Opinion of Advocate General Trstenjak delivered on 2 June 2010

Robert Koller

Reference for a preliminary ruling: Oberste Berufungs- und Disziplinarkommission - Austria.

'Court or tribunal' within the meaning of Article 234 EC - Recognition of diplomas - Directive 89/48/EEC - Lawyer - Entry on the professional roll of a Member State other than that in which the diploma was recognised as equivalent

Case C-118/09

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I – Introduction

1. With this reference for a preliminary ruling the Court is asked, pursuant to Article 234 EC, (2) to give a ruling on the interpretation of Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration. (3) More specifically, the Oberste Berufungs- und Disziplinarkommission (Appeals and Disciplinary Board, 'OBDK') asks in essence whether, in the light of the objectives of Directive 89/48, a Community national who has completed all of his academic studies in his country of origin, Austria, and who, by way of recognition of the equivalence of his degree in Spain, has obtained a diploma entitling him to take up the profession of lawyer in that country, can take advantage of the mutual recognition of his Spanish degree in Austria in order to pursue that profession in his country of origin, even though he has not acquired in Spain the degree of professional experience required in Austria.

II – Legal context

A – *Community law*

2. Directive 89/48, which is applicable to the case with which the main proceedings are concerned, regulated the mutual recognition between the Member States of higher-education diplomas obtained after professional education and training of at least three years' duration, before it was repealed by Directive 2005/36/EC on the recognition of professional qualifications. (4)

3. The first recital of the preamble to Directive 89/48 is worded as follows:

'Pursuant to Article 3(c) of the Treaty the abolition, as between Member States, of obstacles to freedom of movement for persons and services constitutes one of the objectives of the Community; … for nationals of the Member States, this means in particular the possibility of pursuing a profession, whether in a self-employed or employed capacity, in a Member State other than that in which they acquired their professional qualifications'.

4. Recital 3 of the preamble to that Directive states:

'In order to provide a rapid response to the expectations of nationals of Community countries who hold higher-education diplomas awarded on completion of professional education and training issued in a Member State other than that in which they wish to pursue their profession, another method of recognition of such diplomas should also be put in place such as to enable those concerned to pursue all those professional activities which in a host Member State are dependent on the completion of post-secondary education and training, provided they hold such a diploma preparing them for those activities awarded on completion of a course of studies lasting at least three years and issued in another Member State.'

5. Recital 5 of the preamble to Directive 89/48 reads as follows:

'For those professions for the pursuit of which the Community has not laid down the necessary minimum level of qualification, Member States reserve the option of fixing such a level with a view to guaranteeing the quality of services provided in their territory; … however, they may not, without infringing their obligations laid down in Article 5 of the Treaty, require a national of a Member State to obtain those qualifications which in general they determine only by reference to diplomas issued under their own national education systems, where the person concerned has already acquired all or part of those qualifications in another Member State; … as a result, any host Member State in which a profession is regulated is required to take account of qualifications acquired in another Member State and to determine whether those qualifications correspond to the qualifications which the Member State concerned requires'

6. Article 1(a), (b) and (g) of Directive 89/48 provide:

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

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

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

– which shows that the holder has successfully completed a post-secondary course of at least three years' duration, or of an equivalent duration part-time, at a university or establishment of higher education or another

establishment of similar level and, where appropriate, that he has successfully completed the professional training required in addition to the post-secondary course, and

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

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

(b) host Member State: any Member State in which a national of a Member State applies to pursue a profession subject to regulation in that Member State, other than the State in which he obtained his diploma or first pursued the profession in question;

…

(g) aptitude test: a test limited to the professional knowledge of the applicant, made by the competent authorities of the host Member State with the 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.

7. The first paragraph of Article 2 of Directive 89/48 reads as follows:

'This Directive shall apply to any national of a Member State wishing to pursue a regulated profession in a host Member State in a self-employed capacity or as an employed person.'

8. Point (a) of the first paragraph of Article 3 of Directive 89/48 provides as follows:

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

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

9. Article 4 of Directive 89/48 provides as follows:

'Notwithstanding Article 3, the host Member State may also require the applicant:

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

– may not exceed twice the shortfall in duration of education and training where the shortfall relates to post-secondary studies and/or to a period of probationary practice carried out under the control of a supervising professional person and ending with an examination,

– may not exceed the shortfall where the shortfall relates to professional practice acquired with the assistance of a qualified member of the profession.

In the case of diplomas within the meaning of the last subparagraph of Article 1(a), the duration of education and training recognised as being of an equivalent level shall be determined as for the education and training defined in the first subparagraph of Article 1(a).

When applying these provisions, account must be taken of the professional experience referred to in Article 3(b).

At all events, the professional experience required may not exceed four years;

(b) to complete an adaptation period not exceeding three years or take an aptitude test:

– where the matters covered by the education and training he has received as laid down in Article 3(a) and (b), differ substantially from those covered by the diploma required in the host Member State,

– where, in the case referred to in Article 3(a), the profession regulated in the host Member State comprises one or more regulated professional activities which are not in the profession regulated in the Member State from which the applicant originates or comes and that difference corresponds to specific education and training required in the host Member State and covers matters which differ substantially from those covered by the diploma adduced by the applicant, or

– where, in the case referred to in Article 3(b), the profession regulated in the host Member State comprises one or more regulated professional activities which are not in the profession pursued by the applicant in the Member State from which he originates or comes, and that difference corresponds to specific education and training required in the host Member State and covers matters which differ substantially from those covered by the evidence of formal qualifications adduced by the applicant.

Should the host Member State make use of this possibility, it must give the applicant the right to choose between an adaptation period and an aptitude test. By way of derogation from this principle, for professions whose practice requires precise knowledge of national law and in respect of which the provision of advice and/or

assistance concerning national law is an essential and constant aspect of the professional activity, the host Member State may stipulate either an adaptation period or an aptitude test. Where the host Member State intends to introduce derogations for other professions as regards an applicant's right to choose, the procedure laid down in Article 10 shall apply.

(2) However, the host Member State may not apply the provisions of paragraph 1 (a) and (b) cumulatively.'

B – *National law*

10. According to the information provided by the referring court, the Bundesgesetz über den freien Dienstleistungsverkehr und die Niederlassung von europäischen Rechtsanwälten (Federal law on the free movement of services and the establishment of European lawyers, EuRAG) is to be applied to the present case.

11. Paragraph 24 EuRAG provides as follows:

'(1) Nationals of the Member States of the European Union and the other Contracting States of the Treaty on the European Economic Area who have obtained a diploma which shows that the holder meets the professional requirements necessary for direct entrance to a profession listed in the annex to this federal law must, on application, be registered in the list of lawyers (Paragraph 1(1) of the Rechtsanwaltsordung (Lawyers' Code, RAO)) if they have successfully passed an aptitude test.

(2) Diplomas within the meaning of subparagraph 1 are diplomas, certificates or other evidence of formal qualifications within the meaning of Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration.'

Paragraph 27 EuRAG provides as follows:

'On application by the candidate, at the latest four months after submission of the complete documentation by the candidate, the chairman of the Lawyers' Examination Board shall decide, in consultation with the local Chamber of Lawyers for the Oberlandesgericht, on admission to the aptitude test.'

12. In addition, according to the referring court, certain provisions of the Austrian RAO are applicable.

13. Paragraph 1 RAO concerning registration in the list of lawyers reads as follows:

'(1) An official appointment is not required for the purposes of professional practice as a lawyer in [the Republic of Austria]; it is merely necessary to prove that the following requirements have been fulfilled and that the lawyer is registered in the list of lawyers. (Paragraph 5 and 5a)

…

(2) Those requirements are:

…

(d) practical experience of the nature and duration required by law;

(e) successful completion of the lawyers' test;…'

14. With regard to practical experience, Paragraph 2 RAO provides as follows:

'(1) The practical experience required for professional practice as a lawyer must consist of professional legal work in a court or a public prosecutor's office and with a lawyer; …

(2) The practical experience for the purposes of subparagraph 1 shall be of five years' duration.'

15. The examination for lawyers is regulated in the Rechtsanwaltsprüfungsgesetz (Law on the examination of lawyers, 'RAPG'), Paragraph 1 of which reads as follows:

'The lawyers' examination is intended to demonstrate the candidate's ability and knowledge necessary for professional practice as a lawyer, and in particular his skill in preparing and handling public and private matters entrusted to a lawyer and his aptitude for formulating legal documents and legal opinions and for making orderly written and oral submissions in relation to a legal position and the facts of a case.'

III – Facts of the case, main proceedings and questions referred

16. Mr Koller, an Austrian national, took a course in law at the University of Graz and successfully completed it with the award of the degree of 'Magister der Rechtswissenschaften' on 25 November 2002. By a decision of the Spanish Ministry of Education and Science of 10 November 2004, the Austrian title 'Magister der Rechtswissenschaften' was recognised as equivalent (after courses and supplementary examinations at the University of Madrid) to the Spanish title 'Licenciado en Derecho' and Mr Koller was granted the right to use the Spanish title. (5) On that basis, on 14 March 2005 he was granted the right to use the professional title 'abogado' by the Madrid Chamber of Lawyers.

17. After Mr Koller had practised as a lawyer in Spain for a few weeks, he applied on 5 April 2005 to the Lawyers' Examination Board of the Oberlandesgericht Graz for admission to the aptitude test under Paragraph 28 EuRAG. At the same time he applied to be exempted from examination in all subjects on the basis of Paragraph 29 EuRAG.

18. The Lawyers' Examination Board refused the applications by decision of 11 August 2005. Mr Koller's appeal to the Oberste Berufungs- und Disziplinarkommission (Appeals and Disciplinary Board, OBDK) was unsuccessful. He appealed on a point of law to the Verfassungsgerichtshof (Constitutional Court), which set aside the decision and directed the OBDK to give a fresh ruling on Mr Koller's admission to the aptitude test.

