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The Recognition of Diplomas within the Internal Market

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With the step by step realisation of the internal market, the professional mobility of EU citizens has also increased. Due to this development, the recognition of professional qualifications has earned greater and greater importance. As a result, a regime for recognition of diplomas within the European Community has been gradually brought into practice. The EU Member States have, in addition, created autonomously or through international conventions rules for the recognition of diplomas. These national systems for the recognition of diplomas are differently organised, but are closely related to one another.

In this light, the occupational recognition of diplomas in European Community law is described in the following. In connection therewith, the recognition of academic titles and degrees is dealt with according to international law and the national law of the Member States. Building upon these comments, the interplay between occupational and academic recognition of qualifications will be elucidated. Short concluding remarks will then wrap up this discussion.

I. Occupational Recognition of Diplomas under European Community Law

The *fundamental freedoms* of the internal market relating to persons, namely, the freedom of movement of workers (Articles 39 et seq. EC Treaty), the freedom of establishment (Articles 43 et seq.) and the (active and passive) freedom to provide services (Articles 49 et seq. EC Treaty), guarantee to all EU citizens in the entire EU territory the right to become commercially active and to pursue an occupation. Moreover, EU citizens undertaking activities in another Member State are in principle bound by the same legal provisions which apply to the nationals of that host Member State, but may not be treated worse than the nationals of the receiving Member State

(*principle of non-discrimination* or alternatively, the *principle of equal treatment*).¹ In addition, all of the legal provisions of each Member State which restrict, prevent or make the exercise of one of the fundamental freedoms (relating to persons) less attractive are, in principle, forbidden (*prohibition against restrictions*).² Restrictions are only permitted if they are not employed in a discriminating way, correspond to compelling grounds of public interest, are the appropriate means to reach the desired objective and do not exceed what is absolutely necessary to achieve its objective.³ Restrictions whose consequences are too uncertain or too indirect do not fall under the prohibition (*sufficient causal connection* or “*Spürbarkeit*”).⁴

To the extent that a Community-wide harmonisation of occupation law is lacking, the Member States can, in compliance with the given boundaries under the fundamental freedoms relating to persons, regulate the entry into and the practice of commercial activities within its sovereign territory.⁵ In doing so, they may define the necessary abilities and knowledge and can require the presentation of a diploma which certifies this knowledge and ability.⁶

In this context, regulated professions must be distinguished from non-regulated professions. The term *regulated professions* covers those professions where the admission thereto or the practice thereof are directly or indirectly provided for in legal and/or administrative provisions.⁷ The admission to and practice of a profession are *directly* legally regulated if the provisions of a Member State expressly reserve the activities

¹ ECJ 30 November 1995 – C-55/94 – *Gebhard*, para. 36.

² ECJ 31 March 1993 – C-19/92 – *Kraus*, para. 32; ECJ 15 December 1995 – C-415/93 – *Bosman*, para. 96.

³ ECJ (*supra* note 1), para. 37; ECJ 4 July 2000 – C-424/97 – *Haim II*, para. 57; ECJ 1 February 2001 – C-108/96 – *Mac Quen et al.*, para. 26.

⁴ ECJ 27 January 2000 – C-190/98 – *Graf*, para. 25.

⁵ ECJ 29 October 1998 – Joined Cases C-193/97 and C-194/97 – *De Castro Freitas and Escallier*, para. 23; ECJ 3 October 2000 – C-58/98 – *Corsten*, para. 31.

⁶ ECJ 15 October 1987 – 222/86 – *Heylens*, para. 10; ECJ 7 May 1991 – C-340/89 – *Vlassopoulou*, para. 9.

⁷ ECJ 1 February 1996 – C-164/94 – *Aranitis*, para. 18.

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concerned for persons who fulfil specific criteria and simultaneously prohibit persons who do not fulfil these criteria from performing these activities.⁸ The admission and practice of a profession are then *indirectly* legally regulated if the legal and administrative provisions of a Member State lead as a “side effect” to the professional activities concerned being restricted to those persons fulfilling certain prerequisites.⁹ In contrast, a profession is *not regulated* if according to the legal provisions, the admission to and practice thereof do not presume the possession of specific qualifications.¹⁰

The occupational rules of Member States can however hinder those EU citizens, who have acquired their professional qualifications in a Member State other than the one in which they want to practice, from exercising the fundamental freedoms guaranteed to them by the EC Treaty. This can even occur if these rules are employed in a non-discriminatory way, particularly in relation to the respective qualification prerequisites. For instance, this can be the case if domestic provisions of the relevant Member State do not take into consideration the knowledge and abilities which the person concerned has acquired in another Member State.¹¹ In order to dismantle these obstacles, a series of directives have been enacted which are particularly aimed at the mutual recognition of diplomas, certificates and other evidence of formal qualifications. In addition, the ECJ has inferred from the fundamental freedoms (relating to persons) that the Member States are under the duty to examine the knowledge and abilities which an EU citizen has acquired in another Member State, on the basis of their equivalence with the knowledge and abilities prescribed by domestic law.

The recognition of diplomas according to European Community law is however, only effective in cases where the applicant is entitled to rely on the *European Community law*. It does not apply to purely internal case scenarios which have no association whatsoever with any of the scenarios provided for under Community law and which do not involve any transnational elements.¹² Nationals of a Member State who have legitimately resided in the sovereign territory of another Member State and acquired occupational qualifications there, find themselves, however, in a comparable situation vis-à-vis their home State to that of an EU foreigner, in order that they may also enjoy the rights and freedoms guaranteed by the EC Treaty.¹³ If Community law is not applicable, the Member States are not prevented from employing the relevant rules of recognition anyway; they are, however, not obliged to do so.

⁸ Ibid., para. 19. According to this definition, the terms of a collective bargaining agreement can also be considered as “legal and administrative provisions” if they control the admission to and practice of a profession in general; ECJ 8 July 1999 – C-234/97 – *Fernández de Bobadilla*, para. 20 et seq.

⁹ ECJ 15 January 1998 – C-15/96 – *Schöning-Kougebetopoulou*, para. 12.

¹⁰ ECJ (*supra* note 7), para. 23.

¹¹ ECJ – *Vlassopoulou* (*supra* note 6), para. 15.

¹² ECJ 2 July 1998 – Joined Cases C-225/95, C-226/95 and C-227/95 – *Kapasakalis et al.*, para. 22.

¹³ ECJ 7 February 1979 – 115/78 – *Knoors*, para. 17; ECJ 6 October 1981 – 246/80 – *Broekmeulen*, para. 27; ECJ 3 October 1990 – C-61/89 – *Bouchoucha*, para. 11; ECJ – *Kraus* (*supra* note 2), para. 32.

