ISSN 2384-9169
Fascicolo n. 3 - 2019
rivista.eurojus.it

MOBILITY IN THE LEGAL PROFESSION*

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Summary: 1. Introduction. – 2. Emigration of German Jewish jurists to the US during the Third Reich. – 3. The free movement of lawyers within the European Union. – 4. Mobility in legal academia: the German case as a prime example. – 5. A European or global jurist.

1. Introduction

Despite globalisation and increasing interdependence among different legal orders, for a jurist trained in one country to relocate to a new country and practice law there is a project not easily undertaken. Mobility within the legal profession is instead a complex process, one often underestimated by the academic literature,[1] that can be analysed only by engaging a broad comparative perspective and by taking into account the impact of multiple factors. First, there

* The idea of developing this topic comes from a talk given at Hebrew University in Jerusalem in occasion of the Joint Workshop: *Mobility 2.0: Aspirations, Challenges, Obstacles*, organized on December 11-12, 2016 by the *Zukunftskolleg* of the University of Konstanz (Germany) and the Martin Buber Society of Fellows in the Humanities and Social Science (Jerusalem). Therefore, the author thanks the *Zukunftskolleg*, where she worked as Marie Curie Postdoctoral Fellow from 2015 to 2017, and its director Giovanni Galizia, who allowed her to deal with a topic that is very close to her personal professional experience both as academic scholar and lawyer.

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[1] However, a great contribution for the study of this topic comes from the Center on the Legal Profession of Harvard Law School, whose mission is «increasing understanding of the structures, norms and dynamics of the global legal professions». See: https://clp.law.harvard.edu.

is the uniqueness of legal expertise.[2] Working abroad for lawyers is not as easy as it is for people in other professions. While a doctor, a biologist, or an engineer has no problem doing his/her job anywhere in the world, since there is a common ground with regard to the substantive knowledge, a legal expert meets more difficulties when moving from the country where he/she studied to another one, because «the substantive knowledge differs considerably from state to state».[3] This happens not only in the case of countries that greatly differ culturally or politically, but even between Member States of the European Union and among the United States.[4] In fact, legal professions are based specifically on the national legal systems in which lawyers are educated and trained; therefore, they are experts in their own system, but this expertise does not necessarily transfer to other legal systems. Second, regulation by the national state plays a crucial role: because of the state's monopoly on the legal profession, each country restricts the career paths to becoming lawyer/advocate, judge or notary according to its own rules. Third, the taxes and contributory obligations imposed on the membership to the professional orders have in most countries a protectionist nature, because they tend to limit the access to those who can afford the burden and to guarantee an elite status to their members. Fourth, the legal professions are, from a social perspective, highly desirable professions and are usually easier to achieve by people who are native to the country.

The problem of international mobility within the legal profession will be introduced by considering briefly the historical case of the forced emigration of German Jewish jurists to the United States during the Third Reich. Then, turning to the current day, the topic will be analysed from the perspective of the free movement of lawyers within the European Union and of the voluntary mobility within the world of legal academia.

2. Emigration of German Jewish Jurists to the US during the Third Reich

[2] See: S.J.F.J. Claessens et al., *Evaluation of the Legal Framework for the Free Movement of Lawyers*, Maastricht University 2012, 15.

[3] *Ibidem*.

[4] As Joan Mahoney highlighted, «In the United States … a law graduate must decide which state's bar exam to take, and, having done so, can generally only practice in that state. Moving from one state to another requires either another bar exam or, in some cases, sufficient practice in one state to be admitted in another without the exam. Even though Britain and the United States share the same common law tradition, lawyers who are admitted to practice in one of those countries cannot be admitted in the other without repeating some or all of their education» (J. Mahoney, *The internationalisation of legal education*, Amsterdam Law Forum 3/2010, 43).

The Nazi persecution against Jewish people hit jurists harder than other professional categories.[5] It indeed brought about the collapse of a vibrant professional community, as the Exhibition «Lawyers Without Rights» presented by the German Federal Bar and American Federal Bar clearly shows.[6] In fact, at that time a substantial percentage of jurists in Germany were of Jewish origin. During the 1930s in Germany 4,394 of the approximately 19,500 admitted lawyers were Jewish or of Jewish descent, i.e. nearly a quarter.[7] «In Berlin, for example, on 1 January 1933 more than half of the 3400 lawyers were of Jewish origin».[8] These professionals were immediately affected by the racial laws. On April 7, 1933 the Law Regarding Admission to the Legal Profession (*Gesetz über die Zulassung zur Rechtsanwaltschaft*), approved together with the Law for the Restoration of the Professional Civil Service (*Gesetz zur Wiederherstellung des Berufsbeamtentums*), banned Jews from civil service, deprived them of their rights to practice their profession and impeded the youngest of them from taking the bar exam necessary to become a lawyer.

As highlighted by Ernst C. Stiefel and Frank Mecklenburg in their book «Deutsche Juristen im amerikanischen Exil» («German jurists in American exile»),[9] many of them escaped the prospect of death by emigrating to the United States. According to their survey, half of the Jewish lawyers expelled from the German Bar[10] (*i.e.* circa 2,200) and around one third of the 120 Jewish law professors expelled from German Universities[11] (*i.e.* circa 40) landed in the United States.

Although they tried to exercise their profession in their new homeland, only few of them were able to succeed. The main obstacle encountered relied on the deep difference between the legal system of their provenience, a civil law system, and the American one, a common law system. Further problems were represented by the difficulties in obtaining new qualification given the substantially diverse education and experience gained in Germany, by the divergent

[5] E.C. Stiefel, F. Mecklenburg, *Deutsche Juristen im amerikanischen Exil (1933-1950)*, Mohr 1991.

[6] German Federal Bar and American Federal Bar, *Lawyers Without Rights: Jewish Lawyers in Germany Under the Third Reich*, *Exhibition*, available at https://lawyerswithoutrights.com/Exhibition/index.html. On the destiny of Jewish German jurists during the Nazi period see: W. Benz, *Von der Entrechtung zur Verfolgung und Vernichtung. Jüdische Juristen unter dem Nationalsozialisten Regime*, in: H. Heinrichts, H. Franzki, K. Schmalz, M. Stolleis (eds), *Deutsche Juristen jüdischer Herkunft*, Beck 1993, 813-852; Bundesrechtsanwaltkammer (ed), *Anwalt ohne Recht. Schicksale jüdischer Anwälte in Deutschland nach 1933*, be.bra Verlag 2007. It is worth mentioning that an English version of this latter book was recently released with the title *Lawyers Without Rights: Jewish Lawyers in Germany under the Third Reich* (ABA Buch Publishing 2018).

[7] I. Müller, *Furchtbare Juristen. Die unbewältigte Vergangenheit unserer Justiz*, Kindler 1987, 67.

[8] German Federal Bar and American Federal Bar, *Lawyers Without Rights: Jewish Lawyers in Germany Under the Third Reich*, *Exhibition*, cit., 1.

[9] E.C. Stiefel, F. Mecklenburg, *Deutsche Juristen im amerikanischen Exil (1933-1950)*, cit.

[10] *Ibidem*, 111-112.

[11] *Ibidem*, 41.

approach to the law[12] and, of course, by the English language. It is worth mentioning that many jurists spoke better Latin and Ancient Greek than English.

While it not possible to go through all the biographies of the German Jewish jurists who emigrated to the United States, the analysis led by Ernst C. Stiefel and Frank Mecklenburg demonstrated clearly that in most cases they needed to fall back on other skills or to take up new professions.[13] The obstacles met by such forced emigrants are summarized well by the account of one of them, Max Rheinstein, who was – in contrast from the majority of his peers – successful, as he was able to pursue an academic career in the US, becoming in fact one of the founding father of private comparative law there.[14] In an interview given at the end of the 1950s, he explicitly admitted that for the legal experts, who at the time of their emigration were more than 60, there were no opportunities, while even for those who were 40 or 45, there were few possibilities to get back on track.[15]

Neither were things simpler for the younger generations. Indeed, many of the emigrated jurists decided to start again, studying economics and pursuing new careers in the accounting, banking, finance or insurance sectors, or as real estate agents, importers and exporters; others became librarians, social workers or functionaries of various associations.[16] Sometimes they were able to return to the practice of law after many years, as was true the case of one of the authors of the aforementioned book, Ernst C. Stiefel,[17] who after his emigration in 1939 to the United States worked as a chauffeur and restaurant assistant, then as clerk for an important law firm in New York and as expert for various government agencies (e.g. Office of Strategic Services). Only in 1950 could he work again as a lawyer and in 1970 he joined the well-known law firm Coudert Brothers in New York.

It is also important to highlight that, given the closure of law schools, legal academics – with few exceptions – switched from the law faculties to other faculties, foremost of all to that of political science: prime examples are Karl Löwenstein, Ernst Fraenkel and Franz Leopold Neumann.[18] After all, it is not a mere coincidence that even the well-known Austrian jurist Hans

[12] The lawyers' ambition to publish and to teach, which is typical in Europe, does not exist for example in the United States given the strict separation between legal scholarship and legal profession. *Ibidem*, 110.

[13] E.C. Stiefel, F. Mecklenburg, *Deutsche Juristen im amerikanischen Exil (1933-1950)*, cit.

[14] See O. Lepsius, *Rheinstein, Max*, Neue Deutsche Biographie, 21/2003, 493-494, available online at www.deutsche-biographie.de.

[15] E.C. Stiefel, F. Mecklenburg, *Deutsche Juristen im amerikanischen Exil (1933-1950)*, cit., 5-6.

[16] *Ibidem*, 9.

[17] *Ibidem*, 131-134. See also: K. Biedenkopf, *Stiefel Ernst (Ernest) Carl*, Neue Deutsche Biographie, 25/2013, 323-324, available online at www.deutsche-biographie.de.

[18] E.C. Stiefel, F. Mecklenburg, *Deutsche Juristen im amerikanischen Exil (1933-1950)*, cit., 77 ff.; D. Schefold, *Zu den Spuren von Hellmut Wollmann*, in: S. Kuhlmann, O. Schwab (eds), *Starke Kommunen – wirksame Verwaltung*, Springer 2017, 288-289.

Kelsen, after his emigration to the United States in 1940s, became in 1945 full professor at the University of Berkeley within the department of political science and not of law.