19. The OBDK stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

(1) Is Directive 89/48/EEC applicable to the case of an Austrian national if he

(a) successfully completed his diploma course in law in Austria and was awarded by decision the academic degree of 'Magister der Rechtswissenschaften',

(b) after taking supplementary examinations at a Spanish university, which however involved less than three years of study, was then granted, by a certificate of recognition from the Ministry of Education and Science of the Kingdom of Spain, the entitlement to use the Spanish title 'Licenciado en Derecho', which is equivalent to the Austrian title, and

(c) by registering with the Madrid Chamber of Lawyers gained the entitlement to use the professional title 'abogado' and actually pursued the profession of a lawyer in Spain for three weeks before making the application and for five months at the most before the first instance decision?

(2) In the event that Question 1 is answered in the affirmative:

Is it compatible with Directive 89/48/EEC to interpret Paragraph 24 of the Bundesgesetz über den freien Dienstleistungsverkehr und die Niederlassung von europäischen Rechtsanwälten in Österreich (Federal law on the free movement of services and the establishment of European lawyers in Austria, EuRAG) as meaning that obtaining an Austrian degree in law and attaining the entitlement to use the Spanish title 'Licenciado en Derecho' after taking supplementary examinations at a Spanish university over a period of less than three years of study is not sufficient for admission to the aptitude test in Austria under Paragraph 24(1) of the EuRAG without proof of the practice required under national law (Paragraph 2(2) of the Rechtsanwaltsordnung (Lawyers' Code, RAO), even if the applicant has been admitted as an 'abogado' in Spain without a comparable requirement for practice and had pursued the profession there for three weeks before making the application and for five months at the most before the first instance decision?

IV – Proceedings before the Court

20. The order for reference of 16 March 2009 was lodged at the Registry of the Court of Justice on 1 April 2009.

21. Written observations were submitted by the applicant in the main proceedings, the governments of the Kingdom of Spain, the Republic of Austria, the Czech Republic and the Hellenic Republic as well as the Commission within the time limit of Article 23 of the Statute of the Court of Justice.

22. By way of measures of organisation of procedure, the Court addressed a question to the parties, which they have answered.

23. Since a hearing was not requested, after the general meeting of 9 February 2010 the case became ready for the preparation of this opinion.

V – Main arguments of the parties

A – *Jurisdiction of the Court*

24. The Greek Government and the Commission take the view that the OBDK has all the attributes required by case-law to be recognised as a court for the purpose of Article 234 EC. Consequently they consider that the Court of Justice has jurisdiction

B – *First question*

25. All the participants in the proceedings agree that the qualifications obtained by Mr Koller must be examined to determine whether they may be recognised as diplomas within the meaning of Article 1(a) of Directive 89/48.

26. The *Austrian, Greek* and *Czech* governments point out that a similar problem arose in *Cavallera* (6) in connection with an application by an Italian national for enrolment in the register of the association of engineers of his homeland, after his university course had been recognised as equivalent to that of Spain by way of the homologation procedure. In the opinion of the *Austrian* and *Czech* governments, the conclusions reached in paragraph 55 *et seq.* of that judgment are applicable to the present case.

27. The *Austrian Government* considers that the homologation of Mr Koller's academic title in Spain and his enrolment in the register of the Madrid Chamber of Lawyers do not permit of any review of the qualifications and professional experience gained in Spain. Nevertheless, admission to the legal profession presupposes that the fulfilment of those requirements must be verified.

28. The *Czech Government* submits that recognition of the right to use the professional title 'abogado' cannot be regarded as a 'diploma' within the meaning of Article 1(a) of Directive 89/48 since the conferment of that right depends only on the recognition of the right to use the academic title 'Licenciado en Derecho', without the need for further training, examination or professional experience.

29. The *Greek Government* for its part claims that the 'equivalence' of the Austrian university diploma 'Magister der Rechtswissenschaften' with the Spanish diploma 'Licenciado en Derecho' goes back to a procedure which, although it is provided for in the Spanish legislation, is incompatible with the wording and the spirit of Article 1(a) of Directive 89/48. In the opinion of the Greek Government, although Spain cannot be prevented from retaining a system for the mutual recognition of diplomas, nevertheless academic recognition in Spain, which takes place between the academic title and the (desired) practice of the legal profession in Austria, splits the unity of the concept of the diploma by allowing part of the concept to fall under a procedure situated outside the Directive. With regard to the application of Directive 89/48 in Austria, the academic recognition granted in Spain is not an equalisation procedure provided for in the general system for the recognition of university diplomas, those procedures being comprehensively provided for by statute. Nor does it amount to the 'informal' acquisition of a new title which in Spain could automatically lead to practising the profession of 'abogado' and thereafter to the export of the new diploma to Austria because not even the minimum requirement of a three-year post-secondary course is fulfilled.

30. The Greek Government adds that, even if the missing period of professional practice could be treated as equivalent to the experience acquired by practice of the profession in another Member State, as required by the general statutory equalisation procedure, Mr Koller did not spend the necessary time in both States since he must be treated as having practised in Spain for five months.

31. The A*ustrian, Greek* and *Czech Governments* therefore propose that the first question be answered in the negative. As a precaution, the Greek Government points out that the present case, like the*Cavallera* case, raises the question of circumventing the national systems of education and training. The Greek Government is uncertain as to whether the present case could be dealt with from the viewpoint of misuse of rights.

32. *Mr Koller*, the *Spanish Government* and the *Commission,* on the other hand, contend that Directive 89/48 applies to the main proceedings, so that the professional titles in question fulfil all the requirements of a 'diploma' within the meaning of Article 1(a) of Directive 89/48.

33. First of all, the Ministry of Education and Science and the Madrid Chamber of Lawyers are responsible under Spanish law for recognition of the equivalence of the Austrian title and the conferment of the professional designation 'abogado'.

34. Second, the formal qualifications in question show that the holder has 'successfully completed a post-secondary course of at least three years' duration … at a university'. The *Commission* points out that Mr Koller possesses the title 'Magister der Rechtswissenschaften' and explains that any professional training required in addition to the post-secondary course is not necessary under Article 1(a) of Directive 89/48.

35. Third, the formal qualifications in question certify that 'the holder has the professional qualifications required for the taking up or pursuit of a regulated profession in that Member State'. The Spanish Government makes it clear that the homologation of foreign diplomas produces the same legal effects in Spain as the designation 'Licenciado en Derecho', namely the right to take up the profession of lawyer. The*Commission* and *Mr Koller* submit that the latter exercised that right.

36. The *Commission* also stresses that Mr Koller completed all the stages of his education and training in accordance with the requirements of Article 1(a) of Directive 89/48 (university in Austria, further examinations in Spain). *Mr Koller* points out that, according to Article 8(1) of Directive 89/48, as interpreted by the Court in Case C-274/05, (7) a host Member State is obliged to recognise a diploma awarded by an authority of another Member State even if that diploma is awarded on completion of education and training received, in whole or in part, in the host Member State.

37. *Mr Koller* and the *Commission* go on to state that the present case differs considerably from *Cavallera* in so far as Mr Koller's situation has none of the shortcomings that were evident in that case. For example, the recognition by the Spanish Ministry of Education and Science is not based solely on the fact that university studies were completed in Austria, but on the supplementary examinations taken at the University of Madrid.

38. The *Commission* considers that *Cavallera* does not require the post-secondary course of three years' duration referred to in the second indent of Article 1(a) of Directive 89/48 to be completed in a Member State other than the host State, but only requires the qualifications shown by the certificate to have been 'acquired, wholly or in part, under the education system of the Member State which issued the certificate in question' (8) The Commission points out that Mr Koller acquired the qualifications certified in the recognition decision at least partly in Spain, that is to say, in so far as they relate to the knowledge of Spanish law substantiated by the supplementary examinations after the courses of study.

39. With regard to the meaning and purpose of Directive 89/48, the Commission considers that the evidence of formal qualifications certifies in any case supplementary qualifications acquired in another Member State which give access to the profession regulated there. That requirement prevents the mere homologation of the university degree obtained in the host State from making that possible. The Commission also submits that the *Cavallera* judgment does not require evidence of formal qualifications to prove professional experience in every case. Rather, it is clear from the Court's phrasing that, without any of those elements, the formal qualification cannot be regarded as a 'diploma' within the meaning of Article 1(a) of Directive 89/48 on account of the fact that there is no connection with the Member State issuing it.

40. *Mr Koller,* for his part, points out that Article 4(1)(a) of Directive 89/48 provides that, if the duration of education and training is at least one year less than that required in the host Member State, the applicant may be required to adduce evidence of professional experience. He submits that he cannot be required to adduce such evidence because he can show that he has successfully completed a post-secondary course in Austria and has a diploma proving a three-year post-secondary course in Spain.

C – *The second question*

41. The *Commission* states that Article 3(a) of Directive 89/48 precludes a national provision to the effect that the holder of a diploma of the kind described in the first question cannot be admitted to the aptitude test without the proof of practice required by national law. According to Article 3(a), the host State may not refuse to authorise an applicant to take up a regulated profession for lack of qualifications if the applicant holds a diploma within the meaning of Article 1(a) of Directive 89/48.

42. The Commission points out that the aptitude test serves to determine whether the applicant is suitable for practising the regulated profession in the host State. Austria cannot refuse to allow applicants to take the aptitude test on the ground that their qualifications differ from those of the host State.

43. On that point the *Spanish Government* submits that persons holding the title 'Licenciado en Derecho', which enables them to take up the profession of lawyer in Spain, cannot be required to obtain the practical experience required for pursuing that profession in Austria. The Spanish Government adds that professional experience cannot be required. Furthermore, the Ministerial Decree of 10 November 2004 is compatible with Directive 89/48 and it must permit the applicant to take the aptitude test in Austria without having to produce proof of practical experience.

44. The *Commission* and *Mr Koller* reach the conclusion that Directive 89/48 precludes a national provision which prevents the holder of a diploma without proof of the practical experience required under national law, as in the present case, from being admitted to the aptitude test.

