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Notes and Comments

THE EUROPEAN COMMUNITY DIRECTIVE MANDATING RECOGNITION OF POST-GRADUATE TRAINING: ARE BORDERS OPENING FOR EUROPEAN PROFESSIONALS?

Daphne W. Gardiner*

INTRODUCTION

On December 21, 1988, the Council of the European Communities¹ (the Council) issued a directive² (the '1988 Directive or the Directive) to assure European professionals³ an opportunity to practice their trades in any European Member State (Member State).⁴ The Direct-

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1. See Treaty of Rome, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) (official English translation) (describing the powers of the Council of the European Communities) [hereinafter Treaty of Rome]. Four institutions comprise European Community (EC) government. *Id.* art. 4. They are the Council, the Assembly, the Commission, and the Court of Justice. *Id.* The Council has members from each of the EC's Member States. *Id.* art. 148. Members are either the Member State's Foreign Minister or the Minister representing the subject the Council is addressing at a particular meeting. COMMISSION OF THE EUROPEAN COMMUNITIES, A JOURNEY THROUGH THE EC 47 (1988) [hereinafter A JOURNEY THROUGH THE EC]. The Council ensures that Member States' economic policies are consistent. Treaty of Rome, *supra*, art. 145. To achieve consistency, the Commission may issue regulations and directives, make decisions, and recommend or issue opinions. *Id.* art. 89.

2. Council Directive of 21 December 1988, 32 O.J. EUR. COMM. (No. L 19) 16 (1989) [hereinafter 1988 Directive]. A directive is one type of legislation that binds Member States to the directive's goals, but it requires states to design national legislation to implement the goals. Treaty of Rome, *supra* note 1, art. 189. In general, a European citizen, in his or her capacity as an individual, cannot rely on a directive to assert rights in a national court. R. KOVAR, *The Relationship Between Community Law and National Law*, in THIRTY YEARS OF COMMUNITY LAW 134 (1983) (quoting the European Court of Justice). The European Court of Justice, however, has held that some directives have direct effect, thereby allowing individuals to rely on those directives to bring suit against national authorities. *Id.* See *infra* note 74 and accompanying text (discussing the concept of direct effect). In contrast, a regulation is legislation that binds Member States. Treaty of Rome, *supra* note 1, art. 189. Regulations have automatic effect in Member States and do not require Member States to enact measures to incorporate their substance into national law. R. KOVAR, *supra*, at 131-33.

3. See J.-P. DE CRAYENCOUR, THE PROFESSIONS IN THE EUROPEAN COMMUNITY: TOWARDS FREEDOM OF MOVEMENT AND MUTUAL RECOGNITION OF QUALIFICATIONS 135 (1982) (listing 70 professions to which the 1988 Directive would apply).

4. See generally, A JOURNEY THROUGH THE EC, *supra* note 1, at 4 (noting that 12

ive, to be implemented by January, 1991,⁵ sets up a system through which Member States must recognize higher-education diplomas⁶ awarded to European Community (EC or the Community) citizens who have completed at least three years of professional education and training in other EC states.⁷ European Community officials have hailed the directive as a significant step toward achieving the integration of Europe by 1992.⁸

When the founders of the European Economic Community signed the Treaty of Rome⁹ (the Treaty) in 1957 in order to restore economic stability¹⁰ and improve social conditions in Europe,¹¹ they gave European citizens the right to move freely across national borders to seek employment.¹² Free movement of persons is essential to the concept of

member states currently comprise the European Community and describing each state). Belgium, France, Germany, Italy, Luxembourg, and the Netherlands founded the European Community in 1957. *Id.* at 4. Denmark, Ireland, and the United Kingdom joined the EC in 1973. *Id.* Greece joined in 1981, while Portugal and Spain became members in 1986. *Id.*

5. 1988 Directive, *supra* note 2, at 21.

6. See U. EVERLING, THE RIGHT OF ESTABLISHMENT IN THE COMMON MARKET 101 (1964) (exploring the breadth of the terms "diplomas, certificates and other evidence of qualifications"). The Directive focuses less on academic equivalence and more on the quality of the entire training experience. See Carrewyn, *Mutual Recognition of Diplomas in the Community: Making up for Lost Time*, 174 EUR. REP. 1, 2 (1974) (distinguishing between the academic and the professional approaches to mutual recognition of diplomas); see also J.-P. DE CRAYENCOUR, *supra* note 3, at 42-43 (1981) (discussing academic equivalence in diplomas).

7. 1988 Directive, *supra* note 2.

8. See COMMISSION OF THE EUROPEAN COMMUNITIES, FOURTH PROGRESS REPORT OF THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT 5 (1989) (describing the 1988 Directive as the only important step that the Community has taken recently towards creating a Citizen's Europe) [hereinafter FOURTH PROGRESS REPORT]; see also COMMISSION OF THE EUROPEAN COMMUNITIES, COMPLETING THE INTERNAL MARKET: WHITE PAPER FROM THE COMMISSION TO THE EUROPEAN COUNCIL 25 (1985) [hereinafter WHITE PAPER] (describing the removal of obstacles crucial to free movement for the self-employed by 1992).

9. Treaty of Rome, *supra*, note 1. The Treaty of Rome established the common Market, providing for the eventual free movement of goods, capital, and people among the Member States. *Id.* Title III.

10. Treaty of Rome, *supra* note 1, preamble.

11. See *id.* (stating the goals of the European Community). The Treaty includes a resolution to ensure social progress in European countries and improve European working and living conditions. *Id.* The Treaty also restricted the Community's involvement in the social field to issues concerning "employment; labor law and working conditions; vocational training; social security; prevention of occupational accidents and diseases; occupational hygiene; and the right of association and collective bargaining between employers and workers." *Id.* art. 118.

12. See *id.* art. 48 (establishing free movement for workers). The Treaty proscribed discrimination against workers based on their nationality. *Id.* To this end, it provided workers with the right to move freely throughout and live in any state in the EC in order to accept job offers. *Id.* art. 48(3)(a)-(c). The Treaty required such freedom of movement for workers by the end of the transitional period or 1969. *Id.* art. 48(1).

a European Common Market.¹³ It gives Europeans the choice of relocating to another European country to improve their personal working and living conditions.¹⁴ In addition, it should produce a more efficient allocation of the labor force, raising the EC's productivity.¹⁵ Free movement should reduce unemployment¹⁶ and equalize employment conditions across Europe.¹⁷

The Treaty of Rome defined free movement to give workers in the

13. See *id.* art. 3 (listing the elimination of barriers to the freedom of movement for persons as one of the Community's main activities); see also F. BURROWS, FREE MOVEMENT IN EUROPEAN COMMUNITY LAW 117 (1987) (describing the free movement of workers as one of the basic principles of the common market); Comment, *Political Integration Through Jurisprudence: An Analysis of the European Court of Justice's Rulings on Freedom of Movement for Workers* 6 B.C. INT'L & COMP. L. REV. 273, 275 (1983) [hereinafter Comment, *Political Integration*] (concluding that the free movement of persons is essential to achieving the economic goals of the EC); COMMISSION OF THE EUROPEAN COMMUNITIES, FREEDOM OF MOVEMENT FOR PERSONS IN THE EUROPEAN COMMUNITY 5 (1982) [hereinafter FREEDOM OF MOVEMENT] (stating that free movement of persons is essential to the ideal conception of the EC); J.-P. DE CRAYENCOUR, *supra* note 3, at 9 (1982) (quoting a Commission memorandum which described the freedom of movement as the most "original feature" of the Common Market).

14. See J.-P. DE CRAYENCOUR, *supra* note 3, at 9 (arguing that free movement for professionals plays a central role in improving European social life). On an individual level, freedom of movement gives people a sense of equality and the ability to choose their own living conditions. *Id.* at 10. On a more global level, because freedom of movement stimulates professional activity, it encourages interaction between people. *Id.* This is important to offset the often bureaucratic atmosphere that defines European government. *Id.* See also U. EVERLING, *supra* note 6, at 31 (stressing that freedom of movement will encourage a spirit of solidarity, and deeming such solidarity central to the political development of the Community); FREEDOM OF MOVEMENT, *supra* note 13, at 5 (stating that freedom of movement provides individual choice, which is a significant factor in improving the Community's economic life).

