CHAPTER 3

FREEDOM OF MOVEMENT FOR THE REGULATED PROFESSIONS

—David Edward

BACKGROUND AND INTRODUCTION

The adoption by the Council on December 21, 1988 of the Directive on Higher Education Diplomas\(^1\) has been hailed as a milestone in the progress towards “1992” and completion of the Internal Market. It has also given rise to some misunderstanding as to the scope of the directive and its relationship with established rules deriving directly from the Treaty. The subject of professional mobility was one which engaged Frank Dowrick’s attention towards the end of his life since he foresaw the effect that such a directive could have upon our traditional approach to teaching law in the British universities and upon our students’ careers. This contribution to his memory seeks to place the new directive (“the general directive” or “the professional directive”) in its Treaty context and to consider some of the problems it raises or solves.

The regulated professions have, for many years, been the Cinderella of the Community. In spite of their economic and social importance and their role in promoting the economic activities of others, their problems have received little attention. Even today, when Financial Institutions

and Company Law, and Small and Medium-Sized Enterprises, have their own Directorates-General in the Commission, the regulated professions do not rate so much as a Directorate to themselves. One consequence of this neglect is illustrated by the following exchange between Baroness Lockwood, a member of the House of Lords' Select Committee on the European Communities, and M. Michel Petite a member of Lord Cockfield's Cabinet with particular responsibility for the general directive, on May 14, 1986:

*Baroness Lockwood:* ... Has the Commission made any estimate of the number of professions to which the directive is likely to apply ...?

*M. Petite:* We can only have an approximate idea of the number of professions concerned. The reason why is that basically the directive does not directly address the professions but it addresses the professional activities. This is a significant difference because an activity can be covered in the Member States by either similar professions or by differing professions or by overlapping professions. So in fact, the number of professions concerned is quite difficult to state precisely. I might add that these professions also vary; some new professions appear, some professions merge in Member States and that is an added reason why it is really impossible to have a precise number to offer. This being said, a problem will be to apply the directive and to implement it. No doubt each Member State will have to go through the exercise of working out to whom this directive will apply. This exercise is already in progress in the Working Group in Council. The Member States have circulated a questionnaire in order exactly to achieve that exercise, that each Member State can exactly appreciate who will be concerned, how many professions and in what conditions ...

While it was fair to draw attention to the difficulties and the inevitable margin of uncertainty, it is hardly creditable that, 29 years after the signature of Treaty, the Commission was in possession of no statistical data with which even to hazard a reply to so simple and important a question. Nevertheless, there are other and more fundamental reasons why freedom of movement for the professions has been slow to achieve. The very idea of a profession, in the English sense of the word at least, implies a measure of regulation. Since long before the Treaty of Rome, all the Member States have sought to protect the public from quacks and charlatans by regulating the performance of certain professional activities—usually by restricting the right to perform them to those who hold defined qualifications. This sort of regulation necessarily involves a corresponding element of exclusion since those who do not possess the requisite qualifications may be excluded altogether from the activity in question, or at least from adopting the relevant professional title which attracts clients and affects the level of fees.

The regulation of professional activities was, and generally still is, on

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3 In most other languages the word "profession" has a wider connotation than it does in English, being applicable to any trade or vocation involving an element of skill.
a national basis. Again, national regulation has had the effect of excluding professionals from other countries since they do not, save in the exceptional case, possess the requisite qualifications in any country other than their own. In economic terms, therefore, such regulation has acted as a "non-tariff barrier" to the free flow of economic activity. But can it properly be said, in the words of Art. 3(c), to be an "obstacle" to freedom of movement calling for abolition? Or is it simply a feature of Western European society which the Treaty seeks to palliate but not to remove?

Long before Cassis de Dijon 4 introduced the concept of "mandatory requirements," the professions already presented the Community with the problem of reconciling freedom of movement with legitimate national measures of consumer protection. This was recognised by the European Court in Van Binsbergen 5 and Thieffry 6 but the European Court's dicta received less attention at the time than they deserved, perhaps because the underlying Treaty rules in relation to the professions were only beginning to be examined.