1. Legal Bases

According to established ECJ case-law, the central elements of the free movement of workers (Article 39(2) EC Treaty), the freedom of establishment (Article 43(2) EC Treaty) and the freedom to provide services (Article 50(2) EC Treaty) contain the principle that each Member State must take into account all qualifications gained in another Member State for the undertaking of commercial activities within its sovereign territory.¹⁴ This basic rule results from the principle of non-discrimination or (from now on) the prohibition against restrictions which has developed direct effect since the expiry of the transition period on 1 January 1970.¹⁵

At the same time, Articles 47 and 55 EC Treaty in conjunction with Articles 47 and 40 EC Treaty grants the EU the power to enact provisions aimed at facilitating the entering into and practice of independent and dependent employment. This includes directives for the co-ordination of the statutory and administrative provisions of Member States on the entering into and practice of gainful employment (*coordinating directives*) as well as directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications (*recognition directives*).

For some of these activities, particularly in the health care area, coordinating and recognition directives have been enacted. This *vertical (sectoral) system* applies to the following professions: doctors,¹⁶ dentists,¹⁷ veterinarians,¹⁸ pharmacists,¹⁹ midwives²⁰ as well as nurses.²¹

This should be distinguished from the *horizontal system* which obliges the Member States to mutually recognise diplomas without correlating the types of education and the occupation law in the Member States. This system is laid down in two directives from 1989²² and 1992.²³ These directives are supplemented by a third directive from 1999²⁴ which covers

¹⁴ ECJ 14 September 2000 – C-238/98 – *Hocsmán*, para. 24.

¹⁵ Cf. e.g. *Streinz*, *Europarecht*, 4th ed., Heidelberg (D), 1999, para. 705.

¹⁶ Council Directive 93/16, OJ 1993 L 165, at 1, as printed in OJ 1999 L 39, at 25.

¹⁷ Council Directive 78/686, OJ 1978 L 233, at 1, as printed in OJ 1994 L 1, at 371; Council Directive 78/687, OJ 1978 L 233, at 10, as printed in OJ 1994 L 1, at 371.

¹⁸ Council Directive 78/1026, OJ 1978 L 362, at 1, as printed in OJ 1994 L 1, at 371; Council Directive 78/1027, OJ 1978 L 362, at 7, as printed in OJ 1989 L 341, at 19.

¹⁹ Council Directive 85/432, OJ 1985 L 253, at 34; Council Directive 85/433, OJ 1985 L 253, at 37, as printed in OJ 1994 L 1, at 371.

²⁰ Council Directive 80/154, OJ 1980 L 33, at 1, as printed in OJ 1994 L 1, at 371; Council Directive 80/155, OJ 1980 L 33, at 8, as printed in OJ 1989 L 341, at 19.

²¹ Council Directive 77/452, OJ 1977 L 176, at 1, as printed in OJ 1994 L 1, at 371; Council Directive 77/453, OJ 1980 L 33, at 8, as printed in OJ 1989 L 341, at 30.

²² Council Directive 89/48/EEC of 21 December 1988 on the general system for the recognition of higher-education diplomas awarded on the completion of professional education and training of at least three years' duration, OJ 1989 L 19, at 16.

²³ 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, OJ 1992 L 209, at 25, as printed in OJ 2000 L 54 at 42.

²⁴ Directive 1999/42/EC of the European Parliament and of the Council of 7 June 1999 establishing a mechanism for the recognition of qualifications in respect of the professional activities covered by the Direc-

above all the activities contained in the so-called transition and liberalisation directives.²⁵

Moreover, special provisions exist for two occupations. A recognition directive²⁶ was enacted for *architects*. This directive neither correlates the occupation law in the individual Member States nor does it contain mandatory requirements regarding training. It does however prescribe minimum prerequisites for the recognition of diplomas.²⁷ The directive for *lawyers* concerning the providing of services²⁸ as well as the established practice of law as an independent or dependent worker²⁹ does not provide for either a standard correlation of occupation laws or standard requirements for the occupational training.³⁰

2. Substance

Although the recognition of diplomas according to EU law is subject to different material *requirements*, it must still be differentiated between the vertical system, the horizontal system and the special provisions on the one hand, and the test of material equivalence under primary law on the other hand. In all cases, the relevant rules are only then applicable if the applicant EU citizen demands admittance to a specific occupation, wants to perform a specific professional activity or engages in other acts which are directed at a later performance of commercial activities and are closely related to these activities (*recognition for occupational purposes*).³¹

The concept "diploma" refers to the sum of all diplomas, certificates and other evidence of formal qualifications including whatever necessary professional experience proving that the person concerned fulfils the professional prerequisites which are necessary for the admission into a (regulated) profession or the practice thereof in a Member State ("*end product conception*").³² Although this conception originates from the horizontal system, it is also transferable to the vertical system and in principle also to the test of equivalence according to primary law. The test of equal value requires, according to established ECJ case-law, that the person seeking admission has gained "the diplomas, certificates and other evidence of

formal qualifications (...) in order to exercise the same profession in another Member State".³³ In its more recent case-law, the ECJ appears however to deviate from this stance if it finds that the responsible public body in the host Member State has considered not just for regulated professions but has also in general considered all the abilities and knowledge acquired by the applicant and has compared them to the abilities and knowledge required by the host Member State.³⁴

The *relationship* between the various *systems* is determined via the following specific rule: the directive on the horizontal system does not apply to (regulated) professions which are the subject of the single directive on the vertical system.³⁵ Scenarios which are not encompassed by any of the recognition directives are subject to the material test of equivalence under primary law.³⁶

a) Automatic and compulsory mutual recognition in the vertical system

The vertical system is based on a Community wide correlation of professional training, admission and practice rules. At the same time, a mandatory minimum standard is laid down for all Member States. Diplomas which are granted in consideration of these minimum standards must be "automatically and compulsorily" recognised.³⁷ In addition, the Member States are prohibited from demanding from the beneficiaries the fulfilment of other conditions which are not laid down in the relevant directive.³⁸ The recognition is therefore restricted to a *purely formal examination* which must be undertaken on application.

This type of recognition applies only however to diplomas which have been awarded by a Member State. ("*Community diplomas*").³⁹ Diplomas which are awarded in a non-Member State ("*non-EC diplomas*") are not encompassed by the vertical system even if they are recognised in one or more Member States as equivalent.⁴⁰

b) Principle of trust and the mechanism for compensation in the horizontal system

The horizontal system is based on the assumption that training courses which allow the practice of a particular (regulated) profession in a Member State are largely comparable, i.e. are in principle of equal standing (*principle of mutual trust*). This approach leads to EU citizens, who are entitled to

tives on liberalisation and transitional measures and supplementing the general systems for the recognition of qualifications, OJ 1999 L 201, at 77.

