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REGULATION OF PROFESSIONALS IN THE EUROPEAN COMMUNITY

BETTY BLANCO* AND SUSAN DOLAN**

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I. INTRODUCTION

The main purpose of The Treaty of Rome of 1957¹ (the "Treaty") is to provide for unified growth and development of the economies of the Member States. The Treaty also envisages a common market that, in an economic sense, is a single market encompassing various politically separate and independent state territories where the economic forces of supply and demand are unified without national restrictions.²

In the European Community (the "EC"), considerable efforts have been made to assess the overall macroeconomic implications of the manufacturing and extractive industries.³ However, there have been relatively few studies of the service or information industries.⁴ The importance of the service industry, particularly the

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1. Treaty Establishing the European Economic Community, [EEC Treaty] art. 2., 298 U.N.T.S. 3.

2. *Id.*

3. Kenneth Button & Michael Fleming, *The Changing Regulatory Regime Confronting the Professions in Europe*, 37 ANTITRUST BULL. 429 (1992).

4. *Id.* at 430.

profession's sector, cannot be understated due to its impact on long-term economic development in the EC.⁵

In an integrated internal market, the right of establishment and the freedom to provide services for professionals is essential for ensuring the mobility of economic forces.⁶ Commercial, as well as financial enterprises need to be able to conduct their operations freely in the Community in order to provide for economies of scale and to promote the development of enterprises which will be better able to compete in the global marketplace.⁷

For this reason, the Treaty provides for the right of establishment⁸ and the freedom to provide services.⁹ The principle Articles that grant these rights are Article 52¹⁰ and Article 59.¹¹ Article 52 provides:

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be progressively abolished in the course of the transitional period. Such progressive abolition shall also apply to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of [the second paragraph of] Article 58, under the conditions laid down [for its own nationals] by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

Article 59 provides:

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a

5. See George A. Bermann ET AL., CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW, 584 (1993).

6. See Dominik Lasok, *The Professions in the European Community: The Treaty Framework*, 29 COLUM. J. TRANSNAT'L L. 41 (1991)(discussing the importance of these rights in the EEC).

7. BERMANN, *supra* note 5, at 542.

8. EEC TREATY art. 52.

9. EEC TREATY art. 59.

10. EEC TREATY art. 52.

11. EEC TREATY art. 59.

State of the Community other than that of the person for whom the services are intended.

The Council may, acting by a qualified majority on a proposal from the Commission, extend the provisions of this Chapter to nationals of a third country who provide services and who are established within the Community.

These two rights allow professionals, businessmen, and entrepreneurs to move freely within the community as well as to choose a location from which to conduct a business, practice, or profession.

Commentators frequently consider the right of establishment and the freedom to provide services as the right to conduct freely, commercial, financial, or professional activities throughout the Community, and find the line of demarcation between the two difficult to discern.¹² Others state that the differences between the two rights is one of degree rather than kind.¹³

Under the Treaty, the right of establishment is the right to situate oneself in another Member State for the purpose of performing a particular activity in that state. On the other hand, the freedom to provide services is the right to provide service in another Member State on a temporary or occasional basis without necessarily residing in the state.

The right of establishment and the freedom to provide services are not unlimited.¹⁴ There are express exceptions in Articles 55,¹⁵ 56,¹⁶ and 66¹⁷ of the Treaty, which may serve to limit these rights. In addition, there may be conditions which are imposed by a state on a particular trade or profession which may impede a professional from exercising these rights.¹⁸ These conditions are normally prescribed by state law or professional associations and usually relate to the education, training, and rules of professional conduct required for a particular job or profession.¹⁹

12. See BERMAN, *supra* note 5, at 543; see also P.S.R.F. MATHIJSEN, A GUIDE TO EUROPEAN COMMUNITY LAW, 147-48 (1990).

13. JOSEPHINE STEINER, TEXTBOOK ON EEC LAW, 205 (1992).

14. EEC TREATY arts. 55 and 66.

15. EEC TREATY art. 55.

16. EEC TREATY art. 56.

17. EEC TREATY art. 66.

18. See Case 96/85, Commission v. French Republic, 1986 E.C.R. 1475; see also Case 154/87 and 155/87, RSVZ v. Wolf, 1988 E.C.R. 3897.

19. See Case 143/87, Stanton v. Inasti, 1988 E.C.R. 3877, 3 C.M.L.R. 761 (1989).

The Treaty provisions relating to the right of establishment and freedom to provide services are general in nature, and provide only a framework for further legislation in the common market. The Treaty provisions are then amplified, transformed, and harmonized mainly through directives.²⁰ This legislative power remains with the legislative bodies of the Community institutions. However, when there is inaction on the part of these legislative bodies, the European Court of Justice (the "Court") may be called upon for decisive action.²¹

Member States have an express duty under the Treaty to take all appropriate measures to fulfill their obligation not to jeopardize the objectives of the Treaty or any actions taken by Community institutions.²² If a state fails to comply with its obligation under the Treaty, the Commission may bring enforcement proceedings against a state before the Court.²³

Primarily, this paper aims at examining the two freedoms that professionals presumably enjoy. It attempts to show the difficulties in the implementation of Community legislation as well as the failure of Member States to comply with the Treaty obligations relating to the right of establishment and the freedom to provide services. Furthermore, it examines past case law as well as recent cases in order to demonstrate how the Court has dealt with the difficulties relating to the mutual recognition of diplomas, professional qualifications, and free movement and establishment of professionals throughout the Member States.