3. The Free Movement of Lawyers within the European Union

Far from the extreme example of the German Jewish jurists, which belongs to a tragic page of history, the current mobility of jurists within the European Union has a voluntary nature. Although it is nowadays often overlooked, especially because of populistic political propaganda that blames the European Union for economic crisis and a faulty migration policy, the European Union has the great merit of having assured a long-lasting peace and of having built an integration on the European space.

The free movement of labour is one of the four freedoms enjoyed by the EU citizens.[19] Nevertheless, while notaries and judges remain exclusively confined to within their national borders, the affirmation of the free movement of lawyers – which has been up to now the only legal profession regulated at the European level – is the result of a long process that developed first on the basis of the ECJ case law, then through European legislation and continued by virtue of both. As pointed out by Sjoerd Claessens, «the evolution has been characterised by a combination of what is called positive integration (*i.e.* secondary legislation) and negative integration (*i.e.* integration through judgments of the European Court of Justice)».[20]

In order to understand such evolution,[21] it is essential to go briefly over on its most important steps, remind ourselves of its temporal coordinates and point out the reciprocal influence between case law and secondary legislation.

[19] The "four freedoms" are the free movement of goods, capital, services, and labour. For a deep analysis of the four freedoms see: C. Barnard, *The Substantive Law of the EU. The Four Freedoms*, Oxford University Press 2013.

[20] S. Claessens, *Free Movement of Lawyers in the European Union*, Wolf Legal Publishers 2008, 4.

[21] For a deep analysis of such evolution see, *ex multis*: K. Gromek-Broc, *The Legal Profession in the European Union – A Comparative Analysis of Four Member States*, Liverpool Law Review 2002, 109-130; S. Claessens, *Free Movement of Lawyers in the European Union*, cit.; J. Lonbay, *Assessing the European Market for Legal Services: Developments in the Free Movement of Lawyers in the European Union*, Fordham International Law Journal 2011, 1629-1669; S. Claessens, H. Schneider, *Legal Education and Free Movement of Lawyers in the European Union*, in: A.W. Heringa, B. Akkermans (eds), *Educating European Lawyers*, Intersentia 2011, 121-156; S.J.F.J. Claessens et al., *Evaluation of the Legal Framework for the Free Movement of Lawyers*, cit.; G. Muller, *Free Movement of Lawyers within the EU Internal Market: Achievements and Remaining Challenges*, European Business Law Review 2015, 355-390.

It started in the 1970s with two leading judgments, both issued in 1974: *Reyners*[22] and *Van Binsberger*.[23] By the *Reyners* case, the ECJ «opened the gates»[24] to the free movement of lawyers. In fact, rejecting the thesis supported by the Luxembourg Government and the Belgium Ordre national of advocates, the Court highlighted that the profession of advocate «cannot be considered as connected with the exercise of public authority»[25] and, therefore, is not included in the exceptions foreseen in respect of the principle of freedom of establishment. As a consequence, specific nationality cannot be seen as a requirement for practicing law. In the light of the *Van Binsberger* case as well, the habitual residence requirement falls down.[26] In 1977 the first mosaic tile toward a regulation of the matter is placed: the Council of European Communities adopted the Lawyer Service Directive (77/249/EEC).[27] In the same year the ECJ, faced with a question on the interpretation of the right of establishment with regard to the admission to exercise the profession of advocate, stated that «demanding the national diploma prescribed by the legislation of the country of establishment constitutes, even in the absence of the directives provided for in Article 57, a restriction incompatible with the freedom of establishment guaranteed by Article 52 of the Treaty».[28]

The European Court in the 1970s gave a great push for the development of the free movement of lawyers, and in the 1980s and 1990s proved to be able to create «a self-supporting system that facilitated lawyers' movement from one Member State to another».[29] Indeed, following the *Reyners* and *Van Binsberger* cases, it allowed the right of establishment despite the maintenance of a professional domicile in another Member State and authorized double

[22] CJEU, Judgment of the Court of 21 June 1974, Case 2/74, *Jean Reyners v. Belgium*, 1974, 00631, commented by A. Trabucchi, *L'esercizio dell'avvocatura non subordinato in Europa alla cittadinanza nazionale*, Rivista di diritto civile 1974, 317-321; F.-X. De Dorlodot, *L'avocat au regard du traité de Rome après l'arrêt de la Cour de justice du 21 juin 1974*, Revue du Marché Commun 1974, 473-480; E. Graziadei, *La condizione della professione legale nella CEE: un passo avanti*, Il Foro italiano 1974, IV, 342-346.

[23] CJEU, Judgment of the Court of 3 December 1974, *Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, Case 33/74, 1974, 01299, annotated by Y. Loussouarn, *Droit d'établissement*, Revue trimestrielle de droit européen 1975, 518-531.

[24] The expression belongs to S. Claessens, *Free Movement of Lawyers in the European Union*, cit., 15.

[25] CJEU, Judgment of the Court of 21 June 1974, *Jean Reyners v. Belgium*, cit., par. 52.

[26] In order to be precise, it must be underscored that the decision concerned the right to provide service. However, the principle is applicable also to the right of establishment.

[27] Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, Official Journal L 78, 26/03/1977, 17-18.

[28] CJEU, Judgment of the Court of 28 April 1977, *Jean Thieffry v Conseil de l'ordre des avocats à la Cour de Paris*, Case 71/76, 1977, 00765, par. 27. On this judgment see: R. Wägenbauer, *Das Thieffry-Urteil und das Niederlassungsrecht der Rechtsanwälte in den Europäischen Gemeinschaften*, Europäische Grundrechte-Zeitschrift 1977, 260-262.

[29] S. Claessens, *Free Movement of Lawyers in the European Union*, cit., 75.

establishment.[30] At the same time, on one hand, it considered the obligation to register with the bar of the host Member State as an appropriate and non-discriminatory requirement, since the enrolment in the bar is required by the law also for domestic lawyers.[31] On the other hand, it subordinated the admissibility of national restrictions on four conditions: that they are applied in a non-discriminatory manner, justified by imperative requirements in the general interest, suitable for securing the attainment of the objective which they pursue and not beyond what is necessary in order to attain it.[32] Moreover, the ECJ – sentencing both the Federal Republic of Germany[33] and the French Republic[34] – stated that requiring a lawyer providing services to work in conjunction with a lawyer who is a member of the home bar is not legitimate, when the assistance of a lawyer is not compulsory or when acting before authorities or bodies which have no judicial function. After all, «the role of a lawyer in providing representation for a client abroad would be marginal if he was forced to work with a national lawyer even in situations where the national law did not prescribe compulsory legal representation».[35]

Meantime, in December 1988 a general Diploma Directive (89/48/EEC)[36] was adopted. Four years later with the *Vlassopoulou* case, the ECJ specified that the national authorities of a Member State to which an application for admission to the profession of lawyer by a subject who is already admitted to practice as a lawyer in his/her country of origin have to examine to what extent the knowledge and qualifications attested by the diploma obtained in his/her

[30] CJEU, Judgment of the Court of 12 July 1984, *Ordre des avocats au Barreau de Paris v. Onno Klopp*, Case 107/83, 1984, 02971, annotated by L. Gormley, *Freedom to Practise at the Bar in More than One Member State*, European Law Review 1984, 439-441; J. Mendelsohn, *European Court of Justice: Paris Bar Rule Violates Right of Establishment*, Harvard International Law Journal 1985, 562-568; R. Scarpa, *Libertà di stabilimento e professione forense*, Giustizia civile 1985, I, 1266-1268.

[31] CJEU, Judgment of the Court (Sixth Chamber) of 19 January 1988, *Claude Gullung v Conseil de l'ordre des avocats du barreau de Colmar et de Saverne,* Case 292/86, 1988, 00111, commented by A. Brunois, *Le barreau d'Europe demain: l'affaire Gullung*, Revue trimestrielle de droit européen 1988, 421-435; R. Baratta, *Recenti sviluppi normativi e giurisprudenziali in tema di stabilimento e di servizi da parte degli avvocati*, Giustizia civile 1989, I, 1972-1980. On the non-discriminatory nature of the obligation to be registered in the bar see more recently: CJEU, Judgment of the Court (Fourth Chamber) of 3 February 2011, *Donat Cornelius Ebert v Budapesti Ügyvédi Kamara*, Case C-359/09, 2011, I-00269, par. 35.

[32] CJEU, Judgment of the Court of 30 November 1995, *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, Case C-55/94, 1995, I-04165.

[33] CJEU, Judgment of the Court of 25 February 1988, *Commission of the European Communities v. Federal Republic of Germany*, Case 427/85, 1988, 01123, annotated by R. Zuck, *Freier Dienstleistungsverkehr der Rechtsanwälte, Umsetzung der Richtlinie 77/249/EWG in innerstaatliches Recht*, Europarecht 1988, 186-190; J. Lonbay, *Cross-frontier Provision of Services by Lawyers*, European Law Review 1988, 347-350.

[34] CJEU, Judgment of the Court of 10 July 1991, *Commission of the European Communities v. French Republic*, Case C-294/89, 1991, I-03591.

[35] S.J.F.J. Claessens et al., *Evaluation of the Legal Framework for the Free Movement of Lawyers*, cit., 47.

[36] 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, Official Journal L 019, 24/01/1989, 16-23. This directive was replaced in 2005 by the Professional Qualification Directive (2005/36/EC) and lately in 2013 amended by the Directive 2013/55/EU.

country of origin correspond to those required by the rules of the host State and to require the person concerned to prove the acquisition of the knowledge and qualifications which are lacking when the diplomas correspond only partially.[37]

However, the process of the development of the free movement of lawyers reached its peak in 1998 with the adoption of the Lawyers' Establishment Directive (98/5/EC),[38] which filled the existing gap in the regulation and incorporated the principles asserted by the ECJ. The role of this latter has nevertheless not become less relevant. Indeed, it on one hand repelled the national resistances against the adoption of the directive[39] and convicted two Member States for its missing or late implementation[40] and on the other hand constantly intervenes to guide and correct its interpretation, as is highlighted below.

A) The current European legal framework

In Europe, the profession of lawyer falls under specific regulation,[41] which is strongly influenced by the European case law. There are two directives, one on temporary mobility and one on permanent mobility:

- The Lawyers' Service Directive: Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services;
- The Lawyers' Establishment Directive: Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the

[37] CJEU, Judgment of the Court of 7 May 1991, *Irène Vlassopoulou v. Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg*, Case C-340/89, 1991, I-02357, on which C. Poma, *La libera circolazione dei professionisti e il riconoscimento dei titoli di studio*, Diritto comunitario e degli scambi internazionali 1992, 669-676

[38] Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, Official Journal L 77, 14/03/1998, 36-43.