In contrast, by the time of Cassis de Dijon the European Court had already had the opportunity to define with some precision the nature and scope of the Treaty prescriptions with respect to goods. So the doctrine of the "mandatory requirements" or "rule of reason" was introduced as a new feature into a landscape of which the contours and principal landmarks were already known. This did not prevent some difference of opinion amongst legal cartographers as to the way in which the new feature should be plotted and described. But its broad outlines were obvious enough. It was, moreover, clear that the European Court envisaged that the rule of reason would have a limited lifespan in relation to goods, its purpose being to allow the Member States to provide for consumer and environmental protection until a Community standard could be set.

There may have been some enthusiasts in the early years of the Community who thought that a time would come in the relatively near future when a Community standard would be set for the professions and all the national professions would be reorganised by sectoral directives into "Euro-professions." But this was no longer a realistic expectation in the mid-1970's when Van Binsbergen and Thieffry were decided. So the European Court's recognition of a rule of reason in relation to the professions cannot sensibly be seen as acceptance of a temporary impediment to the ultimate Community goal of free movement. Rather, it was acknowledgment of a continuing feature of the Community legal order. What was missing at that time (and, to some extent, still is) was a clear definition of the nature of the

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BACKGROUND AND INTRODUCTION

Community goal in relation to the professions, to which the rule of reason could be related.

THE TREATY RULES

In the case of goods, the intention of the treaty-makers has been evident, really since Van Gend en Loos, from the terse and all-embracing terms of Articles 3(a), 9(1), 12, 30 and 34 EEC. The same is true as regards persons, at least superficially, in the case of the Workers. But the Chapter on Workers is concerned with enabling wage- and salary-earners to find employment within the context of the economic operations of actual and prospective employers. Restrictions upon the economic operations of the employers themselves are addressed by the following Chapters on Establishment and Services, whose intended scope and meaning has only recently been elucidated by the European Court—particularly in the insurance cases.

It now seems to be clear that the Chapter on Services is to be interpreted as being limited strictly to the situation envisaged in Article 59(1)—namely, a bilateral (or multilateral) transaction where the provider and recipient of services are established in different Member States. If the provider of services is established in the same Member State as the recipient or must, according to the criteria laid down by the European Court, be deemed to be so established, then the Chapter on Services does not apply. In the context of modern business practice this may have the effect of reducing the scope for application of that Chapter almost to vanishing point.

The Chapter on Establishment must therefore be seen as the key Chapter in defining the extent to which economic operators of all kinds are to be free to move or extend their operations to a state other than that of which they are nationals. Articles 52 and 53 show that the concept of nationality as such was the central concern of the treaty-makers, playing a similar rôle in this context to that played by the concept of origin in relation to goods. But the two concepts are not identical, or even necessarily of the same logical character.

There is, nowadays, a tendency to equiparate all aspects of market activity and to treat all restrictions on the operation of a notionally free market as if they are the same and can be dealt with in the same way. In particular, the vocabulary of the market in goods is regularly used to describe the operations of other markets. Thus, there is said to be a

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10 See the present author’s discussion of the insurance cases in (1987) E.L.Rev. 231.
financial services “industry,” and what it offers to the public—insurance policies, bonds, share issues and banking services—are said to be its “products.” Similarly, any form of protest action by workers on a production line, teachers, academics, doctors, lawyers or even judges is described as “industrial action,” and so on.

This persistent devaluation of the linguistic coinage may have attractions for bureaucrats, management consultants and others who enjoy forcing square pegs into round holes. But it has led, particularly in the United Kingdom, to the erroneous assumption that the Treaty set out to create a free market in financial and professional “products” in exactly the same way as the free market in goods. The “producer” of insurance policies should, it is said, be as free as the producer of washing powder to market his “products” anywhere in the Community. While this may be a desirable end-result, the idea that it can be brought about in the same way, or that the “products” are of the same type, involves an elementary category mistake.