II. CASE ANALYSIS

Decisions of the Court have greatly contributed to the attainment of freedom of establishment and freedom to supply services.²⁴ The Court has consistently emphasized the principles of non-discrimination and equality. It has steadily held that a Member State must accept the conditions imposed upon the provision of services in another Member State as equivalent to its own con-

20. EEC TREATY art. 189.

21. EEC TREATY art. 175.

22. EEC TREATY art. 5.

23. EEC TREATY art. 169.

24. Case 107/83, *Ordre des Avocats au Barreau de Paris v. Klopp*, 1984 E.C.R. 2971, 1 C.M.L.R. 99 (1985); Case 11/77, *Patrick v. Ministre des Affaires Culturelles*, 1977 E.C.R. 1199, 2 C.M.L.R. 523 (1977); Case 2/74, *Reyners v. Belgium*, 1974 E.C.R. 631, 2 C.M.L.R. 305 (1974).

ditions.²⁵ The following case analysis demonstrates how the Court has played an active role in the area of professionals by vindicating the rights of individuals granted by the Treaty.²⁶

In *Reyners*,²⁷ one of the first cases involving freedom of establishment, the Court held that Article 52²⁸ of the Treaty had a direct effect on Member States. Following this important decision, in the cases of *Patrick*²⁹ and *Thieffry v. Conseil de l'Ordre des Avocats de Paris*³⁰ the Court emphasized that qualifications obtained in one Member State but recognized by another must be acceptable in the latter as meeting entry conditions for the professions in question.

In *Reyners*,³¹ a Dutch national had successfully obtained a Belgian law diploma and the other credentials necessary to acquire the status of an avocat in Belgium. Because Belgian law required Belgian citizenship as a prerequisite for the status of an avocat, his application was denied.³² In holding that Article 52³³ of the Treaty had a direct effect upon Member States, the Court ruled that he could practice as an avocat in Belgium regardless of his citizenship.³⁴

In *Thieffry*,³⁵ a Belgian lawyer, holding a Belgian degree of doctor of laws and a diploma in French law, was recognized by the University of Paris I as having the equivalent of a law degree from a French university. Under this assumption, he obtained a qualifying certificate for the profession of advocat from the Institute of Judicial Studies of the University of Paris II.³⁶ However, the Paris Bar Council refused to register him for practical training at the bar on the ground that he submitted no evidence of having obtained

25. See, e.g., Case 13/76 *Dona v. Mantero*, 1976 E.C.R. 1333, 2 C.M.L.R. 578 (1976); Case 36/74 *Walgrave v. Association Union Cycliste Internationale*, 1974 E.C.R. 1405, 1 C.M.L.R. 320 (1975).

26. See generally Gregory Siskind, *Freedom of Movement for Lawyers in the New Europe*, 26 INT'L LAW. 899.

27. *Reyners*, 1974 E.C.R. 631.

28. EEC TREATY art. 52.

29. *Patrick*, 1977 E.C.R. 1199.

30. Case 71/76, *Thieffry v. Conseil de l'Ordre des Avocats a la Cour de Paris*, 1977 E.C.R. 765, 2 C.M.L.R. 373 (1977).

31. *Reyners*, 1974 E.C.R. at 633.

32. *Id.*

33. EEC TREATY art. 52.

34. *Reyners*, 1974 E.C.R. at 654-55.

35. *Thieffry*, 1977 E.C.R. at 767.

36. *Id.*

schooling equivalent to a French doctorate in law as required by a 1971 law governing certain French legal and judicial professions.³⁷ The Court found that even in the absence of any Community legislation,³⁸ the additional requirements of the prescribed national diploma constituted a restriction which was incompatible with the freedom of establishment guaranteed by Article 52³⁹ of the Treaty.⁴⁰ In the *Richard Hugh Patrick*⁴¹ case, a British holder of a diploma from the United Kingdom Architectural Association applied for authorization to practice as a architect in France, and was denied authorization. The Court, following *Reyners*,⁴² held that a Member State cannot make the exercise of the right of establishment subject to exceptional authorization when a national of another Member State fulfills the conditions laid down by the host state for its own nationals.⁴³

Nevertheless, in *Ministere v. Auer*,⁴⁴ the Court held that a qualification obtained in one Member State will not necessarily be automatically accepted by another unless it has been recognized by national legislation.

These cases illustrate the Court's desire to support individual rights guaranteed by the Treaty. However, the Court has consistently stressed the need for additional Community legislation in order to allow individuals to obtain remedies more easily and avoid the burdens of litigation.

Perhaps the best examples of the Court's active role in protecting the freedom of establishment for professions are the "lawyer" cases beginning with the landmark case of *Klopp*.⁴⁵

Mr. Klopp, a German national, obtained a doctorate from the University of Paris in 1969.⁴⁶ He passed the French bar examination in 1980, and sought to open a second law office in Paris, in-

37. *Id.*

38. *But see* Case 61/89, *Bouchoucha*, 1 C.M.L.R. 1033 (1992).

39. EEC TREATY art. 52.

40. *Thieffry*, 1977 E.C.R. at 780.

41. *Patrick*, 1977 E.C.R. at 1201.

42. *Reyners*, 1974 E.C.R. at 654-55.

43. *Patrick*, 1977 E.C.R. at 1206-7.

44. Case 136/78, *Ministere v. Auer*, 1979 E.C.R. 437, 2 C.M.L.R. 373 (1979) (holding that a French national with a diploma from the University of Parma could not rely on Directives 78/1026 and 78/1027 to practice as a veterinary in France for the period prior to the date on which the Directives were required to be implemented by the Member States).

45. *Klopp*, 1 C.M.L.R. 99 (1985).