²⁵ Cf. hereon *Séché*, *Berufsausübung im Gemeinsamen Markt*, 2nd ed., Luxembourg (L), 1992, at 19 et seq.

²⁶ Council Directive 85/384, OJ 1985 L 223, at 15, as printed in OJ 1994 L 1, at 371.

²⁷ Cf. ECJ 21 January 1992 – C-310/90 – *Egle*, para. 7.

²⁸ Council Directive 77/249, OJ 1977 L 78, at 17, as printed in OJ 1994 L 1, at 371.

²⁹ Council Directive 98/5, OJ 1998 L 77, at 36.

³⁰ Cf. ECJ 7 November 2000 – C-168/98 – *Luxembourg v Parliament and Council; Eilmansberger*, Die Niederlassungsrichtlinie für Rechtsanwälte und ihre Umsetzung in Österreich, AnwBl. 2000, at 318 et seq.; *Lach*, Die Möglichkeiten der Niederlassung europäischer Rechtsanwälte in Deutschland, NJW 2000, at 1609 et seq.; *Salvemini*, La direttiva sulla libertà di stabilimento degli Avvocati, Riv. it. dir. pubbl. com. 1999, at 809 et seq.

³¹ This includes e.g. an application for insertion in an employment register; cf. ECJ (*supra* note 7), para. 32.

³² E.g. Article 1, lit. a Council Directive 89/48. Cf. *Görlitz*, Gemeinschaftsrechtliche Diplomanerkennungspflichten und Zugang zum deutschen Vorbereitungsdienst, EuR 2000, at 836 et seq.

³³ ECJ – *Vlassopoulou* (*supra* note 6), para. 16.

³⁴ ECJ – *Fernández de Bobadilla* (*supra* note 8), paras. 28 et seq. Cf. *Görlitz* (*supra* note 32), at 846 et seq.

³⁵ Article 2(2) Council Directive 89/48; Article 2(2) Council Directive 92/51; Article 1(1) Council Directive 99/42.

³⁶ ECJ (*supra* note 14), para. 34.

³⁷ ECJ 14 September 2000 – C-16/99 – *Erpelding*, para. 23 et seq.

³⁸ ECJ (*supra* note 14), para. 33.

³⁹ "Community diplomas" also include diplomas granted in the EFTA-States of the EEA in accordance with Annex VII (mutual recognition of professional qualifications) in the EEA Agreement, OJ 1994 L 1, at 1, as printed in OJ 2001 L 7, at 3.

⁴⁰ E.g. Article 23(5) Council Directive 93/16. Cf. ECJ 9 February 1994 – C-319/92 – *Haim I*, para. 21; ECJ 9 February 1994 – C-154/93 – *Tavil-Albertini*, para. 12 et seq.

practice a particular (regulated) profession in their home State, also being entitled to the admission to and practice of this profession in a host Member State. For this reason, the host Member State must recognise the diploma awarded in the home State. If the profession in the home State is not regulated, i.e. is open in respect of its access and practice, the guarantee of a certain level of knowledge inherent to a regulated profession is replaced by evidence of professional experience over a minimum period of time or alternatively by any prescribed regulated training.⁴¹

The host Member State may *examine the substance* of the qualifications of the applicant for their congruence with its own criteria for that profession. If considerable differences arise in terms of the duration or contents of the training or if the activities of the (regulated) profession are different in each State, the host Member State may require an appropriate compensation according to its own *compensation mechanism*. A different duration of training may be made up for through professional experience; a divergence in the content of the training or a difference in the activities assigned to the (regulated) profession may be balanced out via an aptitude test or an adaptation period. Professional experience on the one hand, and an aptitude test or adaptation period on the other hand, may not be cumulative; the choice between an adaptation period or an aptitude test is in principle left to the applicant.⁴²

The rules of the horizontal system are then employed if the training evidenced by the diploma is entirely ("*Community diploma*") or mostly undertaken in the Community ("*Community diploma with foreign aspect*").⁴³ They are however, also applicable to (purely) *foreign diplomas* if these have been recognised as equivalent by a EU Member State and the holder of this diploma can prove professional experience in that Member State of a particular duration.⁴⁴

c) Automatic and compulsory recognition in the context of the special provisions

Although the recognition of diplomas must, in the context of the special provisions, follow automatically and compulsorily, certain (additional) requirements are however necessary for recognition. In relation to architects, only those diplomas which correspond to the minimum qualitative and quantitative requirements of the directive can be recognised; such diplomas entitle the holder to commence and undertake activities which are commonly performed by architects in the host Member State.⁴⁵ In relation to lawyers, an actual and regular position of at least three years in the host Member State under

the original professional title and practising the law of the host Member State including Community law is required in order to be directly admitted to the professional title of the host Member State; resort to compensatory mechanisms is then not necessary.⁴⁶

d) Material test of equivalence under primary law

If the directive is not applicable, every Member State according to the established case law of the ECJ must under primary law "take into consideration the diplomas, certificates and other evidence of formal qualifications which the person concerned has acquired in order to exercise the same profession in another Member State by making a comparison between the specialised knowledge and abilities certified by those diplomas and the knowledge and abilities required by the national rules" ("*Vlassopoulou formula*").⁴⁷ This applies both to regulated and non-regulated professions.⁴⁸ The examination process must enable the public authorities of the host Member State to establish objectively whether the knowledge and abilities attested to by the diploma in question is the same or at least equivalent to those required under domestic law.⁴⁹ The judgment of equivalence must ensue solely according to the extent of knowledge and ability attributable by the diploma to its holder, having taken into account the type and duration of the post-secondary course and the associated practical training.⁵⁰ Objective differences in terms of the legal context of the profession in question in its home State as well as the professional activities can be taken into account. If the comparative examination leads to the conclusion that the required and the attested abilities and knowledge correspond to each other, then the Member State is obligated to recognise that the foreign diploma fulfils the required conditions.⁵¹ If the examination shows that they correspond only partly, then the host Member State may require proof that the applicant has acquired the knowledge and abilities which are lacking.⁵²

3. Beneficiaries

Included among the beneficiaries are in the first instance, the EU citizens in the exercise their fundamental freedoms. Likewise, the *citizens of non-Member States* and *stateless persons* are entitled to exercise the derived rights granted to them as family members of an EU citizen who exercises the freedom of movement of workers;⁵³ the same applies – according

⁴¹ Article 3, lit. b Council Directive 89/48; Article 3, lit. b and Article 4(1), lit. b Council Directive 92/51; in relation to regulated vocational training and education see Annex C of Council Directive 92/51.

⁴² Article 4 Council Directive 89/48; Article 4 Council Directive 92/51; Article 4 Council Directive 99/42.

⁴³ Article 1, lit. a, subpara. 2 Council Directive 89/48; Article 1, lit. a, subpara. 2 and Article 1, lit. b, subpara. 2 Council Directive 92/51.