45. In particular, *Mr Koller* submits that to construe Directive 89/48 and Paragraph 24 EuRAG as requiring an aptitude test or an adaptation period is not consistent with Community law. Referring to Article 4 of Directive 89/48 and the Court's case-law, he claims that he should be allowed to take up the profession of lawyer without an aptitude test being necessary for that purpose. In that connection he submits that there are no essential differences between his training and that required in the host State.

46. In Mr Koller's opinion, the second question implies that he is charged with misuse of rights. In his case, however, the Austrian Verfassungsgerichtshof has already found that there was no conduct which was a misuse

of rights. Such a charge cannot therefore be based on Community law or on the Court's case-law. Furthermore, it cannot be presumed that he intended to circumvent the relevant regulations.

VI – Legal assessment

A – *Introductory remarks*

47. The adoption of Directive 89/48 was an significant reversal in the system regulating the freedom of movement of professional people. Whereas in the 1970s the Community legislature had at first set out to harmonise the national measures regulating entry to certain professions (so-called sectoral or vertical approach), the legislature decided, in order to simplify the mutual recognition of academic diplomas, to supplement the harmonisation of certain professional areas, which was not always easy to formulate, with a new, more general approach covering different professional fields (so–called horizontal approach) and centred on a new principle: mutual trust in their equivalence. (9) In doing so, the Community legislature proceeded from the fundamental premiss that academic courses in the Member States are essentially comparable. (10) While remaining conscious of the conspicuous differences existing in certain sectors, particularly in the training of lawyers, (11) the Community legislature nevertheless included in Directive 89/48 certain individual provisions which enable the Member States to abandon any reservations they may have with regard to the equivalence of diplomas by permitting those States, exceptionally, to examine, under simplified conditions, the professional qualifications of persons applying for the recognition of diplomas obtained in other countries.

48. The present case revolves around a reservation of that kind on the part of Austria, which in Mr Koller's case insists on an aptitude test and five years' practical training. The reason for the reservation lies essentially in the suspicion that Directive 89/48 is manifestly being pleaded with the aim of circumventing the Austrian training system for lawyers since, first, the Spanish training system does not include any comparable practical training and, second, Mr Koller acquired his Spanish diploma solely by means of the homologation procedure provided for by Spanish law and not on the basis of a homologation procedure regulated under Community law.

49. First of all, it is necessary to determine whether Directive 89/48 is applicable to the present case and to consider, as a separate issue, whether pleading the Community law constitutes a misuse of rights. Next is the question whether Austria's reservation is justified and whether, in view of the professional qualifications acquired by Mr Koller in another country, he may be required to complete the five-year period of so-called practical experience before admission to the lawyers' examination, just like other Austrians who have completed the basic university course in law.

B – *Jurisdiction of the Court of Justice*

50. First of all, it is necessary to determine whether the OBDK is a court or tribunal within the meaning of Article 234 EC and whether the Court therefore has jurisdiction to rule on the questions referred to it.

51. The second paragraph of Article 234 EC does not itself contain a definition of the term 'court or tribunal'. However, the Court has laid down certain minimum requirements of Community law. According to settled case-law, in order to determine whether a body making a reference is a court or tribunal for the purposes of Article 234 EC, which is a question governed by Community law alone, it takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent. (12)

52. In accordance with paragraph 59 of the the Bundesgesetz über das Disziplinarrecht für Rechtsanwälte und Rechtsanwaltsanwärter (Federal Law on the disciplinary regulations for lawyers and candidates for the legal profession, 'DSt'), the OBDK is composed of a president, a vice president, at least 8 and at most 16 judges of the Oberster Gerichtshof (Supreme Court) and 32 lawyers (lawyer-judges). Pursuant to Paragraph 63(1) of the DSt, the OBDK makes its decisions in chambers. Pursuant to Paragraph 59(2) of the DSt 1990, the professional judges are appointed by the Federal Minister of Justice for a term of five years. The lawyer-judges are elected for five years by the Chambers of Lawyers. The law makes no provision for the premature removal of members of the OBDK. Pursuant to Paragraph 64(1) of the DSt, the members of the OBDK are not bound by instructions. There are no circumstances to suggest that its members are not independent. There is no question of transferring the lawyer-judges or the judges who are members of the OBDK. It makes decisions in an adversarial procedure, it has a comprehensive right of examination and it can review questions of fact and of law as well as the assessment of evidence. It is a permanent institution which is not altered by the fact that its members are appointed for only a limited number of years. (13) The OBDK works on a statutory basis laid down in detail in the RAO and the DSt.

53. In my opinion therefore, the OBDK has all the attributes required by the case-law for recognition as a court or tribunal within the meaning of Article 234 EC. As, according to the information in the order for reference, there are no means of redress in national law in relation to decisions of the OBDK, it is furthermore obliged to seek a preliminary ruling under the third paragraph of Article 234 EC. (14)

C – *The first question*

54. The first question from the OBDK seeks enlightenment as to whether Directive 89/48 is applicable to the case in the main proceedings. For that purpose it will be necessary to examine the scope *ratione personae* and the scope *ratione materiae* of Directive 89/48.

1. Scope of Directive 89/48

(a) Scope *ratione personae*

55. Directive 89/48 establishes a general system for the recognition of diplomas and, more specifically, professional qualifications between the Member States based on the principle of mutual recognition. According to Article 2 of the Directive, it covers 'any national of a Member State wishing to pursue a regulated profession in a host Member State'. The host Member State is defined in Article 1(b) of the Directive as 'any Member State in

which a national of a Member State applies to pursue a profession subject to regulation in that Member State, other than the State in which he obtained his diploma or first pursued the profession in question'.

56. In the present case, those conditions are fulfilled inasmuch as Mr Koller is a Community national who has a diploma issued in Spain allowing him to take up in that Member State the profession of lawyer, which is a regulated profession (15) within the meaning of Article 1(c) of Directive 89/48. He seeks to have the diploma recognised in Austria, the host Member State which is also his State of origin.

(b) Scope *ratione materiae*

(i) First and third conditions

57. Furthermore, the qualification document relied on by Mr Koller must meet the definition of 'diploma' laid down by Directive 89/48 in order for the latter to be applicable. Under Article 1(a) of the Directive, three conditions must be satisfied in order for the qualification document and/or professional experience for which recognition is sought to be regarded as constituting a diploma.

58. First, the diploma must have been awarded by a competent authority of a Member State. On that point it must be observed that, according to the Court's case-law, a 'diploma' within the meaning of Article 1(a) of Directive 89/48 may consist of a set of qualifications. (16) In the present case, that condition is fulfilled inasmuch as the diploma 'Licenciado en Derecho' upon which Mr Koller relies was awarded by the Spanish Ministry of Education and Science (Ministerio de Educación y Ciencia), which, in accordance with Spanish legislation, is authorised to award diplomas to persons who have successfully completed a course in law.

59. Second, the diploma must certify that the holder has completed 'a post-secondary course of at least three years' duration, or of an equivalent duration part-time, at a university or establishment of higher education or another establishment of similar level and, where appropriate, that he has successfully completed the professional training required in addition to the post-secondary course'. As the main variations in the interpretation of Article 1(a) of Directive 89/48 relate to this condition, I shall deal with this aspect last and consider the associated legal problems then.

60. Third, the diploma must give access to a profession in the country of origin. That is to say, the diploma must allow the profession to be actually practised in the State which awarded it. Subject to fulfilment of the second condition, this final condition must also be regarded as having been met. The Spanish diploma obtained by Mr Koller by way of the homologation of his Austrian diploma permits him to pursue the profession of lawyer in the State which awarded the diploma. As the Spanish Government explains at length in its pleading, the homologation of official foreign higher-education diplomas which are acquired in recognised establishments means that, in Spain, they are treated as equivalent in their official effect for academic and professional purposes to the corresponding Spanish diploma. So far as the effect of the official higher-education diploma in turn is concerned, it must be observed that, according to the Spanish Government, the Spanish regulations give it a double academic and professional effect as a result of which the holder has the full benefit of the academic rights inherent in it and, at the same time, has the unconditional right to practise his profession.

(ii) Second condition

61. The difficulty in regarding the second condition as having been fulfilled arises not least from the fact that the Directive expressly requires the holder of a diploma which he seeks to have recognised in the host State to have 'successfully completed a post-secondary course of at least three years' duration'.

62. On the basis of the wording of that provision alone, it would appear at first sight that the condition is not fulfilled, particularly as Mr Koller did not obtain his Spanish degree, which enables him to take up the profession of lawyer in Spain, within the prescribed normal period of four years' studies, which would comply with the requirements of Directive 89/48 with regard to the length of a course. He obtained his Spanish degree by means of a homologation procedure which in any case took less than three years. It appears from the order for reference that about two years elapsed from the conferment of the degree of Magister in Graz (the so-called *Sponsion*) to the recognition of the degree in Spain. (17) Consequently, without further information, it must be presumed that that corresponds more or less to the duration of the homologation procedure.

63. However, that interpretation would overlook the fact that, as a result of homologation, Mr Koller acquired a degree which requires a four-year law course in Spain. As he observed in his pleading, for that purpose he had to take a number of examinations covering various areas of law. According to what he says, the subjects were the same as those of the normal degree course in law of the Universidad Autónoma de Madrid. (18) The reason for such a comprehensive test of his knowledge and abilities in the course of the homologation procedure was that the Spanish Ministry responsible found significant differences in education and training between the Austrian and the Spanish degrees which had to be compensated for.

64. In view of the foregoing observations, I think the following main conclusions may be drawn from the fact that Article 1(a) of Directive 89/48 is applicable.