“Category mistake” and “category confusion” are useful terms coined by the Oxford philosopher, Gilbert Ryle, to help in demolishing what he called “Descartes’ Myth” or “the dogma of the Ghost in the Machine”—the idea that “with the doubtful exceptions of idiots and infants in arms every human being has both a body and a mind.”11

One need not agree with Ryle’s conclusions to see that his insight can be useful in legal analysis. Characteristically, Ryle did not seek to define the terms “category mistake” and “category confusion.” Rather, he explained them by a series of illustrations taken from the University of Oxford, a military parade, cricket and the British constitution, the last of which is the most apt in the present context:

The theoretically interesting category-mistakes are those made by people who are perfectly competent to apply concepts, at least in the situations with which they are familiar, but are still liable in their abstract thinking to allocate those concepts to logical types to which they do not belong. An instance of a mistake of this sort would be the following story. A student of politics has learned the main differences between the British, the French and the American Constitutions, and has learned also the differences and connections between the Cabinet, Parliament, the various Ministries, the Judicature and the Church of England. But he still becomes embarrassed when asked questions about the connections between the Church of England, the Home Office and the British Constitution. For while the Church and the Home Office are institutions, the British Constitution is not another institution in the same sense of that noun. So inter-institutional relations which can be asserted or denied to hold between the Church and the Home Office cannot be asserted or denied to hold between either of them and the British Constitution. “The British Constitution” is not a term of the same logical type as “the Home Office” and “the Church of England.” In a partially similar way, John Doe may be a relative, a friend, an enemy or a stranger to Richard Roe; but he cannot be any of these things to the Average Taxpayer. He knows how to talk sense in certain sorts of

discussions about the Average Taxpayer, but he is baffled to say why he could not come across him in the street as he can come across Richard Roe.\textsuperscript{12}

It may be convenient for the providers of financial services to describe their offerings as “products”: it does not assist legal analysis to assume that they belong for all purposes to the same category as the products of manufacturing industry. Similarly, when the Treaty speaks of “Free Movement of Goods, Persons, Services and Capital,” it does not follow that the Treaty-makers regarded goods, persons, services and capital as entities of the same type. On the contrary, they saw that, in each case, implementation of the concept of free movement would require a different approach.

As suggested above, the overall approach adopted in the Treaty to free movement of persons and services is to deal separately with two readily definable situations—free movement of “workers” and freedom to provide “services” (in the restricted Treaty sense)—leaving all other aspects to be covered by the Chapter on Right of Establishment. That Chapter involves four distinct elements or phases:

1. prohibition of any new restrictions on the right of establishment of nationals of other Member States—Article 53;
2. abolition of any restriction on grounds of nationality by the end of the transitional period and prohibition of any such restriction after that date—Article 52 as interpreted in \textit{Reyners}\textsuperscript{13};
3. implementation of a “general programme for the abolition of existing restrictions on freedom of establishment within the Community”—Article 54;
4. The adoption of directives “in order to make it easier for persons to take up and pursue activities as self-employed persons”—Article 57.

The use in the English text of the Treaty of the phrase “self-employed persons” as a translation of \textit{personnes non salariées} is misleading since it obscures the fact that all four stages apply equally to natural and legal persons (from the sole practitioner to the multi-million pound corporation) although in the context of 1957 the restrictions dealt with by Article 57 were unlikely to affect other than natural persons. The first two phases where there is direct effect\textsuperscript{14} relate solely to restrictions on grounds of nationality, as is clear from the reference in the second paragraph of Article 52 to

“freedom of establishment ... under the conditions laid down for its own nationals by the law of the country where such establishment is effected.”

Certain judgments of the European Court, particularly \textit{Thieffry}, have been construed as giving an extended interpretation to the concept of

\textsuperscript{12} \textit{Ibid.}, p. 17–18.
\textsuperscript{14} \textit{Case 6/64 Costa v. ENEL} [1964] E.C.R. 585 (direct effect of Art. 53); \textit{Reyners}, \textit{supra.} n. 13 (direct effect of Art. 52).
discrimination on grounds of nationality. Thus the exclusion of Thieffry from the French Bar on the ground that his law degree was Belgian has been treated as being on a par with the exclusion of Reyners from the Belgian Bar on the ground that his nationality was Dutch. On closer analysis it seems that the proper approach to the judgment in Thieffry is to start from the fact that, in the case of a French national, the French professional authorities would have treated a Belgian law degree as equivalent to a French law degree. Consequently, refusal of such recognition of equivalence in the case of Thieffry, a Belgian national, was a straightforward case of discrimination on grounds of nationality.