⁴⁴ Article 1, lit. a, subpara. 1 Council Directive 89/48; Article 1, lit. a, subpara. 1 and Article 1, lit. b, subpara. 2 Council Directive 92/51.

⁴⁵ ECJ 23 November 2000 – C-421/98 – *Commission v Spain*, para. 37.

⁴⁶ Article 10 Council Directive 98/5.

⁴⁷ ECJ – *Vlassopoulou* (*supra* note 6), para. 16.

⁴⁸ ECJ – *Fernández de Bobadilla* (*supra* note 8), paras. 28 et seq.

⁴⁹ ECJ – *Heylens* (*supra* note 6), paras. 12 et seq.; ECJ *Vlassopoulou* (*supra* note 6), para. 17; ECJ 7 May 1992 – C-104/91 – *Borrell*, para. 12.

⁵⁰ ECJ – *Heylens* (*supra* note 6), para. 13.

⁵¹ ECJ – *Borrell* (*supra* note 49), para. 14.

⁵² ECJ – *Vlassopoulou* (*supra* note 6), para. 19; ECJ – *Borrell* (*supra* note 49), para. 14; ECJ – *Fernández de Bobadilla* (*supra* note 8), paras. 32 and 33.

⁵³ Article 11 Council Regulation (EEC) No. 1612/68 on freedom of movement for workers within the Community, OJ 1968 L 257, at 2, as printed in OJ 1992 L 245, at 1. Cf. ECJ 7 May 1986 – 131/85 – *Gül*, paras. 18, 20, 29; ECJ 7 July 1992 – C-370/90 – *Singh*, para. 25.

to the principle of structural congruence of fundamental freedoms in the internal market – to family members of an EU citizen who exercises the freedom of establishment.⁵⁴

4. Procedure

In the context of the *vertical system*, the relevant public authorities of the host Member State may exclusively examine whether the diploma is covered by a recognition directive; they may neither compare the content of the training nor require additional qualification as preconditions (*formal examination*). In the horizontal system, they are authorised to examine the duration and content of the training taken as well as the activities of the regulated profession in the home state and to compare these to their own domestic conditions. In cases of considerable difference, compensation in some form may be required. In some cases, the host Member State is actually obliged to recognise a submitted diploma without further compensating conditions where a sufficient duration of professional experience has been proved.⁵⁵

The procedure must be concluded as swift as possible, but may not take longer than three months (under the vertical system) or four months (under the horizontal system) as of the date the documents were submitted in full.⁵⁶ If compensatory measures must be taken, the four month period is extended according to the duration required for fulfilment of the compensatory measure. The decision – whether positive or negative – must be given with reasons and must be domestically open to judicial appeal.⁵⁷

Under the *special provisions*, the same procedure applies to *architects* as in the vertical system.⁵⁸ For *lawyers*, there are no prescribed procedural periods. The decision on the application for admission into the profession must be given with reasons and must be domestically subject to judicial appeal.⁵⁹

In terms of the *material test of equivalence* under primary law, the relevant domestic public authority must compare the substance of the abilities and knowledge acquired and proven by the applicant with the abilities and knowledge required under national law. If the host Member State has not created a general procedure for recognition for this or if its general procedure for this does not correspond to the Community law requirements, then the employer must undertake this examination itself.⁶⁰ This also applies to private employers.⁶¹ Each

decision in such cases must be judicially reviewed for its legitimacy in terms of Community law and it must be possible for the applicant to be informed of the reasons referred to in the decision concerning his or her case.⁶²

5. Legal consequences

The host Member State must ensure that a diploma, which is recognised as equivalent, is treated in the same way as the respective diploma awarded by the host Member State in terms of admission to and practice of professional activities.⁶³ Beneficiaries who have received recognition under one of the directives, are entitled to carry the *professional title* of the host Member State and any of its characteristic abbreviations in the language of the host Member State.⁶⁴ They do not however, have the right to use the *academic title* normally awarded for that training in the host Member State, but may carry the legitimate academic title of their home state and any abbreviations in the language of this state. The host Member State can prescribe that next to this title, the name and place of the institution or examination committee which granted the academic title concerned, be specified.⁶⁵

II. Academic Recognition of Titles and Degrees under International Law and under the Domestic Laws of the Member States

The *mobility of the EU citizen* can also be further facilitated by the recognition of educational qualifications particularly in the area of higher education. The organisation of educational institutions and the education policies fall, as was previously the case, within the jurisdiction of the Member States.⁶⁶ They can independently determine the structures, the prerequisites and the contents of their respective education systems with the exception of the Community law minimum requirements in the vertical system. Accordingly, the Member States are also free to determine the legal consequences of their diplomas.⁶⁷

The states of Europe have concluded a series of international agreements on the mutual *recognition of qualifications* with the aim of promoting mobility at the higher education level.⁶⁸ In satisfaction of these international law obligations, but also partly independent thereof, the individual EU Mem-

⁵⁴ ECJ 10 March 1993 – C-111/91 – *Commission v Luxembourg*, para. 17; ECJ 8 June 1999 – C-337/97 – *Meeusen*, paras. 27 et seq.

⁵⁵ This applies to the occupations listed in Title III of Council Directive 99/42.

⁵⁶ Cf. e.g. Article 15(1) of Council Directive 93/16 or Article 10(1) of Council Directive 77/452; Article 8(1) of Council Directive 89/48; Article 12(1) of Council Directive 92/51.

⁵⁷ Cf. ECJ – *Heylens* (*supra* note 6), para. 17; Article 8(2), sentence 2 Council Directive 89/48; Article 12(2), sentence 2 Council Directive 92/51; Article 3(2) Council Directive 99/42.

⁵⁸ Articles 20(2) and 27(1) Council Directive 85/384.

⁵⁹ Article 10(3), subpara. 2 Council Directive 98/5.

⁶⁰ Cf. ECJ – *Fernández de Bobadilla* (*supra* note 8), para. 34.

⁶¹ Cf. ECJ 6 June 2000 – C-281/98 – *Angonese*, para. 36. Cf. *Obwexer*, ECJ: Neue Pflichten für Unionsbürger, EWS 9/2000, Die Erste Seite; *Streinz/Leible*, Die unmittelbare Drittwirkung der Grundfreiheiten, EuZW 2000, at 459 et seq.; *Grigolli*, Free Movement of Workers versus

Protection of Minorities, EuLF 2000/01 (E), at 170 et seq.

⁶² Cf. ECJ – *Heylens* (*supra* note 6), para. 17.

⁶³ E.g. in relation to medical doctors, Article 4 and Article 6 Council Directive 93/16; cf. ECJ – *Broekmeulen* (*supra* note 13), para. 25; Article 3 Council Directive 89/48; Article 3 Council Directive 92/51; Articles 3 and 4 Council Directive 99/42.

