

Opinion of Advocate General Poiares Maduro delivered on 28 February 2008

Consiglio Nazionale degli Ingegneri v Ministero della Giustizia and Marco Cavallera

Reference for a preliminary ruling: Consiglio di Stato - Italy

Recognition of diplomas - Directive 89/48/EEC - Homologation of an educational qualification – Engineer

Case C-311/06

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1. By this reference for a preliminary ruling the Court is being asked to give a ruling on the correct 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 (2) ('the Directive'). More specifically, the national court asks in essence whether, in light of the objectives of the Directive, a Community national who has completed all of his academic education in his country of origin and who, by way of homologation of his qualification in Spain, has obtained a certificate entitling him to take up the profession in that country, is entitled to mutual recognition of his Spanish certificate in Italy in order to pursue the profession of engineer in his State of origin, even though he has not undergone any academic training in Spain or acquired any professional experience there.

I – Factual and legal background to the dispute

2. Mr Cavallera, an Italian national, obtained a diploma in mechanical engineering (*laurea in ingegneria meccanica*) upon completion of a three-year degree course from the University of Turin (Italy) on 9 March 1999. He subsequently applied to the Spanish Ministry of Education for homologation of his academic qualification. The Spanish Ministry granted his application on 17 October 2001 and Mr Cavallera was at that time also enrolled in the register of the Professional Association of Engineers in Catalonia, which entitled him to pursue the profession of engineer in Spain.

3. Until the entry into force of Royal Decree No 285/2004 (3) in September 2004, the procedure for the homologation of foreign university diplomas was governed in Spain by Royal Decree No 86/1987. Under Article 1 of Royal Decree No 86/1987, (4) homologation involves recognition in Spain of the official validity, for academic purposes, of higher-education diplomas acquired abroad. In accordance with Article 2 of that decree, recognition may be subject to the requirement that additional examinations be taken in those cases where the education and training attested by that diploma are not equivalent to those attested by the Spanish diploma.

4. That procedure is to be distinguished from the procedure for recognition of professional qualifications established by Royal Decree No 1665/1991, which transposes Directive 89/48 into Spanish law. Since Mr Cavallera does not have an Italian diploma entitling him to take up the profession of mechanical engineer in Italy, but simply an academic title awarded on completion of a three-year university course, the homologation procedure alone was applicable to him. It was thus under Royal Decree No 86/1987 that he obtained a decision recognising the equivalence of his Italian university education and training with Spanish university education and training.

5. In order to be entitled to recognition of his diploma on the basis of the Directive, Mr Cavallera would first have had to pass the Italian State examination which governs access to the profession of mechanical engineer in Italy, as laid down in Royal Decree No 2537 of 23 October 1925 (5) and Decree No 328 of the President of the Republic (DPR) of 5 June 2001. (6)

6. However, the homologation decision given in Spain is sufficient in that State in order to pursue the profession of engineer. Unlike in Italy, there is no requirement in Spain to pass a State examination. Access to the profession of technical engineer in Spain is subject only to possession of an official university diploma and membership of the professional association of engineers. In the same way as in Italy, registration with the professional body is a simple administrative step. As, in accordance with Article 4(1) of Spanish Royal Decree No 86/1987, the homologation decision has the effect of conferring 'on the foreign diploma, from the time at which it is awarded and when the corresponding certificate is issued, the same effects throughout the national territory as the Spanish diploma or academic degree with respect to which it has been recognised as being equivalent, in accordance with the legislation in force', Mr Cavallera was able to secure registration in the register of the Professional Association of Engineers in Catalonia, which entitled him to pursue the profession of mechanical engineer in Spain.

7. Having thus a Spanish diploma in mechanical engineering, Mr Cavallera applied to the competent authorities in Italy, on 6 March 2002, for recognition in Italy of that certificate with a view to pursuing, for the first time, the profession of engineer in Italy.

8. By decree of 23 October 2002, the Italian Minister for Justice upheld Mr Cavallera's application by recognising the validity of his Spanish certificate for the purpose of his registration in the register of the association of engineers in Alessandria.