15. See U. EVERLING, *supra* note 6, at 28-29 (1964) (suggesting that to raise the EC's productivity, treaties should include provisions which ensure the mobility of factors of production, including labor); see also Comment, *Political Integration*, *supra* note 13, at 275 (indicating that without the free movement of labor, production in one area could be low because of a shortage of labor, while another area would have high unemployment rates). Furthermore, free movement should enable individual businesses to operate more efficiently. G. RESS, *Free Movement of Persons, Services and Capital*, in THIRTY YEARS OF COMMUNITY LAW 285 (1983). For example, when workers can move to meet labor demand, businesses can select sites of business based on a location's economic advantages rather than its labor population. *Id.*

16. Comment, *Political Integration*, *supra* note 13, at 276; see also FREEDOM OF MOVEMENT, *supra* note 13, at 5 (noting that freedom of movement may be a way to reduce the high level of unemployment in Europe).

17. See Hepple, *The Crisis in EEC Labor Law*, 16 INDUS. L.J. 77, 78 (1987) (stating that free movement of labor would purportedly eliminate "distortions" caused by labor demand increases based in areas offering lower wages). Supporters of free movement for workers argue that free movement forces employers to raise wages so that workers will not leave those areas offering lower wages. *Id.* See also FREEDOM OF MOVEMENT, *supra* note 13, at 5 (explaining that freedom of movement may ensure that wage rates keep pace with economic progress).

Community several rights. The Treaty proscribes employers from discriminating against workers because of their nationalities.¹⁸ In addition, it gives workers the rights to move freely throughout Europe in order to accept job offers and to live in any Member State in which they wish to work.¹⁹

The Treaty provides professionals with two additional rights to enable them to move freely among Member States. Freedom of services²⁰ gives professionals the right to furnish services to citizens of a Member State outside of the state in which they have established their business.²¹ Freedom of establishment²² permits professionals to establish their businesses in any Member State as long as the professionals conform to that state's laws.²³ The Council's 1988 Directive seeks to further the achievements of the Treaty of Rome by securing these two freedoms for professionals.²⁴

The Treaty of Rome did not confer the rights of services and estab-

18. Treaty of Rome, *supra* note 1, art. 48(b). The Treaty forbids businesses from discriminating against workers from other countries in hiring, remuneration, and general office policies. *Id.*

19. *Id.* art. 48(3)(a)-(d). The provision limits workers' rights where overriding concerns of public policy, public security, and public health exist. *Id.* art. 48(3). See generally Note, "Public Policy" Discrimination in the EEC: A Proposal for Assuring the Free Movement of Workers, 8 FORDHAM INT'L L.J. 447 (1985) [hereinafter Note, *Discrimination in the EEC*] (analyzing the public policy limitations and suggesting that the limitations be interpreted strictly).

20. Treaty of Rome, *supra* note 1, art. 59-60; *But see* Steindorff, *Freedom of Services in the EEC*, 11 FORDHAM INT'L L.J. 347, 358 (1988) (noting that each profession has its own specific qualifications and that services are monitored by separate administrative regulation).

21. *Id.* art. 59, 60(d).

22. Treaty of Rome, *supra* note 1, art. 52-56. The Treaty's right of establishment extends to "self-employed persons." *Id.* art. 52. Scholars interpret the term "self-employed persons" to include professionals. See J.-P. de CRAYENCOUR, *supra* note 3, at 36 (including members of the professions among the self-employed); U. EVERLING, *supra* note 6, at 47 (translating art. 57 as applying to "engagement in non-wage earning activities" and including professionals within its definition).

23. Treaty of Rome, *supra* note 1, art. 52.

24. See 1988 Directive, *supra* note 2, at 16 (purporting to respond to professionals' desire to pursue their professions in any EC states other than states where they received professional training); Treaty of Rome, *supra* note 1, art. 57 (authorizing the Council, under the chapter on the right of establishment, to "issue directives for the mutual recognition of diplomas, certificates, and other evidence of formal qualifications"); see also U. EVERLING, *supra* note 6, at 48 (noting that the Treaty's provision authorizing the Council to issue directives on mutual recognition of diplomas, certificates, and other evidence of qualification relates specifically to the objectives of the right of establishment). Directives mandating mutual recognition of diplomas and training also have a significant impact on the freedom of services. *Id.*; see also Van Binsbergen Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid, 1974 E. Comm. Ct. J. Rep. 1299, 1311 (stating that one purpose of directives on the mutual recognition of diplomas is to promote effective exercise of freedom of services).

lishment upon individuals directly. Rather, the Treaty instructed the Council to develop a plan to eliminate existing restrictions on the two freedoms and to implement the plan through the issuance of directives.²⁵ The Treaty set December 31, 1969 as the deadline for implementation.²⁶

To enable professionals to exercise their freedom of movement easily, the Treaty also required the Council to issue directives for the mutual recognition of diplomas, certificates, and other formal qualifications.²⁷ While Community authorities recognize that freedom of movement is essential to European integration, they have been slow to reach agreement on directives for mutual recognition of professional training and diplomas.²⁸ Despite the Treaty's instruction to implement the rights of establishment and services by 1970, the European Council did not issue its first mutual recognition directive until 1975.²⁹

This Comment will examine the implementation of the freedom of movement for professionals, as accomplished through various directives for mutual recognition, freedom of services, and freedom of establishment. Part I will discuss the significance of mutual recognition directives. Part II will examine the directives issued prior to the December 31, 1988 Directive and the events leading to their adoption. Part II will also present the alternative approach used for freedom of establishment for lawyers. Part III will analyze the Council's 1988 Directive and compare it to the Council's approach in previous directives. Part IV will critique the 1988 Directive. The Comment will conclude by proposing that the Council actively enforce the 1988 Directive, that it adopt additional measures to prevent Member States from discriminating against professionals, and that it mandate the involvement of professional organizations in implementing the Directive.

25. Treaty of Rome, *supra* note 1, art. 54(1)-(2) and 63(1)-(2).

26. *See id.* art. 8 (giving states until the end of the transitional period, 12 years after adoption of the Treaty, to implement the provisions).

27. Treaty of Rome, *supra* note 1, art. 57.

28. *See* Commission of the European Communities, Press Release No. IP(74)99 (June 6, 1974) (summarizing Professor Ralf Dahrendorf's speech at a meeting of the Ministers of Education on June 6, 1974 in Luxembourg, which stated that the Council had considered 40 draft directives addressing 12 professions but had not issued any directives).

29. *See Council Directive Concerning the Mutual Recognition of Diplomas, Certificates and Other Evidence of Formal Qualifications in Medicine, Including Measures to Facilitate the Effective Exercise of the Right of Establishment and Freedom to Provide Services*, 18 O.J. EUR. COMM. (No. L 167) 1 (1975) [hereinafter *Mutual Recognition Directive for Doctors*] (announcing, in directive form, the mutual recognition of formal qualifications in medicine).

I. THE SIGNIFICANCE OF MUTUAL RECOGNITION DIRECTIVES

Directives mandating that European states recognize professional degrees from other Member States are essential to the effective exercise of the rights of establishment and services.³⁰ Common market theory assumes that a qualification that is sufficient to allow someone to practice a profession in one country equips the professional to practice in another.³¹ The different nature of the professions in the various Member States, however, precludes such a simplistic view of implementation.

First, individual Member States have developed strict professional standards for training and certification through evolutionary processes peculiar to their histories and sociological structures.³² A Community failure to recognize these varying standards could result in the disruption of professional practice in individual Member States.³³ Second, the composition of individual professions differs among the states.³⁴ Thus, training for a professional degree in one state may not prepare an individual to practice the same activities as training programs in another state.³⁵

In the absence of Community mandated recognition of diplomas, Member States may preclude EC citizens from practicing their professions if they obtained their degrees in other Member States.³⁶ In

30. See Carrewyn, *supra* note 6, at 1 (describing mutual recognition of diplomas as a prime element in assuring increased professional mobility within the Community). Mutual recognition of diplomas will also help stem the rising unemployment rate among intellectuals. *Id.*; see also L. GAZZO, *Professionals on the Move in Europe*, VISION, June 1978, at 23 (noting that the right of establishment would not be in effect in practical terms until the Council issued directives for mutual recognition).

31. F. BURROWS, *supra* note 13, at 203; see also Steindorff, *supra* note 20, at 400 (stating that a common market requires everyone to be able to supply services with the qualifications he or she acquired in the market).

32. See, e.g., Bowden, *Higher Education and the Professions: Problems of Harmonization*, 23 EUR. REV. 28 (1973) (noting the stringency of training and qualifications in England as compared to other European countries). A system of regulations governing EC professional standards seriously threatens the English educational system and the autonomy of English professions. *Id.* See also U. EVERLING, *supra* note 6, at 99 (discussing the implications for freedom of establishment of the fact that rules resulting from historical developments are the product of political and social structures in the state); J.-P. DE CRAYENCOUR, *supra* note 3, at 11 (suggesting that consistency and harmonization among EC professional standards should account for the fact that individual professions are each governed by very strict standards).