– 'Post-secondary course': second indent of Article 1(a) of Directive 89/48

65. First of all, the homologation procedure to which Mr Koller had to submit is undoubtedly a 'post-secondary course at a university' within the meaning of that provision. This is primarily a matter of acquiring an additional qualification. As the Court stated in Case C-19/92, (19) a national of a Member State can rely in that State on a diploma acquired in another Member State if and only if that document 'constitutes proof of possession of an *additional professional qualification* [with respect to the training undertaken in the Member State of origin] and thereby confirms its holder's fitness for a particular post'. The homologation certificate received by Mr Koller after passing the examinations should not be regarded as a 'formal act' or 'mere recognition' (20) of his Austrian degree, as the referring court suggests in the order for reference, (21) but rather as proof, furnished by the State, of an additional qualification in Spanish law. In that respect the facts of the present case differ fundamentally from those of the *Cavallera* case, to which all the parties refer.

66. That case arose from an application by Mr Cavallera, an Italian national with a diploma in mechanical engineering from the University of Turin. In order to pursue that profession in Italy, he was required by Italian law to take in addition a State examination. Instead of doing so, he applied to the Spanish Ministry of Education and Science for the recognition of his Italian diploma as equivalent to the corresponding Spanish qualification in accordance with a homologation procedure which was regulated solely by national law and differed from that recognition procedure, which transposes Directive 89/48 into Spanish law. After obtaining recognition, Mr Cavallera was enrolled in the register of the Professional Association of Engineers in Catalonia. However, he neither worked outside Italy in his acquired profession nor did he complete additional education or training in Spain.

67. The Court therefore correctly found in that case that the Spanish homologation did not provide evidence of any additional qualification whatever and therefore did not meet the requirements for a diploma within the meaning of Article 1(a) of Directive 89/48. (22) In support of that finding, the Court added that neither homologation nor enrolment in the register of one of the Catalonian professional associations was based on an examination of the qualifications or professional experience acquired by Mr Cavallera. The Court took the view that to accept, in such circumstances, that Directive 89/48 may be relied on in order to secure access to the regulated profession at issue in the main proceedings in Italy would be tantamount to allowing a person who has merely obtained a qualification awarded by that Member State which does not in itself provide access to that regulated profession none the less to gain access to that profession, without the homologation certificate obtained in Spain providing evidence that the holder has acquired an additional qualification or professional experience. In the Court's opinion, such a result would be contrary to the principle enshrined by Directive 89/48 and set out in recital 5 of its preamble, according to which Member States reserve the option of fixing the minimum level of qualification necessary to guarantee the quality of services provided in their territory. (23)

68. However, that risk does not arise in the present case because the homologation certificate granted to Mr Koller is entirely based on verification of the professional qualifications he acquired in courses of study in Spain. So far as the relation with the diploma gained in Austria is concerned, it would not be appropriate, in view of the undoubted differences between Austrian and Spanish law, to regard the knowledge and qualifications obtained in Spain as an adjunct to the Austrian university law course. Rather, it must be presumed that the education or training in the context of the homologation procedure in Spain is an independent course of study.

69. As no professional experience of any kind is required in order to take up the profession of lawyer in Spain, unlike Austria, and only the 'academic qualifications' of a graduate are taken into account, those are sufficient for concluding that the holder of such a qualification has 'professional qualifications'.

– 'Studies of at least three years' duration': second indent of Article 1(a) of Directive 89/48

70. Second, the fact that the homologation procedure undoubtedly took less than three years does not automatically preclude the presumption of 'at least three years' duration' under the second indent of Article 1(a) of Directive 89/48.

71. In the first place, the equivalence provision of the second subparagraph of Article 1(a) of Directive 89/48 may be applicable by analogy. According to that provision, 'the following shall be treated in the same way as a diploma, within the meaning of the first subparagraph: any diploma, certificate or other evidence of formal qualifications or any set of such diplomas, certificates or other evidence awarded by a competent authority in a Member State if it is awarded on the successful completion of education and training received in the Community and recognised by a competent authority in that Member State as being of an equivalent level and if it confers the same rights in respect of the taking up and pursuit of a regulated profession in that Member State.' That provision, which was originally intended to regulate the so-called 'alternative route', was, as the Court stated in *Beuttenmüller*, (24) included to take account of 'persons who had not undergone three years of higher education and training, but who hold qualifications giving them the same professional rights'. (25) The homologation procedure constitutes, according to its meaning and purpose, in so far as it provides for a test of knowledge of Spanish law in the present case, in a certain way an alternative route to the ordinary university course in Spain, leading to the recognition of foreign degrees and professional examinations as it confers upon them the same legal effect as upon national degrees and examinations. If the homologation procedure leads to a successful conclusion for foreign lawyers such as Mr Koller, it makes it possible for them to take up a regulated profession in Spain.

72. In the second place, there appears to be no reason why the fact that in only two years, that is to say less than the normal period of study, Mr Koller completed his legal education, which under national law requires a four-year law degree course in Spain, should be detrimental to him. Non-recognition of the equivalence of the homologation procedure at Community level would mean that achievement is not valued, but rather punished because applicants who pass the necessary examinations in less time than others would be worse off. That is not appropriate, nor is it in accordance with Community law as it stands at present, as shown by Case C-286/06 *Commission* v *Spain*, (26) for example.

73. The subject of that case was an infringement by Spain of Directive 89/48 and, in particular, Article 3, which the Court found that Spain had infringed by refusing to recognise the professional qualifications obtained by an engineer in Italy on the basis of university education acquired only in Spain, and by making admission to internal examinations for promotion in the civil service subject, in the case of engineers with professional qualifications obtained in another Member State, to academic recognition of those qualifications. It must be noted that the persons concerned held diplomas awarded by the University of Alicante (Spain) which had been recognised as equivalent on the basis of a framework cooperation agreement with the Polytechnic University of the Marches (Italy). Consequently they had been awarded the Italian diploma of 'ingenere civile'. It must also be observed that, after obtaining that diploma in Italy, they had passed the State examination entitling them to pursue the profession of civil engineer in that Member State.

74. In that judgment the Court began by observing that Article 8(1) of Directive 89/48 obliges the host Member State to accept, in any event, as proof that the conditions for recognition of a diploma are satisfied, the certificates and documents issued by the competent authorities in other Member States. (27) The Court then to a certain extent spoke out against the unequal treatment of persons who obtained their professional qualifications

on the basis of homologation instead of by means of normal studies at a university or higher education establishment. The Court made the following observations in paragraphs 80 and 81 of the judgment:

'Thus, in the present case, where the profession of road, canal and port engineer is normally pursued in Spain by holders of a Spanish diploma obtained following five years of studies, the holder of a diploma awarded in another Member State and entitling the person concerned to pursue, where appropriate after he has been the subject of compensatory measures, the same profession in Spain must be accorded the same promotion possibilities as holders of that Spanish diploma. Those considerations apply irrespective of the number of years required by that holder to obtain the diploma in question.

Once a diploma awarded in another Member State has been recognised pursuant to Directive 89/48, where appropriate after compensatory measures have been imposed, it is considered to confer the same professional qualifications as the equivalent Spanish diploma. In those circumstances, depriving the holder of a diploma awarded in another Member State of the benefit of the same promotion possibilities as holders of the equivalent Spanish diploma, on the sole ground that that diploma was obtained after a shorter period of education and training would amount to placing holders of a diploma of another Member State at a disadvantage solely because they acquired equivalent qualifications within a shorter space of time.'

75. I think the following conclusion can be drawn from the foregoing observations and from the Court's case-law previously cited. First, the question whether a 'post-secondary course of at least three years' duration' within the meaning of Article 1(a) of Directive 89/48 is involved cannot depend on whether the degree in question was obtained following a normal university course of not less then three years or a homologation procedure taking less than three years. Provided that the latter is comparable with a university course, as in the present case, in so far as it provides for education and training in the form of courses of study and supplementary examinations and the corresponding degree has the same legal effect in the country concerned, the two types of degree must be regarded as equivalent.

76. A lack of professional experience is perhaps irrelevant with regard to the question of the applicability of Directive 89/48 to the case in the main proceedings, which is the subject of the first question. It must be borne in mind that the mutual recognition of diplomas which is required by the Directive is based on the principle of mutual trust, (28) so that the host State is in principle prevented from calling into question the equivalence of professional qualifications acquired in the other Member State. It must also be observed that, as the Court has consistently held, (29) unlike the sectoral directives relating to specific professions, Directive 89/48 is not intended to harmonise the conditions for taking up or pursuing the various professions to which it applies. The Member States therefore remain competent to define such conditions within the limits imposed by Community law. (30)

77. Consequently Spain must be regarded as being free to determine access to the profession of lawyer on its territory both on the basis of a decision recognising the equivalence of education and training undertaken on the territory of another Member State and on the basis of a diploma awarded on completion of education and training in Spain, since the only requirement laid down by Article 1(a) of Directive 89/48 is that the diploma must show 'that the holder has successfully completed a post-secondary course of at least three years' duration … and … that the holder has the professional qualifications required for the taking-up or pursuit of a regulated profession in that Member State'. (31) The question of how far the pursuit of a particular profession requires an exact knowledge of national law must therefore be determined by reference to national law alone. (32) Consequently Austria, as the host State, cannot, in order to question whether Directive 89/48 is applicable to the main proceedings, successfully plead that Mr Koller did not complete the five years' practical experience prescribed by Austrian law.

78. As the degree obtained by Mr Koller in Spain by way of homologation has the same legal effect as a four-year university course and as his degree is based on additional qualifications in the Member State where it was conferred, for example, in the form of courses of study and supplementary examinations, it is to be presumed that the second requirement in the definition of 'diploma' within the meaning of Article 1(a) of Directive 89/48 is fulfilled.

(c) Interim conclusion

79. Therefore the formal qualification upon which Mr Koller relies accords with the definition of 'diploma' in Article 1(a) of Directive 89/48 and consequently that Directive is applicable.