Similarly, the cases on “reverse discrimination” (Knoors,\textsuperscript{15} Broekmeulen\textsuperscript{16}) are cases of discrimination on grounds of nationality, although the persons discriminated against were nationals of the host state. The proper ground of distinction between these cases and the cases where the Court has treated the situation as purely internal (Saunders,\textsuperscript{17} Debaue\textsuperscript{18}) is that the former involved movement between states whereas the latter did not. The absence of any element of cross-frontier movement in the latter cases meant that they did not enter the purview of the EEC Treaty at all.

The European Court has also struck down restrictions on the ground that their effect is to discriminate against nationals of other Member States (for example, Klopp\textsuperscript{19}). But this does not affect the point that the directly effective provisions of the Chapter on Right of Establishment are concerned with discrimination on grounds of nationality as such. Other types of obstacle to freedom of movement are to be dealt with by directives under Article 54 or Article 57.

Article 54 is concerned with “the abolition of existing restrictions on freedom of establishment within the Community,” whereas Article 57 is concerned with “making it easier to take up and pursue activities as self-employed persons.” The difference in language shows that, in the minds of the Treaty-makers, the matters dealt with by Article 57 were not seen as restrictions calling for abolition, but rather as inherent characteristics of certain types of activity, which call for measures of mutual recognition and co-ordination of national regulatory provisions and methods.

Thus it is a mistake to suppose that the treaty-makers intended to create a market in professional services which would be “free” in the sense of being unregulated. The Chapter on Right of Establishment is not a manifesto for deregulation, though the legislative measures adopted in pursuance of it may, of course, have that effect. But that is a matter of political choice rather than Treaty prescription.

The new directive must therefore be read against a Treaty background which not only admits but presupposes the continued existence

of national systems of professional regulation. The purpose of directives in this field is to promote professional mobility. Deregulation is a matter for competition policy which may overlap with, but is not the same as, the policy of promoting freedom of movement—again the source of a category confusion.

THE GENERAL DIRECTIVE

The core of the new directive lies in Article 3:

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

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

or

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

— which have been awarded by a competent authority in a Member State . . . ,

— which show that the holder has successfully completed a post-secondary course of at least three years' duration, or of an equivalent duration part-time, . . . and, where appropriate, that he has successfully completed the professional training required in addition to the post-secondary course and

— which have prepared the holder for the pursuit of his profession.20

Thus, the primary concern of the directive is with the exclusion of other Community nationals from professional activities "on the grounds of inadequate qualifications." The directive does not, except incidentally, seek to outlaw other restrictions on professional activity so long as they are non-discriminatory. This is made clear in the tenth Recital:

Whereas, moreover, the general system for the recognition of higher-education diplomas is intended neither to amend the rules, including those relating to professional ethics, applicable to any person pursuing a profession in the territory of a Member State nor to exclude migrants from the application of those rules; whereas that system is confined to laying down appropriate arrangements to ensure that migrants comply with the professional rules of the host Member State.

20 Emphasis added.
Far from the directive being a licence to ignore the professional structures and rules of the host state, it presupposes that inability to enter, and become part of, the profession in the host state (with all concomitant rights and obligations) is the main obstacle to professional freedom of movement that the directive is intended to overcome. This is clear from the way in which the directive deals with the problem presented by the Chartered Institutes and comparable professional organisations, particularly in the United Kingdom and Ireland.