33. J.-P. DE CRAYENCOUR, *supra* note 3, at 11-12.

34. F. BURROWS, *supra* note 13, at 202.

35. See *id.* (noting that training requirements vary between states).

36. See F. BURROWS, *supra* note 13, at 204-05 (discussing the effect of the directives on a state's power to consider applicants for professional certification in a state). Without mutual recognition of diplomas, the Member State has the power to decide

Ministere Public v. Auer,³⁷ for example, the European Court of Justice held that France could prevent a French veterinarian with a degree from Italy from practicing in France. The court suggested, however, that the outcome of the case would have been different if the directive requiring France to recognize veterinary degrees from other countries had been in effect.³⁸ Thus, directives requiring Member States to recognize professional degrees from other Member States are necessary to remove the obstacles that prevent professionals from exercising their freedom of movement.³⁹

II. PRIOR DIRECTIVES

A. 1961-1973: A PERIOD OF IMPASSE

Prior to 1988, the Council issued several directives to mandate the recognition of professional qualifications attained in other states. These directives provided mutual recognition of qualifications for doctors,⁴⁰ nurses,⁴¹ dentists,⁴² veterinarians,⁴³ midwives,⁴⁴ pharmacists,⁴⁵ and ar-

whether to recognize degrees or qualifications from other countries provided that its laws do not discriminate on the basis of nationality. *Id.*

37. 1979 E. Comm. Ct. J. Rep. 437.

38. *Id.* Before directives went into effect, a non-national had to conform to conditions defined in the Member State's own legislation. *Id.* at 437. In this case, Vincent Auer obtained his Doctor of Veterinary Medicine degree in Italy. *Id.* at 438. Mr. Auer moved to France, became a French citizen and applied to practice as a veterinary surgeon in France. *Id.* at 439. Authorities rejected his application on the grounds that it was not equivalent to the French degree for veterinary medicine. *Id.* Later, after French authorities convicted Mr. Auer for illegally practicing veterinary medicine, he appealed, asserting that the French ruling restricted his right of establishment. *Id.* at 440. The European Court of Justice upheld the French decision because the directive for mutual recognition of veterinary diplomas had not yet taken effect. *Id.* at 451.

39. See F. BURROWS, *supra* note 13, at 205 (noting that only the presence of a directive on mutual recognition of diplomas and training will guarantee professionals the right to practice in one country with a diploma from another).

40. *Mutual Recognition Directive for Doctors*, *supra* note 29.

41. *Council Directive Concerning the Mutual Recognition of Diplomas, Certificates and Other Evidence of the Formal Qualifications of Nurses Responsible for General Care, Including Measures to Facilitate the Effective Exercise of the Right of Establishment and Freedom to Provide Services*, 20 O.J. EUR. COMM. (No. L 176) 1 (1977) [hereinafter *Mutual Recognition Directive for Nurses*] (addressing the activities of nurses responsible for general care).

42. *Council Directive Concerning the Mutual Recognition of Diplomas, Certificates and Other Evidence of the Formal Qualifications of Practitioners of Dentistry, Including Measures to Facilitate the Effective Exercise of the Right of Establishment and Freedom to Provide Services*, 21 O.J. EUR. COMM. (No. L 233) 1 (1978) [hereinafter *Mutual Recognition Directive for Dentists*] (covering the training of practitioners of specialized dentistry).

43. *Council Directive Concerning the Mutual Recognition of Diplomas, Certificates and Other Evidence of Formal Qualifications in Veterinary Medicine, Including Measures to Facilitate the Effective Exercise of the Right of Establishment and Free-*

chitects.⁴⁶ The process that ultimately resulted in these directives, however, was slow. In 1961, the Council adopted General Programmes that defined conditions and set a timetable for implementing the freedoms of services and establishment by 1969.⁴⁷ By 1974, however, the Council had issued none of forty proposed directives.⁴⁸

Several factors caused this delay. Between 1958 and 1974, for example, the Council was unable to formulate a concrete policy for establishing mutual recognition of diplomas.⁴⁹ Rather than acknowledging that degree programs in the different countries taught professionals similar skills, the Council focussed on correcting the disparities between educational programs in the different Member States.⁵⁰ Proposed directives, therefore, attempted to equalize training programs by defining minimum quantitative requirements for a program.⁵¹ This approach

dom to Provide Services, 21 O.J. EUR. COMM. (No. L 362) 1 (1978) [hereinafter *Mutual Recognition Diplomas for Veterinarians*] (recognizing the formal qualifications of veterinary medicine).

44. *Council Directive Concerning the Mutual Recognition of Diplomas, Certificates and Other Evidence of Formal Qualifications in Midwifery and Including Measures to Facilitate the Effective Exercise of the Right of Establishment and Freedom to Provide Services*, 23 O.J. EUR. COMM. (No. L 33) 1 (1980) [hereinafter *Mutual Recognition Directive for Midwives*] (concerning the recognition of evidence of formal qualifications in midwifery).

45. *Council Directive Concerning the Mutual Recognition of Diplomas, Certificates and Other Evidence of Formal Qualifications in Pharmacy, Including Measures to Facilitate the Effective Exercise of the Right of Establishment Relating to Certain Activities in the Field of Pharmacy*, 28 O.J. EUR. COMM. (No. L 253) 1 (1985) [hereinafter *Mutual Recognition Directive for Pharmacists*].

46. *Council Directive on the Mutual Recognition of Diplomas, Certificates and Other Evidence of Formal Qualifications in Architecture, Including Measures to Facilitate the Effective Exercise of the Right of Establishment and Freedom to Provide Services*, 28 O.J. EUR. COMM. (No. L 233) 15 (1985) [hereinafter *Mutual Recognition Directive for Architects*].

47. COMMISSION OF THE EUROPEAN COMMUNITIES, DRAFT FOR A COUNCIL RESOLUTION ON GUIDELINES FOR THE MUTUAL RECOGNITION OF DIPLOMAS, CERTIFICATES, AND OTHER EVIDENCE OF FORMAL QUALIFICATIONS BY VIRTUE OF ARTICLE 57 OF THE EEC TREATY 1 (1974) [hereinafter RESOLUTION DRAFT].

48. Commission of the European Communities, Press Release No. IP(74)99 (June 6, 1974). The 40 draft directives proposed to provide mutual recognition of diplomas and training for 12 groups of professionals: doctors, dentists, chemists, veterinary surgeons, midwives, nurses, opticians, architects, engineers, lawyers, tax consultants, and chartered accountants. RESOLUTION DRAFT, *supra* note 47, at 2.

49. See J.-P. DE CRAYENCOUR, *supra* note 3, at 13 (attributing the delay in passing the 40 proposed directives to changes in ideas concerning freedom of movement for professions).

50. See J.-P. DE CRAYENCOUR, *supra* note 3, at 13 (discussing the preoccupation with coordination of conditions governing the right to enter and practice a profession); see also U. EVERLING, *supra* note 6, at 99 (advocating changes in "intellectual spheres" to further the uniformity of practices).

51. See RESOLUTION DRAFT, *supra* note 47, Annex III, at 1 (noting that draft directives submitted before 1974 focused only on setting quantitative criteria for professional training programs).

raised serious differences of opinion among Council members.⁵² In addition, when Ministers of Education of the Member States met in 1971, they disagreed as to how mutual recognition of diplomas should relate to the widespread educational reform just beginning in Europe.⁵³ Furthermore, the development of these directives was slow because the European Commission⁵⁴ (the Commission) lacked the staff to handle all of its responsibilities under the Treaty.⁵⁵

B. 1973-74: EVENTS THAT ACCELERATED THE ISSUANCE OF DIRECTIVES

Several events in 1973 and 1974 accelerated the Council's issuance of directives for mutual recognition. First, delegates from Great Britain, Denmark, and Ireland provided strong views on mutual recognition of diplomas when their countries acceded to the Community in January 1973.⁵⁶ Representatives of the three new Member States criticized the Commission's previous approach at a meeting of the working party on mutual recognition of diplomas in October 1972.⁵⁷ While the Commission had focussed on setting quantitative criteria to standardize degree programs,⁵⁸ the British and Danish delegations instead stressed that

52. See RESOLUTION DRAFT, *supra* note 47, at 2 (noting the differences of opinion that arose during discussions about training requirements).

53. J.-P. DE CRAYENCOUR, *supra* note 3, at 14. After this meeting of the Ministers of Education, however, the European Council instructed the committee working on directives for mutual recognition to continue its work with renewed vigor. RESOLUTION DRAFT, *supra* note 47, at 2.