9. The National Council of Engineers (Consiglio nazionale degli Ingegneri), the appellant in the main proceedings, challenged the ministerial decree recognising the Spanish certificate before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court for the Region of Lazio) (TAR Lazio). It submits that the Italian authorities were not entitled to confer such recognition on Mr Cavallera on the basis of the Directive inasmuch as, under national law, the pursuit of the profession of engineer requires, in addition to the academic diploma that Mr Cavallera possesses, successful completion of the State examination.

10. The TAR Lazio dismissed the action, holding that the Ministry of Justice had not committed an error of law. However, the Consiglio di Stato (Council of State), before which an appeal against that judgment is pending, takes the view that the Directive does not apply to Mr Cavallera's situation because he did not obtain in Spain any diploma within the meaning of Article 1(a) of the Directive.

11. Article 1 of the Directive states:

'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.
- ...
- (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;
- ...'

12. The first paragraph of Article 2 of Directive 89/48 provides:

'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.'

13. The first paragraph of Article 3 of the Directive is worded 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 ...'

14. Since it is uncertain as to how to interpret the Community law and, more specifically, Directive 89/48, the Consiglio di Stato, in accordance with Article 234 EC, has referred the following questions to the Court for a preliminary ruling:

- '(1) Does Directive 89/48/EEC apply to an Italian national who:
- obtained a three-year degree in engineering in Italy;
 - obtained recognition of the Italian qualification as being equivalent to the corresponding Spanish qualification;
 - obtained registration in the Spanish register of engineers but never pursued that profession in Spain; and
 - applied, on the basis of the Spanish recognition of equivalence, for registration in the register of engineers in Italy?
- (2) If the answer to the first question is in the affirmative, is a domestic provision (Article 1 of Legislative Decree No 115 of 1992) that does not permit recognition in Italy of a qualification of a Member State which in turn is exclusively the result of recognition of a previous Italian qualification compatible with Directive 89/48/EEC?'

II – Legal analysis

15. The main issue which arises in this case is therefore the determination of the extent to which a Community national may rely on the provisions of the Directive in his Member State of origin for the purpose of recognition of a certificate which results from the mere recognition of equivalence of a three-year university degree completed in his Member State of origin, but without his having completed any further academic or professional training in the Member State which issued the certificate.

16. This case leads me to consider, first, the scope of the Directive and, second, whether it may be relied on by a national in a situation such as that which has given rise to the questions referred.

A – The applicability of the Directive to the dispute

17. 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'.

In the present case, those conditions must be regarded as being fulfilled inasmuch as Mr Cavallera is indeed a Community national who has a certificate issued by Spain allowing him to take up the profession of engineer in

that State, and which he seeks to have recognised in Italy, the host Member State which is also his State of origin.

18. It has been pointed out by several Member States that those conditions were not satisfied on a reading of a number of language versions, which refer, in the abovementioned provisions, as well as in the first paragraph of Article 3 and indent (a) thereto, to a national of a Member State other than the host Member State. (7) The literal interpretation of those variations in the language versions must, however, be disregarded in light of the objective pursued by the Directive. Very early on the Court stated that freedom of movement for workers and the right of establishment constitute fundamental freedoms which could not be fully realised if the Member States were in a position to refuse to grant the benefit of the provisions of Community law to those of their nationals who have taken advantage of the facilities provided by that law and who have acquired professional qualifications in a Member State other than that of which they are nationals. (8) The Directive may therefore be relied on by a national of a State in his own Member State. Those variations in the language versions must, in fact, be construed as restating the requirement of a foreign element for the purposes of applying Community law. As Mr Cavallera has a Spanish certificate which he seeks to have recognised in Italy, his position may be regarded as being manifestly connected to Community law, with the result that those articles alone do not, in my view, allow the facts of this case to be excluded from the scope of the Directive.

19. Having said that, the certificate relied on by Mr Cavallera must none the less correspond to 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 cumulative 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.

20. First, the diploma must have been awarded by the competent authority of a Member State. In this case, that condition must be regarded as having been fulfilled inasmuch as the diploma was awarded by the Spanish Ministry of Education and Science (Ministerio de Educación y Ciencia), which, in accordance with Spanish legislation, is entitled to award industrial technical engineering diplomas. Second, the diploma must attest that the holder has indeed 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'. (9) 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 effectively pursued 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 on which the respondent relies authorises him to pursue the profession of mechanical engineer in the State which awarded the diploma, *in casu* Spain.