The approach of the United Kingdom and Ireland to professional regulation through chartered bodies is unusual, though not unique, in European terms. Membership of a chartered body (which, as its name implies, is a body corporate established by Royal Charter) is not normally an essential precondition of access to the professional activity concerned. Unlike the situation in some other countries, "unqualified practice" is not, with few exceptions, a criminal offence. On the other hand, membership of a chartered or similar body may, as a practical matter, be a precondition of access to employment. Thus, in Britain, health authorities will not normally employ, in the professions supplementary to medicine, those who do not hold the "state registered" qualification.21

In its original form, and indeed in its first amended form, the directive did not deal adequately with the situation of the chartered and comparable bodies. Of particular concern to the United Kingdom was the possibility that the qualifications granted by those bodies might not benefit from mutual recognition since they were not "higher education diplomas" as defined in Article 1 of the draft directive.22

This problem has been overcome in the directive as finally adopted. But discussion of the problem led to the inclusion of an unusual, if not unique, provision.

The seventh Recital, which did not appear in the Council's Common Position of June 30, 1988,23 now reads:

"Whereas the term 'regulated professional activity' should be defined so as to take account of differing national sociological situations; whereas the term should cover not only professional activities, access to which is unrestricted when they are practised under a professional title reserved for the holders of certain qualifications; whereas the professional associations and organizations which confer such titles on their members and are recognized by the public authorities cannot invoke their private status to avoid application of the system provided for by this Directive."

Article 1(d) of the directive then goes on to provide that:

"... a professional shall be deemed to be a regulated professional activity if it is pursued by the members of an association or organization the purpose of which is, in particular, to promote and maintain a high standard in the professional field concerned and which, to achieve that purpose, is recognized in a special form by a Member State and:

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21 See the Report of the House of Lords Select Committee, cit. sup. n. 2, p. 30, para. 72.
THE GENERAL DIRECTIVE

—awards a diploma to its members,
—ensure that its members respect the rules of professional conduct which it prescribes, and
—confers on them the right to use a title or designatory letters, or to benefit from a status corresponding to that diploma.

Thus, the scope of the directive is such as to embrace, not only state regulation of professional activity, but the restrictions which flow indirectly from state recognition of self-regulating professional bodies. The effect of the directive is to give professionals from other Member States access to those bodies. Once in, however, they are to be subject to their rules and discipline.

In this respect, the approach adopted in this directive is different from that adopted in the banking and financial services directive. All these post-Single Act directives are based on the principle of mutual recognition in that they require recognition of the licence to practise or to do business granted by the Member State of origin. But they do not apply the concept of mutual recognition in the same way, and the professional directive does not require the host State to accept “home-country-control” of professionals from other Member States.

The professional directive therefore neither invalidates nor supports the “practice-under-home-title” argument canvassed by the United Kingdom in Gullung.24 In that case, the United Kingdom on the one hand and the French bar authorities on the other sought to get a ruling from the Court as to whether a professional from one Member State (for example, a barrister or solicitor) is entitled to practise in another Member State under his “home title” without joining, and therefore becoming subject to the rules and discipline of, the professional body of the host state. The substance of this dispute is easier to appreciate where the home title is clearly different from that of the host state—barrister or solicitor as opposed, for example, to Rechtsanwalt or avocat—than it is where they are the same or very similar—e.g. avocat (France, Belgium and Luxembourg), advocaat (Netherlands), avvocato (Italy), advokat (Denmark). This has led to a measure of argument at cross-purposes. In the event the European Court declined to deal with the point25 although the Advocate General had done so, coming down in favour of the French position.26

The reason why the directive does not deal directly with the point is that its purpose is to facilitate access to regulated professional activities.27 The “practice-under-home-title” argument only arises where the professional activity in question (in casu, the giving of legal advice) is unregulated in the host state, at least to the extent that nationals of the

25 Ibid., para. 27 of Judgment at p. 139.
26 Ibid., Opinion of Advocate General Darmon, para. 21 at p. 127.
27 This is clearly implied by Art. 1(b) which defines “host Member State” as “any Member State in which a national of a Member State applies to pursue a profession subject to regulation in that State …” (emphasis added).
host state can perform it without being a member of a host State’s professional organisation. The directive does, however, recognise the right of Member States to continue to regulate professional activities and, if they so choose, to introduce new measures of regulation, subject to an obligation to inform the Commission. Moreover, the definition of “a regulated profession” as “the regulated professional activity or range of activities which constitute the profession in a Member State” seems to be inimical to the “practice-under-home-title” argument in so far as the latter approach looks at each activity in isolation in order to see whether it is regulated or not. However that may be, it is apparent that the directive is designed to promote free movement of professionals as persons by enabling them to enter the professional structure of the host State. Harmonisation of professional structures and rules may result from, but is not compelled by, the directive.