46. *Id.* at 104-5.

tending to reside and practice in both Dusseldorf and Paris.⁴⁷ The Paris bar rules prohibited an avocat in Paris from establishing an office outside the territorial jurisdiction of the French Court for the Paris region.⁴⁸ The Court held that, even in the absence of any Directive coordinating national provisions governing access to the exercise of the legal profession, Article 52⁴⁹ of the Treaty prevents a Member State from denying to a national of another Member State the right to enter and exercise the legal profession solely on the ground that the individual maintains an office simultaneously in another Member State.⁵⁰

Likewise, in *Commision v. Germany*⁵¹ the Court narrowly construed the obligations of the directive and held that freedom to provide services is a fundamental right and that therefore restrictions on a lawyer's freedom to provide services are only justifiable if they are for the general good.⁵²

III. RECENT CASES BEFORE THE EUROPEAN COURT OF JUSTICE

A. *Ramrath v. Ministre de la Justice*⁵³

Background-

On February 11, 1985, Mr. Ramrath, a company auditor, was granted authorization to practice his profession in Luxembourg as required pursuant to the Luxembourg Act of June 28, 1984 (the "Act").⁵⁴ At that time, he was employed by Societe Civile Treuarbeit which has its registered office in Luxembourg and has authorization to practice auditing as a company in Luxembourg.

In 1988, The Institute des Reviseurs d'Entreprises (the "Institute") inquired further about Mr. Ramrath's employment. He noti-

47. *Id.*

48. *Id.*

49. EEC TREATY art. 52.

50. *Klopp* 1 C.M.L.R. at 114 (1985).

51. Case 427/85, *Commission v. Germany*, 1988 E.C.R. 1123, 2 C.M.L.R. 677 (1989).

52. *Contra* Case 292/86, *Gullung v. Conseils de l'Ordre des Avocats du Barreau de Colmar et de Saverne*, 1988 E.C.R. 111, 2 C.M.L.R. 57 (1989) (upholding a provision of the directive that subjects lawyers to the host State's rules of professional conduct as consistent with Article 52 of the Treaty).

53. Case 106/91, *Ramrath v. Ministre de la Justice*, 3 C.M.L.R. 173 (1992).

54. Memorial A, 1984 Memorial du Grand-Duche de Luxembourg 1345. Section 3 of the Act in part provides that:

"The statutory audit of the documents referred to by Section 1 can be carried out only by persons authorized by the Minister of Justice."

fied the Institute that he was employed by Treuarbeit Dusseldorf in the Federal Republic of Germany, and that his professional establishment was in Dusseldorf. The Institute then asked the Minister of Justice to verify whether there was sufficient justification to continue to allow Mr. Ramrath to practice the profession of company auditor in Luxembourg. In August of 1988, the Minister of Justice informed Mr. Ramrath of his intention to withdraw his authorization, even though Mr. Ramrath stated that his employer in Dusseldorf refrained from exerting any influence on his professional independence,⁵⁵ and even though Treuarbeit Luxembourg stated that Mr. Ramrath was in fact their employee during the time that he worked in Luxembourg.

On May 19, 1989, the Minister of Justice withdrew Mr. Ramrath's authorization to practice as a company auditor in Luxembourg on the grounds that he no longer had a "professional establishment" in Luxembourg within the meaning of the Act,⁵⁶ and secondly that he lacked the professional independence required under Section 6 of the Act.⁵⁷

Mr. Ramrath appealed this decision to the *Comite du Contentieux du Conseil d'Etat* (Contentious Proceedings Committee of the Council of State) contending that he was a victim of discrimination and that the Minister of Justice had incorrectly applied Section 3(1)(c) and Section 6 of the Act.⁵⁸ Since the *Comite du Contentieux du Conseil* found that Mr. Ramrath's appeal raised problems concerning the interpretation of Community law, it decided to refer the following question to the Court for a preliminary ruling:⁵⁹

- 1.(a) Do Article 52 et seq. or any other provisions of the Treaty and the implementing rules, permit the competent authori-

55. *Id.* Section 6 of the Act provides in part that:

The profession of company auditor shall be incompatible with any activity likely to affect the professional independence of a member of that profession.

56. *Id.* Section 3(1) of the Act provides:

In order to obtain authorization, legal persons must satisfy the following conditions:

(a) They must be nationals of a member state of the European Community. . .

(b) They must furnish proof of professional qualification and good repute. . .

(c) They must have a professional establishment in Luxembourg.

57. *Id.* at Section 6.

58. *Id.* at Section 3(1)(c) and Section 6.

59. EEC TREATY art. 177.

ties of a Member State to deem it incompatible with the exercise by a natural person in that Member State of the profession of auditor for that person to be established as an auditor in another Member State?

and if not,

- 1.(b) May a Member State impose, on a person authorized to carry on the profession of an auditor in another Member State in which that person also has a business establishment, requirements with regards to a permanent infrastructure for the performance of his work, minimum conditions with regard to actual presence in that Member State and the conditions necessary for ensuring compliance with the rules of professional conduct?
2. Do Article 52 et seq. EEC or any other provisions of the Treaty and the implementing rules, permit the competent authorities of a Member State to grant authorizations to act as auditors only to employees of a person so authorized under its national legislation, to the exclusion of employees of a person authorized under the legislation of another Member State?

Court's Judgment-

The Court began its analysis by stating that the questions referred to it by the Conseil d'Etat should be answered in light of the principles underlying articles 48,⁶⁰ 52,⁶¹ and 56⁶² of the Treaty.

The Court quickly dispensed with the first question presented by the Conseil d'Etat. The Court affirmed that according to the Treaty as well as settled case law,⁶³ a Member State is prevented from prohibiting a person from establishing himself in its territory and practicing as a company auditor on the ground that he is established and authorized as such in another Member State.