2. The finding of misuse of rights in relation to the general rules for the mutual recognition of diplomas

(a) The Community-law concept of misuse of rights

80. The fact that a directive is applicable in principle must not be confused with the right to invoke it. If there are actual indications of misuse of rights, there should be no right to rely on Community law. (33) As the Court last observed in *Commission* v *Spain*, (34) in relation to the interpretation of Directive 89/48, nationals of a Member State cannot attempt, under cover of the rights created by the Treaty, improperly to circumvent their national legislation. In the main proceedings, the referring court appears to imply a suspicion of the misuse of rights of that kind when it states in the order for reference that the procedure used by Mr Koller was aimed at circumventing the statutory requirement in Austria to have five years' practical experience. (35) This provides an occasion to consider the misuse of rights.

81. Community law recognises a concept of misuse or abuse of rights, (36) which goes back to the Court's case-law (37) and has by now been relatively well defined. (38) It originated in the area of fundamental freedoms and has been applied by the Court to other specific areas of Community law and developed further. In very simple terms, it can be understood as the principle that wrongful practices are prohibited and that 'Community law cannot be relied on for abusive or fraudulent ends'. (39) In the Court's opinion, evidence of an abusive practice requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved, and,

second, a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it. (40)

82. It is for the national court to ascertain whether the elements constituting an abusive practice are present in the dispute in the main proceedings. (41) However, the Court, when delivering a preliminary ruling, may nevertheless provide clarification designed to give the national court guidance in its interpretation. (42)

(b) Consideration from the viewpoint of the aims of the Directive

83. The question whether there has actually been a misuse of rights in the present case cannot be discussed in general terms, without taking account of the aims of the Directive. The general system of recognition introduced by Directive 89/48 is designed precisely to enable the nationals of a Member State entitled to pursue a regulated profession in one Member State to take up that profession in other Member States. (43) The Court therefore has already decided that the fact that a national of a Member State who wishes to pursue a regulated profession chooses to take up that profession in his preferred Member State cannot of itself constitute misuse of the general system of recognition laid down by Directive 89/48. The Court added that the right of nationals of a Member State to choose the Member State in which they wish to acquire their professional qualifications is inherent in the exercise, in a single market, of the fundamental freedoms guaranteed by the EC Treaty. (44)

84. In view of those case-law principles, a national of a Member State cannot be blamed for wishing to have his home State recognise his foreign diploma after he has completed his basic university course in his home State and has acquired an additional qualification in a different Member State of his choice. As a Union citizen, it is open to him to exercise his freedom of movement and to study and/or work abroad without having to fear that he will, as a result, be at a disadvantage in his academic and/or professional career if he returns home. That is what recital 1 of the preamble to Directive 89/48 aims to secure in stating that the abolition, as between Member States, of obstacles to freedom of movement for persons is one of the objectives of the Community. An individual may, of course, rely on the freedom of movement vis-à-vis his home State also.

85. The situation described above is also consistent with the aim of the greatest possible realisation of the freedom to provide services which, according to recital 1 of the preamble, is aimed at by Directive 89/48 because, first of all, it assists the provision of education and training services by institutions in the territory of another Member State. The academic/professional qualification acquired abroad is also of benefit to the State of origin of the Union citizen if it attaches importance to the best possible education and training of its nationals and this helps in the creation of a European employment market, which can only be achieved if there is an education and training market at European level. In the second place, the freedom to provide services is also given effect in so far as lawyers' services in the area of cross-border legal transactions are made possible. (45) That requires knowledge of the law of the other Member States which is best acquired by additional training on the spot. That objective is promoted by the recognition by the host State of a legal qualification obtained abroad in the law of that Member State. (46)

86. As Advocate General Poiares Maduro correctly observed in his opinion in the *Cavallera* case, (47) it cannot automatically be regarded as a misuse of rights if a Union national can obtain more favourable access to a profession in a Member State other than the State in which he studied and takes advantage of that for himself. Rather, misuse of rights in the present context is to be presumed only where the Union national has not actually exercised his freedom of movement by way of, for example, supplementary education and training or by obtaining professional experience in a different Member State. There can truly be 'economic and social interpenetration', (48) as required by the internal market objective of Article 3(c) EC, only where education and training or professional experience are obtained in that way. As it has already been found that Mr Koller obtained a professional qualification following a 'post-secondary course' within the meaning of the second indent of Article 1(a) of Directive 89/48, (49) the requirements for presuming a misuse of rights are not clearly fulfilled.

3. Conclusion

87. The reply to the first question must therefore be that the concept of 'diploma' within the meaning of Article 1(a) of Directive 89/48 embraces formal qualifications conferred by an organisation of another Member State which show that the applicant satisfies the professional requirements there for taking up the regulated profession, but which do not certify a university course of at least three years' duration in that State and are based on the recognition of a corresponding degree obtained in the host State, provided that such recognition is based on additional qualifications in the Member State conferring the qualification, such as, for example, education and training in the form of courses of study and supplementary examinations.

D – *The second question*

88. In essence, the second question from the referring court is whether Directive 89/48 precludes a national rule that a holder of a diploma of the kind described in the first question cannot be admitted to an aptitude test without proof of the practical experience required by national law.

89. Consequently, having established, in response to the first question, that Directive 89/48 is applicable, it is now necessary to determine whether the national law complies with the requirements of the Directive. Therefore the question is whether Austria may derogate from the principle of mutual recognition and require Mr Koller, who possesses the Austrian title of 'Magister der Rechtswissenschaften' and the Spanish title 'Licenciado en Derecho', as well as the professional designation 'abogado', to serve a period of practical training as a precondition for admission to the aptitude test.

90. Article 4(1)(b) of Directive 89/48 may be regarded as the legal basis of a national measure of that kind. However, the meaning of that provision can be ascertained only after elucidation of the system of mutual recognition underlying the Directive and of the relevant case-law of the Court.

1. No automatic mutual recognition

91. First of all, reference must be made to the first paragraph of Article 3 of Directive 89/48, which gives effect to the principle of mutual trust in relation to the recognition of diplomas (50) by providing that a host

Member State which makes entrance to a profession subject to possession of a diploma may not, on the grounds of inadequate qualifications, refuse to authorise a national of a Member State to take up that profession if the applicant holds the diploma required in another Member State for the taking up or pursuit of the profession in question in its territory, such diploma having been awarded in a Member State. In addition, reference must be made to the abovementioned Article 8(1) of Directive 89/48, which obliges the host State to recognise the certificates and documents issued by the competent authorities of other Member States.

(a) The *Morgenbesser* judgment of 13 November 2003

92. As the Court made clear in *Morgenbesser*, (51) Directive 89/48 does not require recognition of a diploma to be purely automatic. (52) Rather, it is the duty of the competent authority to examine, in accordance with the principles set out by the Court of Justice in *Vlassopoulou* (53) and *Fernández de Bobadilla*, (54) whether, and to what extent, the knowledge certified by the diploma granted in another Member State and the qualifications or professional experience obtained there, together with the experience obtained in the Member State in which the candidate seeks enrolment, must be regarded as satisfying, even partially, the conditions required for access to the activity concerned. (55)

93. That examination procedure must enable the authorities of the host Member State to assure themselves, on an objective basis, that the foreign diploma certifies that its holder has knowledge and qualifications which are, if not identical, at least equivalent to those attested [to] by the national diploma. That assessment of the equivalence of the foreign diploma must be carried out exclusively in the light of the level of knowledge and qualifications which its holder can be assumed, by virtue of that diploma, to possess, having regard to the nature and duration of the studies and practical training to which the diploma relates. (56)

94. In the course of that examination, a Member State may take into consideration objective differences relating to both the legal framework of the profession in question in the Member State of origin and to its field of activity. In the case of the profession of lawyer, which is relevant here, a Member State may therefore, in the Court's opinion, carry out a comparative examination of diplomas, taking account of the differences identified between the national legal systems concerned. (57).

95. If a comparative examination results in a finding that the knowledge and qualifications attested [to] by the foreign diploma correspond to those required by the national provisions, the Member State must recognise that diploma as fulfilling the requirements laid down by its national provisions. If, on the other hand, the comparison reveals that the knowledge and qualifications attested [to] by the foreign diploma and those required by the national provisions correspond only partially, the host Member State is entitled to require the person concerned to show that he has acquired the knowledge and qualifications which are lacking. (58) In that regard, it is for the competent national authorities to assess whether the knowledge acquired in the host Member State, either during a course of study or by way of practical experience, is sufficient to prove possession of the knowledge which is lacking. (59)

(b) The *Peśla* judgment of 10 December 2009

96. Most recently the Court expressly confirmed on 10 December 2009, in Case C-345/08 *Peśla*, which concerned qualification for the profession of lawyer, that a comparative examination by the authorities of the host State of professional qualifications acquired in another Member State is consistent with the requirements of Community law. (60)

97. That case arose from an application by Mr Peśla, a Polish national, for admission to the legal traineeship service in Germany. Mr Peśla had completed a law degree course in his homeland and later, under a German-Polish legal training scheme, had acquired the degree of Master of German and Polish Law and also the title of Bachelor of German and Polish Law. The German authorities rejected his application for a finding of equivalence on the ground that knowledge of foreign law could not be recognised as equivalent because of the differences from German law. In addition, the German authorities pointed out that the level of the knowledge of German law required for the credits obtained by Mr Peśla in the Master of German and Polish Law course was significantly lower than that required for the written tests of the first State examination in the compulsory subjects. Nevertheless, in the rejection decision he was offered an opportunity to take an aptitude test, upon application. (61)

98. In the *Peśla* judgment, the Court substantially confirmed the view of the law taken by the German authorities. The Court found that 'the knowledge attested by the diploma granted in another Member State and the qualifications and/or work experience obtained in other Member States, together with the experience obtained in the Member State in which the candidate seeks enrolment, *must be examined by reference to the professional qualification required by the law of the host State*'. (62)

99. At the same time, the Court correctly observed that, with regard to entering a legal profession in the host State, the decisive factor is knowledge of the law of that Member State. The Court indicated that such knowledge cannot simply be replaced by knowledge of the law of the State of origin, and not even if the study of the law in the two Member States is comparable from the point of view of both the level of training received and the time and effort invested to that end. To illustrate the absurdity of Mr Peśla's argument to the contrary, the Court observed that, 'if taken to its ultimate conclusion, [it] would be tantamount to accepting that a candidate could be admitted to serve as a legal trainee *without having any knowledge of German law or the German language*'. (63)