[39] In fact, the ECJ rejected the action for annulment of Directive 98/5/EC brought on by the Grand Duchy of Luxembourg, which asserted that the directive introduced a difference in treatment between nationals and migrants and a prejudice to the public interest in consumer protection and the proper administration of justice. See: CJEU, Judgment of the Court of 7 November 2000, *Grand Duchy of Luxemburg v. European Parliament and Council of the European Union*, Case C-168/98, 2000, I-09131, commented by V. Bettin, *L'Europa degli avvocati: prospettive per il futuro,* Diritto pubblico comparato ed europeo 2001, 196-205; F. Spitaleri, *Accesso alla professione forense e discriminazioni "alla rovescia" nella sentenza Lussemburgo c. Parlamento europeo e Consiglio*, Il diritto dell'Unione Europea 2001, 179-195; E. Granziera, *Il diritto di stabilimento degli avvocati: verso una nuova era?*, Giurisprudenza italiana 2002, 38-42.

[40] They are France and Ireland. See respectively: CJEU, Judgment of the Court (Third Chamber) of 26 September 2002, *Commission of the European Communities v. French Republic*, Case C-351/01, I-08101, and CJEU, Judgment of the Court of 10 December 2002, *Commission of the European Communities v. Ireland*, Case C-362/01, 2002, I-11433.

[41] About the professions falling under specific legislation see: https://ec.europa.eu/growth/single-market/services/free-movement-professionals/qualifications-recognition/specific-legislation_en (accessed on April 22, 2019).

profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained.

However, the aforementioned European directives do not concern the practice of the profession of lawyer in general, but only the conditions under which a EU citizen who has qualified as a lawyer in one Member State can exercise his or her profession on a temporary or permanent basis in another Member State. They do not even define the profession of lawyer but are simply addressed to those people who hold the title of lawyer according to the national legislations in the different linguistic variations listed by the directives. There is in fact no reference to scope, content nor length of studies and training paths, which differ deeply per country. Therefore, as Sjoerd Claessens and Hildegard Schneider strongly stated, «the notion of a European lawyer is not a legal reality».[42]

Furthermore, differently from the other liberal professions, for which «the ability to cross borders is derived from a mutually recognized educational route to qualification»,[43] «in the legal profession it arises solely from the acquisition of a title, through whichever route is nationally recognized».[44]

With regard to temporary mobility, lawyers can provide their services in a host Member State, keeping the professional title of their home country expressed in the original language and with an indication of the professional organisation by which he/she is authorized to practise or the court of law before which he/she is entitled to practise pursuant to the laws of that State.[45] For the exercise of their activity relating to the representation of a client in legal proceedings or before public authorities they have to respect the «conditions laid down for lawyers established in that State, with the exception of any conditions requiring residence, or registration with a professional organisation, in that State»[46] and to «observe the rules of professional conduct of

[42] S. Claessens, H. Schneider, *Legal Education and Free Movement of Lawyers in the European Union*, cit., 123. They explain their statement in the following way: «There is no separate category of European lawyers, any lawyer seeking to embark on European adventures must still be firmly rooted in one of the national professions in order to be able to carry one of the titles mentioned in the two Directives. The designation European lawyer can at best be used for lawyers that are active in a Member State by virtue of these Directives in order to distinguish them from the lawyers that were purely domestically trained and qualified and never crossed borders. But next to being classed as European lawyers, these mobile lawyers are fully qualified national lawyers in at least one Member State of the European Union» (*ibidem*).

[43] Council of Bars and Law Societies of Europe (CCBE), *Guidelines for Bars & Law Societies on Free Movement of Lawyers within the European Union*, Fotolia 2016, 5 (available at www.ccbe.eu).

[44] *Ibidem*.

[45] Art. 3 Lawyers' Service Directive.

[46] Art. 4(1) Lawyers' Service Directive.

the host Member State, without prejudice to his obligations in the Member State from which he comes».[47]

For the practice of the profession on a permanent basis, there are two options provided for by the Lawyers' Establishment Directive: **a)** a recognition without integration and **b)** a full integration, which can be obtained in three different ways.[48]

a) Recognition without integration: it is provided for that any lawyer is entitled to work on a permanent basis under his/her home-country professional title that must be expressed in the official language of the home Member State in order to avoid any confusion with the professional title of the host Member State[49] (establishment under home title). The right to practice under the home-country professional title is subordinated to the requirement of the registration with the competent authority of the host State upon presentation of a certification attesting the lawyer's registration with the competent authority in the home Member State[50] and to the respect of the professional rules of the host Member State.[51]

b) Full integration: There are three alternatives set down by the art. 10 of the Directive, two that require the passage of a period of three years and one that can be realized at any time:

1) The regular exercise of the activity of a lawyer under the home country professional title for a period of at least three years (without any interruption other than that resulting from the events of everyday life), involving the law of the host Member State, including Community Law. This continued practice must be documented by the applicant and verified by the competent authority;[52]
2) The regular exercise of the activity of a lawyer under the home country professional title for a period of at least three years but for a lesser period in the law of host Member State under evaluation of some conditions by the host Member State (and, particularly, the effectivity of the practice, the knowledge

[47] Art. 4(2) Lawyers' Service Directive.

[48] Art. 2 Lawyers' Establishment Directive states: «Any lawyer shall be entitled to pursue on a permanent basis, in any other Member State under his home-country professional title, the activities specified in Article 5. Integration into the profession of lawyer in the host Member State shall be subject to Article 10».

[49] Art. 4(1) Lawyers' Establishment Directive.

[50] Art. 3(1 and 2) Lawyers' Establishment Directive.

[51] Art. 6(1) Lawyers' Establishment Directive expressly states: «Irrespective of the rules of professional conduct to which he is subject in his home Member State, a lawyer practising under his home-country professional title shall be subject to the same rules of professional conduct as lawyers practising under the relevant professional title of the host Member State in respect of all the activities he pursues in its territory».

[52] Art. 10(1) Lawyers' Establishment Directive.

and the professional experience of the law of the host Member State, attendance at lectures or seminars on the law of the host Member State) and, subsequently, authorisation by the competent authority;[53]

3) The passing of an aptitude test.[54] This latter possibility, which is the fastest method of obtaining the full integration in the host Member State, relies on the general system concerning the recognition of professional qualifications and, especially, on articles 13-14 (titled respectively «Conditions for recognition» and «Compensation Measures») of the Directive 2005/36/EC[55] (earlier Directive 89/48/EEC). That means that the existence of specific regulations for the profession of lawyer does not prevent the utilisation of the general system concerning the recognition of professional qualifications.[56] It is worth mentioning that the number of lawyers who use the general system appears to be higher than that of those who pursue the integration though the Lawyers' Establishment Directive. There are many reasons for that. Besides the speed of obtaining a full integration into the host Member State, the circumstance that the practical implementation of the Lawyers' Establishment Directive «is surrounded by a great deal of uncertainty among the Bar associations and lawyers»[57] about the amount of experience necessary to fulfil the requirements of three years of effective and regular activity plays a big role. Moreover, «insurers … are more inclined to accept a lawyer who has proven his or her abilities by successfully completing an aptitude test».[58] It is also important to note that while the choice between compensation measures – either an aptitude test or an adapting period – usually belongs to the applicant,[59] for the professions

[53] Art. 10(3) Lawyers' Establishment Directive.

[54] Art. 10(2) Lawyers' Establishment Directive.

[55] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, Official Journal L 255, 30/09/2015, 22-142.

[56] As the same ECJ recognized: «… a lawyer from a Member State may gain admission to the profession of lawyer, in a host Member State where that profession is regulated, and practise under the professional title awarded by it, either under Directive 89/48 or Article 10(1) and (3) of Directive 98/5. Therefore, … Directives 89/48 and 98/5 complement one another by establishing, for lawyers from Member States, two means for gaining admission to the profession of lawyer in a host Member State under the professional title of that State»: CJEU, Judgment of the Court (Fourth Chamber) of 3 February 2011, *Donat Cornelius Ebert v Budapesti Ügyvédi Kamara*, cit., par. 35.

[57] S.J.F.J. Claessens et al., *Evaluation of the Legal Framework for the Free Movement of Lawyers*, cit., 7-8.

[58] *Ibidem*, 8.

[59] Pursuant to the first sentence of art. 14(2) Directive on the recognition of professional qualifications: «If the host Member State makes use of the option provided for in paragraph 1, it must offer the applicant the choice between an adaptation period and an aptitude test».

that require a knowledge of national law the decision is instead made by the State. In fact, the first sentence of Article 14(3) prescribes that «for professions whose pursuit 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».[60] It is very interesting to mark that, based on this framework, all the Member States have preferred to impose an aptitude test. Only Denmark had originally opted for an adaptation period, but then it changed, aligned itself to the other Member States.[61]

Therefore, the *discrimen* between the first two options and the last one relies on the examination, which is indeed not necessary in the case of a regular exercise of the activity for three years. Independently of the path followed to the profession of lawyer in the host Member State, once granted, the lawyer is entitled to use his/her home-country professional title alongside the professional title corresponding to the profession of lawyer in the host Member State.[62]

B) Critical and open issues

Despite this framework the mobility of lawyers is quite limited. According to the ranking of the most mobile professions drafted by the European Commission the profession of lawyer/barrister/solicitor lands in 52nd place.[63]

Indeed, the mobility of lawyers built on the aforementioned directives clashes with a series of problems. Since a harmonized definition of the profession of lawyer is missing, the scope of activity of the profession is to some extent uncertain, because it depends on domestic regulations. There are in fact Member States in which lawyers are authorized to exercise activities that in other Member States are reserved to other professions (in particular, to that of notary) or in which the representation before supreme courts is circumscribed to specialized lawyers. Therefore, while the general rule is that the lawyer carries on the same professional activities allowed to him/her in the host Member State, both the directives leave a margin of discretion to the Member States. In fact, according to Article 1 of the Lawyers' Service Directive, «notwithstanding anything contained in this Directive, Member States may reserve

[60] Art. 14(3) Directive on the recognition of professional qualifications.
[61] S. Claessens, *Free Movement of Lawyers in the European Union*, cit., 32.
[62] Art. 10(6) Lawyers' Establishment Directive.
[63] See: http://ec.europa.eu/growth/tools-databases/regprof/index.cfm?action=stat_ranking&b_services=true (accessed on April 22, 2019).

to prescribed categories of lawyers the preparation of formal documents for obtaining title to administer estates of deceased persons, and the drafting of formal documents creating or transferring interests in land».[64] Similarly, the Lawyers' Establishment Directive states at the Article 5(2), just title «Area of Activity», that: «Member States which authorise in their territory a prescribed category of lawyers to prepare deeds for obtaining title to administer estates of deceased persons and for creating or transferring interests in land which, in other Member States, are reserved for professions other than that of lawyer may exclude from such activities lawyers practising under a home-country professional title conferred in one of the latter Member States».[65]

Another critical aspect concerns the autonomy and independence of the lawyer who provides services or who has attained establishment in a host Member State.[66] According to the Article 5 of the Lawyers' Service Directive, the Member State may require the lawyer «to work in conjunction with a lawyer who practises before the judicial authority in question and who would, where necessary, be answerable to that authority, or with an *avoué* or *procuratore* practising before it».[67] Similarly, the Lawyers' Establishment Directive leaves at the discretion of the Member States the possibility of requiring to «lawyers practising under their home country professional titles to work in conjunction with a lawyer who practises before the judicial authority in question and who would, where necessary, be answerable to that authority or with an *avoué* practising before it»[68] and of laying down «rules for access to supreme courts, such as the use of specialist lawyers».[69] Although, as already highlighted, the ECJ tried to circumscribe the requirement of "work in conjunction" and although it is to some extent beneficial because of the support given by the domestic lawyer,[70] this could of course be a great limitation and an additional reason for lawyers to choose an immediate integration through the

[64] Art. 1(1) Lawyers' Service Directive.

