The Services Directive: What is Actually New?

By **Dr Timm Rentrop***

The Services Directive seeks to facilitate the exercise of two fundamental freedoms enshrined in the EC Treaty – the freedom of establishment and the freedom to provide services – and to give service providers greater legal certainty. In fact, the Directive restates the principles that have evolved in the case law surrounding these two freedoms. The Directive in essence only introduces new rules on the following points:

- the obligation for all authorities involved to communicate with applicants through a point of single contact;
- the obligation to provide the possibility to complete all procedures and formalities electronically;
- the obligation to inform foreigners about the system, in particular the means of redress available against their service providers, should things go wrong;
- the ban on the prohibitions of advertising.

All other issues have already been laid down in one way or another by the European Court of Justice based directly on the text of the Treaty.

Introduction

The Services Directive 2006/123/EC has the questionable honour of being the most controversial piece of EU legislation in recent history. However, when considered in combination with the current legal requirements, the controversy was not warranted for the simple fact that the Directive does not introduce any significant innovations.

This article examines the substantial provisions of the Directive in the light of the legal situation that already exists.

The background

The Services Directive is part of the process of economic reform launched by the Lisbon Strategy, that aims to make Europe one of the most competitive knowledge-based economies by 2010. As services account for a large proportion of the EU economy, competitive service markets are essential for economic growth.

In order to create a genuine single market in services by 2010, the Commission proposed a directive which seeks to eliminate the legal obstacles preventing enterprises from offering their services or establishing themselves in other Member States. By fostering cross-border economic activity and stimulating competition in this way, the aim was to provide wider choice, improve quality and lower prices for consumers and for enterprises using services. Innovation, improved competitiveness and the creation of high-quality jobs in the sector was also sought.

At present, a wide range of internal market barriers prevent many service companies, especially SMEs, from expanding across national borders and fully benefiting from the internal market. This also undermines the global competitiveness not only of EU service providers, but also of the EU manufacturing sector, which increasingly relies on high quality services. It also makes Europe a less attractive place for foreign investment. Some of these barriers also prevent consumers from extending their choice by looking at potential offers from abroad.

Although in law many issues have already been resolved through litigation – based on the provisions of the EC Treaty – and some legislation, it appears that many authorities have not incorporated into their own policies and practices the obligations the flow from the internal market principles.

The Directive and the reach of the rules of the internal market

At the start the Directive specifies what it does and does not do. The provisions regarding the latter are quite extensive, presumably in order to allay the fears of power–grabbing by the EU. Litigation is now more frequently invoking arguments based on the rules of the internal market to challenge legislation and other rules in other fields, such as education, taxation, healthcare etc. that are of national competence and where everyone thought that the EU had nothing to say there. As a result the impression appeared that the internal market is used as a battering ram to extend the EU's powers into these fields (by stealth) and that the national governments as a result lose their power. Some of the criticisms levelled against the original proposal for a Services Directive (the "Bolkestein Proposal") went in the same direction.

However, the arguments along those lines overlook a

simple fact of life in the EU: With the complexity of today's life, there is hardly a situation where only one, single field of law applies in isolation. So, the facts giving rise to the litigation involved not only the legal fields of education, taxation, healthcare etc., but also the internal market, usually because there was a cross-border element: someone or something had moved from one country to another and then ran into problems.

What usually then happened was that the officials involved only considered "their" legal rules and ignored (deliberately or by accident) the fact that the internal market was also involved and as a result, its rules needed to be taken into account. For example, healthcare services are excluded from the scope of the Directive (but not from the internal market). Although there is no plan for the EU to legislate on how healthcare should be organised, when doctors, patients or equipment moves across borders, the internal market is, was and will be relevant and needs to be taken into account by officials.

The Directive and its interaction with other EU legislation

The Services Directive addresses its relationships with other EU legislation, by providing that in case of conflict, it will cede the handling of the situation to that other legislation. What is surprising is that most of the controversies surrounding the Services Directive do not fall within the scope of this Directive at all but in the scope of other legislation that proved to be less controversial. For example, on the issue of social dumping, the Directive leaves the matter to legislation that is over 10 and 30 years old respectively and on the issue of which country (and its rules) determines how a job is done (and what is a "good" or "bad" service), this Directive leaves that question to the diploma recognition directive.