21. Thus, the principal differences regarding the interpretation of Article 1(a) of the Directive are centred essentially on the second condition, which requires that the diploma must show that the holder has successfully completed a post-secondary course of at least three years' duration.

22. The parties which oppose the application of the Directive to this case base their arguments essentially on that point in their contention that the certificate acquired by the defendant in Spain cannot be treated as a diploma. In support of their arguments, they claim in substance that Mr Cavallera's application to the Italian authorities for recognition is not based on any diploma acquired in the context of academic or professional training in Spain, but simply on a homologation decision issued by Spain and attesting the equivalence of the Italian academic qualification with a Spanish academic qualification. The recognition of equivalence therefore had the consequence solely of allowing the respondent access to the profession of engineer in Spain.

23. It has been clearly established that the respondent has neither studied nor worked in Spain, with the result, more specifically, that he has not followed any professional or academic training in that State. The diploma in mechanical engineering obtained in Spain therefore results from a 'mere' recognition of equivalence between the Italian university/academic qualification and the qualification of Ingeniero Técnico Industrial, Especialidad en Mecánica. In other words, the Spanish diploma results from the conversion, by means of an administrative procedure of homologation, of Mr Cavallera's Italian academic qualification into a Spanish qualification evidencing professional competence.

24. Everything depends, therefore, on the interpretation to be given to the term 'diploma' in the Directive. According to a strict interpretation, the homologation decision cannot be treated as equivalent to a diploma within the meaning of the Directive, with the result that that decision cannot give rise to mutual recognition on the basis of the general system established by the Directive. By contrast, on a broad interpretation, such a decision may be regarded as equivalent to a diploma within the meaning of the Directive. If this latter interpretation were to be accepted, the question would none the less necessarily arise, in light of the Community principle prohibiting abusive practices, as to whether Mr Cavallera could rely on the rights conferred by the Directive.

25. It must be acknowledged from the outset that the choice of a narrow or broad interpretation of the Directive provides the Court with two options of equal value, as the broad interpretation involves application of the principle prohibiting abusive practices. As will be demonstrated, those approaches represent two methods, either of which may be adopted by the Community Courts in order to achieve the same results. My preference tends, however, towards a broad interpretation of the Directive and, more specifically, of the term 'diploma'. Such an option offers not only the advantage of preserving the discretion of the Member States as to the conditions for taking up and pursuing professions covered by the Directive, but, as I will explain below, it prevents situations which come perfectly within the objective of free movement from being excluded from the Directive's scope.

26. In support of the narrow interpretation of the term 'diploma', which would preclude a homologation decision, such as that described above, from being treated as equivalent to a diploma, the Commission refers to recital 12 in the preamble to Directive 2005/36/EC, (10) which henceforward replaces Directive 89/48.

That recital excludes from the scope of Directive 2005/36 'the recognition by Member States of recognition decisions adopted by other Member States pursuant to this Directive ... to obtain in [the] Member State of origin [of the individuals concerned] rights different from those conferred by the professional qualification obtained in that Member State, unless [those individuals] provide evidence that they have obtained additional professional qualifications in the host Member State'.

27. That argument is unconvincing. First of all, the decision relied on by Mr Cavallera is not 'a recognition decision' based on the Directive, but a homologation decision made under national law. The Italian diploma is not a 'diploma' for the purposes of Article 1(a) of the Directive. That is precisely the problem in this case, as the qualification obtained by Mr Cavallera in Italy, although awarded on completion of a three-year post-secondary course, still does not authorise him to pursue the profession of engineer in Italy. In those circumstances, the third requirement for the certificate to be classified as a diploma within the meaning of the Directive was not satisfied. Moreover, the homologation and subsequent registration with the Professional Association of Engineers in Spain were effected solely on the basis of national law, and not on the basis of Directive 89/48.