As to the second and third questions, the Court maintained that there was an issue as to whether an auditor, who intends to carry out company audits in another Member State, has the status of an employee, self-employed person, or supplier of services. How-

60. EEC TREATY art. 48.

61. EEC TREATY art. 52.

62. EEC TREATY art. 56.

63. See *Klopp*, 1984 E.C.R. 2971; see also *Stanton*, 1988 E.C.R. 3877; *Wolf*, 1988 E.C.R. 3897.

ever, the Court felt that this was a matter for the national court to decide if and when the need may arise.

The Court did, however, feel that it was necessary to analyze all the provisions of the Treaty concerning the freedom of movement of persons in order to ascertain whether they preclude conditions such as those laid down by the Act.⁶⁴

The Court noted that the Treaty provisions relating to freedom of establishment are intended to facilitate the pursuit by Community nationals of occupational activities of all kinds throughout the Community, and preclude national legislation which might place Community nationals at a disadvantage when they wish to extend their activities beyond the territory of a single Member State. However, it went on to state that when certain professional or business activities are at issue, the imposition of specific requirements by Member States may be justifiable and cannot be automatically regarded as incompatible with the Treaty.

In answering the second and third questions, the Court held that Article 48⁶⁵ and Article 59⁶⁶ of the Treaty do not preclude a Member State from subjecting an auditor to objective and necessary conditions pertaining to professional rules, a permanent infrastructure for the performance of work, actual presence in that Member State, and supervision of compliance with practical rules. Nonetheless, the Court held that a Member State is precluded from the aforementioned, when compliance with such rules and conditions is already assured through an auditor, whether a natural or a legal person, who is established and authorized in that Member State and who employs, for the duration of the work, the person who wishes to practice as a company auditor.

Accordingly, the Court found that because Mr. Ramrath was employed during his stay in Luxembourg by an authorized Luxembourg auditing firm, he was entitled to carry out the audits in Luxembourg in spite of his permanent establishment and employment in a German auditing firm. The Court then remanded the case to the *Comite du Contentieux du Conseil d'Etat* for a decision on the facts as well as the costs.

64. 1984 Memorial A 1345.

65. EEC TREATY art. 48.

66. EEC TREATY art. 59.

*B. RE Access to Medical Professions: EC Commission v. Luxembourg*⁶⁷

Background-

A Luxembourg statute (the "Act")⁶⁸ provides that a doctor, dentist, or veterinary surgeon could only have one surgery (office) with certain minor exceptions.⁶⁹ The relevant sections provide: Section 16 of the Act⁷⁰ is worded as follows: "A doctor or a dentist shall not have more than one surgery (office)." Pursuant to the same section:⁷¹

. . . a doctor or dentist established in Luxembourg may be authorized by the Minister of Health, on a report by the professional body for doctors, to have a second surgery in the country for periodic consultations, provided that the second surgery is located in a region where there is no doctor practicing the same discipline or no dentist, and provided that the medical cover in the region is insufficient.

Under Section 29 of the same Act:⁷²

"A veterinary surgeon may have only one place of establishment." Section 22(2) of the Act,⁷³ concerning veterinary medicine, allows the same exception to the single-practice rule for veterinary surgeons.

On April 19, 1989, the European Commission sent a letter to the Luxembourg authorities to question whether the single-practice rule in the Act⁷⁴ concerning doctors, dentists, and veterinary surgeons was compatible with Articles 48⁷⁵ and 52⁷⁶ of the Treaty.

The Luxembourg authorities did not respond to this letter. Therefore, on November 21, 1989, the European Commission delivered a reasoned opinion under Article 169⁷⁷ of the Treaty, asking the Luxembourg government to take the necessary measures in

67. Case 351/90, *RE Access to Medical Professions: EC Commission v. Luxembourg*, 3 C.M.L.R. 124 (1992).

68. Memorial A, 1983 Memorial du Grand-Duché de Luxembourg, 745.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. EEC TREATY art. 48.

76. EEC TREATY art. 52.

77. EEC TREATY art. 169.

order to fulfill its obligations within two months.

The Luxembourg government replied and contested the terms of the reasoned opinion of the Commission on the ground that the Act⁷⁸ was neither ambiguous nor discriminatory in relation to nationals of other Member States with an establishment in a Member State other than Luxembourg. Due to the intransigency of the Luxembourg government, the Commission brought the matter before the Court asking it to declare that the Grand Duchy of Luxembourg failed to fulfill its obligations under Article 48⁷⁹ and 52⁸⁰ of the Treaty.⁸¹

Court's Judgment-

The Court determined that the so-called "single-practice rule" for doctors, dentists, and veterinary surgeons has the effect of restricting the freedom of movement of workers and the right of establishment, rights which are guaranteed by Articles 48⁸² and 52⁸³ of the Treaty.

The Luxembourg government maintained that the single-practice rule is essential for the continuity of patient care. The Court determined that because Section 16 of the Act⁸⁴ permits an exception to the single-practice rule only in favor of persons practicing in Luxembourg, it was applied more strictly to doctors and dentists practicing in other Member States.

The Luxembourg government argued that the exception to the single-practice rule could be extended under special circumstances to persons established in other Member States by ministerial decision. The Court and the Advocate General, Francis Jacobs, strongly disagreed with this argument and stated that "the observance of the principles of equal treatment which find expression in Article 48 and 52 of the Treaty should not depend on the unilateral will of the national authorities."⁸⁵ Therefore the Court, relying on *EC Commission v. French Republic*,⁸⁶ held that the continued

78. 1983 Memorial A 745.