What are *Services*?

The "real" text of the Directive begins with a series of definitions of key terms.

A key battleground here was the definition of "service". In the end, the definition refers to the EC Treaty and, consequently, to the definition of service developed by the European Court of Justice over the years:

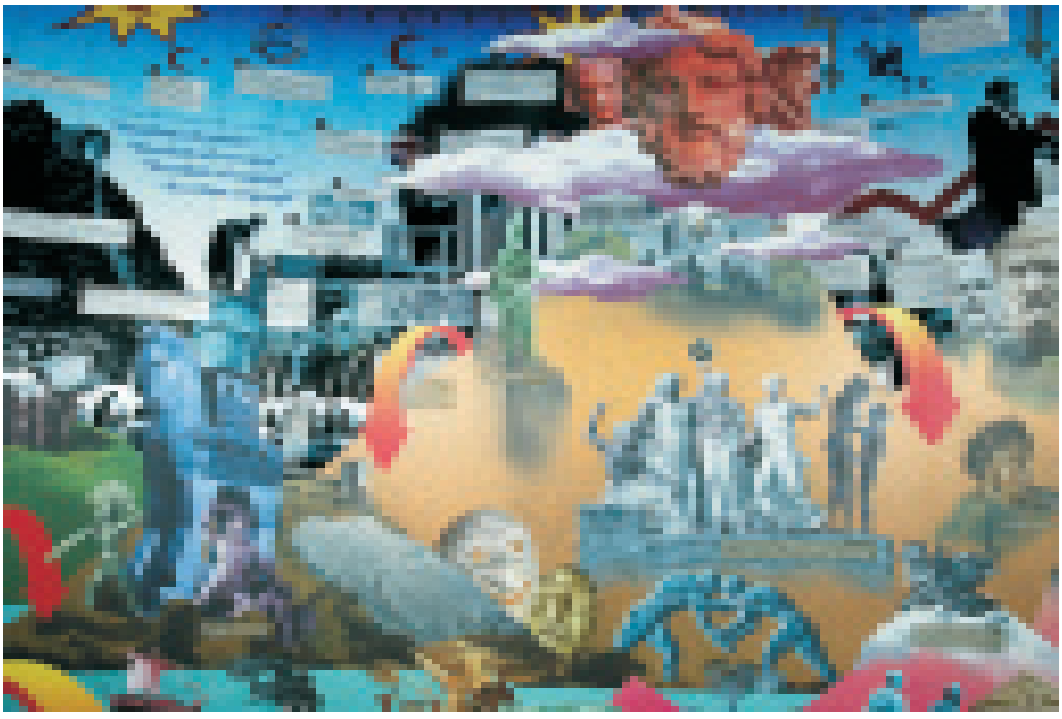
Article 50 EC provides that services are to be considered to be services within the meaning of the Treaty where they are normally provided for remuneration.[1]

[T]he essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question, and is normally agreed upon between the provider and the recipient of the service.[2] *Article [50] of the Treaty does not require that the service be paid for by those for whom it is performed.*[3]

Fighting "red tape" – the directive does not want to add to it, but to trigger a reduction in administrative burdens

Then first chapter that actually "legislates" is Chapter II that deals with administrative simplification. It requires Member States to review their bureaucracy with a view to simplifying them. We should note that from the start in 1957 the Treaty required Member States to be proactive to "facilitate the achievement of the Community's tasks". This obligation to facilitate the work of the EU (and not to obstruct it) is intensified by the additional involvement here of the general legal principle of proportionality, as defined by the European Courts of Justice:

"[A] requirement may be regarded as compatible with Articles 49 EC and 50 EC only if it is established that in the field of activity concerned there are imperative reasons relating to the public interest which justify the restrictions on the freedom to provide services, that the public interest is not already protected by the rules of the State of establishment



and that the same result cannot be obtained by less restrictive rules."[4]

Regarding paperwork, Member States are reminded of their duty not to insist on their own documents but to recognise the information provided by foreign documents and accept these as proof – they can of course determine themselves what they want to know, as long as they are not nationalistic when it comes to the manner in which the evidence is provided (the "Vlassopoulou-Hocsman" formula[5]). The Commission may support this process by developing forms that provide information in a harmonised format.