28. Next, there is a certain contradiction in raising recital 12 in the preamble to Directive 2005/36 for interpretive purposes in order to determine whether the decision at issue corresponds to the definition of diploma within the meaning of Directive 89/48. That plea is relevant only if and in so far as one already assumes that the homologation decision does not amount to a diploma within the definition of the Directive. In other words, if a choice has already been made in favour of the narrow interpretation of the term 'diploma'. In those circumstances, that amounts to using one interpretation of the term 'diploma' as a basis on which to identify the interpretation of that term to be adopted. That approach appears to me to be demonstrably flawed in a number of respects.

29. However, further justification for a narrow interpretation may be found in the first and fifth recitals in the preamble to the Directive, from which it is clear, in substance, that a certificate of professional competence cannot be treated as a diploma unless all or part of the qualifications have been acquired in the Member State which awarded the diploma.

30. That position also appears to be confirmed by the case-law. In its judgment in *Kraus*, in particular, the Court held that a national of a Member State could 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 ...'. (11)

31. From this it may be inferred, in the present case, that at least part of the academic education and training must have been undertaken in Spain or that professional experience was obtained there in order for the Directive to be applicable. As has been established, and as the Commission points out, Mr Cavallera neither studied for nor obtained any qualification or specific competence in that State, unless it is to be held that the acquisition, solely by way of a homologation decision, of a *certificate* of professional competence is equivalent to the acquisition of such a professional qualification.

32. However, that choice of interpretation carries with it the risk of excluding from the scope of the Directive situations which in fact correspond precisely to the objectives of free movement. The general system of recognition of diplomas must be able to apply to a homologation decision where it is made by a Member State in which professional competence, resulting in particular from the pursuit of the profession on the territory of that Member State, has been acquired. In those circumstances, the homologation attesting that individual's academic qualifications and the professional experience acquired on the territory of that State must allow him to pursue his profession in another Member State by virtue of the mutual recognition of his professional qualifications on the basis of the Directive. (12) In other words, a homologation decision must, in my view, correspond in certain circumstances to classification as a diploma, as otherwise the objectives pursued by the Directive would be compromised. The narrow interpretation risks leading to the systematic exclusion of those situations from the scope of the Directive.

33. Furthermore, since mutual recognition of diplomas is based on the principle of mutual trust, an unduly narrow interpretation of the Directive might undermine those principles. For that purpose, the Court has consistently held that 'unlike the sectoral directives relating to specific professions, Directive 89/48 is not intended to harmonise the conditions for the taking-up or pursuit of the various professions to which it applies. The Member States remain competent to define such conditions within the limits imposed by Community law'. (13)

34. From that perspective, Spain must be regarded as being free to determine access to the profession of engineer 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 the Directive 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'. (14)

35. From reading that article, it matters little by which methods or procedures the diploma was awarded or on which territory the education and training were undertaken, on condition that they took place mainly on Community territory. (15) The broad interpretation of the Directive thus ensures that the discretion reserved to the Member States with regard to the definition of 'diploma' is respected. Since in Spain's view Mr Cavallera has the professional skills necessary and sufficient to practise within its territory, it appears difficult to deny that the certificate awarded to Mr Cavallera by Spain is a 'diploma'. (16)

36. In order to be satisfied, it is also sufficient to recall that, according to heading (a) of the first paragraph of Article 3 of Directive 89/48, Member States may not refuse a national access to a profession if he 'holds the diploma required in another Member State for the taking-up or pursuit of the profession in question in its territory'.

37. For all of those reasons, it seems to me that the Directive must be regarded as applicable in this case. However, the fact that the Directive is applicable does not mean that it can be relied on. As already stated, the particular nature of the factual circumstances in this case, as demonstrated in particular by the fact that the State of origin and the host Member State are one and the same, calls for a more detailed examination of the circumstances in which the Directive may be relied on and, more specifically, of the circumstances in which there is an abuse of rights.

B – Whether the Directive may be relied on

38. The right to the mutual recognition of diplomas within Community territory is a right inherent to the free movement of persons guaranteed by the Treaty. The application for recognition in the host Member State of a diploma acquired in another Member State in order to pursue a profession does not constitute, in itself, an abuse of Community law. However, 'the facilities created by the Treaty cannot have the effect of allowing the persons who benefit from them to evade the application of national legislation and of prohibiting Member States from taking the measures necessary to prevent such abuse'. (17)

39. Where the national court addresses the issue of the compatibility with Community law of the domestic provision (Article 1 of Legislative Decree No 115 of 1992), which refuses recognition in Italy to a certificate which was issued by a Member State and which is itself exclusively the result of homologation of a qualification previously acquired in Italy, it deals obliquely with that issue.