⁶⁴ In relation to the vertical system, cf. e.g. Article 19 Council Directive 93/16 and Article 17 Council Directive 78/686; in relation to the horizontal system cf. Article 7(1) and (3) Council Directive 89/48 and Article 11(1) and (3) Council Directive 92/51.

⁶⁵ E.g. Articles 38 and 39 Council Directive 93/16; Article 7(2) Council Directive 89/48; Article 11(2) Council Directive 92/51.

⁶⁶ Cf. ECJ 13 February 1985 – 293/83 – *Gravier*, para. 19; ECJ 30 May 1989 – 242/87 – *Erasmus*, para. 31.

⁶⁷ Cf. CFI 11 February 1992 – T-16/90 – *Panagiotopoulou*, para. 46.

⁶⁸ Cf. *Driscchel*, Die internationalen Abkommen über Gleichwertigkeiten, Vienna (A), 1992, at 10.

ber States have laid down prerequisites and procedures in its legal system for the recognition of foreign qualifications. This type of recognition is aimed at many completely different qualifications ranging from course certificates, course diplomas, university diplomas to (academic) titles and degrees. This “academic recognition” includes on the one hand the recognition of foreign (academic) qualifications for the purposes of admission to or continuation of studies in the host Member State and on the other hand, the recognition of studies completed abroad for the purpose of attributing to it the same position as the corresponding domestic (academic) qualification in the host Member State.⁶⁹

In the above context, only the second aspect is of importance, namely, the (academic) studies completed abroad and the consequent qualification which lead to the conferring of the corresponding domestic qualification in the host Member State (hereinafter referred to as the *title and degree*). Depending on the legal situation in the host Member State, academic recognition can also enable admission to a (regulated) profession. This is the case if the corresponding domestic title and degree of the host Member State itself enables the access to regulated professional activities.⁷⁰ Even if academic recognition is not connected with any admission to a profession, the right to hold a domestic title or degree can still be worth striving for.⁷¹ The same applies to the possibility of being allowed to hold a foreign title or degree.

1. Legal bases

In terms of the *international law legal bases*, it must be differentiated between multilateral conventions and bilateral agreements. Agreements aimed at the recognition of titles and degrees in the field of higher education exist between the EU Member States themselves as well as between EU Member States and non-Member States.

The *multilateral conventions* standardise common general principles and basic conditions according to which the recognition procedure must be carried out and which must be adhered to in the determination of equivalence.⁷² These include in particular the European Convention on the Academic Recognition of University Qualifications of 15 December 1959 (*European Equivalence Convention*),⁷³ the Convention on the Recognition of Studies, Diplomas and Degrees concerning Higher Education in the States belonging to the Europe Region of 21 December 1979 (*European Recognition Convention*)⁷⁴ and the Convention on the Recognition of Qualifications concerning Higher Education in the European Union of

11 April 1997 (*Lisbon Recognition Convention*).⁷⁵ The last convention should step by step replace the earlier conventions and accommodate the changed relations in the area of higher education.⁷⁶

Alongside the multilateral conventions, there are a series of *bilateral conventions*.⁷⁷ Some of these conventions implement the multilateral conventions in greater detail,⁷⁸ others exist independently from them.⁷⁹ Many bilateral conventions lay down *ex ante* the equivalence between particular titles and degrees and obligate the parties to recognise mutually the respective titles and degrees without any material examination. These include in particular the Exchange of Grades between the governments of the Austrian Republic and the Italian Republic based on Article 10 of the Culture Agreement Austria-Italy⁸⁰ on the Mutual Recognition of Academic Degrees and Titles last amended on 28 January 1999 (*Grade Exchange Austria-Italy*).⁸¹

The international agreements on academic recognition do not affect the education systems of the Contracting States and their regulations for the admission and practice of professions. They focus neither on a coordination nor on a harmonisation of education and occupation law; rather, they create solely the connection between two independent systems by opening up the possibility of mutual recognition of comparable qualifications.

In most of the *EU Member States*, the academic recognition of titles and degrees is regulated under *higher education law*: in Austria in § 70 of the Federal Act on University Studies (“Universitäts-Studiengesetz”, hereinafter “UniStG”),⁸² in Germany in § 20 of the Higher Education Act of 9 April 1987 (“Hochschulrahmengesetzes”, hereinafter “HRG”)⁸³ and the corresponding statutory provisions of the Bundesländer (German federal states), in Italy under Article 170 in conjunction with Article 332 of the Royal Decree of 31 August 1933, No. 1592.⁸⁴

⁷⁵ ÖBGBL. III No. 71/1999.

⁷⁶ Cf. explanatory report on the Lisbon Recognition Convention in: *Kasparovsky*, *Akademische Anerkennung multilateral*, Vienna (A), 1999, at 36. The Lisbon Recognition Convention was ratified by 21 States at the end of February 2001; of these 21 States, only 3 were Members of the EU, namely Austria, France and Luxembourg. The current ratification status can be obtained from the homepage of the EU Council at <http://conventions.coe.int>.

⁷⁷ Cf. e.g. the bilateral agreement of the Republic of Austria in: *Kasparovsky*, *Akademische Anerkennung bilateral*, Vienna (A), 1999, at 1 et seq.

⁷⁸ E.g. Agreement between the Republic of Austria and the Portuguese Republic on Equivalence at University Level of 4 April 1984, öBGBL. No. 328/1985.

⁷⁹ E.g. Agreement between the Republic of Austria and the Italian Republic to promote the cultural relationship between the two countries of 14 March 1952 (Cultural Agreement Austria-Italy), öBGBL. No. 270/1954.

⁸⁰ See *ibid.*

⁸¹ ÖBGBL. III No. 45/2001; Ordinary Supplement No. 183/L to the Official Gazette of the Italian Republic of 8 November 2000, No. 261.

⁸² ÖBGBL. I No. 48/1997, as printed in öBGBL. I No. 167/1999.

⁸³ BGBl. I, at 1170, as printed in BGBl. I, at 2190.

⁸⁴ Ordinary Supplement to the Official Gazette of the Italian Republic of 7 December 1933, No. 283.

⁶⁹ The term “akademische Anerkennung”, i.e. academic recognition in German, is not completely accurate because the German term is not restricted only to titles and degrees at the university level. Cf. *Wasmeier*, *Aktuelle Fragen im Zusammenhang mit der Anerkennung von Berufsschlüssen*, *EuZW* 1999, at 746 et seq. (748).

⁷⁰ Cf. *ibid.*, at 746, 749.

⁷¹ Cf. Communication from the Commission on the academic and professional recognition of higher education and specialist diplomas, COM (94)596 final of 13 December 1994, at 2.

⁷² Cf. *Drischel* (*supra* note 68), at 11.