[65] Art. 5(2) Lawyers' Establishment Directive.

[66] That, although according to the survey led by Claessens et al., only 14% of lawyers complained of a limitation of their ability to work independently. See: S.J.F.J. Claessens et al., *Evaluation of the Legal Framework for the Free Movement of Lawyers*, cit., 81.

[67] Art. 5 Lawyers' Service Directive

[68] Art. 5(3) Lawyers' Establishment Directive.

[69] *Ibidem*.

[70] According to the survey made by Claessens et al., «more than three quarters of lawyers (77%) indicates that the local lawyer has provided knowledge of local customs and court procedures. Almost as many lawyers (71%) have profited from advice that the local lawyer can give on the law of the host country» (S.J.F.J. Claessens et al., *Evaluation of the Legal Framework for the Free Movement of Lawyers*, cit., 81).

aptitude test. Additional related difficulties are the costs of working in conjunction and of finding an available local lawyer.[71]

Moreover, the system applies only to fully qualified lawyers, with the consequence that «those who are still seeking to gain qualification are left to the mercy of the regulations in the different Member States».[72] Indeed, the status of trainee does not fall under the regime of the Lawyers' Directives[73] and it is up to the Members States to determine the level of knowledge required to access the legal traineeship.[74] The only limitations laid down by the ECJ are that a Member State cannot refuse «to enrol the holder of a law degree obtained in another Member State in the register of persons undertaking the necessary period of practice for admission to the bar solely on the ground that it is not a legal diploma issued, confirmed or recognised as equivalent by a university of the first State»[75] and should examine «the possibility of partial recognition of the knowledge attested by qualifications which the person concerned has obtained»[76] to access to the traineeship.

Mobility on a permanent basis meets further drawbacks. First of all, the distinction between the right to provide service and the right of establishment is not always easily delineable as it is based on factors that are subject to interpretation. The ECJ was unable to add clarity on that. Without identifying a specific criterion, it simply affirmed that «the temporary nature of the provision of services … is to be determined in the light of its duration, regularity, periodicity and continuity» [77] and that the conditions for the exercise of the right of

[71] The costs of working in conjunction is «the most commonly experienced difficulty» according to 24% of the lawyers asked by Claessens et al. in their survey. *Ibidem*.

[72] *Ibidem*, 72.

[73] CJEU, Judgment of the Court (Fifth Chamber) of 13 November 2003, *Christine Morgenbesser v. Consiglio dell'Ordine degli avvocati di Genova*, Case C-313/01, 2003, I-13467, annotated by A. Mari, *La qualificazione del praticante avvocato nell'ordinamento comunitario*, Giornale di diritto amministrativo 2003, 1041-1044; M. Berti, *Pratica forense e libertà di stabilimento*, Diritto pubblico comparato ed europeo 2004, 372-377; C. Tuo, *La "professione" del praticante avvocato secondo la Corte di Giustizia: alcuni rilievi sul caso Morgenbesser*, Diritto del commercio internazionale 2005, 435-455.

[74] CJEU, Judgment of the Court (Third Chamber) of 10 December 2009, *Krzysztof Peśla v Justizministerium Mecklenburg-Vorpommern*, Case C-345/08, 2009, I-11677, commented by M. Castellaneta, *Lo Stato può imporre il superamento di una prova per dare un via libera alla frequenza del tirocinio*, Guida al diritto 1/2010, 96-98.

[75] CJEU, Judgment of the Court (Fifth Chamber) of 13 November 2003, *Christine Morgenbesser v. Consiglio dell'Ordine degli avvocati di Genova*, cit., par. 72.

[76] CJEU, Judgment of the Court (Third Chamber) of 10 December 2009, *Krzysztof Peśla v Justizministerium Mecklenburg-Vorpommern*, Case C-345/08, par. 65.

[77] CJEU, Judgment of the Court of 30 November 1995, *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, cit. About the difference between the right to provide service and the right of establishment as stated by this decision see: E. Adobati, *Differenza tra libera prestazione di servizi e libertà di stabilimento per l'esercizio della professione forense secondo la sentenza della Corte di giustizia nel caso "Gebhard"*, Diritto comunitario e degli scambi internazionali 1996, 293-300; F. Puel, *L'arrêt "Gebhard": la clarification de la distinction entre établissement et prestation de services*, Gazette du Palais 1996, III, 18-21; J.-

establishment «must be determined in the light of the activities which he intends to pursue on the territory of the host Member State».[78]

Furthermore, the registrations with the home bar association and the host bar association, the first as a prerequisite and the second as a requirement for the exercise of the right of establishment in the case of recognition without integration,[79] imply the payment of double fees (without considering the fee requirement for the registration with the host State bar, whose legitimacy is questionable, since it is not even mentioned in the European directives but sometimes required on the basis of the national rules). There is in fact no exemption from payment. Only in the case of the professional indemnity insurance, an exemption is admitted insofar as the insurance or guarantee paid in the home country is equivalent in terms of the conditions and extent of coverage to that required in the host country.[80] That situation is certainly inconvenient from an economic perspective. In addition, the lack of any rule overseeing pensions (e.g. Social Security) or continuing professional education expose migrant lawyers to the difficulties of double compulsory expenses and double mandatory lifelong learning obligations. It is worth mentioning that the Council of the Bars and Law Societies of the European Union tried to solve this latter problem, suggesting that the lawyer should be generally subject to the continuing professional education rules of the host State bar.[81]

G. Huglo, *Liberté d'établissement et libre prestation des services*, Revue trimestrielle de droit européen 1996, 741-746.

[78] CJEU, Judgment of the Court of 30 November 1995, *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, cit.

[79] The link with the home country bar can be severed only in the case of full integration in the host Member State's legal profession.

[80] Art. 6(3) Lawyers' Establishment Directive states: «The host Member State may require a lawyer practising under his home-country professional title either to take out professional indemnity insurance or to become a member of a professional guarantee fund in accordance with the rules which that State lays down for professional activities pursued in its territory. Nevertheless, a lawyer practising under his home-country professional title shall be exempted from that requirement if he can prove that he is covered by insurance taken out or a guarantee provided in accordance with the rules of his home Member State, insofar as such insurance or guarantee is equivalent in terms of the conditions and extent of cover. Where the equivalence is only partial, the competent authority in the host Member State may require that additional insurance or an additional guarantee be contracted to cover the elements which are not already covered by the insurance or guarantee contracted in accordance with the rules of the home Member State».

[81] According to the Guidelines on implementation of the Establishment Directive issued on November 2001, «In order to avoid the multiple application of continuing professional education schemes, where a lawyer is established under the Directive in a Member State other than that in which he or she is qualified, the lawyer shall be subject to the continuing professional education rules of the host State bar, except where the home State bar has rules which oblige the lawyer to continue home State professional education wherever he or she is based. In addition, the bars and law societies of all Member States are encouraged to develop flexible continuing professional education rules which will permit migrant lawyers to satisfy them by undertaking continuing professional education not only in host state law but also in home state law». Council of the Bars and Law Societies of the European Union (CCBE), *Guidelines on the implementation of the Establishment Directive (98/5/EC of 16th February 1998) issued by the CCBE for bars and law societies in the European Union*, November 2001, available at www.ccbe.eu, point 13. On that issue see also: Council of the Bars and Law

Another big issue is the double deontology, i.e. the necessity to observe the rules of professional conduct stated both by the home Member State and by the host Member State, a phenomenon called «*Kumulationsprinzip*».[82] This goes both for lawyers who provide services according to Article 4(4) of the Lawyers' Service Directive[83] and for established lawyers. Indeed, although Article. 6(1) of the English version of the Lawyers' Establishment Directive seems to give priority to the rules of professional conduct of the host member State,[84] other versions of the same directive (such as the German one)[85] consider as applicable both the rules of the host and home Member States.[86] Since all the language versions of the European acts have the same legal value and effect, it is clear that such linguistic difference is not of little importance. The duty to comply with the professional rules of two States puts lawyers in a situation of great confusion, since deontological rules do not only differ broadly across States but can also be in conflict with each other. It happens especially in the areas of professional secrecy, confidentiality, legal privilege, minimum and maximum fees, prohibition of conflict of interest, publicity and advertising.[87]

With regard to full integration in the host country, the system presents a great complexity. As already mentioned, there is no clarity about the three years' professional activity that must be taken into account and none of the domestic implementation laws identify «how much

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Societies of the European Union (CCBE), *CCBE Resolution on continuing legal education*, 29/11/2013, available at www.ccbe.eu. Cf. also Council of Bars and Law Societies of Europe (CCBE), *Guidelines for Bars & Law Societies on Free Movement of Lawyers within the European Union*, cit., 22-23.

[82] S.J.F.J. Claessens et al., *Evaluation of the Legal Framework for the Free Movement of Lawyers*, cit., 45, who refers in footnote 1 to S. van Camp, *Het statuut van de advocaat in het Europese Gemeenschapsrecht*, Kluwer 1989, 38.