The directive in its final form is a considerable improvement on the amended Commission proposal considered by the Select Committee of the House of Lords. Although its structure remains broadly the same, substantial parts have been modified or rewritten.

The directive began life as one requiring mutual recognition of “higher-education diplomas”—essentially, university or other tertiary degrees or diplomas awarded on the basis of at least three years’ study. While the title of the directive still refers to “higher-education diplomas,” this is misleading since the primary beneficiary of the directive is now a person who “has the professional qualifications required for the taking up or pursuit of a regulated profession in [a] Member State.”

In other words, the directive is concerned with mutual recognition of the finished product of professional education and training, not with mutual accreditation of degrees and other higher education diplomas. There are provisions which favour the migrant student or trainee, but these are of limited application.

It might, for this reason, have been preferable to alter the title of the directive to refer to professional rather than higher-education diplomas since that is what, ultimately, the directive is about. That is not to say, however, that the requirement of tertiary education is irrelevant. On the contrary, the scope of the directive is defined by reference to such education in two respects. First, the directive applies “where, in a host Member State, the taking up or pursuit of a regulated profession is subject to possession of a diploma.”

The definition of “diploma” is long and rather complicated but it includes the requirement of suc-

28 Art. 12, second para.
29 Art. 1(c), emphasis added.
30 For the relevant texts and criticisms of them, see Report, supra., n. 2.
32 See Art. 1(a) last para. Art. 3 last para. and Art. 5.
33 Art. 3, quoted supra.
34 Art. 1(a).
cessful completion of a course of tertiary education of three years' (or equivalent part-time) duration. Second, in order to benefit from the directive, a person must possess either a "diploma" as so defined or the equivalent.

The education attested by the diploma must have been "received mainly in the Community" unless the Member State of origin recognises third country diplomas and can certify that the holder has three years' professional experience. This reinforces a point made earlier. The directive is not intended to benefit a non-Community national even if he/she holds Community qualifications and belongs to the professional body of a Member State. The directive, like the Treaty, is concerned with promoting freedom of movement for Community nationals.

Nor are Member States required directly to accord recognition to third-country qualifications. They must, as indicated, recognise "diplomas" granted by other Member States on the basis of third-country qualifications but only when combined with a certificate of three years' professional experience. This must have given rise to concern since, on the same day as the directive, the Council adopted a "Recommendation concerning nationals of Member States who hold a diploma conferred in a third State." This recommends, but does not require, Member States to allow Community nationals with third-country qualifications "to take up and pursue regulated professions within the Community by recognizing these ... qualifications in these territories."

Thus, there is no equivalent, in the present context, of the concept of "goods in free circulation." The many Commonwealth and other third country nationals who hold British professional qualifications are not beneficiaries of the Directive. In this respect, the position is different from that which obtains under the Lawyers' Services Directive the benefits of which are not limited to Community nationals. (The second paragraph of Article 59 explains the difference. There is no equivalent provision in the Chapter on Right of Establishment.) Problems may also arise for United Kingdom nationals if the educational components of their professional qualifications were obtained in a Commonwealth or other third country. This is a point that should be borne in mind when advising students on their careers.

Finally, so far as the scope of the directive is concerned, it does not apply "to professions which are the subject of a separate Directive establishing arrangements for the mutual recognition of diplomas by

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35 Art. 1(a) second indent.
36 Art. 3(a), quoted supra.
37 Art. 3(b), second indent, quoted supra.
38 Art. 1(a), proviso.
39 Art. 2, first para.
Member States, i.e. professions which have their own sectoral directives: doctors, nurses, dentists, vets, midwives, architects and pharmacists. Under the Commission's amended proposal, there appeared to be a way in which those who did not qualify under the appropriate sectoral directive could nevertheless qualify under the general directive. The final text eliminates this and returns to the Commission's original proposal.