Then comes a real innovation: the obligation of the Point of Single Contact. The proposal spoke of "single points of contact", which apparently lead to the misapprehension in some Member States that they now had to re-arrange the competencies when it came to foreigners and determine a single authority that handles everything. That is of course one way of handling this situation, but the Directive does not impose this option. One can also satisfy this one-stop-shop requirement by obliging all the authorities involved to change their communication channels, but not their competencies. Instead of insisting that applicants communicate individually with them directly, often leading to a "paper-chase" of Kafkaesque proportions with one authority requiring a paper from another and the other authority in turn requiring a paper from the first before issuing anything, everyone involved in the situation needs to communicate through a single interlocutor. But the Directive does not say who that must be. So the requirement can also be satisfied when the first of the authorities involved that is contacted takes on that role in that case. The Directive never spoke of sole points of contact.

Another true novelty is the obligation to offer the possibility to complete all procedures and formalities electronically. In an indirect way, such an obligation already exists, as was made explicit in the *Klopp* case in 1984,[6] where the Court of Justice deemed that certain professional rules of conduct were no longer appropriate in view of the advances in technology. So, when technology moves ahead, rules should adapt to this progress.

Contrary to its name, the Directive deals not only with the free movement of services but also with the free movement of persons

Chapter III deals with Establishment. Contrary to the name of the Directive, it is not only dealing with the free movement of services (Freedom Number 3 of the four Internal Market Freedoms) but also with the freedom of establishment (which is a part of Freedom Number 2 of the four Internal Market Freedoms), i.e. the free choice of self-employed professionals and companies to set up the base of their operations anywhere in the EU or to move it to another place, where they feel that it is most advantageous to them. Here the Directive, in different words, repeats the classic formulas and conditions that the Court rulings have developed in order to determine whether national rules and regulations are compatible with the internal market or constitute an unjustified restriction. The main principles are:

- no discrimination against foreign applicants,
- free choice to the applicants how they want to be present in the territory,
- there must be an overriding reason relating to the public interest that justifies the measure and not just an administrative hurdle that exists for its own sake or a measures that "conveniently" keeps out foreign competitors,
- the level of the requirements that are imposed stand in an appropriate relation with the said reason for which they are imposed,
- these requirements are clear, unambiguous, objective and transparent,
- they do not duplicate requirements that the applicant has already satisfied in another country,
- the procedures involved are reasonable in terms of time and costs for the applicants, and
- decisions are explained and subject to judicial review.

Regarding the time that procedures take the Directive further develops an approach used in the realm of diploma recognition which prevents authorities from stretching procedures into a never-ending loop. Now, the authorities must tell applicants what is needed to make their application complete and how much time they will need to process the file (once complete). These indications must be given in each individual case at the latest when acknowledging receipt of the applications so that applicants know what they need to submit to make their file complete and how much time that processing will take. The authority is then bound to these indications and the clock starts ticking when the file is complete, without room for the classic excuse for delays that "a document is missing which one had forgotten to ask for in the first place". When this self imposed timeframe is over (there is room for extensions if one can justify them), the authority can no longer refuse. Failing a response within the time period set or extended, authorisation shall be deemed to have been granted. Applicants cannot be obstructed by delaying tactics anymore. If the procedure takes too long, that will now be problem for the authority and no longer for the applicant.

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Permits, licences and authorisations should in principle be granted for an unlimited period. However, in view of the tendency to move away from open-ended licences, with an increasing number of professions provided now for licences only for a number of years before re-registration is imposed (and often coupled to requirements to have undergone continuous professional training – the professional airline pilots are an example of this trend), this provision will probably wither away gradually. And of course all such decisions, systems and rules have to be subject to judicial review.

The Directive then provides for a blacklist of requirements that can not be imposed. Most of these have already been outlawed in rulings by the European Court of Justice and so

should not exist anymore anyway. Other requirements expressly listed need to be reviewed.

The free movement of services

The Directive in Chapter IV turns to the subject matter that gives it its nickname: the free movement of services. This is the part of the Directive that was most heavily modified. Here, the country-of-origin principle had been proposed, but dropped after long discussion. Now, instead, the Directive reminds Member States that the freedom of movement is the principle and any measures that restrict it need to be justified. So it is not the profession, the service provider, or the client or patient that has to prove that they are entitled to move across borders, but the burden of proof rests with the authorities. They must provide evidence that shows why they are justified in restricting the cross border movement on that specific situation. Nothing new here. Here are samples of what the Court of Justice has already ruled on this issue:

Member States are not prevented from applying their own rules; how they do that was, is and will remain subject to scrutiny.