[83] «A lawyer pursuing activities other than those referred to in paragraph 1 shall remain subject to the conditions and rules of professional conduct of the Member State from which he comes without prejudice to respect for the rules, whatever their source, which govern the profession in the host Member State, especially those concerning the incompatibility of the exercise of the activities of a lawyer with the exercise of other activities in that State, professional secrecy, relations with other lawyers, the prohibition on the same lawyer acting for parties with mutually conflicting interests, and publicity. The latter rules are applicable only if they are capable of being observed by a lawyer who is not established in the host Member State and to the extent to which their observance is objectively justified to ensure, in that State, the proper exercise of a lawyer's activities, the standing of the profession and respect for the rules concerning incompatibility».

[84] «Irrespective of the rules of professional conduct to which he is subject in his home Member State, a lawyer practising under his home-country professional title shall be subject to the same rules of professional conduct as lawyers practising under the relevant professional title of the host Member State in respect of all the activities he pursues in its territory».

[85] «Der unter seiner ursprünglichen Berufsbezeichnung tätige Rechtsanwalt unterliegt *neben* den im Herkunftsstaat geltenden Berufs- und Standesregeln hinsichtlich aller Tätigkeiten, die er im Aufnahmestaat ausübt, den gleichen Berufs- und Standesregeln wie die Rechtsanwälte, die unter der jeweiligen Berufsbezeichnung des Aufnahmestaats praktizieren» (cursive is mine).

[86] On the confusion generated by the different language versions of the directive see: S.J.F.J. Claessens et al., *Evaluation of the Legal Framework for the Free Movement of Lawyers*, cit., 98.

[87] *Ibidem*, 103.

national law must be dealt with during the three years … and what constitutes interruptions other than those resulting from everyday life».[88] As recognized by the Italian National Bar Council (*Consiglio Nazionale Forense*), the territorial bar associations have a wide evaluative power on the verification of the activities actually carried out by the applicant for exemption from the aptitude test, since they have to avoid the entrance of people who are not well qualified or are unaware of the peculiarities of the Italian Law.[89] The importance to be attributed to extrajudicial activity is for example variable.[90] Thus, the evaluation of information and documentation (notably on the number of matters dealt with and their nature) by competent authority for the recognition of a regular exercise of the activity of a lawyer under the home-country professional title for a period of three years can be conducted according to different standards and can lead to different results. Evidence of that situation is the diverse numbers of rejection of call for registration in the various Member States.[91] Since a rejection – which has to be motivated and must be founded on the lack of proof of the fulfilment of the requirements or, as expressly stated by Article 10(4) of the Lawyers' Establishment Directive, on the consideration that a registration «would be against public policy, in particular because of disciplinary proceedings, complaints or incidents of any kind»[92] – can be subject to appeal under domestic law, there is also the possibility that litigations arise.

In addition, the aptitude test differs per country, making the system complex and not easily intelligible. The discretion of Member States is quite broad. In fact, the Professional Qualification Directive sets down as a criterion only that the test should regard «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»[93] and whose knowledge «is essential in order to be able to pursue 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».[94] The only limit is the principle of proportionality, which implies that it must first ascertain

[88] *Ibidem*, 112.

[89] See: Consiglio nazionale forense (CNF), parere 17 settembre 2015, n. 96, available online: https://www.codicedeontologico-cnf.it/?p=32512 (accessed on April 22, 2019).

[90] According to the Italian National Bar Council, extrajudicial activity may be regarded as an element of evaluation in order to verify the effective exercise of the profession by the established lawyer (*Ibidem*).

[91] See the statistics regarding the number of decisions taken on recognition of professional qualifications for the purpose of permanent establishment within the EU Member States, EEA countries and Switzerland: http://ec.europa.eu/growth/tools-databases/regprof/index.cfm?action=profession&id_profession=2010&tab=stat1 (accessed on April 22, 2019).

[92] Art. 10(4) Lawyers' Establishment Directive.

[93] Art. 3(1)(h) Directive on the recognition of professional qualifications.

[94] *Ibidem*.

whether the knowledge acquired by the applicant in the course of his/her professional experience in a Member State or in a third country, is of a nature to cover, in full or in part, the substantial difference[95] and that the aptitude test must not be more demanding than the national bar examination. With regard to the scope of the aptitude test, the ECJ in 2002[96] – judging as incomplete the transposition of the Directive 89/48 by Italy through the legislative decree No 115/1992 (today implemented by ministerial decree 191/2003) – added that the Member States must clearly identify the nature and the content of the test in order to avoid of creating a situation of legal uncertainty.[97]

Nevertheless, the information about the various modes of the aptitude test are often hard to find. Indeed, access to them implies a knowledge of the bar association system that could differ quite broadly per country, without considering that in common law countries like the United Kingdom there are even different categories of lawyers: barristers and solicitors.

Finally, it deserves to be said also that the familiarity of lawyers with the possibilities for free movement is quite low.[98] This situation rests on two principal reasons: on one hand, the scarcity of information and, on the other hand, the lack of interest of people that, trained on national law system, rarely think of going abroad to practice the profession of lawyer.

C) Potential for abuse of the system

If the European Establishment Directive aims at facilitating the movement of lawyers from the home Member State to another Member State, it is also used for bypassing the

[95] Art. 14(5) Directive on the recognition of professional qualifications.

[96] CJEU, Judgment of the Court (Fifth Chamber) of 7 March 2002, *Commission of the European Communities v. Italian Republic*, Case C-145/99, 2002, I-02235, annotated by F. Ferraro, *Avvocati: cronaca di una condanna da tempo annunciata per l'Italia*, Diritto pubblico comparato ed europeo 2002, 1270-1284.

[97] The ECJ stated: «Whilst Article 1(g) of Directive 89/48 does not require the Member States to regulate in detail all aspects of the aptitude test, it does not relieve them of the obligation to specify and publish the subjects regarded as indispensable for practising the profession concerned and the rules regulating the conduct of the aptitude test, so that applicants can be aware, in a general way, of the nature and content of the test which they may be required to sit. In the absence of such rules, the comparison called for in the second subparagraph of Article 1(g) of Directive 89/48 on a case-by-case basis is at risk of being arbitrary or even discriminatory» (CJEU, Judgment of the Court (Fifth Chamber) of 7 March 2002, *Commission of the European Communities v. Italian Republic*, cit., par. 53).

[98] According to the survey conducted by Claessens et al., the percentages are the following: only 17% of lawyers are familiar with the possibility of providing legal services in another EU Member State under home professional title; only 13% of lawyers are familiar with the possibility of obtaining the right to use the professional title of another EU country after being established there for three years; only 18% of lawyers are familiar with the possibility of establishing as a lawyer in another EU Member State under home country professional title; only 20% of lawyers are familiar with the possibility of obtaining the right to use the professional title of another EU country by completing an aptitude test (S.J.F.J. Claessens et al., *Evaluation of the Legal Framework for the Free Movement of Lawyers*, cit., 121).

domestic profession provisions regulating the access to the profession. The case of the Italian *abogados* and of the Italian *avocați*, i.e. the Italians who go respectively to Spain and Romania to obtain the title of lawyer and then return immediately to Italy to practice law, are prime examples. The numbers are quite high: according to the assessment of the Italian National Bar Council made in 2014, 92% of the lawyers registered in the list of the established lawyers are Italian nationals, of whom 83% received qualification in Spain and 4% in Romania.[99]

Since in Spain, until the 2006 reform that came into force only many years later,[100] there was no training period and no state exam, many Italian law graduates went there, homologated their diplomas (by taking some integrative exams at the University) so that they could enrol as lawyers in Spain, and then returned to Italy, where they were entitled (under Directive 98/5/EC) to practice as Spanish lawyers (*abogados*). The phenomenon does not seem to be blocked by the mentioned reform (ley 34/2006)[101], which introduced three new requirements for the access to the profession: the attendance of a master's program of eight months, a training period of three months at a law firm (or other entity agreed upon by the University) that can be carried out simultaneously with the master's program, an aptitude test consisting of multiple choice questions and a legal opinion on a practical case on the matters identified by the applicant. Since the Spanish qualification is still currently easier than the Italian ones, a sort of "shortcut" with regard to the Italian State examination, the migration continues. There are even organizations that profit from such situation, assuring the "Spanish route to the title" to their clients with the minimum effort.[102] Moreover, some Spanish bar associations continue to apply the previous regulation even though the reform has entered into force (on October 31, 2011). The irregularity of this practice, recognized by the same Spanish Ministry of Justice, was the reason for the rejection in 2017 by the Italian Ministry of Justice of 332 applications for the recognition of the

[99] *Abogados e abuso del diritto europeo, rilevazione CNF: il 92% degli avvocati iscritti nell'elenco degli avvocati "stabiliti" è di nazionalità italiana*, Rilevazione del 6/02/2014, available at www.consiglionazionaleforense.it (accessed on April 22, 2019). The total number of established lawyers is 3759, of which 3452 are Italian nationals: 3117 gained the title in Spain and 134 in Romania. The territorial bar associations that count the highest number of established lawyers of Italian nationality are Rome (1058), Milan (314), Latina (129) and Foggia (126). See: Ufficio Studi del Consiglio Nazionale Forense, *Dossier di documentazione e analisi n. 1/2014*, 9/01/2014, available at www.consiglionazionaleforense.it (accessed on April 22, 2019).

[100] In 2011 on paper and in 2014 in reality. The entering into force of the reform occurred, according to the law, on October 31, 2011; however, the first session of the state exam provided for by the 2006 reform took place only in 2014.

[101] Ley 34/2006, de 30 de octubre, sobre el acceso a las profesiones de Abogado y Procurador de los Tribunales, BOE núm. 260 de 31 de Octubre de 2006.

