background, are preserved. Since the directives give each Member State the right to determine the activities which form part of a profession, it would be contrary to the objective of the directives to compare the profession of director of voluntary sales of chattels by public auction with similar professions in other Member States to create

21 — JORF of 5 January 1972, p. 131.

22 — See Jacques Pertek, 'Free movement of professionals and recognition of higher-education diplomas', *Yearbook of European Law*, Vol. 12 (1992), p. 293 (320).

a single profession of auctioneer under Community law by which the corresponding professions in the Member States are to be measured.

132. The French system concerning the profession of director of voluntary sales of chattels by public auction at issue in these proceedings has developed historically and legally as a specific, independent part of French law on professions and must be accepted as such.

E — *Interim conclusion*

133. Therefore, the answer to the second question must be that pursuant to national law applicable in the main proceedings the profession of director of voluntary sales of chattels by public auction must be classified as a profession providing legal advice for the purposes of the first subparagraph of Article 4(1)(b) of Directive 92/51.

VI — Conclusion

134. In the light of those considerations, I propose that the Court should answer the national court's questions as follows:

(1) Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive

89/48/EEC is to be interpreted as being applicable to the activity of director of voluntary sales of chattels by public auction under French law only if

— the profession is not regulated in the United Kingdom and the applicant fulfils the conditions laid down in subparagraph (b) of the first paragraph of Article 3 of the directive, or

— a diploma as defined in this directive is required for the profession in the United Kingdom.

It is for the national court to decide whether these conditions are fulfilled in the main proceedings.

(2) Pursuant to national law applicable in the main proceedings the profession of director of voluntary sales of chattels by public auction must be classified as a profession providing legal advice for the purposes of the first subparagraph of Article 4(1)(b) of Directive 92/51.