⁷³ ÖBGBL. No. 143/1961.

⁷⁴ ÖBGBL. No. 244/1986.

In addition, the EU Member States have in accordance with their own constitutional rules incorporated into their domestic laws the international agreements which apply to them. They have also enacted domestic legislation to the extent necessary for the fulfilment of these international obligations.⁸⁵

2. Content

The objective of academic recognition is the *examination* and (if applicable) the determination of the *equivalence* of a foreign qualification with the corresponding education in the host Member State in the form of a title, degree or diploma and with the domestic qualification granted on the basis of this education. The determination of equivalence results from a comparative examination of a series of elements of the foreign qualification, for instance the nature and type of educational institution, the prerequisites for access to the education, duration and content of the education, the educational methods as well as the overall result of the education.

The examination of equivalence is subject to different *material requirements*. In most cases, particularly according to the relevant international agreements, it does not depend on the equality of the academic title and degree, but rather on the comparability. The States party to these international agreements (i.e. the Contracting States) presume that foreign educational courses can in principle be considered equal to those in the host State.⁸⁶ This principle of trust leads to the situation that in the context of the international agreements, a strict examination of the equality is disregarded and recognition is only allowed to be refused in cases of considerable differences between the qualifications.⁸⁷

The academic titles and degrees must however, correspond to certain *prerequisites*. In principle, they must be titles and degrees which are completed in their entirety in one of the Contracting States and granted there. On the other hand, titles and degrees which are acquired in a third State and recognised in a Contracting State are not encompassed.⁸⁸ This applies particularly in the context of the bilateral agreements which contain the so-called determinations of equivalence.⁸⁹ In contrast, some international agreements also provide for academic titles and degrees which are only predominantly acquired in the home State; however, this is subject to the proviso that the final qualification is awarded in the home State.⁹⁰ A small

number of agreements even provide that titles and degrees, which are acquired in their entirety in a non-party State, can fall within the field of application of the recognition rules established in the agreement. This is the case however only if they are recognised by one of the States party to the agreement.⁹¹

The determination or alternatively the declaration of equivalence means that the foreign academic title or degree is given a status equal to the corresponding domestic title or degree, and the foreign diploma is recognised as a diploma from domestic studies.⁹²

a) Recognition based on the equivalence test

For academic recognition via the equivalence test, the State in which recognition is sought compares the foreign title and degree in substance with its own requirements (*material test*). In doing so, the State must observe its obligations under international law agreements. The multilateral conventions contain in this respect legal definitions for terms like "higher education qualification" and "recognition"⁹³ and principles of procedure law like observance of appropriate time periods and refusal of recognition only in cases of substantial differences.⁹⁴ The clear tendency here is to defer the material comparison in favour of the procedural provisions.⁹⁵

There is no obligation to recognise a title or degree if equivalence is lacking. This may occur either because the difference between the standards of the institution granting the qualification and that of the comparable domestic institution is too large, or because the duration and content of the education and the educational methods are too different.⁹⁶

b) Recognition based on given determinations of equivalence

In bilateral agreements, it is common for determinations of equivalence for certain titles and degrees to be fixed.⁹⁷ In this way, the States party to the agreement have already carried out the examination of equivalence during the negotiations for the relevant agreement and recorded these results.⁹⁸ Usually, the agreements contain their own lists of corresponding titles and degrees from the States party to the agreement.

In such a case, it is only necessary to examine whether the foreign title or degree was acquired and granted in the State conferring the title or degree and whether it counts as one of those titles and degrees which are already *ex ante* considered

⁸⁵ In Italy, e.g. Act No. 322 of 10 October 2000 on the ratification and implementation of the exchange of grades between the governments of the Italian Republic and the Republic of Austria concerning the mutual recognition of academic degrees and titles including a list of equivalent academic degrees and titles, signed in Vienna on 28 January 1999, Ordinary Supplement No. 183/L to the Official Gazette of the Italian Republic of 8 November 2000, No. 261.

⁸⁶ Cf. *Drischel* (*supra* note 68), at 14 et seq.

⁸⁷ Cf. Art VI.1 Lisbon Recognition Convention (1997). Special attention has thus moved from an exact comparison of the course curriculum and the lists of course materials to a thorough comparison of the qualification acquired. Cf. Explanatory Report in: *Kasparovsky* (*supra* note 76), at 40.

⁸⁸ Cf. e.g. Point 9(2) Grade Exchange Austria-Italy (1999).

⁸⁹ Cf. e.g. Article 1 Agreement between the Republic of Austria and the Federal Republic of Germany on the Recognition of Equivalence in higher Education including an Exchange of Grades, 19 January 1983, öBGBL. No. 368/1983.

⁹⁰ E.g. Article 2 Agreement between the Republic of Austria and the State

of Spain on equivalence at university level including appendix, 21 January 1983, öBGBL. No. 17/1990.

⁹¹ Article 7(2) European Recognition Agreement (1979).

⁹² Cf. § 70 UniStG.

⁹³ Cf. Sections I and III Lisbon Recognition Convention (1997); Article 1 European Equivalence Convention (1959); Article 1 European Recognition Convention (1979).

⁹⁴ Cf. Articles III.5 and VI.1 Lisbon Recognition Convention (1997).

⁹⁵ Cf. Explanatory Report in: *Kasparovsky* (*supra* note 76), at 40.

⁹⁶ Article VI.1 Lisbon Recognition Convention (1997).

⁹⁷ For how a bilateral agreement functions cf. *Drischel* (*supra* note 68), at 12 et seq.

⁹⁸ Cf. e.g. Grade Exchange Austria-Italy (1999).

equivalent to domestic titles and degrees (*formal test*). If this is the case, the recognition is mandatory and – comparable to the vertical system in Community law – must be effected automatically. Only if additional criteria for the determination of equivalence, i.e. *supplementary tests*, are allowed for in the agreement, then their fulfilment may be demanded.⁹⁹

c) Supplementary rules

In some agreements, the prerequisites for academic recognition are supplemented by provisions on the bearing of foreign academic titles and degrees which are not classified as equivalent. According to these rules, the holder of such a title or degree is entitled to bear the title or degree in the same form as he or she is entitled according to the applicable legal provisions of the State in which the relevant title or degree was granted. This is mostly, however, subject to specification of the name of the institution granting the title or degree.¹⁰⁰ If such rules do not exist, the holder of a foreign title or degree may only bear the title or degree in the host State then when he or she has satisfied the domestic requirements and (if applicable) has received the respective authorisation.¹⁰¹

3. Beneficiaries

The beneficiaries of the *international agreements* on the recognition of academic qualifications are firstly the *citizens of the States party* to the respective agreements. Citizens of third States and stateless persons can also be similarly benefited.¹⁰² This is often the case with multilateral agreements which are focused on the nature of the qualification, but seldom so with bilateral agreements.¹⁰³

The recognition rules of the Member States are mostly geared towards the holding of a foreign title or degree. As a result, all holders of such a qualification may rely on the relevant rules.¹⁰⁴

The academic recognition may be applied for and received independent of whether or not the applicant intends to obtain access to or to carry on any professional activities. As a result,

the beneficiaries are those who hold citizenship of a certain State and are able to present an appropriate title or degree, or alternatively, those who simply hold a particular title or degree.