54. See Treaty of Rome, *supra* note 1, art. 155 (defining the role of the Commission in the EC). The Commission has the power to participate in developing measures which the Council issues. *Id.* Its 17 members work with the Council to develop directives. A JOURNEY THROUGH THE EC, *supra* note 1, at 47. The Commission proposes draft directives to the Council. J.-P. DE CRAYENCOUR, *supra* note 3, at 57. During the development of draft directives, the Commission collects information about the legal provisions applying to professions in the Member States, establishes working parties of experts from Member States to discuss proposal measures, and solicits input from professional organizations. *Id.*

55. J.-P. DE CRAYENCOUR, *supra* note 3, at 14. The Commission never designated more than five officials to address issues concerning freedom of movement for professionals. *Id.*

56. See Carrewyn, *supra* note 6, at 3 (noting the significance of the acceding country's contributions in changing the approach to mutual recognition of diplomas).

57. See RESOLUTION DRAFT, *supra* note 47, at 3 (stating that Denmark, Great Britain, and Ireland deemed mutual recognition of diplomas impracticable due to the diversity of training programs between countries).

58. RESOLUTION DRAFT, *supra* note 47, Annex III (Note of the United Kingdom Delegation). Quantitative criteria included the length of training, the number of hours of teaching, and the number of hours to be allocated to particular subjects in a curriculum. *Id.*

criteria should address the quality of educational programs.⁵⁹

Second, the Commission held a hearing in 1973 to obtain the latest views from professional bodies and organizations on the directive for mutual recognition of diplomas for doctors.⁶⁰ Participants acknowledged that the Council could achieve mutual recognition of degrees only by comparing state standards broadly because training programs differed among and within countries.⁶¹ Participants suggested that, despite differences in training programs, the standards defining degree qualification at the completion of the programs were comparable in the different Member States.⁶² While some participants questioned the validity of quantitative criteria, the group as a whole accepted the recommendation that the directives for doctors include a minimum requirement of six years or 5,500 hours of training.⁶³ University representatives recommended the establishment of advisory committees to discuss the present state of medical education and to advise the Commission on problems that might arise after the directives became effective.⁶⁴

In addition, the participants backed a proposal to include in the directive mandating mutual recognition of medical training and adaptation period for non-national doctors to ensure that they are proficient in the language and have sufficient knowledge of the social and legal issues relevant to medical practice in the state.⁶⁵ The Commission's legal

59. See RESOLUTION DRAFT, *supra* note 47, Annex III at 1 (Note of the United Kingdom Delegation) (noting that quantitative criteria, the number of hours a program must contain, does not determine the quality of a program, which could vary widely). In addition, the British pointed out that establishing criteria based on the quantity of training would not take into account improvements in training from educational innovation or changing professional requirements. *Id.* See also RESOLUTION DRAFT, *supra* note 47, Annex I at 1 (Note of the Danish Delegation) (acknowledging that some professions may require minimum criteria for basic training and stressing that the criteria be qualitative).

60. *Report of a Hearing Concerning the Mutual Recognition of Professional Qualifications in Relation to the Freedom of Establishment of Doctors*, in RESOLUTION DRAFT, *supra* note 47, at 2-3. The hearing took place on October 22-25, 1973 in Brussels. *Id.* at 3. The hearing addressed only the directive for mutual recognition of medical training because the Council had already discussed the directive at length; the public had shown interest in the directive; and the directive had fewer definitional problems than other directives. *Id.* at 3. Participants included doctors' professional organizations, university rectors' conferences, medical teaching staffs, medical student representatives, hospital and health insurance groups, and consumer organizations. *Id.* at 3.

61. *Id.* at 8.

62. *Id.*

63. *Id.*; see also J.-P. DE CRAYENCOUR, *supra* note 3, at 69 (advocating the presence of some quantitative criteria to give a directive force and ensure its effectiveness).

64. *Report of a Hearing Concerning the Mutual Recognition of Professional Qualifications in Relation to the Freedom of Establishment of Doctors*, in RESOLUTION DRAFT, *supra* note 47, at 9.

65. *Id.* at 10.

counsel, however, argued that the adaptation period would violate the provisions of the Treaty of Rome by discriminating against non-national doctors.⁶⁶

With input from the acceding nations and participants in the hearing,⁶⁷ the Council issued a resolution that provided new guidelines for directives on mutual recognition of diplomas.⁶⁸ Whereas the Council had previously worked to eliminate differences between training programs in the Member States, this resolution acknowledged that the skills which the different states' training programs provide are comparable.⁶⁹ To this end, the resolution recommended that the Commission deemphasize the use of detailed training requirements in developing subsequent proposals for directives.⁷⁰

Third, the European Court of Justice issued two decisions in 1974 that addressed the rights of establishment and services and freed the Commission to concentrate on mutual recognition of diplomas.⁷¹ In the first of the two decisions, *Reyners v. Belgian State*,⁷² the European Court of Justice held that the right of establishment had direct effect⁷³ and declared null and void all state provisions on establishment that

66. *Id.* The Treaty of Rome prohibits any discrimination based on nationality. Treaty of Rome, *supra* note 1, art. 7.

67. *See*, RESOLUTION DRAFT, *supra* note 47, at 4 (proposing that the conclusions from both the working party's hearing and the public hearing allowed the Commission to develop new guidelines, which the Commission then proposed in the resolution).

68. *Council Resolution of June 6, 1974*, 17 O.J. EUR. COMM. (No. C 98) 1 (1974).

69. *Id.*

70. *See id.* art. II. (providing guidelines for work on future directives concerning mutual recognition involving few detailed training requirements); *see also* RESOLUTION DRAFT, *supra* note 47, at 3 (discussing the results of the working party on "mutual recognition of diplomas").

71. *See Gazzo, supra* note 30, at 24 (covering the *Reyners* and *Van Binsbergen* cases).

72. 1974 E. Comm. Ct. J. Rep. 631. Jean Reyners was born in Brussels of Dutch parents. *Id.* at 633. Although he opted to keep his Dutch citizenship, he obtained a Belgian legal diploma and subsequently applied for admission to practice in Belgium. *Id.* Belgian authorities, however, rejected his application because Belgian law provided that only Belgians could practice in Belgium. *Id.* Reyners maintained that Belgian requirements infringed on the right of establishment provisions of the Treaty of Rome. *Id.* at 634.

73. *See* T.C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW 183 (1988) (defining the concept of direct effect). A Community law which has direct effect gives individuals the right to enforce the provision in national courts. *Id.* Generally, provisions cannot have direct effect unless national courts recognize the provision as a valid legal provision, and the provision's terms are suitable to give rights to individuals. *Id.* at 184. The test which the Court currently applies to determine whether a provision has direct effect demands that a provision be clear, unambiguous, and unconditional and that it require no additional action of Community or national authorities to be operational. *Id.* at 188.

discriminated between nationals and non-nationals.⁷⁴ Similarly, in *Van Binsbergen v. Bedrijfsvereniging Metaalnijverheid*,⁷⁵ the European Court of Justice held that freedom of services had direct effect and that a state could not discriminate against people providing service in that state because they were non-nationals or non-residents.⁷⁶ After these decisions, professionals could rely on the rights of establishment and services in court to safeguard their interests or to show that a national law was incompatible with a European Community law.⁷⁷ Moreover, the Court's holdings in these cases relieved the Council of its obligation to issue measures eliminating discrimination based on nationality.⁷⁸

C. 1975: MANDATING MUTUAL RECOGNITION FOR DOCTORS

The Council finally⁷⁹ issued directives concerning mutual recognition of diplomas, certificates, and other evidence of formal qualifications in medicine⁸⁰ in 1975, despite heavy opposition from Belgium.⁸¹ A Coun-

74. *Reyners*, 1974 E. Comm. Ct. J. Rep. at 656.

75. 1974 E. Comm. Ct. J. Rep. 1299. Van Binsbergen, a Netherlands citizen, brought an action before the Trade Association of the Engineering Industry in 1972, which the Board dismissed. *Id.* Van Binsbergen then authorized Mr. Kortmann, also a Netherlands citizen, to appeal the Board's dismissal for him. *Id.* In 1973, the Assistant Registrar of the court in which Van Binsbergen was appealing notified Kortmann that he could no longer act on Van Binsbergen's behalf because he had moved his habitual residence to Belgium. *Id.* The rules of procedure for the Netherlands court provided that only persons permanently established in the Netherlands could represent or advise clients. *Id.* Kortmann invoked freedom of services and claimed that it prevented the application of the Netherlands court rule. *Id.*

76. *Id.* at 1311-12.

77. *Reyners*, 1974 E. Comm. Ct. J. Rep. at 659 (opinion of Mr. Advocate-General Mayras); *Vans Binsbergen*, 1974 E. Comm. Ct. J. Rep. at 1312.