The right conferred by the directive on its beneficiaries is not an unqualified right of access to the profession in the host State. The standard provisions of the sectoral directives, with minor modifications, are adapted to enable Member States to insist upon production of certificates (or the equivalent) of good character, solvency, a clear criminal and disciplinary record and/or good physical and mental health. Thus, the directive provides in advance for the sort of problem that actually rose in the Gullung case.

The new and distinctive features of the directive, and those most contested during its progress, are those relating the requirement of professional experience, an adaptation period or an aptitude test. The purpose is to provide for the situation where, in the words of the eighth Recital, "the person's qualifications do not correspond to those laid down by national provisions." Such a situation clearly arises in the case of lawyers since the laws of the Member States are different: a qualification in Portuguese or Danish law hardly provides an adequate basis for legal practice in Ireland. But there are other, less obvious problems, to which the House of Lords Select Committee drew attention. For example, radiography as a professional skill embraces diagnostic radiography, therapeutic radiography and nuclear medicine. A British radiographer may be a specialist in diagnostic or in therapeutic radiography, but the same would not be true in some other Member States where radiotherapy is carried out only by doctors. Any sensible system of mutual recognition of professional qualifications must take account of such differences.

The directive identifies two situations where such problems may arise: first, where the period of education and training in the Member State of origin is significantly shorter than that required in the host State; and second, where there is a substantial difference in the subject matter covered by the education and training required in the two States. The latter situation may arise simply because the process of education and training is approached in a different way, or because the scope of

42 Art. 2, second para.
43 The texts of these Directives are collected in the Commission's "Guide to the Professions" by Jean-Claude Sèché, 1988.
44 See H.L. Report, supra, n. 2, p. 62 for text and p. 27, para. 58 for commentary.
45 Art. 6.
46 Supra., n. 24.
47 Art. 4.
49 Ibid., Evidence, pp. 419–425.
50 Art. 4(1)(a).
professional activities is different and the scope of education and training are correspondingly different. 51 The directive prescribes two ways in which the host Member State can deal with these situations: by requiring evidence of professional experience to make up the shortfall in the first case; or by requiring the applicant to undergo either an “adaptation period” or an “aptitude test,” but not both, to cover the difference in subject matter in the second case. The host Member State can require one or the other, but not both, 52 and in the second case the applicant must be allowed to choose between an adaptation period and an aptitude test. 53

The practical approach to applying these provisions seems to be this. The first question should be whether there is a “substantial difference” between the subject matter of the applicant’s diploma and that of the diploma required in the host state. If there is, the host Member State is entitled to require, and probably will require, the applicant to undergo an adaptation period or an aptitude test. If there is not, the next question is whether the total period of the applicant’s education and training amounts to at least one year less than that required in the host State. In that event, the host State is entitled to require evidence of “actual and lawful pursuit of the profession in a Member State” 54 for a period not exceeding twice the shortfall.

There is one exception. It is confined to “professions whose practice requires precise knowledge of national law and in respect of which the provision of advice and/or assistance concerning national law is an essential and constant aspect of the professional activity.” Here the applicant may have no choice since the host Member State has the option to require either an adaptation period or an aptitude test. 55

The distinction between an “adaptation period” or “aptitude test” is essentially that between a post-qualifying stage and a pre-qualifying professional examination. The Commission initially set its face firmly against any possibility of requiring an applicant to undergo further examination 56 but this was unrealistic and, moreover, potentially prejudicial to the migrant professional who might well be able to pass an examination on the basis of private study before making the move to another country.