40. Where a Member State wishes to rely on such a principle in support of restrictive national legislation, it must also, in the absence of any justification based on overriding grounds of public interest, satisfy itself that the situation referred to does in fact meet the requirements for an abusive practice as defined by the case-law. This involves an examination *in concreto* of each individual situation in order to ascertain whether the requirements for an abusive practice are satisfied.

41. While it is for the national court to ascertain whether the elements constituting an abusive practice are present in the dispute in the main proceedings, the Court, when delivering a preliminary ruling, may nevertheless provide clarification designed to give the national court guidance in its interpretation. (18) As the Court has not yet had the opportunity to give a ruling on this question in the context of the general system of diploma recognition, it appears to me to be important to provide some guidance on the implementation in that particular domain of the general criteria characterising an abusive practice.

42. On the basis of that information, it will then be easier to provide the national court with the material which will enable it to determine whether the restrictive national legislation is compatible with Community law.

1. Identification of an abusive practice in the context of the general system governing mutual recognition of diplomas

43. Community law contains a principle prohibiting abusive practices, which provides that 'Community law cannot be relied on for abusive or fraudulent ends'. (19) The content of that principle has now been relatively well defined by the case-law of the Court. (20)

44. Abuse requires the meeting of two criteria which are inherently connected and are both based on objective elements. (21) In order to be able to conclude that an abusive practice exists, it must first be evident from all of the objective evidence that, despite formal compliance with the conditions laid down by the Community rules, the purpose of those rules has not been achieved and, second, it must be clear from that evidence that the main aim of the transaction undertaken is to derive an advantage from the Community rules by creating artificially the conditions laid down for obtaining it. (22)

45. First of all, as regards the first criterion relating to the existence of a contradiction between the results achieved and the objectives pursued by the Community provision, it is appropriate to examine whether recognition of the Spanish diploma in Italy results in the holder of the diploma securing an advantage contrary to the objectives pursued by the general system for the recognition of diplomas.

46. This first stage in the identification of an abusive practice requires the objectives pursued by the Directive to be precisely identified. Mutual recognition is intended above all to facilitate the freedom of movement of persons within Community territory by encouraging freedom of establishment, freedom to provide services and freedom of movement of workers.

47. That objective consists in fact of three aspects. It requires that a qualified national should be able to pursue his profession in another Member State, notwithstanding the differences in the regulatory regimes between the Member State of origin and the host Member State. (23) It also requires that a national should be able to choose the State in which he wishes to acquire his professional qualifications. (24) Finally, it is designed to enable educational institutions in one Member State to provide their services to nationals of other Member States, and even to provide such services on the national territory of other Member States. (25) In other words, the system for recognition of diplomas applies to nationals who wish to 'pursue a profession, on a self-employed or employed basis, in a Member State other than that in which they have obtained their professional qualifications', (26) to those who wish 'to acquire vocational qualifications in a Member State other than that of which they [are] nationals', (27) or '[to acquire] in another Member State a university qualification which supplements [their] basic education and training'. (28)

48. Directive 89/48 and the sectoral directives which accompany it are therefore designed explicitly to facilitate the *effective* exercise of the freedom of movement of persons. The recognition of diplomas is thus closely linked to the effective exercise of the freedoms recognised by the Treaty for the purpose of assisting 'economic and social interpenetration within the Community' (29) in that field. That is why a national of a Member State who has not worked or studied, or obtained a diploma on completion of education and training, in a Member State other than his State of origin cannot rely on the rights conferred by Directive 89/48. (30)

49. Consequently, this economic and social interpenetration sought by means of the system of diploma recognition requires at the very least that the education or training should have been undertaken partly or entirely in the territory of the Member State which awarded the diploma or in the context of the education and training which it provides or, even more generally, that academic or professional experience has been acquired

which is connected territorially or materially to the Member State which awarded the diploma recognition of which is sought in another Member State.