78. See *Reyners*, 1974 E. Comm. Ct. J. Rep. at 652 (stating that directives required under the right of establishment became superfluous with respect to executing the rule prohibiting discrimination based on nationality); see *Van Binsbergen*, 1974 E. Comm. Ct. J. Rep. at 1311 (stating that freedom of services became unconditional at the end of the transitional period and implying that directives that were to institute freedom of services during the transitional period were thus unnecessary).

79. See J.-P. DE CRAYENCOUR, *supra* note 3, at 93 (noting that work on the directive for doctors began in 1970).

80. *Mutual Recognition Directive for Doctors*, *supra* note 29; *Council Directive Concerning the Coordination of Provisions Laid Down by Law, Regulation or Administrative Action in Respect of Activities of Doctors*, 18 O.J. EUR. COMM. (No. L 167) 14 (1975) [hereinafter *Coordination Directive for Doctors*]; *Council Decision Setting up an Advisory Committee on Medical Training*, 18 O.J. EUR. COMM. (No. L 167) 17 (1975). The Council accomplished mutual recognition of diplomas for doctors through two directives and a decision. The first directive names specific diplomas that States must honor. *Mutual Recognition Directive for Doctors*, *supra* note 29, at 1-9. In addition, it defines the rights of States when an applicant has not complied with all of the directive's requirements and when individuals have satisfied the directive's requirements. *Id.* at 9-12. The second directive defines minimum quantitative and qualitative criteria that States must establish for medical training programs. *Coordination Direct-*

cil decision set up an advisory committee on medical training to ensure a high standard of medical training in the Community.⁸² In addition, the directives list all the medical diplomas that Member States must recognize as equivalent⁸³ and include both minimum qualitative⁸⁴ and quantitative criteria to which medical training programs must comply.⁸⁵ When a state requires proof of good character or good repute from its own nationals, the directives authorize the state to require similar proof from non-nationals.⁸⁶ When incoming professionals meet the requirements of the directives, a state must allow them to use the professional training they acquired in their home states.⁸⁷

When a professional's training does not meet minimum requirements, the directives require countries to recognize a diploma if the professional provides additional certification⁸⁸ from authorized authorities in the professional's home state.⁸⁹ The directives also permit a state to require non-nationals to complete training of less than six months to receive an appointment as a doctor under social security laws, as long as the state requires the same training of its own citizens.⁹⁰ The directives do not require an adaptation period for foreign doctors.⁹¹ A state

ive for Doctors, supra at 14-16. The Council decision establishes an Advisory Committee on Medical Training. *Council Decision Setting up an Advisory Committee on Medical Training, supra* at 17.

81. See G. RESS, *supra* note 15, at 310 (noting Belgium's resistance to the directives); see also J.-P. DE CRAYENCOUR, *supra* note 3, at 66 (noting that the Belgian government advocated increased coordination between educational programs). The Belgian government approved the directive when the Council agreed to establish a committee to examine difficulties resulting from implementation of the directive. *Id.*

82. *Council Decision Setting up an Advisory Committee on Medical Training, supra* note 80, at 17.

83. *Mutual Recognition Directive for Doctors, supra* note 29, at 2-9.

84. See *Coordination Directive for Doctors, supra* note 80, art. I (requiring an applicant for a degree to have clinical experience, adequate knowledge of medical sciences, sufficient understanding of healthy and sick bodies, and clinical disciplines and knowledge). Great Britain had made special requests for inclusion of qualitative criteria in evaluating training programs. RESOLUTION DRAFT, *supra* note 47, at 3.

85. See *Coordination Directive for Doctors, supra* note 80, art. I(2) (requiring training to be at least six years or 5,500 hours).

86. See *Id.*, art. 11(2)-(3). Proof of good character may consist of either a certificate, an extract from the "judicial record" or an equivalent document. *Id.*

87. *Id.*, art. 10.

88. *Id.* The certification which a Member State could require depends on the extent to which a professional's training differs from that set out in the directive. See *id.* art. 9(2)-(3) (listing variations in training requirements).

89. *Id.*

90. *Id.*

91. See *supra* note 66 and accompanying text (discussing the Commission legal counsel's reaction to the possibility of an adaptation period); see also J.-P. DE CRAYENCOUR, *supra* note 3, at 86 (discussing the abandonment of the adaptation period).

may, however, require a foreign doctor to obtain training in that state's language.⁹²

Specific directive provisions govern when an individual chooses to enter a country to exercise only the freedom of services.⁹³ When a Member State requires doctors to belong to a professional organization, the directive exempts professionals who enter the country only to render services.⁹⁴ These professionals must, however, comply with the Member State's administrative and professional rules.⁹⁵ When individuals who come to a Member State only to provide services intend to stay in the country temporarily, the state may require them to register with its authorities.⁹⁶ Furthermore, the state may demand that individuals have legal standing to practice in another state and that they submit certificates that confirm that they hold diplomas recognized by a directive.⁹⁷

D. AN EVALUATION OF THE DIRECTIVE FOR DOCTORS

All signs suggest that the directive for mutual recognition of diplomas for doctors is a success. Member States had until December 31, 1976 to amend their laws to comply with the directive.⁹⁸ Only two states failed to comply.⁹⁹ Furthermore, thousands of doctors have moved to different Member States since the Council issued the directives.¹⁰⁰

92. *Mutual Recognition Directive for Doctors*, *supra* note 29, art. 20(3).

93. *See id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*; *Coordination Directive for Doctors*, *supra* note 80, at 16.

99. *See Commission v. Belgium*, 1987 E. COMM. CT. J. REP. 675, 686 (holding that Belgium failed to meet its obligations under the Treaty). Belgium failed to lengthen its specialized training program in tropical medicine to conform with the directive's requirement of four years. *Belgium*, 1987 E. Comm. Ct. J. Rep. at 685; *See also Commission v. French Republic*, 1986 E. Comm. Ct. J. Rep. 1475, 1487 (holding that France failed to fulfill its obligations under the Treaty). The Court rejected France's requirement that non-national doctors applying for recognition in France must cancel their enrollment or registration in their state of origin in order to practice in France. *French Republic*, 1986 E. Comm. Ct. J. Rep. at 1487. It is impressive, in light of the Community's general failure to comply with directives, that most Member States implemented the directive. *See* FOURTH PROGRESS REPORT, *supra* note 8, at 4 (noting that of the 68 Council actions that states should have incorporated into their legislation by 1989, only two actions had been implemented by every member state).

100. *See, Gazzo*, *supra* note 30, at 24 (noting that 414 non-national doctors had registered in Holland, Great Britain, France, West Germany, Belgium, Luxembourg, Denmark, and Ireland between January 1977 and January 1978); J.-P. DE CRAYENCOUR, *supra* note 3, at 136 (stating that in 1978 645 non-nationals qualified for practice in Germany, France, Italy, the Netherlands, Belgium, Luxembourg, Eng-

An obstacle still exists, however, for doctors hoping to exercise their freedom of services. The directives did not mandate reimbursement for doctors who provided services to patients living outside their state of establishment.¹⁰¹ Because states' health care systems are so different, the Council must coordinate regulations concerning social security insurance before doctors can be assured compensation and thus practice freely throughout Europe.¹⁰²

E. ADDITIONAL DIRECTIVES IN THE HEALTH CARE FIELDS

Passage of additional directives in the health care fields followed soon after the directives for mutual recognition of medical training.¹⁰³ The Council issued directives governing the recognition of diplomas, certificates, and other evidence of formal qualifications for nurses in 1977,¹⁰⁴ veterinarians¹⁰⁵ and dentists¹⁰⁶ in 1978, midwives in 1980,¹⁰⁷ and pharmacists in 1985.¹⁰⁸ These directives are similar in form to the

land, Ireland, and Denmark). In contrast, in 1988 *The Economist* estimated that "fewer than 2,000 doctors" move to another country each year. *Show Me Your Testimonials*, THE ECONOMIST, June 11, 1988, at 54.

101. G. RESS, *supra* note 15, at 310.

102. *Id.*

103. See *Mutual Recognition Directive for Nurses*, *supra* note 41, at 1 (noting that the Council issued the directive in 1977); *Mutual Recognition Directive for Dentists*, *supra* note 42, at 1 (noting that the Council issued the directive for dentists in 1978); *Mutual Recognition Directive for Veterinarians*, *supra* note 43, at 1 (listing an issuance date of 1978); *Mutual Recognition Directive for Midwives*, *supra* note 44, at 1 (noting an issuance date of 1980); *Mutual Recognition Directive for Pharmacists*, *supra* note 45, at 37 (noting that the Council issued the directive for pharmacists in 1985).