"[The Treaty] requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State, where he lawfully provides similar services."[7]

"In particular, the Member State cannot make the performance of the services in its territory subject to observance of all the conditions required for establishment; were it to do so the provisions securing freedom to provide services would be deprived of all practical effect."[8]

However, in justified circumstance restrictions are permissible. The internal market rules an case law use a very wide definition of "restriction" but does not (contrary to popular perceptions) outlaw all of them. It only complains about "unjustified" restrictions. So the crucial question is when is a restriction justified and therefore permitted. In the case of justified restrictions, the internal market rules themselves accept that mobility has reached its limits. On this issue, the Directive imposes the classic trio of requirements: non-discrimination, need and proportionality. Certain types of requirements are blacklisted, because previous court rulings have shown that they are prone to abuse and usually server protectionism behind a facade or legitimacy.

An interesting provision here is paragraph 3 of Article 16.

"The Member State to which the provider moves shall not be prevented from imposing requirements with regard to the provision of a service activity, where they are justified for reasons of public policy, public security, public health or the protection of the environment and in accordance with paragraph 1. Nor shall that Member State be prevented from applying, in accordance with Community law, its rules on employment conditions, including those laid down in collective agreements."

It appears to give immunity to Member States on these issues of public policy, public security, public health, the protection of the environment, employment conditions, including those laid down in collective agreements.

These were the issues which in particular sparked the controversies surrounding the initial proposal, boosted by high-profile litigation, such as the *Vraxholm/Laval* case on the issue of social dumping.

However, the impression that this provisions allows Member States not to comply with the internal market rules and permits them to impose their own rules on foreign service providers without "interference" from the rigours of the Directive (and previous court rulings) is misleading. The problems in the past related to the way in which national rules were applied. Although Member States are not prevented from applying their own rules; how they do that was, is and will remain subject to scrutiny. Even if one could interpret this provision as stating something else, one must bear in mind that behind this legislation are the general principles of EU law, which have higher legal value than the legislation, and one of these principles is proportionality.

It follows that the best way to handle any collision between the rules of the internal market and national measures is to apply the six-stage test developed by the European Court of Justice, building upon the Cassis-de-Dijon mechanism developed in the framework of the free movement of goods:

"[W]here national legislation falling within an area which has not been harmonised at Community level is applicable without distinction to all persons and undertakings operating in the territory of the Member State in which the service is provided, it may, notwithstanding its restrictive effect on the freedom to provide services, be justified where it meets overriding requirements relating to the public interest in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State in which he is established and in so far as it is appropriate for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it."[9]

Thus, there are now the following conditions for restrictive national measures against foreign service providers:

1. the rules cover a matter which has not been harmonised at Community level (or is not of EU competence),
2. there is no discrimination in the way they are implemented,
3. the rules are needed to protect an "overriding requirements relating to the public interest",
4. that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State in which he is established,
5. this action is appropriate for securing the attainment of the abovementioned objective and
6. this action does not go beyond what is necessary in order to attain it.

Furthermore, the Directive limits its applications in cases where certain other EU legislation also applies.

There follows a special procedure for serious problems in Article 18, which requires a combined reading of Articles 18 and 35. As it deals with the safety of services, which is covered in most circumstances by the Directive on the Recognition of Diplomas, it is almost redundant. It permits unilateral action in the host country in relation to safety of services where there is no harmonisation (stage 1 of the six-stage test). The host country must first ask the country of origin for help and request that it intervenes in relation to the service provider coming from its territory. If the country of origin has taken insufficient measures and/or the host country wants to take measures providing for a higher level of protection (protection of recipients/ safety of services are an accepted "overriding requirements relating to the public interest" – stage 3 of the test) than the measures that the country of origin can take (stage 4 of the test);and these measures are appropriate under the test developed by the European Court of Justice (stages 5 and 6), then the host country must notify the Commission and the country of origin of its plans and the reasons why it believes that it must take this action (the duty to give reason that is part of the general principles of EU law). After a standstill period of 15 days (shorter in urgent cases), the host country can then take that action. The Commission here has the opportunity to intervene, if it disagrees.