79. EEC TREATY art. 48.

80. EEC TREATY art. 52.

81. EEC TREATY art. 177.

82. EEC TREATY art. 48.

83. EEC TREATY art. 52.

84. 1983 Memorial A 745.

85. Case 351/90, 3 C.M.L.R., at 135.

86. *Commission v. French Republic*, 1986 E.C.R. 1475.

existence of Section 16 of the Act⁸⁷ gives rise to an ambiguous de facto situation by keeping the concerned individuals in a state of uncertainty with regard to their rights under Community law.

The Luxembourg government further argued that the single-practice rule was objectively justified on grounds of public health, public policy, and general interest, due to the inherently personal relationship between the practitioner and the patient. The Court refuted this argument by noting that there is no need for a practitioner or even a specialist to be continuously close to patients, and irrespectively, that the single-practice rule does not ensure that the same practitioner is available at all times. The Court emphasized that the continuity of patient care can be secured by less restrictive means, and that therefore, the single-practice rule is too absolute and too general to be justified. Consequently, the Court held that by preventing medical practitioners, dentists, and veterinary surgeons established in another Member State from establishing themselves or working as employed persons in Luxembourg while retaining their practice or employment in the other Member States, the Luxembourg authorities failed to fulfill its obligations under Articles 48⁸⁸ and 52⁸⁹ of the Treaty. The Court subsequently ordered the Luxembourg authorities to pay the Court costs.

IV. COMMENTARY

These two cases demonstrate how the Member States have historically been able to structure their market environment of professional services by practices that would be banned if engaged in by those providing commercial goods and services, i.e. the single-practice rule in *EC Commission v. Luxembourg*.⁹⁰

The privileged position accorded to the professions was a reflection of the view that competition in the professions would not provide socially beneficial results or serve the public interest. This view rested on the specialized and personal nature of the services provided. These services often affect the health, safety, and well-being of the general public. It was therefore necessary for the Member States to regulate the entry and standards of these professions and to ensure that all practitioners were adequately quali-

87. 1983 Memorial A 745.

88. EEC TREATY art. 48.

89. EEC TREATY art. 52.

90. *EC Commission v. Luxembourg*, 3 C.M.L.R. 124.

fied. However, as these cases demonstrate, the Court has been increasingly critical of these regulations and has begun to question whether these restraints on freedom of establishment are justified.

Nevertheless, although the *Ramrath*⁹¹ decision ultimately struck down the withdrawal of Mr. Ramrath's authorization to carry out audits in Luxembourg, the holding of the case is relatively narrow and limited. The Court upheld the authority of a Member State to subject an independent or self-employed auditor to objective and necessary conditions pertaining to professional rules of conduct, i.e. actual presence in the State.⁹² Therefore, Mr. Ramrath was entitled to carry out audits in Luxembourg only because he was officially employed by a auditing firm which was already authorized under the Luxembourg Act.⁹³

In sum, it appears from these two cases that the Court is willing to restrict the previous freedoms Member States enjoyed in the realm of the service professions to impose whatever restrictions they felt were necessary in those instances where the particular regulation or act is so restrictive on the freedom of establishment so as to entirely defeat the principles of the Treaty. Nevertheless, the Court appears to be reluctant to restrict the Member States to a great extent unless absolutely necessary for the vindication of individual rights. It has attempted to maintain an equitable balance between protecting individual rights and allowing the states to maintain some autonomy in the regulation of professions, especially when it's for the general benefit of their citizens.

V. MUTUAL RECOGNITION OF QUALIFICATIONS

The issue of mutual recognition of qualifications has been historically problematic.⁹⁴ Articles 48,⁹⁵ 57,⁹⁶ and 66⁹⁷ of the Treaty provided for legislation that would lead to the mutual recognition of diplomas, certificates, and other formal qualifications. However, Member States were not obliged to recognize professional quali-

91. *Ramrath*, 3 C.M.L.R. 173.

92. *See id.* at 194.

93. 1984 Memorial A 1345.

94. Button & Fleming, *supra* note 3, at 446.

95. EEC TREATY art. 48.

96. EEC TREATY art. 57(1) (providing for the basis of "mutual recognition" of professional qualifications).

97. EEC TREATY art. 66.

cations obtained in other Member States and often did not do so.⁹⁸ In fact, it took nearly twenty years for the first council directives on mutual recognition to emerge.⁹⁹

For many years, the Community authorities sought to deal with each of the professions individually; they adopted a "vertical" approach to the liberalization of professional activities. Under this system, it was mandatory to coordinate training requirements between all Member States, or to achieve harmonization. This meant that the Council had to adopt directives on the coordination of training requirements as well as directives on mutual recognition of professional qualifications for each profession. In one or two areas, this approach was moderately successful, but it required considerable time and progress was very slow.¹⁰⁰

By the early 1980's, it was decided that a new approach was necessary. The Commission responded with the June 1985 White Paper¹⁰¹ which proposed a general method to cover all professions where the rules had not yet been harmonized. This approach, borrowed from the sphere of the free movement of goods, consisted of mutual trust and recognition. It combines the following two elements: the "horizontal" approach and the adoption of the principle of mutual recognition rather than harmonization.¹⁰²

The horizontal approach means that instead of examining each of the professions one by one, the legislation scrutinizes professional qualifications across the board.