104. *Mutual Recognition Directive for Nurses*, *supra* note 41, at 3; *Council Directive Concerning the Coordination of Provisions Laid Down by Law, Regulation or Administrative Action in Respect of the Activities of Nurses Responsible for General Care*, 20 O.J. EUR. COMM. (No. L 176) 8 (1977) [hereinafter *Coordination Directive for Nurses*].

105. *Mutual Recognition Directive for Veterinarians*, *supra* note 43; *Council Directive Concerning the Coordination of Provisions Laid Down by Law, Regulation or Administrative Action in Respect of the Activities of Veterinary Surgeons*, 21 O.J. EUR. COMM. (No. L 362) 7 (1978) [hereinafter *Coordination Directive for Veterinarians*].

106. *Mutual Recognition Directive for Dentists*, *supra* note 42; *Council Directive Concerning the Coordination of Provisions Laid Down by Law, Regulation or Administrative Action in Respect of the Activities of Dental Practitioners*, 21 O.J. EUR. COMM. (No. L 233) 10 (1978) [hereinafter *Coordination Directive for Dentists*].

107. *Mutual Recognition Directive for Midwives*, *supra* note 44; *Council Directive Concerning the Coordination of Provisions Laid Down by Law, Regulation or Administrative Action Relating to the Taking up and Pursuit of the Activities of Midwives*, 23 O.J. EUR. COMM. (No. L 33) 8 (1980) [hereinafter *Coordination Directive for Midwives*].

108. *Mutual Recognition Directive for Pharmacists*, *supra* note 45; *Council Directive Concerning the Coordination of Provisions Laid Down by Law, Regulation*

directive for medical training. Differences in the diplomas to be recognized¹⁰⁹ as well as basic qualitative¹¹⁰ and quantitative¹¹¹ criteria distinguish the health care directives from each other.

or *Administrative Action Relating to the Taking up and Pursuit of the Activities in the Field of Pharmacy*, 24 O.J. EUR. COMM. (No. L 253) 34 (1985) [hereinafter *Coordination Directive for Pharmacists*].

109. Compare *Mutual Recognition Directive for Nurses*, *supra* note 41, art. 3 (listing nursing degrees which qualify for Community recognition) and *Mutual Recognition Directive for Veterinarians*, *supra* note 43, art. 3 (listing veterinary degrees which qualify for recognition) and *Mutual Recognition Directive for Dentists*, *supra* note 42, arts. 3-5 (listing dental degrees which States should recognize) and *Mutual Recognition Directive for Midwives*, *supra* note 44, art. 3 (noting the Midwifery diplomas that qualify for recognition) and *Mutual Recognition Directive for Pharmacists*, *supra* note 45, art. 4 (listing pharmaceutical degrees which the directive recognizes) with *Mutual Recognition Directive for Doctors*, *supra* note 29, art. 7 (listing medical degree programs which the directive recognizes).

110. Compare *Coordination Directive for Doctors*, *supra* note 80 (describing qualitative criteria to which recognized medical degree programs must adhere) with *Coordination Directive for Nurses*, *supra* note 104, art. 1 (requiring nurses to have knowledge of sciences and the profession's nature and ethics, clinical experience, the ability to train personnel, and experience in working with other health care personnel) and *Coordination Directive for Veterinarians*, *supra* note 105, art. 1 (requiring veterinarians to have adequate knowledge of sciences, structure and function of animals, diseases peculiar to animals, preventive medicine, hygiene, animal nutrition, appropriate legal provisions, and clinical experience) and *Coordination Directive for Dentists*, *supra* note 106, art. 1 (requiring a dentist to have clinical experience and adequate knowledge of sciences, healthy and sick bodies, the structure and function of teeth, and dentistry's clinical disciplines and methods) and *Coordination Directive for Midwives*, *supra* note 107, art. 1 (requiring midwifery programs to guarantee that participants acquire clinical and managerial experience and adequate knowledge of ethics and the appropriate sciences including obstetrics, gynecology, and the biology and physiology of pregnant women and newborn babies) and *Coordination Directive for Pharmacists*, *supra* note 108, art. 2 (requiring pharmacists to have adequate knowledge of medicines, pharmaceutical technology, testing of pharmaceutical products, evaluation techniques, and various other requirements connected with pharmaceutical practice).

111. Compare *Coordination Directive for Doctors*, *supra* note 80 (listing quantitative requirements to which the medical training program must conform to satisfy the directive) with *Coordination Directive for Nurses*, *supra* note 104, art. 1(2) (requiring nurses to have at least 10 years of general education resulting in a diploma and full-time vocational training for at least three years or 4,600 hours) and *Coordination Directive for Dentists*, *supra* note 106, art. 1(2) (requiring dentists to complete a full-time dental training course of at least five years) and *Coordination Directive for Midwives*, *supra*, note 107, art. 1(2) (requiring midwives to have at least 10 years of general school education and three years of full-time midwifery training) and *Coordination Directive for Pharmacists*, *supra* note 108, art. 2(3) (requiring pharmacists to finish five years of training including at least four years of training at a university and at least six months of in-service training in a pharmacy) and *Coordination Directive for Veterinarians*, *supra* note 105, at 7 (requiring at least five years training in a university). The veterinary programs attempt to balance training in different subject areas in a way that provides veterinary surgeons with the skills to do their jobs. *Id.* at 9. This serves the same purpose as the quantitative requirements; to coordinate training programs between member states. J.-P. DE CRAYENCOUR, *supra* note 3, at 103.

F. THE RIGHTS OF ESTABLISHMENT AND SERVICES FOR LAWYERS

1. *Freedom of Services*

Progress towards free movement has been slower for lawyers¹¹² than for professionals in the health care fields because the legal professions among Member States are inherently different.¹¹³ In 1977, the Council issued a directive to effectuate a lawyer's freedom of services.¹¹⁴ That directive enables a lawyer¹¹⁵ to represent a client in a Member State other than the lawyer's place of practice.¹¹⁶ The directive, however, limits a non-national's activities to the provision of services.¹¹⁷ It allows states to preclude non-national lawyers from preparing certain formal documents.¹¹⁸ Moreover, the host state may require a foreign lawyer to work with another lawyer who is licensed to practice in that state's courts.¹¹⁹

2. *The Right of Establishment*

The European Court of Justice has established certain principles to protect the freedom of establishment of lawyers. Initially, Article Fifty-

112. See 1988 Directive, *supra* note 2, at 18 (providing for possible mutual recognition of legal degrees). The Directive broadly defines the professional activities it covers and sanctions an aptitude test specifically for legal professionals. *Id.* See also Note, *Securing A Lawyer's Freedom of Establishment Within the European Economic Community*, 10 FORDHAM INT'L L.J. 733, 745 (1986) (discussing a proposal for the 1988 Directive and its application to legal professionals).

113. G. RESS, *supra* note 15, at 310; see also J.-P. DE CRAYENCOUR, *supra* note 3, at 53 (discussing problems with proposed establishment directives for lawyers); Dixon, *Where Qualifications Count*, *The Times* (London), May 21, 1984, at 27 (noting different legal obstacles to practicing law in various Member States). In some countries lawyers can advise clients independently, while in others a lawyer may not. *Id.* Some countries permit non-national lawyers to use the state title; others call them "experts." *Id.*

114. *Council Directive to Facilitate the Effective Exercise by Lawyers of Freedom to Provide Services*, 20 O.J. EUR. COMM. (No. L 78) 17 (1977) [hereinafter *Council Directive on Exercise by Lawyers*].

115. See *id.* at 17 (defining the term lawyer). The directive equates "lawyer" with a Belgian *avocat*, a Danish *advokat*, a German *rechtsanwalt*, a French *avocat*, an Irish barrister or solicitor, an Italian *avvocato*, a Luxembourgian *avocat-avoue*, a Dutch *advocaat*, and a British advocate, barrister, or solicitor. *Id.*

116. *Id.*, art. 1-2.

117. *Id.* art. 1. The freedom of services enables professionals to provide services when their state of establishment differs from that of the person to whom they are providing services. Treaty of Rome, *supra* note 1, art. 59. Where the directive provides only for freedom of services, the non-national lawyer could not invoke its authority to establish a business in a state other than the one from which he or she originates. See *Council Directive on Exercise by Lawyers*, *supra* note 114, at 17 (specifying that other measures will provide for the exercise of freedom of establishment).

118. *Id.* art. 1.