100. The Court went on to observe that 'where the competent authorities of a Member State consider the application of a national of another Member State to be admitted to serve a practical training period, such as a legal traineeship, with a view to exercising a regulated legal profession at a later date, [Article 39 EC] does not of itself oblige those authorities to require from the candidate, in the examination of equivalence required by Community law, merely *a level of legal knowledge which is lower* than that attested by the qualification required in that Member State for access to such a period of practical training. (64)

(c) Conclusions

101. For the purpose of this reference for a preliminary ruling, it follows from the Court's case-law cited above that a diploma is by no means required to be recognised in the host State automatically. (65) Rather, the host State has the right to ascertain whether the foreign diploma is equivalent to the corresponding degree in the host State by means of a comparative procedure. (66) In the case of law degrees, it must in principle be presumed that the legal systems of the Member States differ, so that the host State may, in conformity with Community law, require a diploma-holder to have an exact knowledge of the law of the host State. (67) From the Community-law viewpoint it is permissible, in the interest of the freedom of movement of workers, but not mandatory, to stipulate less stringent requirements concerning the applicant's knowledge of law than those certified by the qualification required in that Member State for admission to serve a practical training period. (68)

102. The Court has developed those principles in interpreting the primary-law provisions of Articles 39 and 43 EC on the freedom of movement and freedom of establishment of workers. The second question from the referring court must be considered principally by reference to Directive 89/48 because secondary law is to be applied in priority. Nevertheless, that does not preclude an interpretation of Directive 89/48 in the light of the abovementioned principles because the Directive was adopted for the purpose of putting into effect the fundamental freedoms, which is indicated by the choice of its legal bases and the first recital in its preamble. (69)

2. The legal basis in Article 4(1)(b) of Directive 89/48

103. The Court's case-law which has already been cited gives valuable guidance for the interpretation of Article 4(1)(b) of Directive 89/48 because it concerns the measures which the host State may take in relation to recognition of the foreign diploma after a comparative examination of the applicant's qualifications. Those measures include the right to require the applicant, under certain conditions, to complete an adaptation period not exceeding three years or to take an aptitude test.

104. Under the second subparagraph of Article 4(1)(b) of the Directive, an applicant has in principle an option. By way of derogation from this principle, for professions whose practice requires precise knowledge of national law and in respect of which the provision of advice and/or assistance concerning national law is an essential and constant aspect of the professional activity, the host Member State may stipulate either an adaptation period or an aptitude test. That undoubtedly applies to the profession of lawyer, which involves the provision of advice and/or assistance to clients in matters of national law. (70) Consequently Austria may require a lawyers' examination to be taken provided that it satisfies the definition of 'aptitude test'.

(a) The lawyers' examination as 'aptitude test' within the meaning of Article 1(g)

105. The lawyers' examination provided for in Paragraph 1 RAPG satisfies the definition of 'aptitude test' within the meaning of Article 1(g) of Directive 89/48 as it relates solely to the applicant's professional knowledge. It assesses the applicant's ability to practise the profession of lawyer in Austria in accordance with the requirements laid down in Paragraph 1 RAPG, which states that proof must be adduced of 'skill in preparing and handling public and private matters entrusted to a lawyer and his aptitude for formulating legal documents and legal opinions and for making orderly written and oral submissions in relation to a legal position and the facts of a case'. As the host State, Austria has the right, under Community law in accordance with the principles developed in the Court's case-law, to lay down those requirements. (71) Article 1(g) of Directive 89/48 also confers upon Austria the right to determine the 'detailed application' of any such 'aptitude test'.

(b) Conditions under which the host State may require an aptitude test

106. Under the second indent of Article 4(1)(b) of Directive 89/48, the host State may require an aptitude test where the profession regulated in the host Member State comprises one or more regulated professional activities which are not in the profession regulated in the Member State from which the applicant originates or comes and that difference corresponds to specific education and training required in the host Member State and covers matters which differ substantially from those covered by the diploma adduced by the applicant.

(i) Professional activity not required in the Member State from which the applicant originates or comes

107. The 'practical experience' required in Austria by Paragraph 1(2)(d) RAO, which is not provided for in the training of lawyers in Spain, must be regarded as a 'professional activity' which is 'not in the profession regulated in the Member State from which the applicant originates or comes'.

(ii) Substantial difference in training

108. The substantial difference which, under the second indent of Article 4(1)(b), must consist in specific education and training required in the host Member State, is to be seen in the fact that entrance to the lawyers' profession in Austria in the final outcome is permitted only to those who, in addition to the basic university course, succeed in the lawyers' examination and complete the five years' practical experience. Those are required by Paragraph 1(1) and (2) RAO for enrolment in the list of lawyers which entitles individuals to practise as lawyers. In Spain, on the other hand, it is sufficient for that purpose to acquire the title 'Licenciado en Derecho', to have completed the university course successfully and to enrol in a chamber of lawyers. As training as a lawyer in Spain requires no practical experience whatever, that difference must be described as substantial.

(iii) Reference to subjects not covered by the diploma from the State of origin

109. Finally, the host State may require an aptitude test to be taken only where that difference relates to subjects which differ substantially from those covered by the qualifications presented by the applicant.

– The qualification obtained in Spain

110. As is clear from Directive 89/48 and the Court's case-law, (72) any existing knowledge of the applicant, for example, of the law of the host-State, must be taken into account. In that connection the fact that Mr Koller not only completed a university course in Spain, but had previously successfully completed a university law course in Austria, is no doubt important, particularly as a 'diploma' within the meaning of Article 1(a) of Directive 89/48 may consist of a set of qualifications (73) and therefore in principle he could have regarded his title of 'Magister der Wissenschaften' as an additional qualification. However, the fundamental differences in the legal systems of

individual Member States indicate that the course completed by Mr Koller in Spain did not in principle supplement his degree course in Austria, but was in essence a fundamentally different course. Therefore they can be compared only to a limited extent. It must also be borne in mind, when assessing professional qualifications, that the professional profile of a lawyer may vary from one Member State to another. (74) Ultimately, however, in accordance with the second subparagraph of Article 1(g) of Directive 89/48, it is incumbent on the competent authorities of the host State to determine which areas of the education and training required in the host State are not covered by the diploma presented by the applicant.

– The relationship between the basic university law course and training as a lawyer

111. In my opinion, the relationship between training as a lawyer and the basic law course is clearer in Austria, where training is designed to build on the basic course because the knowledge of the law acquired thereby is necessarily presumed to exist. The training therefore constitutes supplementary education as it aims to enable examination candidates to acquire the necessary professional qualification and experience. Unlike the purely academic study of law at a university, training as a lawyer is practice-orientated. As the Austrian Government explains, (75) that training, which includes the five years' practical experience and the lawyers' examination, has its legislative justification in the aim of providing high-quality legal services which meet the requirements of actual practice in the interest of clients.

112. In addition to the practical orientation of lawyers' training in Austria, it must be borne in mind that such training covers subjects which are not dealt with at all, or not adequately, in the basic law course. These include the calculation of lawyers' costs and the rules of professional conduct for lawyers. As Mr Koller himself admits in his written submissions, (76) only part of the law of costs was taught in the diploma examination for the law of civil procedure and in the university course in the law of criminal procedure. He is also unable to show practical experience in those fields. However, knowledge of them is an essential requirement for practising as a lawyer. For that reason the rules of professional conduct are expressly mentioned in Article 1(g) of Directive 89/48 as a permissible subject for an aptitude test. Mr Koller's argument that, after more than four years' practice as a lawyer he can be considered to have learnt the law of costs in private study cannot call into question the need for State verification of his qualifications.

113. Finally, it must be noted that, in interpreting the second indent of Article 4(1)(b) of Directive 89/48, it is necessary to consider recital 5 of the preamble to the Directive, which states that for those professions for the pursuit of which the Community has not laid down the necessary minimum level of qualification, Member States reserve the option of fixing such a level with a view to guaranteeing the quality of services provided in their territory. Since neither Directive 89/48 nor any other Community measure regulates the general requirements for taking up the profession of lawyer and consequently the Member States retain the power to lay down the requirements and, therefore, the minimum level of education and training, Community law does not preclude the applicant's obligation to take an aptitude test.

(c) Interim conclusion

114. Accordingly Austria may, on the basis of the enabling provision under the second indent of Article 4(1)(b) of Directive 89/48, require Mr Koller to take an examination for lawyers.

3. Obligation to acquire five years' practical experience

115. However, the duty to take the examination must be distinguished from the applicant's obligation to acquire five years' practical experience.

116. As Article 4(1)(b) of Directive 89/48 does not contain an appropriate enabling provision, it cannot be taken as a legal basis for an obligation to serve a period of practical training.

117. Under Article 4(1)(a), the host State may require an applicant to provide evidence of professional experience, but only if the duration of the education and training adduced in support of his application, as laid down in Article 3(a), is at least one year less than that required in the host Member State. However, there is nothing to indicate that the normal period of study in Spain differs so much from the duration of the law degree course in Austria, which is the criterion for comparison here. As I have already said, (77) in the main proceedings it must be borne in mind that Mr Koller completed a supplementary course in law in only two years which, in terms of Spanish law, corresponds to a law degree course normally lasting four years in Spain.

118. However, even if the approximately two years' duration of the homologation procedure were taken as the only criterion, it would be extremely doubtful whether Article 4(1)(a) would permit such a long period of practical training as the five years' practical experience in Austria, particularly as, under the first indent, the duration of the professional experience required is not to exceed twice the shortfall in duration of education and training. Furthermore, the fourth subparagraph of Article 4(1)(a) clearly provides that in any event the professional experience required may not exceed four years. The mandatory five years' practical experience in Austria would therefore in any case exceed the maximum duration permitted by Directive 89/48.