[102] See, for example, the following link: https://www.omologazionetitoli.it/sos-titoli/?alfa=1 (accessed on April 22, 2019). According to the offer, everything is done online (language test, master, enrolment in the Spanish register); the only exception being a trip for the state examination, which consists of a cross examination.

title of lawyer obtained in Spain by Italian citizens.[103] It also cannot be omitted that a scandal related to the development of an illegal business based on migration of lawyers from Italy to Spain exploded very recently.[104]

While the path of least resistance for Italians to obtaining the title of lawyer has been traditionally toward Spain, after the aforementioned Spanish reform, Romania became another privileged destination. The country is also a fertile ground for illegal practices, stigmatized by a journalistic inquiry that showed how the qualification as a lawyer could be bought for about 7,000 Euro.[105] Since the title was in many cases granted by a non-official organization with a denomination very similar to that of the official one (which is the only one competent to grant the title),[106] the migration to Romania was also censured by the Italian Ministry of Justice,[107] by the Italian National Bar Council[108] and by the Italian Court of Cassation.[109]

Apart from the situations evidently contrary to the law, this migration causes concerns, because on one hand it seems to substantiate a fraudulent use of European Law and on the other hand it causes a disparity of treatment with regard to those people who follow the national and more difficult route to the profession. From a legal point of view, the issue has been already addressed by the ECJ (*Torresi* cases)[110]. In fact, in 2013 the Italian National Bar Council raised

[103] Ministero della Giustizia, Dipartimento per gli Affari di Giustizia, Direzione Generale della Giustizia Civile, Ufficio II – Ordini Professionali – Reparto Internazionale, *Nota DAG*, 12/05/2017, available online: http://www.dirittoegiustizia.it/allegati/MinGiustizia.pdf, accessed on April 22, 2019. For a comment of this administration deed see: M. Carta, *Quando i migranti sono avvocati: la "via spagnola" alla prova, questa volta, del principio del mutuo riconoscimento del diritto dell'UE*, Federalismi.it, 20/12/2017.

[104] See: F. Olivo, *Scandalo a Madrid "Master truccati per avvocati italiani"*, La Stampa, 21/09/2018, 1; *Quei 500 italiani in pullman a Madrid "Compravano l'abilitazione da avvocato*, la Repubblica.it, 21/09/2018 (accessed on April 22, 2019).

[105] See the inquiry by A. Sceresini and N. Federico, la Repubblica.it Rep tv, 1/07/2013, available at https://video.repubblica.it/le-inchieste/settemila-euro-e-un-viaggio-in-romania-cosi-si-diventa-avvocati/133470/131987 (accessed on April 22, 2019).

[106] The unofficial organisation was the U.N.B.R. Bota (*Uniunea Nationala a Barourilor din Romania – Sindacatul Indipendent at Juristilor din Romania*), placed in Bucarest, Str. Academiei 4-6. The official National Associations of Romanians Bar is instead the U.N.B.R. (*Uniunea Nationala a Barourilor din Romania*), placed in Bucarest at the Palatul de Justitie, Splaiul Indipendeţei 5.

[107] Ministero della Giustizia, Dipartimento per gli affari di giustizia – Direzione generale della giustizia civile, Nota del 18/09/2013, *Iscrizione nella sezione speciale dell'albo degli Avvocati stabiliti provenienti dalla Romania*, prot. AMM20/09/13.015534E, available at www.consiglionazionaleforense.it (accessed on April 22, 2019).

[108] Consiglio Nazionale Forense (CNF), Nota del 3/02/2016, *Iscrizione nella sezione speciale dell'Albo degli Avvocati stabiliti provenienti dalla Romania*, N. 1-C-2016, with attached the decision 24/12/2015 No. 200, available at www.consiglionazionaleforense.it (accessed on April 22, 2019). More recently: Consiglio Nazionale Forense, Nota del 1/06/2017, *Iscrizione nella sezione speciale dell'Albo degli Avvocati stabiliti provenienti dalla Romania*, N. 8-C-2017, available at www.consiglionazionaleforense.it (accessed on April 22, 2019).

[109] Corte di Cassazione, Sezioni Unite, Judgment 4/11/2016, No. 22398/2016.

[110] CJEU, Judgment of the Court (Grand Chamber), 17 July 2014, *Angelo Alberto Torresi and Pierfrancesco Torresi v. Consiglio dell'Ordine degli Avvocati di Macerata*, Joined Cases C-58/13 and C-59/13, annotated by G. Di Federico, *La libera circolazione degli avvocati nell'Unione europea, tra abuso del diritto e identità nazionale.*

a request for preliminary ruling under Article 267 TFEU on the interpretation and validity of Article 3 of the Directive 98/5/EC,[111] assuming that the behaviour of nationals who have travelled to Spain in order to acquire the professional qualification of lawyer and have subsequently returned to Italy to practice the profession of lawyer represents an abuse of right and undermines – insofar it enables to circumvent Article 33(5) of the Italian Constitution,[112] under which the acquisition of the qualification to exercise a profession is dependent on having successfully passed a State examination – the national identity guaranteed by Article 4(2) TEU. According to the ECJ, there is, however, neither an abuse of right nor a violation of national identity; instead, a situation such as this «constitutes one of the possible situations where the objective of Directive 98/5 is achieved and cannot constitute, in itself, an abuse of the right of establishment stemming from Article 3 of Directive 98/5».[113] Moreover, since the Article 3 of the Directive does not concern the access to the profession but solely the right of establishment, the fundamental political and constitutional structures and the essential functions of the host Member State within the meaning of Article 4(2) TEU are not affected at all.[114]

Nevertheless, this answer cannot be regarded as satisfying. It is based on a purely literal interpretation of the directive's aim («to facilitate practice of the profession of lawyer on a permanent basis in a Member State *other* than that in which the qualification was obtained»[115]), where the adjective "other" is read as "any", dismissing as irrelevant whether the other State is the national State of the applicant and the State where the applicant wants to establish immediately for practicing his/her profession. However, the directive's purpose is to encourage the mobility of lawyers, not to bypass the national regulations for access to the profession and incentivize a phenomenon of qualification-shopping, as it happens for the majority of the Italian *abogados*. If it is not correct to preclude the establishment in the State of the own nationality

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Il caso degli Abogados dinanzi alla Corte di giustizia, Diritto comunitario e degli scambi internazionali 2014, 553-571; F. Capotorti, *Via libera per gli Abogados? I dubbi del giudice nazionale sono infondati, non c'è abuso secondo la Corte di Giustizia*, Eurojus.it 8/08/2014; A. Iermano, *Il favor della Corte di giustizia dell'Unione europea per gli abogados italiani: note a margine della sentenza Torresi del 17 luglio 2014*, Studi sull'integrazione europea 1/2015, 135-155; R. Mastroianni, A. Arena, *Free Movement of Lawyers and the Torresi Judgment: A Bridge too far?*, European Constitutional Law Review 2015, 373-388.

[111] Consiglio Nazionale Forense (CNF), Seduta del 29/09/2012, Ordinanza di rimessione alla Corte di Giustizia dell'Unione europea, Ordinanza 30/01/2013 No. 1, available at www.consiglionazionaleforense.it (accessed on April 22, 2019). For a comment see: G. Colavitti, *Accesso alla professione forense e libertà di concorrenza: gli Abogados italiani tra abuso del diritto europeo e libertà di stabilimento. Nota a C.N.F., ord. 30 gennaio 2013, N. 1*, Rassegna forense, 3-4/2013, 729-743.

[112] Art. 33(5) of the Italian Constitution: «A State examination shall be required for admission to and graduation from the various types and levels of schools and to acquire qualification to exercise a profession».

[113] CJEU, Judgment of the Court (Grand Chamber), 17 July 2014, *Angelo Alberto Torresi and Pierfrancesco Torresi v. Consiglio dell'Ordine degli Avvocati di Macerata*, cit., par. 49.

[114] *Ibidem*, par. 58.

[115] The cursive is mine.

and of the obtainment of the law degree, it is also not correct to regard it as always legitim and to allow a mobility of the titles instead of the lawyers. It is very difficult not to consider a double transfer without acquisition of additional competences or without any stay in the State of the obtainment of the title as an abuse of right or at least as a way of bypassing the domestic regulation for access to the profession, a regulation that the European Law intends not to impact. Considering that it is impossible to find a valid solution for all the situations, a review of such applications should be admitted in order to avoid an inappropriate or even fraudulent use of the right of establishment recognized by the directive.[116] As elements of evaluation, both the experience gained in the State where the qualification is acquired and the period between the obtainment of the title and the request of enrolment in the host (but also original) State must be taken into account. However, such oversight would open a space of discretion for the territorial bar associations, entering into collision with the European case law, which seems not to admit any form of control by them and to consider as mandatory the acceptance of requests of enrolment from lawyers regularly registered in the bar of another Member State. Indeed, according to the ECJ, «presentation to the competent authority of the host Member State of a certificate attesting to registration with the competent authority of the home Member State is the only condition to which registration of the person concerned in the host Member State may be subject».[117] In this regard, it is worth mentioning that a review would be circumscribed within precise boundaries in order to avoid arbitrary restrictive decisions and should not transform itself into the introduction of compensatory measures which are not in compliance with European Law, as stated by the Italian Competition Authority in proceedings against territorial bar associations that refused the registration, requiring the evidence of one year of professional experience in Spain and of the knowledge of Spanish language and even the paying of an additional fee of 1,500 Euro.[118] It is also important to note that a supervision by bar associations is already allowed in order to evaluate the three years of professional activity required for a full integration. Therefore, it is not clear why it is admitted in one case and precluded in another.

[116] In that sense the opinion of the Italian National Bar Council of 5 May 2011: Consiglio Nazionale Forense, Parere n. 9-C-2011, 5/05/2011.

[117] CJEU, Judgment of the Court (Grand Chamber) of 19 September 2006, *Graham J. Wilson v. Ordre des avocats du barreau de Luxembourg*, Case C-506/04, 2006, I-08613, par. 67.

[118] See, for example: Autorità Garante della Concorrenza e del Mercato (AGCM), *I745 - Consigli degli Ordini degli Avvocati/Diniego all'esercizio di Avvocato*, Provvedimento n. 24327, 23/04/2013, available at www.agcm.it (accessed on April 22, 2019).

The unconditional openness of the European Court faced with this artificial migration of lawyers seems inconsistent also when compared with the jurisprudence on the mutual recognition of higher education diplomas and, particularly, with the *Cavallera* decision,[119] in which the ECJ – analysing the case of an Italian national, holder of a mechanical engineering qualification awarded in Italy, who applied in Spain for the homologation of his diplomas in order to enrol in Italy in the register of engineers without taking the State examination provided for under Italian legislation – highlighted the necessity to prove the possession of additional qualification achieved in the Member State apart from host ones. Although the specific case concerns an engineer and not a lawyer, the principle can be without any doubt generalized. It is not an accident that the Italian National Bar Council mentioned that judgment both in the opinion 9/2011 about the phenomenon of the Italian *abogados*[120] and in the aforementioned reference for a preliminary ruling raised.[121]

In conclusion, the case of the Italian *abogados/avocați* shows clearly the necessity of a system of access to the profession that is more homogeneous among the Member States and of a harmonization at the European level that is still missing.