The definition of “aptitude test” 57 is perhaps the clearest indication of the thinking behind the directive and the way it should be applied:

[a]ptitude test: a test limited to the professional knowledge of the applicant, made by the competent authorities of the host Member State with the

51 Art. 4(1)(b).
52 Art. 4(2).
53 Art. 4(1)(b), last para.
54 See definition of “professional experience” in Art. 1(e). The definition suggests that the professional experience can have been gained in a third Member State.
55 Proviso to Art. 4(1)(b).
56 See Explanatory Memorandum to C.O.M.(86) 257 final, para. 1(d), printed H.L. Report, supra., n. 2, Appendix 4, p. 56.
57 Art. 1(g).
aim of assessing the ability of the applicant to pursue a regulated profession in that Member State.

In order to permit this test to be carried out, the competent authorities shall draw up a list of subjects which, on the basis of a comparison of the education and training required in the Member State and that received by the applicant, are not covered by the diploma or other evidence of formal qualifications possessed by the applicant.

The aptitude test must take account of the fact that the applicant is a qualified professional in the Member State of origin or the Member State from which he comes. It shall cover subjects to be selected from those on the list, knowledge of which is essential in order to be able to exercise the profession in the host Member State. The test may also include knowledge of the professional rules applicable to the activities in question in the host Member State. The detailed application of the aptitude test shall be determined by the competent authorities of that State with due regard to the rules of Community law.

The status, in the host Member State, of the applicant who wishes to prepare himself for the aptitude test in that State shall be determined by the competent authorities in that State.”

While we have not moved towards harmonisation of professional structures and criteria for entry, the complexity of the foregoing definition makes it clear that the successful working of the directive will depend very much upon a high degree of co-operation between the public authorities of the Member States, their professional bodies and their institutions of tertiary education.

The definition, quantification and qualitative assessment of professional qualifications in different countries is a complex and time-consuming task, and it must be said that the inter-governmental machinery provided for in the directive is likely to prove hopelessly inadequate. The European Parliament proposed, and the Commission in its amended proposal adopted, a provision requiring the Member States to enable “representatives of the professions and of higher education establishments to take part in the decision making process.” For reasons unknown, this has emerged in the form of a “Statement by the Council and the Commission” annexed to the text of the directive in the following terms:

The Council and the Commission agree that professional bodies and higher-education establishments should be consulted or be involved in an appropriate way in the decision-making process.

The urgency of doing the necessary homework and of reaching an understanding as to how the directive will be applied is evident from the

58 Art. 9.
59 See H.L. Report, supra., n. 2, Appendix 5, p. 82 (proposed amendment to Article 9(1).
60 See O.J. 1989, p. L19/23. Much has been said recently about the infringement of fundamental liberties involved in the Lord Chancellor’s proposal that his Advisory Committee should prescribe basic conditions for entry to the legal profession in the United Kingdom. Little or no notice has been taken of the implications of this Statement.
fact that it will be in force before the end of 1990\textsuperscript{61} and that, thereafter, the procedure for dealing with applications must be completed within four months.\textsuperscript{62} Failure to complete the procedure within this time limit or to give adequate reasons for an unfavourable decision will give rise to a right of action in the national courts.\textsuperscript{63} In other words, the criteria and procedures for admission to the professions, even where these are in the hands of self-regulating bodies, will come firmly within the domain of administrative law and judicial review.

On the whole, the result seems to be something of which Frank Dowrick would have approved. In “A Model of the E.C. Legal System,”\textsuperscript{64} he contrasted the Community legal order with the picture of legal systems painted by jurists such as Kelsen and Hart:

“In their academic search for unity and harmony and their concern for \textit{elegantia juris}, both jurists explain legal systems as if they were rigid and static, whereas live legal systems, in particular the E.C. legal system, are dynamic, being elaborate structures of organs and doctrine operating to achieve a variety of objectives and policies, which may not be wholly consistent.”\textsuperscript{65}

The professional directive can hardly be described as a model of \textit{elegantia juris} but it may illustrate the dynamic of Community law in being content to provide the solution, leaving those on the ground to grapple with the problems!

\begin{footnotes}
\item[61] Art. 12.
\item[62] Art. 8(2).
\item[63] Art. 8(2).
\item[65] \textit{Ibid.}, p. 230.
\end{footnotes}