119. Finally, it is necessary to take into account Article 4(2) of the Directive, which expressly provides that the host Member State may not apply the provisions of paragraph 1 (a) and (b) cumulatively. This provision is to be understood as prohibiting the simultaneous application of both equalisation measures. (78) When applied to the present case, this means that Austria has no right to require evidence of professional experience in addition to the aptitude test.

120. Consequently Directive 89/48 provides no legal basis for an obligation to acquire five years' practical experience in the particular circumstances of the main proceedings.

4. Conclusion

121. To sum up, it can be found that, although Austria may require Mr Koller to take an aptitude test, it cannot require him to acquire five years practical experience in addition.

122. Therefore the reply to the second question from the referring court must be that Directive 89/48 precludes a national rule which states that the holder of a diploma of the kind described in the first question is not to be admitted to an aptitude test without evidence of the practical experience required under national law.

VII – Conclusion

123. In the light of the foregoing considerations, I propose that the Court of Justice reply to the questions referred for a preliminary ruling by the Oberste Berufungs- und Disziplinarkommission as follows:

1. The concept of 'diploma' within the meaning of Article 1(a) of Directive 89/48 embraces formal qualifications conferred by an organisation of another Member State which show that the applicant satisfies the professional requirements there for taking up the regulated profession, but which do not certify a university course of at least three years' duration in that State and are based on the recognition of a corresponding degree obtained in the host State, provided that such recognition is based on additional qualifications in the Member State conferring the qualification, such as, for example, education and training in the form of courses of study and supplementary examinations.
2. Directive 89/48 precludes a national rule which states that the holder of a diploma of the kind described in the first question is not to be admitted to an aptitude test without evidence of the practical experience required under national law.

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1 – Original language: German.

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2 – Pursuant to the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community of 13 December 2007 (OJ 2007 C 306, p. 1), the preliminary ruling procedure is now governed by Article 267 of the Treaty on the Functioning of the European Union.

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3 – OJ 1999 L 19, p. 16.

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4 – Directive 2005/36 of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22). Directive 2005/36 consolidates the acquis communautaire in the field of the recognition of professional qualifications. The Directive consolidates three horizontal directives on general rules and twelve individual directives. It applies to all nationals of a Member State who wish to take up, whether on a self-employed basis or otherwise, a regulated profession in a Member State other than that in which they obtained their professional qualifications.

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5 – It appears from the documents in the file that official confirmation was on the basis of Royal Decree 86/1987 of 16 January 1987 (BOE 23 January 1987, since replaced by Royal Decree 285/2004 of 20 February 2004, BOE 4 March 2004).

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6 – Case C-311/06 [2009] ECR I-415.

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7 – Case C-274/05 *Commission* v *Greece* [2008] ECR I-7969, paragraphs 31 and 35.

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8 – *Cavallera,* cited in footnote 6, paragraph 55.

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9 – For the secondary-law system of coordination and recognition directives, and the background to Directive 89/48, see Görlitz, N., 'Gemeinschaftsrechtliche Diplomanerkennungspflichten und Zugang zum deutschen Vorbereitungsdienst – Die primär- und sekundärrechtliche Verpflichtung der EU-Staaten zur Äquivalenzüberprüfung von den Ersten Staatsexamina vergleichbaren ausländischen Hochschulabschlüssen", Europarecht, 2000, issue 5, p. 840; Bianchi Conti, A., 'Considerazioni sul riconoscimento delle qualifiche e die titoli professionali', La libera circolazione dei lavoratori, 1998, p. 205; Pertek, J., 'La reconnaissance mutuelle des diplômes d'enseignement supérieur', Revue trimestrielle de droit européen, 1989, no. 4, pp. 629, 637; Boixareu, A., 'Las profesiones jurídicas en la directiva relativa a un sistema general de reconocimiento de los títulos de enseñanza superior', Gaceta jurídica de la C.E.E., 1999, no. 44, pp. 3, 4; Zilioli, C., 'L'apertura delle frontiere intracomunitarie ai professionisti: la direttiva CEE N. 89/48', Diritto comunitario e degli scambi internazionali, 1989, vol XXVIII, no. 3, p. 422, who explain how the Community legislature originally set out to harmonise the content of and the admission requirements for individual national training courses and then, later, changed course with Directive 89/48 so as to introduce, on the basis of the so-called principle of trust, an obligation for the Member States to recognise diplomas acquired in accordance with the rules of the respective State of origin, which to that extent are not harmonised.

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10 – See, to that effect, Pertek, J., 'La reconnaissance des diplômes, un acquis original rationalisé et développé par la directive n° 2005/36 du 7 octobre 2005', Europe, 2006, no. 3, p. 7, in relation to Article 3 of Directive 89/48, and the subsequent provision of the first paragraph of Article 13 which, in the author's opinion, contain a rebuttable presumption of the equivalence of foreign diplomas.

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11 – According to Visée, J.-M., 'L'application de la directive 89/48/CEE (système général de reconnaissance des diplômes) aux avocats', La reconnaissance des qualifications dans un espace européen des formations et des professions, 1998, p.212, the measures (training courses and aptitude tests) laid down in Article 4 of Directive 89/48 are intended to make up for the sometimes substantive differences in the forms of training.

12– Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 23; Case 53/03 *Syfait and Others* [2005] ECR I-4609, paragraph 29, and Case C-246/05 *Häupl* [2007] ECR I-4673, paragraph 16.

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13 – Case C-258/97 *Hospital Ingenieure* [1999] ECR I-1405.

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14 – Consequently the interpretation by the Austrian Verfassungsgerichtshof in its judgment of 30 September 2003 (action no. B614/01 and others) is correct.

15 – With regard to the profession of lawyer as a regulated profession, see Case C-313/01 *Morgenbesser* [2003] ECR I-13467, paragraph 60, and Case C-345/08 *Peśla* [2009] ECR I-0000, paragraph 27.

16 – *Cavallera*, cited in footnote 6, paragraph 47, and Case C-286/06 *Commission* v *Spain* [2008] ECR I-8025, paragraph 55.

17 – Order for reference, p. 13 f..

18 – Mr Koller's pleading, p. 4, paragraph 4.

19 – Case C-19/92 *Kraus* [1993] ECR I -1663, paragraph 19.

20 – In his opinion in Case C-311/06 *Cavallera* [2009] ECR I-415, paragraph 23, Advocate General Poiares Maduro found that Mr Cavallera had neither studied nor worked in Spain, with the result, more specifically, that he had not followed any professional or academic training in that State. The Advocate General correctly concluded that the diploma in mechanical engineering obtained in Spain therefore resulted from a 'mere' recognition of equivalence of the Italian university/academic qualification.

21 – Order for reference, p. 14.

22 – *Cavallera*, cited in footnote 6, paragraphs 56 to 59.

23– *Cavallera*, cited in footnote 6, paragraph 57.

24 – Case C-102/02 [2004] ECR I-5405.

25 – Ibid., paragraph 42, where the Court refers to the Commission Report of 15 February 1996 to the European Parliament and the Council on the state of application of the general system for the recognition of higher education diplomas, made in accordance with Article 13 of Directive 89/48/EEC (COM[1996] 46 final).

26 – Commission v Spain, cited in footnote 16, paragraph 61.

27 – *Commission* v *Spain*, cited in footnote 16, paragraph 61.

28 – See paragraph 47 above.

29 – Case C-149/05 *Price* [2006] ECR I-7691, paragraph 54.

30 – The Court has stated that, in the absence of harmonisation of the conditions of access to a particular occupation, the Member States are entitled to lay down the knowledge and qualifications needed in order to pursue it and to require the production of a diploma certifying that the holder has the relevant knowledge and qualifications (Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 10; Case C-340/89 *Vlassopoulou* [1991] ECR I-2357, paragraph 9; Case C-104/91 *Aguirre Borrell and Others* [1992] ECR I-3003, paragraph 7, and *Peśla*, cited in footnote 15, paragraph 34. Mengozzi, P., 'La direttiva del Consiglio 89/48 CEE relativa ad un sistema generale dei diplomi di istrsuzione superiore', Le nuove leggi civili commentate, year XIII/1990, no. 3-4, p. 1014, takes the same view.

31 – See the Opinion of Advocate General Poiares Maduro in Case C-311/06 *Cavallera* [2009] ECR I-415, paragraph 34.

32 – *Price*, cited in footnote 29, paragraph 54.

33 – The misuse of rights by pleading Community law results in refusal to apply Community law to a particular situation. For example, in Case C-110/99 *Emsland-Stärke* [2000] ECR I-11569, paragraph 51, and Case 125/76 *Cremer* [1977] ECR 1593, paragraph 21, the Court stated that Community regulations cannot be applied where there are abuses on the part of traders.

34 – *Commission* v *Spain*, cited in footnote 16, paragraph 69

35 – Order for reference, p. 3. Irrespective of whether there really is a misuse of rights in the case which is the subject of the main proceedings, which can be determined only by an objective legal assessment, the referring court is not alone in its suspicion. The supposed risk that differences in legal training could end in 'tourism' by prospective lawyers has been pointed out by Mannino, A., 'Anerkennung von Berufsqualifikationen: Anmerkung zu EuGH, C-313/01, 13.11.2003 - Morgenbesser', Zeitschrift für Gemeinschaftsprivatrecht, 2004, no. 5, p. 282, and specifically on the present case. Goldsmith, L., 'Fancy a little law qualification forum shopping?', Law Society Gazette, obtainable on the internet, posted 4 August 2009, but without expressly referring to misuse of rights.