D) Inherent barriers

Besides the critical and open issues derived from the above-described European legal framework and the problems raised by the potential abuse of the system, the migration of lawyers also bumps into some «inherent difficulties».[122]

The fact that the education of lawyers – as widely explained in the § 4(a) of the paper – is still based on the domestic legal systems can imply a lack of expertise in the law of the host Member States. This is especially true for procedural law, since the typical university offering related to comparative and foreign law focuses on substantive law and not on procedure; for this reason, lack of familiarity with the procedural rules of the host Member State represents a big obstacle for the mobility of lawyers. If the regular exercise of the activity for a period of three years or the aptitude test aim to overcome these gaps, that goal cannot be considered always to be reached.

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[119] CJEU, Judgment of the Court (Second Chamber) of 29 January 2009, *Consiglio Nazionale degli Ingegneri v Ministero della Giustizia and Marco Cavallera*, Case C-311/06, 2009, I-00415, annotated by M. Cocconi, *I confini della libertà di stabilimento dei professionisti*, Il Foro italiano 2009, IV, 345-349.

[120] Consiglio Nazionale Forense (CNF), Parere n. 9-C-2011, cit., 73-74.

[121] Consiglio Nazionale Forense (CNF), Seduta del 29/09/2012, Ordinanza di rimessione alla Corte di Giustizia dell'Unione europea, Ordinanza 30/01/2013 No. 1, cit.

[122] Cf. S.J.F.J. Claessens et al., *Evaluation of the Legal Framework for the Free Movement of Lawyers*, cit., 73-74.

Furthermore, language represents a problem. Although the ECJ stated that the registration of a lawyer with the competent authority of a Member State other than the State of the obtainment of the qualification in order to practice there under his home-country professional title cannot be made subject to a prior examination of his proficiency in the languages of the host Member State,[123] a lawyer who plans to cross the borders and practise his/her profession abroad, needs an excellent command of the language of the country where he/she wants to work in. Save some international leading law firms, which are used to work mainly in English but consider the knowledge of other languages as an added value, the activity of lawyer is conducted in the national language. Therefore, proficiency in language is an implicit requirement. It is not an accident that the majority of lawyers migrate to English-speaking countries. This is especially true for the United Kingdom,[124] but the situation is obviously destined to change, once Brexit is definitive. It is also not a coincidence, that the number of lawyers established in a host country is higher among the Member States where the same language is spoken[125]. Along these lines, it has to be emphasized that in law, any word can have a crucial significance, and the use of one term in place of another can make a vast difference. As a consequence, language mistakes could «lead to indemnity issues and perhaps even disciplinary proceedings».[126] Neither can it be forgotten that legalese is a very specific language, not even understandable or accessible to common people, even native speakers. Moreover, it is also worth mentioning that the aptitude test (usually both written and oral) required for an immediate full integration is taken in the language of the host Member State, so a low level of proficiency in the language can easily result in a failure.

A less visible obstacle to mobility is the distrust displayed by clients, markets and professional organizations. The preference for local lawyers is based primarily on the

[123] CJEU, Judgment of the Court (Grand Chamber) of 19 September 2006, *Commission of the European Communities v. Grand Duchy of Luxemburg*, Case C-193/05, 2006, I-08673, and CJEU, Judgment of the Court (Grand Chamber) of 19 September 2006, *Graham J. Wilson v. Ordre des avocats du barreau de Luxembourg*, cit., annotated by E. Adobati, *La normativa lussemburghese che disciplina l'esercizio della professione forense è in contrasto con il diritto comunitario nella parte in cui subordina l'iscrizione all'albo degli avvocati alle conoscenze linguistiche*, Diritto comunitario e degli scambi internazionali 2006, 543-545.

[124] According to the statistics compiled by the European Commission (Geography of mobility – Establishment for lawyer/barrister/solicitor), in UK there are 4771 established lawyers: 1169 from Ireland, 695 from Italy, 676 from Germany, 539 from Spain, 509 from France, 365 from Greece, 105 from the Netherlands, 94 from Belgium, 84 from Portugal, 77 from Romania, 63 from Denmark, 65 from Poland, 40 from Austria, 41 from Bulgaria, 35 from Malta, 34 from Luxembourg, 33 from Cyprus, 31 from Czech Republic, 31 from Sweden, 31 from Hungary, 24 from Finland, 14 from Slovakia, 5 from Croatia, 3 from Estonia, 3 from Latvia, 3 from Lithuania and 2 from Slovenia. See: http://ec.europa.eu/growth/tools-databases/regprof/index.cfm (accessed on April 22, 2019).

[125] For example, from United Kingdom to Ireland 1700; from Ireland to United Kingdom 1169; from France to Belgium 295, from Austria to Germany 29. *Ibidem* (accessed on April 22, 2019).

[126] S.J.F.J. Claessens et al., *Evaluation of the Legal Framework for the Free Movement of Lawyers*, cit., 74.

assumption that domestic lawyers speak the same language of their clients and are better acquainted with the local environment. However, there is another factor whose impact cannot be underestimated: «the fact that the lawyer is a foreigner is often regarded as enough to question the professional capabilities in of the lawyer in question».[127]

4. Mobility in the Legal Academia: the German Case as a Prime Example

Mobility in legal scholarship is undoubtedly of high value. A research stay abroad is an obligatory stage of education because it allows one to experience other legal cultures, to network with other scholars and to enrich the *curriculum vitae*. Nevertheless, the importance of mobility lies not only in these aspects. What is essential is the exchange of ideas that spreads from one country to another and the dialogue among different legal systems that with time becomes a daily need (a *forma mentis*). It is not an accident that judges who have studied or researched abroad are more willing to refer to foreign or comparative law in their judgments. However, mobility is temporary in the majority of cases. After a stay abroad, legal scholars usually come back to their countries with a new collection of experiences; only few remain abroad. Therefore, while legal academia is very international and European in its outlook, network and connections, the practical implementation of the internationalisation/Europeanisation is still inadequate, and the academic market is less open than it appears to be at first sight. There is in fact a certain insularity of Law Faculties as the following indicators show. The German case is a prime example.

a) <u>The subjects taught at undergraduate level</u>

In the usual case, only Public International Law and European Law are mandatory subjects of study. The compulsoriness of the study of European Law introduced approximately 15 or 20 years ago is a reflection of the fact that European Law today forms an essential part of the various domestic legal orders. In contrast, the study of Comparative Law is often optional and relies on the importance conferred to the matter by the university system of the individual country. Similarly, the study of Foreign Law is optional; it is very much a function of whether the courses are offered by national or by foreign professors.

[127] *Ibidem*.

That means that the study of law is mostly based on domestic law. This is even truer with regard to Germany. According to Sec. 5a par. 2 of the Germany Judiciary Act, «Compulsory subjects shall comprise the core areas of civil law, criminal law, public law and the law of procedure, including the links with European law, the methodology of legal science and the philosophical, historical and social foundations». As Michael Stürner highlighted, «the legal education is centred on German law issues».[128] The principal reason for that relies on the uniform nature of the jurist figure, which is identified with the term *Einheitsjurist*.[129] In fact, since the preparation and training required for the access to all the legal profession are the same and are based on the role of the judge, «most subjects are primarily taught in their national dimension».[130]

Furthermore, Comparative Law[131] is not mandatory. Courses on Comparative Law «are considered to be, either part of the basic legal education (and thus exchangeable with legal history, legal philosophy, etc.), or they are part of the areas of specialisation a student can choose».[132] Here a difference with Italy, where in the majority of Universities students have to attend a class on Comparative Law, although students usually can alternatively choose between Comparative Public Law and Comparative Private Law.[133] In addition, while in Italy Comparative Law is regarded as an autonomous field of legal scholarship[134] (also for the habilitation purpose)[135], in Germany it falls into the scope of other areas of law, making this branch less relevant. Therefore, the country is characterized, on one hand, by a «bad

[128] M. Stürner, *How International Should the German Einheitsjurist be?*, in: C. Jamin, W. van Caenegem (eds), *The Internationalisation of Legal Education*, Springer 2016, 115.

[129] A. Keilmann, *The Einheitsjurist: A German Phenomenon*, German Law Journal 2006, Vol. 7, Nr. 3, 293-312.

[130] M. Stürner, *How International Should the German Einheitsjurist be?*, cit., 116.

[131] On the value of the study of Comparative Law in an interconnected world: J. Husa, *Turning the Curriculum Upside Down: Comparative Law as an Educational Tool for Constructing the Pluralistic Legal Mind*, German Law Journal 2009, Vol. 10, No. 7, 913-926.

[132] M. Stürner, *How International Should the German Einheitsjurist be?*, cit., 124.

[133] An update map with the 62 Italian universities where Comparative Law is taught and the list of the 200 full and associate professors of comparative law and their main fields of expertise can be downloaded on the website of the Italian Association of Comparative Law: http://www.dirittocomparato.org/index.htm (accessed on April 22, 2019). An analysis of how much space is given to Comparative Law in Italian Universities based on the situation in 2009 is developed by G. Pascuzzi, *L'insegnamento del diritto comparato nelle Università italiane*, Trento Law and Technology Research Group Research Paper n.1/2010, accessible at www.lawtech.jus.unitn.it. Less recently on the topic: R. Sacco, *L'insegnamento del diritto comparato: situazione di diritto e situazione di fatto*, Quadrimestre 1987, 138-155; Idem, *La formation au droit comparé. L'expérience italienne*, Rev. Intern. Dr. Comp. 1996, 273-278; Idem, *L'enseignement du droit comparé et l'enseignement comparatif du droit*, in: *Italian National Reports to the XVI International Congress of Comparative Law (Brisbane 2002)*, Giuffrè 2002, 61-80.

[134] See: R. Sacco, A. Gianola, *The History and Importance of Comparative Law in Italy*, in: C. Jamin, W. van Caenegem (eds), *The Internationalisation of Legal Education*, cit., 175-184.