4. Procedure

Responsibility for the recognition procedure lies either with the universities which are empowered to grant academic titles and degrees, or the (central or regional) *public authority* which is responsible for the enforcement of bilateral or multilateral agreements or alternatively, responsible for the application of the national legal provisions in this respect.

If an *ex ante* established equivalence between certain titles and degrees does not exist, the responsible authorities must carry out a *material equivalence test*. In contrast, if the beneficiary can rely on given determinations of equivalence, the authorities must only formally examine whether the presented title or degree falls within one of these given determinations and whether the applicant is one of the intended beneficiaries of the agreement.

The procedure is generally aligned to the national administrative rules. In addition, the basic principles of proper procedure are to be observed. These principles include those resulting from international agreement, for example: the principle of non-discrimination, the existence of transparency in the procedural criteria, the observance of appropriate time periods or deadlines, the obligation to give reasons for a judgment refusing recognition and access to judicial appeal against a judgement.¹⁰⁵ If the international agreements contain provisions which may be directly applied (i.e. without additional implementing domestic legislation) and which entail additional procedural provisions, then the responsible authorities must apply these directly.¹⁰⁶

5. Legal effects

Academic recognition entitles the holder in the host State to all rights which are associated with the possession of the respective domestic title or degree according to the applicable legal provisions (*effectus civilis*).¹⁰⁷ This includes in particular, the right to bear the corresponding domestic academic title or degree according to the legal provisions of the State in which recognition is granted and the exercise of any professional rights connected with the title or degree.¹⁰⁸ The academic recognition can thus (indirectly) enable admission to and the practising of a (regulated) *profession* if this consequence is linked to the corresponding domestic degree.¹⁰⁹

If a foreign title for which recognition is sought opens up admission to a certain profession in the home State, but the

⁹⁹ E.g. point 6 of the Grade Exchange Austria-Italy (1999).

¹⁰⁰ E.g. Article 3(2), lit. b European Equivalence Convention (1959); Article 4 Agreement between the Republic of Austria and the Federal Republic of Germany on the Recognition of Equivalence in higher Education including an Exchange of Grades, 19 January 1983, öBGBL No. 368/1983.

¹⁰¹ This applies, for an example, in the Federal Republic of Germany under the Act on the bearing of academic degrees of 7 June 1939 ("Gesetz über die Führung akademischer Grade"), RGBl. I, at 985; see hereon ECJ 31 March 1993 (*supra* note 2), paras. 3 and 4. Cf. Article 88 Bavarian Higher Education Act as printed in the Promulgation of 2 October 1998 ("Bayerisches Hochschulgesetz"), GVBl., at 740, as printed on 25 July 2000, GVBl., at 481.

¹⁰² Cf. e.g. Article III.1 Lisbon Recognition Convention (1997); Article 3(2) European Equivalence Convention (1959).

¹⁰³ Cf. Article 4 of the Agreement between the Republic of Austria and the Kingdom of the Netherlands on the Recognition of Equivalents in the area of Higher Education including an Exchange of Grades, 21 October 1985, öBGBL No. 662/1986. The Grade Exchange Austria-Italy (1999) only benefits the citizens of the two party States (Point 9(1)).

¹⁰⁴ E.g. for Austria § 70 UniStG; for Germany § 20 HRG; for Italy Article 170 in conjunction with Article 332 of the Royal Decree No. 1592/1933.

¹⁰⁵ Cf. Article III.1 et seq. Lisbon Recognition Convention (1997).

¹⁰⁶ Cf. Point 8(1) and (2) Grade Exchange Austria-Italy (1999), which provides for a process period of four months after lodgement of the complete application documents.

¹⁰⁷ Cf. *Drischel* (*supra* note 68), at 9.

¹⁰⁸ Cf. Article VI.3 Lisbon Recognition Convention (1997).

¹⁰⁹ Cf. for the indirect nature of this consequence, see the Explanatory Report in: *Kasparovsky* (*supra* note 76), at 36, 70 et seq.

equivalent domestic academic degree or title does not allow such access in the State in which recognition is sought, then the legal effect of professional admission is not carried over to the State in which academic recognition is sought.¹¹⁰

III. Interplay between Professional and Academic Recognition of Qualifications

Still, academic recognition falls within the jurisdiction of the Member States as part of the area of education and educational policies.¹¹¹ The Member States are accordingly authorised to lay down the material prerequisites and procedural requirements for the recognition of academic titles and degrees. They must however, exercise their powers in this area in accordance with Community law.¹¹² As a result, academic recognition is not removed from Community law, but rather must be organised and applied in accordance with Community law. In this way, it must be differentiated between the following case scenarios:

If the academic recognition is applied for in order to exercise a particular (regulated) profession or if it represents an advantage to the applicant in terms of his or her admission to a profession or professional advancement (“*academic recognition for professional purposes*”),¹¹³ then the relevant provisions of the Member States must be compared with the fundamental freedoms relating to persons under Community law;¹¹⁴ and, if, in contrast, academic recognition is effected without direct or indirect reference to the practice of a particular (regulated) profession (“*purely academic recognition*”), then the Member States are bound to observe the general prohibition against discrimination on the grounds of nationality within the scope of the EC Treaty.

Consequently, the following *principles* arise from the *interplay* between professional and academic recognition of qualifications:

1. Academic recognition ensuing after professional recognition

If, under the Community law guaranteed recognition rules, a beneficiary has had his or her diploma, which was acquired in the home State, recognised as equivalent in the host State, then admission to and the practising of certain (regulated) professions in the host State is open to him or her. If the national law of the host State also allows for academic recognition of the corresponding title and degree, then the host State is obligated under Community law to leave this possibility open to the beneficiary. This obligation is subject to the additional proviso that *academic recognition* must confer more

extensive *advantages for the practising of the profession* than those conferred by mere professional recognition. The right to bear the academic title of the host State may, for an example, have ramifications on the attainable salary level of the beneficiary, or may be the decisive factor in terms of the professional advancement and (especially in the case of self-employed persons) public reputation of the beneficiary.

As a result, the host State may not refuse academic recognition to a beneficiary under Community law on the general ground that the applicant already has access to a certain (regulated) profession and is also allowed to practise this profession. To the extent that academic recognition in the host State is possible and the beneficiary has applied for it for professional purposes, then this additional path to professional recognition must according to Community law remain open to the applicant.