On December 21, 1988, the Council adopted a vitally important 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."¹⁰³ The purpose of the Directive¹⁰⁴ is to enable the nationals of the Member States

98. Button & Fleming, *supra* note 3, at 447.

99. *Id.*

100. See, e.g., Council Directive 75/362 and 75/363, 1975 O.J. (L 167) (on doctors); Council Directive 77/452 and 77/453, 1977 O.J. (L 176) (on nurses); Council Directive 78/686 and 78/687, 1978 O.J. (L 233) (on dentist); Council Directive 78/1026 and 78/1027, 1978 O.J. (L 362) (on veterinary surgeons).

101. See Council Directive 89/48, 1989 O.J. (L 19/16) (resulting in the Higher Education Directive).

102. Bryan Harris, *Freedom to Provide Professional Services*, NEW L.J. 164 (1989) (discussing the Mutual Recognition Directive).

103. Council Directive 89/48, 1989 O.J. (L 19).

104. *Id.* The directive provides in part that where the applicants education and training is at least one year shorter than that which is required by the host State the applicant may be required to provide evidence of professional experience. The host State may also require

to pursue a profession in a Member State other than that in which they acquired their professional qualifications. This Directive¹⁰⁵ represents a significant breakthrough, removing many of the existing barriers to the free movement of professionals. Nevertheless, the case analysis will demonstrate that the provisions adopted by the Council, following the introduction of this Directive,¹⁰⁶ still leave many questions unanswered.¹⁰⁷

A. *Marc Bouchoucha*¹⁰⁸

Background-

Mr. Bouchoucha, a French national, holds a French state diploma as a masseur-kinesitherapist and a diploma in osteopathy issued by the European School of Osteopathy in England. Pursuant to Section L372 of the French Code de la Sante Publique (Public Health Code),¹⁰⁹ the work of osteopaths is regarded as one of the professional acts which can only be performed by a doctor of medicine.

On November 24, 1987, at the request of the Ministere Publique (Public Prosecutors Office of France), proceedings were commenced against Marc Bouchoucha for illegally practicing medicine in France since 1981 by practicing as an osteopath although not qualified as a doctor of medicine.

On April 29, 1988, the Tribunal Correctionnel (the "Tribunal") found Mr. Bouchoucha guilty of the offense and fined him 5,000 French Francs. However, payment of the fine was suspended and it was directed that no mention of the conviction should be entered

an adaptation period or an aptitude test.

105. *Id.*

106. *Id.*

107. See Case 310/90, *Conseil National de l'Ordre des Architectes v. Egle*, 2 C.M.L.R. 113 (1992); Case 61/89, *Bouchoucha*, 1 C.M.L.R. 1033 (1992).

108. *Bouchoucha*, 1 C.M.L.R. 1033.

109. FRENCH CODE DE LA SANTE PUBLIQUE, J.O. L372 (1962).

Section L372(1) provides that:

Any person who habitually or persistently takes part, even in the presence of a doctor, in the making of a diagnosis or the treatment of illnesses or surgical conditions. . . by personal action, or a written or oral consultation. . . or carries out one of the professional acts enumerated in a list drawn up by the Minister for Public Health. . . without holding a degree, certificate or other qualification mentioned in 356-2 which is required for the practice of the profession of doctor or without being covered by the special provisions of Sections L356, L357, L357-1, and L360, is engaged in the unlawful practice of medicine.

in his *Casier Judiciaire* (Record of Convictions). Nevertheless, the Tribunal allowed three parties¹¹⁰ to join the proceedings as civil parties claiming damages and ordered Mr. Bouchoucha to pay each of them 1 French Franc as token damages. Two of the civil parties appealed against that judgment to the Cour d'Appel, Aix-en-Provence.

The Cour d'Appel determined that the proceedings were directly dependent upon the proper construction of certain provisions of the Treaty and therefore stayed the proceedings on January 23, 1989. The Cour d'Appel referred the following question to the Court for a preliminary ruling:¹¹¹

Is the prohibition on the practice of osteopathy in France by a French national holding a State diploma as masseur-kinesitherapist and a diploma in osteopathy issued on 1 October 1979 by the European School of Osteopathy, Maidstone (Great Britain), on the ground that he does not hold the qualification of Doctor of Medicine laid down as requirement for that purpose by the Ministerial Order of 6 January 1962 compatible with the Treaty of Rome, in particular, Article 52 et seq. on freedom of establishment?

Court's Judgment-

Mr. Bouchoucha argued that his degree in osteopathy granted by a British College was sufficient in Great Britain to enable him to exercise and practice as an osteopath. Therefore, he argued that the provisions of the French Order¹¹² which prevented him from exercising the profession of an osteopath in France contravened the Community principle of "proportionality" as applied in the *Knoors* case,¹¹³ and that his rights under Article 52¹¹⁴ were violated.

The French Government first argued that because Mr.

110. The Court allowed the *Syndicat National des Medecins Osteotherapeutes Francais* ("SNMOF"), the *Syndicat National des Medecins Specialises en Reeducation et Readaptation Fonctionnelle* ("SNMSRRF"), and the *Conseil Departementale de l'Ordre des Medecins des Alps* to join the proceedings as civil parties.

111. EEC TREATY art. 177.

112. FRENCH CODE DE LA SANTE PUBLIQUE, J.O. 1372 (1962).

113. Case 115/78, *Knoors v. Secretary of State for Economic Affairs*, 1979 E.C.R. 399, 2 C.M.L.R. 557 (1979) (holding that Article 52 cannot be interpreted so as to exclude a member state's own nationals who have acquired a vocational education in another State from enjoying the rights and liberties guaranteed by the Treaty).

114. EEC TREATY art. 52.

Bouchoucha was a French national the scope of the case was purely national, and therefore the Treaty provisions are not applicable. The French government then argued that, for medical matters, the implementation of freedom of establishment rested on directives of Mutual Recognition of Diplomas.¹¹⁵ The government contended that in the absence of a Community definition of what activities are to be regarded as medical activities, the Member States were free to reserve the activities of osteopathy only to certified doctors of medicine.