119. *Id.* art. 5.

five of the Treaty of Rome, which states that the right of establishment does not apply to activities involving the exercise of official authority, presented a potential obstacle to free movement for officers of the court.¹²⁰ In *Reyners*,¹²¹ however, the European Court of Justice held that a Belgian advocate's activities, specifically, counselling and representing clients in court, were not an exercise of state authority under the Treaty.¹²² Therefore, states cannot preclude lawyers seeking to practice before their courts from exercising their right of establishment.¹²³ The Court also held in *Reyners* that a state could not deny a lawyer with in-state training entry to legal practice based solely on his nationality.¹²⁴

Later, in *Thieffry v. Conseil de L'ordre des Avocats a la Cour de Paris*,¹²⁵ the European Court of Justice held that a state's bar must recognize a foreign diploma where a competent educational authority, in this case the University of Paris,¹²⁶ recognized the diploma as an equivalent qualification.¹²⁷ Finally, in *Ordre des Avocats du Barreau de Paris v. Klopp*,¹²⁸ the European Court of Justice held that a state cannot deny a lawyer admission to practice merely because he or she had established a practice in another Member State.¹²⁹ These cases provided lawyers with tools to prevent a state from excluding them from practice. *Reyners* and *Thieffry* serve to protect non-national law-

120. Treaty of Rome, *supra* note 1, art. 55.

121. *Supra* note 72, (discussing the *Reyners* case). *Reyners* specifically involved a lawyer. *Id.* at 633.

122. *Reyners*, 1974 E. Comm. Ct. J. Rep. at 655.

123. *See id.* (stating that professional activities that involve contact with the courts are not an exercise of official authority under the Treaty of Rome).

124. *Id.* at 650.

125. 1977 E. Comm. Ct. J. Rep. 765. Jean Thieffry was a Belgian who obtained his legal training in Belgium. He later moved to Paris and obtained recognition from the University of Paris of his Belgian law degree. *Id.* The Parisian bar rejected his application for a certificate qualifying him for the profession of *avocat* because he had no diploma in French law. *Id.* at 767.

126. *Id.* at 767.

127. *Id.* at 778.

128. 1984 E. Comm. Ct. J. Rep. 2971. Mr. Klopp, a German citizen and a member of the Dusseldorf bar, sought admittance to the Paris bar in 1981. *Id.* at 2973. He wished to set up practice in Paris, while maintaining his office in Germany. *Id.* The Paris Bar Council, however, rejected his application because a French decree required bar members to maintain only one practice, which had to be within the region in which they registered. *Id.* The Court of Appeals in Paris, however, overturned the Bar Council decision. *Id.* The Bar Council appealed. *Id.* at 2974. The Court of Cassation stayed the proceedings and asked the European Court of Appeals to issue a decision deciding whether the French decree violated the Treaty's freedom of establishment provisions. *Id.*

129. *Id.* *See generally* Comment, *European Court of Justice: Paris Bar Rule Violates Right of Establishment*, 26 HARV. INT'L L.J. 562 (1985) [hereinafter, Comment, *European Court of Justice*] (providing a detailed analysis of *Klopp*).

yers who obtained their training in the state or in a training program that a state educational institution has recognized as equivalent;¹³⁰ *Klopp* permits a lawyer to establish business in more than one state.¹³¹ After these cases, however, state authorities still retained discretion to deny a non-national lawyer entry into practice.¹³² To remedy this situation, the 1988 Directive extends mutual recognition of diplomas to lawyers.¹³³

III. THE 1988 DIRECTIVE

On December 31, 1988 the Council issued a directive that established a general system for the recognition of higher education diplomas obtained at the completion of at least three years of professional education and training.¹³⁴ This Directive implements the rights of establishment and services for professionals for whom previous directives did not provide mutual recognition of diplomas and training.¹³⁵

A. THE POLICY BEHIND THE DIRECTIVE

The 1988 Directive represents a significant shift in Community policy from previous directives.¹³⁶ In 1984, the European Council¹³⁷ had asked the Council to establish a general system for equivalence of diplomas in order to ensure effective exercise of the freedom of establishment.¹³⁸ The Council then established an ad hoc committee composed

130. See *supra* notes 121-127 and accompanying text (discussing the *Reyners* and *Thieffry* decisions).

131. See *supra* notes 128-29 and accompanying text (discussing *Klopp*).

132. See *supra* notes 33-37 and accompanying text (noting the ability of Member States to preclude professionals from practice in the absence of mutual recognition directives).

133. See *infra* note 147 and accompanying text (discussing when a member state must recognize the diploma of a non-national).

134. 1988 Directive, *supra* note 2. Member States must issue legislation in compliance with the Directive by December 31, 1991. *Id.*, art. 12.

135. See *id.* at 19 (enumerating the objectives of the Directive).

136. Compare *supra* notes 80-98 (discussing the approach that the Council took in the directives recognizing medical degrees) with *infra* notes 141-145 (discussing the Council's new approach).

137. See A JOURNEY THROUGH THE EC, *supra* note 1, at 47 (distinguishing the European Council from the Council). The Council consists of representatives from the Member States who are either the States' Foreign Minister or the Minister who is responsible for the area which a particular Council meeting addresses. *Id.* In contrast, the heads of state or government compose the European Council. *Id.* The European Council meets three times each year. *Id.*

138. See COMMISSION OF THE EUROPEAN COMMUNITIES, PROPOSAL FOR A COUNCIL DIRECTIVE ON A GENERAL SYSTEM FOR THE RECOGNITION OF HIGHER EDUCATION DIPLOMAS 2 (1985) [hereinafter 1985 DIRECTIVE PROPOSAL] (discussing changes in the political scenario which led to the proposal of a new directive). The Council meet-

of representatives of government leaders in the Member States to design and coordinate the directives.¹³⁹

The ad hoc committee designed a new approach to directives concerning mutual recognition for diplomas. Whereas previous directives addressed the professions individually, the ad hoc committee envisioned a directive that would apply to all the professions.¹⁴⁰ The new approach also assumed that individuals emerging from three or more years of professional training in any Member State held similar qualifications.¹⁴¹ Furthermore, the committee's strategy included guaranteeing assessment in future years to address problems that might arise as directives are implemented¹⁴² and providing individuals with certain rights.¹⁴³ Finally, the committee's strategy depended on mutual trust and cooperation between Member States to enable states to establish adequate measures to evaluate qualifications.¹⁴⁴

B. THE DIRECTIVE'S PROVISIONS

1. *Diplomas Recognized*

The 1988 Directive encompasses the approach designed by the ad hoc committee. The Directive applies to diplomas acquired after three or more years of professional training¹⁴⁵ and covers a broad range of

ing took place on June 25-26, 1984 in Fontainebleau, France. *Id.* The Council cited the European public's expectations in encouraging an accelerated approach to mutual recognition directives. *Id.*

139. *Id.* The committee was also known as the Adonnino Committee. *Opinion on the Proposal for a Council Directive*, 29 O.J. EUR. COMM. (No. C 75) 5, 6 (1986).

140. See 1985 DIRECTIVE PROPOSAL, *supra* note 138, at 3. *Compare id.* (advocating a general approach) with RESOLUTION DRAFT, *supra* note 47, at 3 (stating that a general system of recognition was not possible because of different training conditions in the member states). According to the Council, the traditional approach gave professionals the chance to become accustomed to the Common Market by attempting to harmonize educational programs and achieve a European program. 1985 DIRECTIVE PROPOSAL, *supra* note 138, at 3. Unfortunately, however, the old approach took a long time and benefitted few people. *Id.* The new approach, on the other hand, attempts to implement directives quickly and for all professionals. *Id.* See also Harris, *Freedom to Provide Professional Services*, NEW L.J. Feb. 3, 1989, at 164, 165 (discussing the differences between the old "vertical" approach and the new "horizontal" approach).

141. 1985 DIRECTIVE PROPOSAL, *supra* note 138, at 4. *Compare id.* with RESOLUTION DRAFT, *supra* note 47, at 3 (noting that training programs between countries are extremely different).

142. *Id.* at 5.

143. *Id.* The proposed directive would obligate states to explain and support any of its decisions to protect the individual against arbitrary state actions and would provide individuals the right to use the state's legal title for the profession. *Id.*

144. 1985 DIRECTIVE PROPOSAL, *supra* note 138, at 4. *Compare id.* with RESOLUTION DRAFT, *supra* note 47, at 3 (noting that training programs between countries are extremely different).