2. Professional recognition ensuing after academic recognition

If, under the international and domestic rules for academic recognition, the beneficiary has had his or her qualifications, which were acquired in another Member State, recognised in the host State, *two case scenarios* must be distinguished from another in terms of any subsequent professional recognition. The domestic rules for academic recognition include international obligations transposed into domestic law and domestic provisions enacted independent thereof.

If academic recognition has entitled the beneficiary to *admission* to a specific *profession* in the host State (“*effectus civilis*”), then he or she may not, in relation to the admission to this same profession, subsequently also apply for professional recognition of his or her diploma under Community law. The recognition rules under Community law (implicitly) presume that the applicant, because of his or her foreign diploma, has no access to a certain (regulated) profession in the host State.

If, in contrast, the academic recognition does *not* allow for *access to a profession*, then the holder of the diploma may rely on the Community law’s recognition rules so that he or she can in this way gain admission to a certain (regulated) profession in the host State.

3. Relationship between professional and academic recognition

If professional as well as academic recognition of qualifications acquired in another Member State are available to the beneficiary, then he or she may decide which of the two options are more advantageous to him or her and which option he or she chooses to exercise (*freedom of choice*).

It is prohibited under Community law for the Member States to require from a beneficiary that his or her qualifications are also examined for equivalence under the rules for academic recognition, if he or she has relied on the Community law recognition rules applicable to his or her actual case.¹¹⁵

¹¹⁰ Cf. point 14 of the Grade Exchange Austria-Italy (1999). The Grade Exchange for the Agreement between the Republic of Austria and the Federal Republic of Germany on the Recognition of Equivalents in the area of Higher Education of 19 January 1983, öBGBI. No. 368/1983, even explicitly excludes the “*effectus civilis*” in Point 3.

¹¹¹ ECJ – *Gravier* (*supra* note 66), para. 19.

¹¹² Cf. most recently ECJ – *Corsten* (*supra* note 5), para. 31.

¹¹³ On this concept, cf. *Wasmeier* (*supra* note 69), at 746, 749.

¹¹⁴ Cf. ECJ – *Kraus* (*supra* note 2), para. 18.

¹¹⁵ ECJ – *Fernández de Bobadilla* (*supra* note 8), para. 27. Cf. *Wasmeier* (*supra* note 69), at 746, 748.

IV. Concluding Remarks

A special recognition regime applies to the recognition of professional qualifications in the internal market of the EU. This regime is based on several vertical and horizontal Directives and is supplemented by the general principles derived from the (person related) fundamental freedoms guaranteed by primary law. Although the Community law recognition regime covers the field and is to a large extent standardised, it only sets minimum requirements, which the respective host State must observe. The relevant rules are profession orientated and are therefore only applicable if the applicant seeks access to a particular (regulated) profession or wants to undertake certain (regulated) professional activities. The Community law recognition regime is therefore based on the professional recognition of diplomas.

In addition, rules on the *academic recognition of titles and degrees* apply in the individual Member States; these rules do not fall under Community jurisdiction, but can under certain

circumstances become relevant to the internal market. This is then particularly the case if the pertinent rules facilitate the exercise of the person related fundamental freedoms in the internal market beyond that provided for in the minimum provisions of the Community law recognition regime (academic recognition for professional purposes). If this is the case, the academic recognition rules applying in the Member States must be measured against the prohibition against restrictions on the fundamental freedoms.

The *interplay* between the professional recognition under Community law and the academic recognition for professional purposes is however, very complex. It is therefore anything but simple for beneficiaries to recognise and exercise the rights which are granted to them within the internal market framework. The responsible public authorities of the Member States are also confronted with the difficult task of applying the rules which are laid down in various legal systems and which are also based on different principles.

INTERNATIONAL AND EUROPEAN COMMERCIAL AND COMPANY LAW

(EC) Directive 2000/35 on Combating Late Payments in Commercial Transactions

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I. Introductory remarks

1. Subject of the Directive and reasons for Community law involvement

With Directive 2000/35/EC the Community has for the first time dealt with a central field of civil law without "hiding" behind the argument of consumer protection.¹ With this Directive to combat late payment in commercial transactions, the Community legislator has recognised the necessity, after a protracted period of time in which the main attention in the process of legal harmonisation seems to have been directed at consumer protection, of dealing with problems relating to the activities of commercial enterprises and, in particular, of small and medium-sized enterprises (SMEs).

Such involvement has actually been demanded for some time now: in its resolution of the integrated programme for SMEs,² the European Parliament in 1994 urged the Commis-

sion to submit proposals for treatment of the problem of late payment. In view of the fact that excessively protracted payment deadlines and late payments have caused major administrative and financial burdens for SMEs in particular, and that such problems are among the main causes of insolvencies³ and have resulted in the loss of jobs,⁴ the realisation has matured, according to the Parliament's resolution, to remedy this phenomenon.

However, taking the needs of enterprise into consideration could not by itself justify intervention by the European legislator. The latter felt prompted to emphasise what a negative effect the difference between payment regulations and practices in the Member States had on competition and transborder transactions and what a serious threat it therefore constituted for the success of the internal market.⁵ Accordingly, Article 14 EC Treaty was used as the basis for intervention, according to which enterprises are supposed to be in a position to engage in trade under conditions guaranteeing that transborder transactions do not involve greater risks than domestic ones.⁶

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¹ On this comment see also *Schmidt-Kessel*, Zahlungsverzug im Handelsverkehr – ein neuer Richtlinienentwurf, JZ 1998, at 1135.

² OJ 1994 C 323, at 19. This factor is also emphasised by *Krebs*, Die EU-Richtlinie zur Bekämpfung des Zahlungsverzugs im Geschäftsverkehr – Eine Chance zur Korrektur des neuen § 284 Abs. 3 BGB, DB 2000, at 1697. The Directive was preceded by a Proposal for a Directive from 23 April 1998; see hereon *Freitag*, Ein Europäisches Verzugsrecht für den Mittelstand?, EuZW 1998, at 559 et seq.; *Gsell*, Der EU-Richtlinienentwurf zur Bekämpfung von Zahlungsverzug im Handelsverkehr, ZIP 1998, at 1569 et seq.; *Kieninger*, Der Richtlinienentwurf der Europäischen Kommission zur Bekämpfung des Zahlungsverzugs im Handelsverkehr, WM 1998, at 2213 et seq.; *Wägenbaur*, Zahlungsverzug im Handelsverkehr: Rechtsangleichung in Bruchstücken?, EuZW 1998, at 417.

³ One quarter of all insolvencies can be attributed to delays in payment in commercial transactions.

⁴ Recital (7).

⁵ Recital (5).

⁶ Recital (10).