The Court first determined that contrary to the contention of the French government, the scope of the case was not purely national and the Treaty provisions were applicable. Secondly, the Court emphasized that there are no Community provisions governing the exercise of professions allied to medicine such as osteopathy. The Court went on to note that Directives 75/362¹¹⁶ and 75/363¹¹⁷ relate only to the profession of "doctor" and that they contain no Community definition of exactly what activities are to be regarded as those of a doctor.

The Court held that, in the absence of any Community law on osteopaths, Member States could regulate the activity of osteopathy in a non-discriminatory manner. Although the Court agreed that under *Knoors*,¹¹⁸ Article 52¹¹⁹ can not be interpreted so as to exclude a Member State's own nationals who have acquired a vocational qualification recognized by Community law in another Member State from enjoying the rights and liberties guaranteed by the Treaty, it distinguished *Knoors*¹²⁰ on the grounds that the diploma held by Mr. Bouchoucha does not enjoy any mutual recognition within the Community. Accordingly, the Court asserted that Mr. Bouchoucha's diploma cannot be regarded as a professional qualification recognized by the provisions of Community law.

115. Council Directive 75/362 and 75/363, 1975 O.J. (L 167). The French government was referring to Directive 75/362 concerning the mutual recognition of diplomas, certificates, and other evidence of formal qualifications in medicine, as well as Directive 75/363, concerning the coordination of provisions laid down by law, regulation, or administration regarding activities of doctors. However, neither of these directives provide a Community definition of which activities are to be regarded as medical ones.

116. Council Directive 75/362, 1975 O.J. (L 167).

117. Council Directive 75/363, 1975 O.J. (L 167).

118. *Knoors*, 1979 E.C.R. 399.

119. EEC TREATY art. 52.

120. *Knoors*, 1979 E.C.R. 399.

Furthermore, the Court relied on *Knoors*¹²¹ to stress that a Member State has a legitimate interest in preventing its nationals from attempting to evade the application of their national requirements in regard to professional training. It concluded that France was not acting in an arbitrary fashion by reserving the activity of osteopathy to holders of a higher level qualification recognized at the Community level. Therefore, the Court held that Article 52¹²² does not preclude a Member State from restricting an activity ancillary to medicine such as osteopathy, exclusively to persons holding the qualification of doctor of medicine. The Court then remanded the case to the Cour d'Appel for a ruling on the facts as well as the distribution of the costs.

*B. Conseil National de l'Ordre des Architectes v. Egle*¹²³

Background-

On March 29, 1988, Mr. Egle, a German national who had lived in Belgium for several years, was rejected enrollment by the Ordre des Architectes for the province Limburg. Mr. Egle holds a diploma from the Department of Architecture of the Fachhochschule Konstanz for four years of studies, including two practical training semesters which were combined with theoretical studies and supervised by the Fachhochschule pursuant to the Act on Fachhochschulen of Land Baden-Wurttemberg.¹²⁴

Mr. Egle appealed this decision to the Conseil d'Appel (the "Conseil d'Appel") de l'Ordre des Architectes. The Conseil d'Appel found that there were no grounds for not accepting Mr. Egle's four years of study as fulfilling the conditions for recognition of the diploma as laid down by the Articles 2 through 4 of Directive 85/384.¹²⁵ Therefore, the Conseil d'Appel found that the Ordre des Architectes for the province Limburg should have recognized his diploma as the equivalent of a diploma awarded in Belgium.

The Conseil National de l'Ordre des Architectes (the "Conseil National") then appealed the decision of the Conseil d'Appel to

121. *Id.*

122. EEC TREATY art. 52.

123. *Egle*, 2 C.M.L.R. 113 (1992).

124. Bundesgesetzblatt, Teil I, Act on Fachhochschulen of Land Baden-Wurttemberg of 1981.

125. Council Directive 85/384, 1988 O.J. (C 270/3); Council Directive 85/384, 1989 O.J. (C 205/5).

the Belgian Cour de Cassation on the grounds that the two practical training semesters should not have been taken into account to calculate the full-time studies requirement of Directive 85/384.¹²⁶ The Belgian Cour de Cassation then referred the following question to the Court for a preliminary ruling:¹²⁷

Must Article 4(1)(a) of Directive 85/384 on the mutual recognition of diplomas, certificates and other evidence of formal qualifications in architecture, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services be interpreted in such a way that education and training which lasts for four years and which includes integrated practical semesters, supervised by the Hochschule, can be regarded as full-time studies of four years?

Court's Judgment-

The Court first observed that the Directive¹²⁸ prescribes the mutual recognition of diplomas, certificates, and other evidence of formal qualifications in the field of architecture which satisfy the requirements of Articles 3¹²⁹ and 4.¹³⁰ The Court then interpreted the concept of "studies" within the meaning of Article 4(1)(a).¹³¹ It relied on Article 3 of the Directive¹³² which expresses the notion that a study in the field of architecture must maintain a balance between the theoretical and practical aspects of education and training. Hence, the Court held that the practical training of the type organized by Fachhochschulen formed an integral part of architectural studies within the meaning of Article 4(1)(a) of the Directive¹³³ and must be regarded as four years of full-time studies. The Court also accentuated that the recognition of Mr. Egle's diploma in Belgium effectively allows him to exercise the right of establishment and freedom to provide services. It reiterated the

126. Council Directive 85/384 art. 4, 1988 O.J. (C 270/3).

127. EEC TREATY art. 177.

128. Council Directive 85/384, 1988 O.J. (C 270/3).

129. *Id.*

130. *Id.* Article 4(1)(a) provides that:

The total length of education and training shall consist of a minimum of either four years of full-time studies at a university or comparable educational establishment, or at least six years of study at a university or comparable educational establishment of which at least three must be full-time.