36 – In connection with the risk of wrongfully pleading the right, recognised in Community law, in Article 7 of Directive 2003/88, to paid annual leave at times of illness, see my opinion in Case C-520/06 *Stringer and Others* [2009] I-179, paragraph 80. In footnote 53, I defined 'abuse of rights' as the inappropriate use of a legal position which

limits the possibility of exercising an existing right. This means that the exercise of a formal right is limited by the principle of good faith. Likewise any person with a formally actionable right may not exercise it unfairly. A similar definition is given in Creifelds, Rechtswörterbuch, publ. by Klaus Weber, 17th ed., Munich 2002, p.1109, which states that the exercise of a subjective right is wrongful if, although it complies formally with the law, it is contrary to good faith because of the particular circumstances of the case.

37 – Case 115/78 *Knoors* [1979] ECR 399, paragraph 25; Case C-61/89 *Bouchoucha* [1990] ECR I-3551, paragraph 14; Case C-370/90 Singh [1992] ECR I-4265, paragraph 24; Case C-367/96 *Kefalas and Others* [1998] ECR I-2843, paragraph 20; Case C-212/97 *Centros* [1999] ECR I-1459, paragraph 24; Case C-373/97 *Diamantis* [2000] ECR I-1705, paragraph 33; Case C-436/00 X and Y [2002] ECR I-10289, paragraphs 41 and 45; Case C-167/01 *Inspire* Art [2003] I-10155, paragraph 136; Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraph 68; Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraph 35; Case C-425/06 *Part Service* [2008] ECR I-897, paragraph 42, and Case C-127/08 *Metock and Others* [2008] ECR I-624, paragraph 75

38 – Advocate General Poiares Maduro agrees, in his opinion in the *Cavallera* case, cited in footnote 20, paragraph 43 et seq.. In the opinion of Baudenbacher, L.M., 'Außer Spesen nicht gewesen – Die Spanienreise des italienischen Ingenieurs Cavallera', European Law Reporter, 6/2009, p 213 f. and "Überlegungen zum Verbot des Rechtsmissbrauchs im Europäischen Gemeinschaftsrecht", Zeitschrift für Europarecht, internationales Privatrecht und Rechtsvergleichung, 2008, p. 205 et seq., the possibility cannot be ruled out that in the future the Court will develop further its case-law on the subject of misuse of rights and even recognise it as a general principle of Community law. Baudenbacher divides the case-law on misuse of rights into two groups of cases. In the first, an individual wrongfully pleads Community law with the aim of avoiding national law. In the second, there is wrongful or even fraudulent use of rights arising from Community law.

39 – *Kefalas and Others*, cited in footnote 37, paragraph 20; *Diamantis*, cited in footnote 37, paragraph 33; *Halifax and Others*, cited in footnote 37, paragraph 68, and *Cadbury Schweppes and Cadbury Schweppes Overseas*, cited in footnote 37, paragraph 35.

40 – *Emsland-Stärke*, cited in footnote 33, paragraphs 52 and 53; Case C-515/03 *Eichsfelder Schlachtbetrieb GmbH* v *Hauptzollamt Hamburg-Jonas* [2005] ECR I-7355, paragraph 39. See also my opinion in Case C-569/08 *Internetportal*[2010] ECR I-0000, paragraph 113.

41 – *Eichsfelder Schlachtbetrieb*, cited in footnote 40, paragraph 40, and *Halifax and Others*, cited in footnote 37, paragraph 76. It is true that, in its judgment in Action B 1098/06 of 13 March 2008, the Austrian Verfassungsgerichtshof could not see a case of misuse of rights in Mr Koller's conduct (point 2.3.8 of the judgment: 'it is clear from the foregoing observations, and in view of the fact that Mr Koller practises as an "abogado" [lawyer], that it is totally inappropriate to charge the appellant with wrongful conduct, as is also clear from the certificate of the Madrid Chamber of Lawyers which he has produced'). However, it must be borne in mind that the concept of misuse of rights, which is relevant here, is a concept of Community law which has specific characteristics and must therefore be interpreted independently in a Community context. In the main proceedings, the national court must refer to Community criteria to determine whether there was a misuse of rights.

42 – Case C-79/01 *Payroll and Others* [2002] ECR I-8923, paragraph 29, and *Halifax and Others*, cited in footnote 37, paragraphs 76 and 77.

43 – *Commission* v *Spain*, cited in footnote 16, paragraph 71.

44 – Ibid., paragraph 72, and Case C-151/07 *Khatzithanasis* [2008] ECR I-9013, paragraph 32

45 – See Goll,U., 'Anerkennung der Hochschuldiplome in Europa: Wunsch und Wirklichkeit', Europäische Integration und globaler Wettbewerb, p. 196, who considers that a lawyer from another Member State who wishes to take an aptitude test in the host State will probably not establish himself there in order to deal with insurance claims for traffic accidents or to sue house builders. He is more likely to wish to specialise in areas of law involved in international legal transactions, where above all a knowledge of the foreign legal system in question is required.

46 – See, to that effect, Kraus, D., 'Diplomas and the recognition of professional qualifications in the case law of the European Court of Justice', A true European, 2003, p. 248, who considers that the right of a Union citizen to work, reside or provide cross-border services in another Member State would be meaningless if his diplomas and professional qualifications were not recognised in other countries.

47 – Opinion of Advocate General Poiares Maduro in *Cavallera*, cited in footnote 20, paragraph 51.

48 – Opinion of Advocate General Poiares Maduro in *Cavallera*, cited in footnote 20, paragraph 56.

49 – *Ibid.,* paragraph 68.

50 – See Pertek, J., op. cit. (footnote 9), p. 637, who regards the principle of mutual trust as likewise enshrined in the first paragraph of Article 3 of Directive 89/48.

51 – *Morgenbesser*, cited in footnote 15.

52 – Ibid., paragraph 44.

53 – *Vlassopoulou*, cited in footnote 30.

54 – Case C-234/97 *Fernández de Bobadilla* [1999] ECR I-4773

55 – *Morgenbesser*, cited in footnote 15, paragraph 67.

56 – Ibid., paragraph 68. See also *Peśla*, cited in footnote 15, paragraph 39.

57 – *Morgenbesser*, cited in footnote 15, paragraph 69.

58 – Ibid., paragraph 70. See also *Peśla*, cited in footnote 15, paragraph 40.

59 – *Morgenbesser*, cited in footnote 15, paragraph 71. See also *Peśla*, cited in footnote 15, paragraph 41.

60 – *Peśla*, cited in footnote 15, paragraph 41.

61 – *Ibid*., paragraphs 12 to 15.

62 – *Ibid*., paragraph 45, emphasis added.

63 – *Ibid*., paragraph 46, emphasis added.

64 – *Ibid*., paragraph 65, emphasis added.

65 – See paragraph 92 above. Also to that effect, Mengozzi, P., op. cit. (footnote 30), p. 1015, and Pertek, J., op. cit. (footnote 9), p. 638, who consider that Directive 89/48 coordinates the mutual recognition of equivalent diplomas, but excludes automatic recognition of any kind. Likewise Kraus, D., op. cit. (footnote 46), p. 253, who points out that neither the EC Treaty nor Directive 89/48 gives rise to a legal obligation on the part of the Member States to recognise foreign diplomas automatically and unconditionally.

66 – See paragraphs 92 to 95 and 98 to 100 above.

67 – See paragraph 99 above.

68 – See paragraph 100 above.

69 – See, to that effect, Görlitz, N., op. cit. (footnote 9), p. 845, who concludes, from the choice of legal bases and the first recital of the preamble to Directive 89/48, that the directive is an act of secondary law which serves precisely to put into effect the fundamental freedoms and, here in particular, to improve the freedom of movement. In the writer's opinion, the preamble to the directive constitutes a regulatory link between the professional activities covered by the fundamental freedoms and those covered by the directive. See also Carnelutti, A., 'L'Europe des professions libérales: la reconnaissance mutuelle des diplômes d'enseignement supérieur', *Revue du marché unique européen*, 1991, No. 1, p. 35, who considers that Directive 89/48 is a 'manual' of the Court's case-law principles in the field of the mutual recognition of diplomas.

70 – The same view is taken by Visée, J.-M., op. cit. (footnote 11), p. 212, who considers that the second subparagraph of Article 4(1)(b) of Directive 89/48 is applicable above all to the legal professions, particularly that of Rechtsanwalt. Likewise Baldi, R., 'La liberalizzazione della professione forense nel quadro della direttiva comunitaria 21 dicembre 1988 (89/48 CEE)', *Rivista di diritto internazionale privato e processuale*, 1991, vol. XXVII, no. 2, p. 349, has no doubt that this provision of the Directive relates directly to the profession of Rechtsanwalt. The Commission's Report to the European Parliament and the Council on the state of application of the general system for the recognition of higher education diplomas, made in accordance with Article 13 of Directive 89/48/EEC (COM[1996] 46 final), p 22, points out that the Member States interpret the provision as including lawyers, judges and other members of the judicial organisation, legally qualified civil servants, patent agents, tax advisers, auditors and accountants.

71 – See paragraph 101 above.

72 – Morgenbesser, cited in footnote 15, paragraphs 57, 62 and 67, and Case C-330/03 *Colegio de Ingenieros de Caminos, Canales y Puertos* v *Administración del Estado* [2006] ECR I-801, paragraph 36.

73 – See paragraph 58 above.

74 – See Carnelutti, A., op. cit. (footnote 69), p. 35, who points out the differences in the professional profile of the lawyer in individual Member States. As an example, the author mentions the functions of an English solicitor, who can carry out tasks which are either incompatible with the professional profile of a lawyer in France or which must be assigned to other professions (lawyer or legal adviser and real property agent).

75 – See paragraph 16, pp 6 and 7, of the Austrian Government's pleading.

76 – See p. 24 of Mr Koller's pleading.

77 – See paragraph 72 above.

78 – See Boixareu, A., op. cit. (footnote 9), p. 7, who points out that Article 4(2) of Directive 89/48 does not permit the host State to use the verification systems set out in Article 4(1)(a) and (b) simultaneously. Pertek, J., op. cit. (footnote 10), p. 8, also presumes that there is to be no simultaneous application of equalisation measures, but in connection with the following provision in Article 14 of Directive 2005/36.