50. Therefore, the fact that the education and training which led to the diploma in respect of which recognition is sought were undertaken in the territory of the Member State in which the applicant seeks to rely on that diploma cannot be regarded as being contrary to the objectives pursued by the free movement of persons, since that education and that training are connected to *another* Member State in particular because they are provided within the educational system of that State. In those circumstances, the exercise of the rights of free movement must be regarded as effective insofar as the Community national has been able to acquire academic and/or professional education and training provided within the system of a Member State other than his State of origin. (31) Likewise, such a situation corresponds exactly to the objective of freedom to provide services insofar as there is no obstacle to the provision of an educational service by an institution in one Member State in the territory of another Member State. Directive 89/48 is designed to put in place in due course a European labour market, which cannot be achieved without the emergence of an educational market at European level.

51. In the same way, the fact that a Community national has sought to take advantage of more favourable access to a profession in a Member State other than the State in which he studied in itself corresponds exactly to the Community objectives.

52. By contrast, where a national seeks to rely in State A, where he has undertaken all his academic education and training, which do not entitle him to take up his chosen profession there, or seeks to rely in Member State C, on a diploma obtained in Member State B enabling him to take up that profession in that State, even though he has not acquired any professional or academic experience connected to the Member State which awarded him that diploma, in other words, even though he has not participated in any education or training provided by State B or worked in State B, there are reasonable grounds for doubting whether there has been an effective exercise of free movement inasmuch as no activity has taken place in the host Member State. In short, the economic and social interpenetration underlying the freedom of movement of workers is absent.

53. The result arrived at by the national on the basis of the Directive, while fulfilling the formal requirements for his application, does not correspond either to the pursuit of a profession on a self-employed or employed basis in a Member State other than the State in which he acquired his professional qualifications, or to the acquisition of professional qualifications in a Member State other than that of which he is a national, or to the acquisition in another Member State, or under the supervision of that State, of a university qualification which supplements his basic education and training. In those circumstances, the benefit of mutual recognition would enable that person to take up a profession in his State of origin for which he does not have the necessary professional qualifications under the applicable national law. The 10th recital in the preamble to the Directive explicitly states that the general system for the recognition of diplomas put in place 'is intended neither to amend the rules, including those relating to professional ethics, applicable to any person pursuing a profession in the territory of a Member State nor to exclude migrants from the application of those rules'. In this case, and despite formal compliance with the conditions for the application of Community law, the result obtained would be manifestly contrary to the objective pursued by the Directive.

54. The apparent contradiction between the result obtained and the objectives pursued by the general system for the recognition of diplomas cannot, however, by itself point to an abusive practice. It is also necessary that the advantage obtained by way of the provisions of Community law cannot be objectively justified on any ground other than that of circumventing the provisions of national law for the purpose of taking up a profession in a Member State without fulfilling the relevant requirements.

55. In order to assess that requirement, account may be taken of the 'purely artificial nature of those transactions', (32) in this case the homologation and recognition procedures, in order to determine whether, in the light of the various objectives mentioned, they may be regarded as being justified on grounds other than that of the interest solely in circumventing the applicable national legislation.

56. In this case, in the absence of any effective exercise of free movement, the arrangements undertaken appear very likely to be artificial. Far from facilitating economic and social interpenetration, the result obtained would have the effect of enabling a national to take up a profession in his Member State of origin without having obtained the qualifications required under the law of that State and without it having been necessary for him to acquire professional and/or academic skills within the framework of a system provided by another Member State. That amounts to obtaining Community advantages in a factual situation which is in fact purely domestic but which has by artificial means been brought within the scope of Community law.

57. Taking up a regulated profession in one Member State without fulfilling the conditions laid down by the applicable national law, by relying on a certificate obtained in another Member State, in which no professional qualifications have been obtained, whether by pursuing further academic education and training within the education system of that Member State and/or by acquiring professional experience which is connected to that Member State, must therefore be regarded as constituting an advantage contrary to the provisions of the Directive in the case where no other justification connected with the objective of free movement can be put forward.