The rules of the internal market affect the activities of most public authorities in the Member States.

The free movement of service recipients

Having dealt with the problems faced by providers of services, the Directive turns to the rights of customers – the recipients of the services – and their freedom to go abroad for this purpose or to choose an offer by a service provider from abroad. Here the Directive essentially repeats what the European Court of Justice has already settled in the past. In most cases we are dealing with discrimination, where a client bears extra costs when choosing an offer from abroad. A classic example is the inability to deduct the costs for these services in the income tax declaration when it would have been possible, had the service provider been a "local".

Facilitating free movement through administrative cooperation – now made compulsory

To increase the confidence for consumers to consider foreign offers, Member States are now under a duty to assist and to provide information on their rules on, for example, the regulation of professions and consumer protection. In this way, the fear of the unknown that is often linked to offers by foreign providers is reduced, because there would then be an opportunity to get familiar with the foreign system and to be more confident and prepared should things go wrong. This measure will be backed up by an information exchange system on the European level.

Then comes Chapter V on the quality of services. It is a set of measures designed to increase confidence among authorities and consumers that foreign professionals can be trusted and allowed to operate without the need for close supervisions. Ideally, since the advent of the principle of mutual recognition, this attitude should already be prevalent but litigation has shown that this is far from being the case.

Now, authorities in the country of origin must make certain information available to authorities and (potential) recipients in the host country and they must assist them in case of problems. One of the constant complaints at the moment is that this is, in fact, not the case and, therefore, everyone is reminded of the way things should already be. For example, although one may require liability insurance and guarantees in appropriate cases, one may not insist that a second policy is taken out and paid for in the host country, when the insurance in the country of origin already covers the situation.

Chapter VI deals with specifically with administrative cooperation. This is the backbone to ensure that authorities trust foreign professionals and are willing to respect the principle of mutual recognition. This objective is pursued by imposing procedures for mutual assistance, so that authorities must speak to each other across borders, thereby get to know each other and – it is hoped – will generate this trust in each other. Apart from a general obligation to help each other, a system of liaison points is established so that authorities have someone to turn to when they do not know who to approach in another country. In view of the practical obstacles encountered here currently, in the shape of silence and a refusal to react, there is now an obligation to use electronic means coupled to notifications to the European Commission.

In particular, the country of origin is obliged to inform others on request whether a particular professional from this country is actually entitled to practice or whether they have had restrictions or sanctions imposed upon them, i.e. whether they are in good standing or have a bad record (Articles 29 and 33).

If through such contacts it becomes apparent that a professional is breaking the rules, the country where he/she comes from must activate its disciplinary system. It cannot lean back with the attitude that because the problem occurred abroad it does not have to act. This attitude is not expressly forbidden.

The host country, is in principle permitted to impose its rules on the foreign service provider. If these rules satisfy the tests mentioned above, those of its rules that fail those tests are, of course incompatible with the internal market and cannot be enforced.

Conversely, if the country of origin would like to know more about how "its" professionals behave while working abroad, it can oblige the authorities there, to supervise the service provider on its behalf.

If anyone becomes aware of a serious problem, it must notify this fact to all other Member States and the Commission. Such alert mechanisms already exist in Europe for dangerous products (the RAPEX system), foodstuff and feedingstuffs (the RASFF system), pharmaceuticals (the pharmacovigilance mechanism run by EMEA). Such an electronic information exchange system is also foreseen here by Article 34. Bad professionals should not be able to "slip through the net" nor may authorities insist on professionals doing as they are told by them because we do not know what goes on outside our borders.

The Directive contains a prohibition of national measures that ban advertising in certain professions. This will therefore provide a fundamental change in the legal professions in some countries.

In conclusion, the Directive in essence only provides for something significantly new on the following points:

- the obligation for all authorities involved to communicate with applicants through a point of single contact;
- the obligation to provide the possibility to complete all procedures and formalities electronically;
- the obligation to inform foreigners about the system, in particular the means of redress available against their service providers, should things go wrong;
- the ban on the prohibitions of advertising.

All other issues have already been laid down in one way or another by the European Court of Justice based directly on the text of the Treaty.