131. *Id.*

132. *Id.*

133. *Id.*

principle introduced in *Klopp*¹³⁴ that Member States cannot deny the right of establishment to a person from another Member State by adopting unnecessarily restrictive rules. Therefore, the Court remanded the case to the lower court for a ruling on the facts as well as the costs.

VI. COMMENTARY

These two cases demonstrate the ambiguities in how the present Court resolves questions involving the mutual recognition of diplomas and professional qualifications. In *Egle*¹³⁵ the Court liberally interpreted Directive 85/384¹³⁶ on the professional qualification of architects. The Court's analysis is consistent with the new "horizontal" approach of mutual recognition of diplomas. Although the Directive¹³⁷ does not specifically permit the substitution of one year of practical training for one year of theoretical training, the Court allowed for this substitution primarily because the recognition of Mr. Egle's diploma in Belgium allows him to exercise his rights of freedom of establishment and freedom to provide services guaranteed by the Treaty and enforces the concept of mutual trust and acceptance of professional qualifications between Member States.

However, the *Bouchoucha*¹³⁸ case appears to contradict these principles. The Court demonstrated its particular reluctance of intervening in the field of protection of public health. One troubling aspect of this case is that its holding seems to give greater standing only to those professionals whose qualifications are recognized by Community law. Fortunately, the holding of this case is limited because presently all "higher" professional qualifications are recognized by the terms of the Mutual Recognition Directive.¹³⁹ It remains to be seen how similar cases will be decided under the terms of the Mutual Directive.

VII. COMPARISON WITH THE UNITED STATES

The right of establishment and freedom to provide services is

134. *Klopp*, 1984 E.C.R. 2971.

135. *Egle*, 2 C.M.L.R. 113.

136. Council Directive 85/384, 1988 O.J. (C 270/3).

137. *Id.*

138. *Bouchoucha*, 2 C.M.L.R. 1033.

139. Council Directive 89/48, 1989 O.J. (L 19/16).

not expressly mentioned in the Constitution of the United States.¹⁴⁰ These two rights are treated as implicit in the Interstate Commerce Clause¹⁴¹ and the Privileges and Immunities Clause¹⁴² of the Constitution of the United States.

There is a body of case law that has emerged which has struck down state laws that either blatantly or indirectly discriminate against persons or entities from other states seeking to provide services or create business operations in the state on the grounds that the statute is in violation of the Commerce Clause.¹⁴³

Furthermore, the Privileges and Immunities Clause of Article IV, 2,¹⁴⁴ of the United States' Constitution prevents states from discriminating against out-of-state individuals.¹⁴⁵ U.S. case law has established certain fundamental rights that are protected by the Clause.¹⁴⁶

Nevertheless, the states regulate many areas of commercial, financial, and professional activity with minimal intervention by the

140. See U.S. CONST.

141. *Id.* at art. I 8.

142. *Id.* at art. IV 2.

143. See *Lewis v. B.T. Investment Managers, Inc.*, 447 U.S. 27 (1980)(striking down a Florida statute on the grounds that the statute prevented competition in local markets by out-of-state firms with the kinds of resources and business interests that make them likely to attempt entry); see also *H.P. Hood & Sons v. Dumond*, 336 U.S. 525 (1945)(holding that New York's refusal to give a Massachusetts milk distributor a license to operate an additional milk receiving station in New York on the grounds that it would divert additional New York milk to Massachusetts consumers thereby dangerously increasing costs and decreasing supply violated the Commerce Clause); *contra Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978)(holding that a Maryland statute which prohibited all oil producers or refiners from operating retail gas stations in Maryland did not violate the Commerce Clause mainly because there was no discrimination).

144. U.S. CONST. art. IV, 2.

145. *Id.* However, the Privileges and Immunities Clause does not prevent states from discriminating against corporations due to the language which refers only to "citizens". Corporations may have a cause of action under the Equal Protection Clause of the United States' Constitution.

146. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985)(holding that the right to practice law is a sufficiently important and fundamental right and that therefore New Hampshire could not restrict the right to practice law only to those who resided within the state); see *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371 (1978)(rejecting a Privileges and Immunities attack on a Montana scheme for issuing elk-hunting licenses on the grounds that the Clause applies only to distinctions between nonresidents and residents with respect to a fundamental right of which recreational elk-hunting was not); see also *Hicklin v. Orbeck*, 437 U.S. 518 (1978)(striking down an Alaska statute which required that all qualified Alaskan residents be given absolute preference over nonresidents for all jobs stemming from oil and gas leases or permits issued by the state on the grounds that access to employment is a fundamental right and that therefore the statute was in violation of the Privileges and Immunities Clause).

federal government.¹⁴⁷ For instance, the states are free to adopt their own independent licensing rules for lawyers, accountants, architects, and many other professions.¹⁴⁸ Apart from national banking and the securities sector, there has been little attempt to federalize these fields or to harmonize the diverse state systems. The United States, unlike in the EEC, has not attempted to harmonize state legislation in the area of professions. Therefore, although the EEC has encountered difficulties in standardizing different professional sectors, it has made significant progress in the harmonization of professions, and provides a good model for other industrialized nations such as the United States, seeking to compete in the changing global marketplace.

147. Bermann, *supra* note 5, at 545.

148. *Id.*