58. If the national court should conclude that Mr Cavallera has abused Community law, it will have to hold that it is impossible for him to rely on the provisions of the Directive, even though his qualification meets the formal requirements for classification as a diploma within the meaning of the Directive. However, that conclusion is not in itself sufficient for the purpose of finding that the domestic legislation which seeks to restrict the recognition of diplomas complies with Community law, with a view to its application in the present case.

2. The conditions governing conformity of the restrictive Italian legislation designed to counter abusive practices

59. This second stage in the reasoning is closely related to the first. It will be for the national court to determine whether the restriction on the mutual recognition of diplomas provided for by the Italian legislation

may be 'justified on the ground of prevention of wholly artificial arrangements and, if so, whether it is proportionate in relation to that objective'. (33)

60. Having regard to the objectives previously mentioned, in order for a restriction on the recognition of diplomas to be 'justified on the ground of prevention of abusive practices, the specific objective of such a restriction must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality', (34) that is to say, arrangements which show that there was never at any time an effective exercise of the freedoms of movement. Those arrangements must therefore demonstrate that the operations were intended solely to avoid application of the national legislation governing access to the profession.

61. In this case, the Italian legislation refusing to recognise 'a qualification of a Member State which in turn is exclusively the result of recognition of a previous Italian qualification' is very likely to contribute to that objective.

62. However, the legislation in question must also be proportionate to the objective pursued and must not go beyond what is necessary to attain it. In the present case, everything depends on the interpretation of the expression 'exclusively the result'. As stated, if the national is able to demonstrate that he acquired professional skills in the territory of the Member State which awarded the diploma, he must be able to rely on that fact in his State of origin by way of the mutual recognition of the diplomas.

63. It will thus be for the national court to ascertain whether, by the formula 'exclusively the result', the Italian legislature does not exclude such situations and merely covers the situation in which a national of a Member State is unable to demonstrate, in the Member State which awarded the diploma, any further professional or academic experience in relation to that already obtained in Italy. However, application of that legislation must be excluded where the request for recognition may be justified by one of the free-movement objectives as specified.

64. Thus, national legislation may restrict the mutual recognition of diplomas, in the case where the formal requirements governing such recognition are satisfied, if – and only if – it is justified on the ground of countering abusive practices characterised in particular by artificial arrangements, and subject to the condition that it is proportionate to that specific objective.

III – Conclusion

65. In light of the foregoing considerations, I propose that the Court should answer as follows the questions referred for preliminary ruling:

- (1) A homologation decision such as that at issue in the main proceedings constitutes a diploma, within the meaning of Article 1(a) 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, if it satisfies the objective conditions laid down by that article.
- (2) However, Directive 89/48 must be interpreted as precluding a request for recognition of a diploma if this amounts to an abusive practice.

First, the finding that such a practice exists requires that the request for recognition should have the result, in spite of the formal application of the conditions laid down by the relevant provisions of Directive 89/48, that an advantage is obtained which, if granted, would be contrary to the objective pursued by those provisions. Second, it must also be evident from all objective elements that the essential purpose of the operations in question is to obtain that advantage.

Access to a regulated profession in one Member State without fulfilment of the conditions laid down by the applicable national rules, by reliance on a certificate obtained in another Member State in which no professional qualification has been obtained, either through the pursuit of further academic education and training in the educational system of that Member State and/or by the acquisition of professional experience connected to that Member State, must be regarded as constituting an advantage contrary to the provisions of Directive 89/48 where no other justification connected with the objective of free movement can be put forward.

- (3) National legislation may limit the mutual recognition of diplomas, in a case where the formal conditions governing such recognition are satisfied, if – and only if – it is justified on the ground of countering abusive practices characterised in particular by artificial arrangements, and subject to the condition that it is proportionate to that specific objective.

¹ – Original language: French.

² – OJ 1989 L 19, p. 16.

³ – Royal Decree of 16 January 1987, BOE of 23 January 1987.

⁴ – Royal Decree of 16 January 1987, BOE of 23 January 1987.

⁵ – Royal Decree No 2537 of 23 October 1925 approving the rules on the professions of engineer and architect, GURI No 37 of 15 February 1926.