[135] As it is provided for by the law 240/2010, establishing the Italian national habilitation, and by its implementing decrees.

institutionalization of comparative law»[136] and, on the other hand, by «the shadowy existence» of this latter «in the general curriculum at universities».[137]

The circumstance that the Sec. 5a(2) of the Germany Judiciary Act states that «proof is required of the successful completion of a law course in a foreign language or a language course geared specifically to law; provision may be made under Land law that proof of foreign language skills can be provided in another manner» does change the situation a lot. It is worthy of mention that many German Universities offer additional studies in foreign language (so-called *Fachspezifische Fremdsprachenausbildung*) also in the field of law. It is for sure a great offer, also considering the strict link between law and language. However, the activation of these courses depends on the number of students who know a language different from their own and on their personal interest for a legal system different from their own ones. At the same time, their effectiveness is obviously subordinated to the language skills of the students.

b) Low number of foreign permanent professors

With the exception of a few states such as Luxembourg[138], the number of foreign permanent professors in the EU is quite limited. Here it is important to clarify that the expression "foreign professors" in this context does not simply mean professors who have different nationalities, but professors who, besides having different nationalities, have completed their university education entirely or partially in countries other than the ones in which they are working as professors. Furthermore, the subject of our analysis is the long-term, permanent positions, because these are the ones that significantly impact the system. While

[136] I. Schwenzer, *Development of Comparative Law in Germany, Switzerland, and Austria*, in: M. Reimann, R. Zimmermann, *The Oxford Handbook of Comparative Law*, Oxford University Press 2006, 105.

[137] *Ibidem*.

[138] In Luxembourg the number of foreign professors is higher than the number of domestic professors and that goes also for the Faculty of Law, Economics and Finance (FDEF). The uniqueness of Luxembourg relies on many factors. The location of the country in the middle of Europe and its multilingual approach (there are three official languages: Luxembourgish, French and German; moreover, English is taught beginning in the first years of school and even in kindergarten) makes the openness of the environment natural and evident. Furthermore, the small size of the country and the many contaminations deriving from other legal cultures (the French one for private law, the Belgium one for criminal and administrative law and the German one for tax law) have a great impact and make the attitude toward comparative law par excellence. In addition, the University of Luxembourg is a very young University, since it was founded only 16 years ago, in 2003. That implies on one hand that people from Luxembourg are used to going abroad to attend university studies and on the other hand that an international recruitment of professors and scholars was the only way forward once the University was established. Therefore, international recruitment is regarded now as a common practice and even as a rule. In addition, the University of Luxembourg (including the Faculty of Law) offers many bilingual and multilingual study programs that of course are very attractive for the mobility both of students and of academic staff. About the peculiarity of Luxembourg see: P. Ancel, *Towards a New Model of Legal Education: The Special Case of Luxembourg*, in: C. Jamin, W. van Caenegem (eds), *The Internationalisation of Legal Education*, cit., 195-208.

short-term positions as visiting researcher or professor contribute to the openness of Law faculties and to the academic exchange, those positions – given their temporary nature and the subsequently limited inclusion allowed by them in the academic system – cannot be regarded as enough in terms of internationalization or transnationalisation of legal education.

With regard to Germany, «while a number of German legal scholars have had successful careers abroad, the German system remains largely closed to foreigners».[139] The main reason relies on the famous State Examinations and especially on the first one, the so-called *erstes Staatexamen*. As pointed out by the German Council of Science and Humanities, «usually, only professors who have passed the First Examination themselves are entitled to examine students – a criterion that foreign scholars do not usually fulfil».[140] That means that only one who travels the standard educational path can aspire to pursue an academic career in Germany. This is true even though the German State Examinations are not explicitly mentioned as a requirement for habilitation, which is the German highest academic qualification and the prerequisite for becoming a full professor. While it is not questionable that the system based on the *Staatexamen* has performed well up to now, ensuring a high level of professionality, that barrier is not justifiable today, especially for the reason that it makes creating long-term opportunities for foreign scholars almost impossible. The value conferred to the *erstes Staatsexamen* is also evident in the case of a foreign scholar, recently employed (2017) by the Humboldt University of Berlin, who decided to take the first state examination in order to perfect his membership in the German legal community, as he himself highlights in his biography on the university website.[141]

For these reasons, the percentage of foreign professors in Germany is not only «below average»,[142] but their number can be counted on the fingers of one hand. Indeed, skimming the list of the German legal scholars (*Liste von Rechtswissenschaftlern*), only 8 professors can be identified who despite their non-German nationality and their education outside Germany managed to obtain a permanent position in Germany (see the table below). Furthermore, each of them represents to some extent an exception, and by this we do not mean the fact that they hold advanced degrees in Germany or from prestigious "Ivy League" American universities.

[139] Wissenschaftsrat, *Prospects of Legal Scholarship in Germany. Current Situation, Analyses, Recommendations*, Hamburg 9/11/2012, 45.

[140] *Ibidem*.

[141] «Zur Vervollkommnung seiner Zugehörigkeit zur deutschen rechtswissenschaftlichen Gemeinschaft hatte sich Hr. Greco daneben entschlossen, das erste juristische Examen abzulegen». See: https://www.rewi.hu-berlin.de/de/lf/ls/grc/greco/person (accessed on April 22, 2019).

[142] As pointed out by the Wissenschaftsrat, *Prospects of Legal Scholarship in Germany. Current Situation, Analyses, Recommendations*, cit., 45.

Indeed, two of them teach the law system of their countries, transferring their home country knowledge: this is the case for Yuanshi Bu, Professor of International Economic Law with a focus on East Asia at the University of Freiburg and Claude Witz, Professor of French Private Law at the University of Saarland. The same goes – owing to his expertise in South African Law – for James Fowkes, Professor of Comparative and International Law at the University of Münster. Given the important role played by Ancient Roman Law in Italy, it is not an accident that the only Italian employed in a German University (Tiziana J. Chiusi) is specialized in Roman Law. Furthermore, the role played by language cannot be underestimated: the Austrian Thomas Klicka, Professor of Civil Procedural Law at the University of Münster, is a German native speaker and the Brazilian Luís Greco, Professor of Criminal Law at Humboldt University of Berlin, attended a German school in Brazil and then obtained a LL.M., a PhD and an habilitation from the University of München. Finally, two foreigners, an American (Professor Clifford Larsen) and a Greek national (Stamatia Devetzi), are employed by two Universities well-known for their international openness: the Bucerius Law School in Hamburg and the Fulda University of Applied Sciences. However, Stamatia Devetzi does not belong to a Department of Law.

Foreign Professors of Law in Germany	**University and Department**	**Field of research**	**Nationality**	**Gender**	**Peculiarities**
Yuanshi Bu	University of Freiburg – Department of Law	International Economic Law with a focus on East Asia	Chinese	F	- Master's degree University of Göttingen - LL.M. Harvard Law School
Tiziana J. Chiusi	University Saarland Saarbrücken – Department of Law and Economy	Private Law, Roman Law and European Comparative Law	Italian	F	Habilitation University of München

Stamatia Devetzi	Fulda University of Applied Sciences – Department of Social and Cultural Science	Social Security Law	Greek	F	LL.M. and PhD University of Osnabruck
James Fowkes	University of Münster – Department of Law	Comparative and International Law	South African	M	LL.M. and J.S.D. Yale Law School
Luís Greco	Humboldt University – Department of Law	Criminal Law, Criminal Procedural Law, Comparative Criminal Law and Theory of Criminal Law	Brasilian	M	- LL.M, PhD and habilitation University of München - Erstes Staatsexamen
Thomas Klicka	University of Münster – Department of Law	Private Law, Private Procedural Law and Comparative Law	Austrian	M	German native speaker
Clifford Larsen	Bucerius Law School	Comparative Law, International Arbitration, International Procedure, Contract Law	American	M	----

Claude Witz	University Saarland Saarbrücken – Department of Law	French Private Law	French	M	- Director of the Centre of Franco-German Legal Studies inside the Department of Law - Also, Professor at the Robert Schuman University (Strasbourg III)

c) <u>Denationalisation and transnationalisation of legal education as a crucial issue</u>

Since local jurists are more often forced to deal with European law, international law and foreign law, the denationalisation and inter/transnationalisation of legal education are crucial issues today. The aforementioned recommendations of the German Council of Science and Humanities are a clear admonishment. At the same time, the great interest shown recently by the legal scholarship for such topics[143] cannot be regarded as a mere coincidence. Nevertheless, while academics hope for a change of *curricula* in order to keep up with the needs of the times, the circumstance that the legal professions are regulated on a domestic basis constitutes – as already highlighted – a big brake on any progress in this area. Moreover, given the lack of competences of the European Union in the field of education (the Bologna process is a voluntary process, not followed as such by Germany in the field of law), the supranational input is weak in this respect.

In addition, the issue of the denationalisation and inter/transnationalisation of legal education is intertwined with that of the suitable legal language/s which would be required to pursue such a process. At first glance, the use of English as *lingua franca* would be the solution. After all, the increasing number of academic publications and conferences in English as well

[143] See among many: J. Klabbers, M. Sellers (eds), *The Internationalization of Law and Legal Education*, Springer 2008; W. van Caenegem, M. Hiscock (eds), *The Internationalisation of Legal Education*, Edward Elgar Publishing 2014; C. Jamin, W. van Caenegem (eds), *The Internationalisation of Legal Education*, cit.; M.-C. Ponthoreau (ed), *La dénationalisation de l'enseignement juridique*, Institut Universitaire Varenne 2016; P. Ancel, L. Heuschling (eds), *La transnationalisation de l'enseignement du droit*, Lancier 2016.

as the rising demand of bachelor/master/PhD programmes in English is a clear signal in that direction. However, a general anglicisation of law as means to reach the goal is not the key. Without minimizing the importance of English, which does make communication and sharing of knowledge easier and faster, the anglicisation of law would not only imply the loss of the legal literature written in other languages but would also create a vacuum and a great cultural impoverishment. Indeed, language, law and culture are concepts that are intrinsically connected and interrelated, since language and law are expressions of culture and language is the vehicle through which culture and law are expressed. This is so true that there are legal concepts such as for example the German "*Rechtsgeschäft"* or the Italian "*interesse legittimo*" that do not find a suitable translation in English. Similarly, the English concept of "trust" does not find an equivalent term in other languages. At the same time, since language, law and culture are elements of the identity of a people, a general use of English would affect such identity and would also not comply with the European Law that explicitly guarantees national identities (article 4.2 TEU). Therefore, rather than forcing the anglicisation of law, it should be stressed that English cannot be regarded as enough and the road of multilingualism should be promoted, demanding lawyers to be also linguists.

5. A European or Global Jurist

Despite the described difficulties, obstacles and barriers, the challenge of our time is to expand the circle of polyglot jurists who know different legal environments and are able to deal with them without problems. For the future we need the development of the figure of a "European or global jurist", a cosmopolitan individual familiar with different legal cultures, multilingual and not concerned with national borders.