What does the European Union want from public authorities? The obligations in a nutshell

The rules of the internal market affect the activities of most public authorities in the Member States. Here is some advice on how national authorities may avoid conflicts between the obligations that arise from Community law and national practices:

1. What requirements do you impose on those who want to work in the field under your control? List them and publish them in order to satisfy the transparency requirements.
2. Why does the legislation that you manage impose these requirements? What is the specific public interest here, actually? Can the public interest be satisfied by less onerous ways than the requirements foreseen by your system? Consider especially what formalities are imposed by your system and whether they are still relevant or necessary.
3. Can these requirements and the conditions that build on them be satisfied by foreign applicants? Many problems in the past resulted from the fact that systems were designed with only the national situation in mind.
4. Can these requirements and the conditions that build on them be satisfied by applicants that want to keep their base abroad? Are you insisting on "establishment" in your country, because your conditions/requirement can only be satisfied by someone who sets up a long-term presence in your territory? You would thereby inadvertently deny the separate existence of the free movement of services and, thus, break the rules of the internal market.
5. Can you rely on the system in use in the applicant's country of origin? If not, why not? If you insist that someone from abroad must do it "your way" before being allowed to operate in your territory, you must be able to prove that any protection, guarantees and the like that that person can offer under the system they are already operating in back home are not good enough for their activities in your territory. You must be able to prove why it should apply and why you cannot simply trust in the effectiveness of the system in the country of origin. This is the application of the principle of mutual recognition.
6. If you can prove that you need to apply your own rules to the foreign candidate, then you must also prove why it is necessary to do it in the way that you demand. Should that candidate propose an alternative way forward, then you must prove why that alternative is not good enough. Under the principle of proportionality, you are able to take measures that protect the public interests that you have identified above, even if they restrict the free movement, but you must chose the method that is least restrictive to free movement.
7. Have you tried to resolve any problems with the help of your colleagues in the applicant's country of origin? You should communicate with your counterparts in other Member States and in the European Commission.

NOTES

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[1] Försäkringsaktiebolaget Skandia (publ), *Ola Ramstedt* v *Riksskatteverket*, Case C-422/01, §23.

[2] *Freskot AE* v *Elliniko Dimosio*, Case C-355/00, §55, citing Case 263/86 *Humbel and Edel* [1988] ECR 5365, paragraph 17, and Case C-109/92 *Wirth* [1993] ECR I-6447, paragraph 15.

[3] *B.S.M. Geraets-Smits* v *Stichting Ziekenfonds VGZ* and H.T.M. *Peerbooms* v *Stichting CZ Groep Zorgverzekeringen*, Case C-157/99, European Court reports 2001, p. I-05473, § 57, citing Case 352/85 *Bond van Adverteerders and Others* [1988] ECR 2085, paragraph 16, and Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, paragraph 56.

[4] *Commission* v *Italy*, Case C-131/01, §43, citing *Commission* v *Denmark*, paragraph 19.

[5] *Hugo Fernando Hocsman* v *Ministre de l'Emploi et de la Solidarité*, Case C-238/98, European Court Reports 2000, p. 0000, §23 (and 40), citing , Case C-234/97 *Fernández de Bobadilla* v *Museo Nacional del Prado* [1999] ECR I-4773, paragraphs 29 to 31:
The authorities of a Member State to whom an application has been made by a Community national for authorisation to practise a profession access to which depends, under national law, on the possession of a diploma or professional qualification, or on periods of practical experience, must take into consideration all the *diplomas, certificates and other evidence* of formal qualifications of the person concerned and his relevant experience, by comparing the specialised knowledge and abilities so certified and that experience with the knowledge and qualifications required by the national rules.

[6] *Ordre des avocats au Barreau de Paris* v *Onno Klopp*, Case 107/83, European Court reports 1984, p. 2971, §21.

[7] *Commission* v *Luxembourg*, Case C-445/03, §20, Case C-164/99 *Portugaia Construções* [2002] ECR I-787, paragraph 16.

[8] See for example:
- *Commission of the European Communities* v *French Republic*, Case C-154/89, European Court reports 1991, p. I-00659, §12
- *Commission of the European Communities* v *Italian Republic*, Case C-180/89, European Court reports 1991, p. I-00709, § 15.

[9] *Commission* v *Luxembourg*, Case C-445/03, §21, citing Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraphs 34 and 35, and *Portugaia Construções*, paragraph 19.