⁶ – Decree No 328 of the President of the Republic of 5 June 2001, amending and supplementing the rules relating to the conditions for admission to the State examination and related tests for the purpose of pursuing certain professions, and the rules relating to the professional bodies concerned, Ordinary Supplement to GURI No 190 of 17 August 2001.

- 7 – See the Italian and Hungarian versions of Article 1(b) of Directive 89/48, the German and Hungarian versions of the first paragraph of Article 2 of Directive 89/48, and the Spanish, Italian and Slovene versions of the first paragraph of Article 3 of Directive 89/48.
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- 8 – See, inter alia, Case 115/78 *Knoors* [1979] ECR 399, paragraph 20, and Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 16.
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- 9 – Second indent of Article 1(a) of Directive 89/48.
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- 10 – Directive of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22).
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- 11 – *Kraus*, paragraph 19 (emphasis added), and Case C-285/01 *Burbaud* [2003] ECR I-8219, paragraphs 50 and 52.
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- 12 – See, to that effect, *Kraus*, paragraphs 15 to 18.
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- 13 – Case C-149/05 *Price* [2006] ECR I-7691, paragraph 54.
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- 14 – First paragraph of Article 1(a) of Directive 89/48.
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- 15 – See, to that effect, points 34 to 39 of the Opinion of Advocate General Bot in Case C-274/05 *Commission v Greece* [2008] ECR I-0000.
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- 16 – Furthermore, it must be pointed out that the homologation procedure is not automatic and that an applicant's qualifications are carefully checked: see Article 4 et seq. of Royal Decree No 86/1987 of 16 January 1987, BOE of 23 January 1987, applicable at the material time.
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- 17 – See *Knoors*, paragraph 25, and the judgments in Case C-61/89 *Bouchoucha* [1990] ECR I-3551, paragraph 14; Case C-370/90 *Singh* [1992] ECR I-4265, paragraph 24; Case C-212/97 *Centros* [1999] ECR I-1459, paragraph 24; Case C-436/00 *X and Y* [2002] ECR I-10829, paragraphs 41 and 45; and Case C-167/01 *Inspire Art* [2003] ECR I-10155, paragraph 136.
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- 18 – See, in particular, Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraphs 76 and 77.
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- 19 – Case C-367/96 *Kefalas and Others* [1998] ECR I-2843, paragraph 20; Case C-373/97 *Diamantis* [2000] ECR I-1705, paragraph 33; *Halifax and Others*, paragraph 68; and Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraph 35.
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- 20 – For a summary of the developments in the case-law on abuse of rights, the reader is referred to my Opinion in *Halifax and Others*, point 62.
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- 21 – See, with regard to the importance of demonstrating the existence of an abusive practice on the basis of objective evidence, without its being necessary to inquire into the intention of the person presumed responsible, my Opinion in *Halifax and Others*, points 70 and 71.
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- 22 – See Case C-110/99 *Emsland-Stärke* [2000] ECR I-11569, paragraphs 52 and 53; and, to the same effect, *Centros*, paragraph 24; *Halifax*, paragraphs 74 and 75; and *Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraph 64.
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- 23 – See more specifically, as regards freedom of establishment, *Centros*, paragraph 25, *X and Y*, paragraph 42, and *Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraphs 41 and 42.
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- 24 – That objective must be considered in the context of Article 3(1)(q) EC and the second indent of Article 149(2) EC, which concern the mobility of teachers and students. See also Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraphs 30 to 32, and Case C-147/03 *Commission v Austria* [2005] ECR I-5969, paragraph 44.
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- 25 – See point 39 of the Opinion of Advocate General Bot in *Commission v Greece*.
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- 26 – Judgment in Joined Cases C-225/95, C-226/95 and C-227/95 *Kapasakalis and Others* [1998] ECR I-4239, paragraph 18.
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- 27 – *Kraus*, paragraph 16.
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- 28 – *Kraus*, paragraph 17.
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- 29 – *Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraph 53.
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- 30 – See, in particular, *Kapasakalis and Others*, paragraph 22.

[31](#) – See point 39 of the Opinion of Advocate General Bot in *Commission v Greece*.

[32](#) – *Halifax and Others*, paragraph 81.

[33](#) – *Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraph 57.

[34](#) – *Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraph 55.