145. See 1988 Directive, *supra* note 2, at 17 (defining diplomas). The Directive

professional activities.¹⁴⁶ A Member State must recognize a non-national's diploma if he or she has engaged in the profession for two of the past ten years or holds a diploma for pursuing practice from any Member State.¹⁴⁷

2. *Limitations on Recognition*

In certain situations a state may require a non-national professional to take additional steps in order to prove professional proficiency. If a non-national professional's educational experience or training is one or more years less than that which the state requires of its own citizens, the state may compel the non-national to provide proof of professional experience.¹⁴⁸ If the non-national professional's educational experience is substantially different from that which the state requires, or the activities that the profession includes differ significantly between the Member States, the state may require the non-national professional to complete an adaptation period¹⁴⁹ or take an aptitude test.¹⁵⁰ In most cases, that state must allow the non-national professional to choose be-

defines diplomas to include one or more diplomas, certificates, or other proof of formal qualification. *Id.* art. 1. A competent authority in a Member State must have issued the degree. *Id.* In addition, the degree must demonstrate that its holder (1) completed a three year post-secondary course at an institution of higher education, (2) completed the required training, and (3) is qualified to pursue the regulated profession. *Id.*

146. *Id.* art. 1. The Directive defines a regulated activity as an activity over which any of the state's laws, regulations, or administrative provisions govern. *Id.* The provision defines specific activities that the Directive covers: (1) pursuit of an activity for which the state's laws provide a specific title and (2) pursuit of a professional activity related to health for which the state's social security laws require a diploma. *Id.* The Directive does not apply, however, to professions for which the Council has already issued directives. *Id.* art. 2. In addition, the Directive defines regulated activities as those which state-recognized professional organizations oversee to maintain high quality in the field. *Id.* art. 1. To qualify, professional organizations must enforce rules of professional conduct and confer on their members diplomas and the right to use a professional title or designatory letters. *Id.*

147. *Id.* art. 3.

148. *Id.* art. 4(1). The state may not require that the professional's experience exceed twice the length of the educational deficit for post-secondary studies or probationary practice. *Id.* In addition, the Member State cannot mandate that the professional's experience exceed the length of the deficit where the deficit is related to the length of professional practice acquired with help from a qualified member of the profession. *Id.*

149. *Id.* art. 4(b). The Directive defines an adaptation period to be professional practice of an activity in a member state which a qualified professional oversees. *Id.* art. 1(f).

150. *Id.* art. 4(b). The Directive defines aptitude test as an exam, administered by the state's authorities, to test only the applicant's professional expertise. *Id.* art. 1(g). In addition, the Directive requires the authorities to take into account that applicants are qualified professionals in their states of origin and to include subject areas which the practice of the profession requires. *Id.* The test may also include questions concerning the rules for practice in the Member State. *Id.*

tween an adaptation period or an aptitude test.¹⁵¹ Lawyers, however, may not have this choice. The state may require any non-national whose profession demands a thorough knowledge of national law and/or who constantly provide assistance in legal matters to take an aptitude test.¹⁵²

3. Provisions Derived from the Health Care Directives

The 1988 Directive does not differ entirely from the various health care directives. Like the health care directives, it permits a Member State to require evidence of good character or conduct¹⁵³ and physical or mental health.¹⁵⁴ Furthermore, a state must recognize a qualified professional's right to use his or her professional title in the state.¹⁵⁵

4. The State's Administrative Process

The Member State must reply within four months of a professional's compliance with the Directive's application requirements.¹⁵⁶ The Directive provides the applicant with the right to contest both the state's failure to meet this deadline and its decision.¹⁵⁷

To administer the program, the Directive requires each Member State to designate authorities to receive applications.¹⁵⁸ In addition, the state must appoint an official to oversee the application process and assure uniform application of the Directive's provisions to all professions.¹⁵⁹ Furthermore, the Directive establishes a coordinating group to facilitate implementation of the Directive and to collect information.¹⁶⁰

151. *Id.* art. 4(b).

152. *Id.*

153. *Id.* art. 6. The state may require the applicant to produce documents issued by competent authorities in his or her state of origin, to take an oath or to make a declaration before a judicial, administrative, or professional authority. *Id.* Compare 1988 Directive, *supra* note 2, with, e.g., *Mutual Recognition Directive for Doctors*, *supra* note 29, at 10 (permitting states to require doctors to produce certificates or judicial records of good character or repute).

154. 1988 Directive, *supra* note 2, art. 6(2). Compare *id.* with *Mutual Recognition Directive for Doctors*, *supra* note 29, at 11 (permitting states to require non-national doctors to produce a certificate of physical or mental health when the state also requires them of their own professionals).

155. 1988 Directive, *supra* note 2, art. 7(1). Compare *id.* (providing the right to use a professional title to qualified applicants) with *Mutual Recognition Directive for Doctors*, *supra* note 29, art. 10 (providing use of the appropriate title to qualified medical applicants).

156. 1988 Directive, *supra* note 2, art. 8(2).

157. *Id.*

158. *Id.* art. 9(1).

159. *Id.* art. 9(2).

160. *Id.*

Finally, the Commission must assess the Directive's progress after five years and propose improvements in the program.¹⁶¹

IV. FLAWS IN THE 1988 DIRECTIVE

While the 1988 Directive for mutual recognition of diplomas provides recognition for professionals in all fields, the Directive's provisions permit states to discriminate against non-national professionals in several ways. First, a state's ability to impose an adaptation period of up to three years¹⁶² on some non-nationals¹⁶³ acts as a significant obstacle to movement among Member States.¹⁶⁴ Although the Directive offers professionals the option to choose between the adaptation period and an aptitude test, it also allows states to retract this option by notifying the Commission.¹⁶⁵ This suggests that states could require non-nationals with sufficient professional aptitude¹⁶⁶ to work under the supervision of another practitioner for up to three years.¹⁶⁷ Such an adaptation period could act as a significant disincentive to professionals who wish travel to another state to establish a practice.

Second, the Directive allows states to discriminate against non-national professionals by requiring non-nationals to take aptitude tests to qualify for entry into the profession regardless of whether nationals must take them.¹⁶⁸ The Directive also leaves much discretion to state authorities who design the aptitude tests. The Directive simply instructs national authorities to compare the applicant's training with its own requirements and provides no Community review to protect individuals from unfair testing.¹⁶⁹ Potential for discriminatory questions is particu-

161. *Id.* art. 13.

162. *1988 Directive, supra* note 2, art. 4(b).

163. *Id.* art. 1(f) (discussing to whom the adaptation period might apply).

164. *See Report of a Hearing Concerning the Mutual Recognition of Professional Qualifications in Relation to the Freedom of Establishment of Doctors*, in RESOLUTION DRAFT, *supra* note 47, at 10 (noting that the Commission's legal services lawyers thought that an adaptation period was incompatible with the Treaty's provisions); Steindorff, *supra* note 20, at 400 (noting that the adaptation period could make the directive an ineffective tool to implement freedom of services). *See also* Harris, *supra* note 140, at 164-65 (suggesting that the adaptation provision may provide opportunities for Member States to discriminate against non-nationals).

165. *See 1988 Directive, supra* note 2, art. 4 (allowing the state to retract an applicant's right to choose between the adaptation period and aptitude test); *id.* art. 10 (establishing the procedure which a state must follow to exercise its option in article 4).

166. *See id.* art. 1(g) (implying that the requisite aptitude is adequate knowledge of certain subject areas, regardless of the professional's previous training).

167. *See id.* art. 1(f) (defining adaptation period).

168. *See id.* art. 4 (making no reference to requirements for national professionals).

169. *See id.* art. 1(g) (requiring the state, with no oversight, to compile a list of subjects which will appear on the test).

larly high when states do not impose aptitude tests on their own citizens. These states have no standard by which to measure tests for non-nationals.

Third, the Directive fails to mandate professional participation in the implementation of the Directive. Professionals have perceived free movement into their states of non-national professionals as a threat to their livelihoods.¹⁷⁰ Professional support, however, is essential to the Directive's success, because, for example, the Directive's provisions require cooperation from professionals to oversee non-nationals during adaptation periods.¹⁷¹ While the Directive recognizes professions over which professional organizations govern, it does not require state authorities to consult with organizations during the Directive's implementation. The Directive suggests only that Member States solicit information from professional organizations where "appropriate" or "relevant."¹⁷²

Fourth, the Directive provides for only one official to oversee the Directive's uniform implementation in all the professions.¹⁷³ The Directive, however, potentially affects over sixty professions, each with different requirements.¹⁷⁴ Without advice from professionals, the application process could fail to take into account important professional qualifications and advancements. This could decrease the quality of the professional pool.¹⁷⁵

Fifth, the Directive may permit Member States to strengthen restrictions on the provision of services. Since the issuance of the Directive, for example, the French have proposed a requirement that all lawyers practicing in France become members of the *Conseils Juridique*.¹⁷⁶ The French cite the 1988 Directive as justifying an increase in restric-

170. See J.-P. DE CRAYENCOUR, *supra* note 3, at 11 (noting that professionals have been hostile towards free movement because they fear non-nationals will have to comply with lower standards and implying that they fear the competition); see also Dixon, *supra* note 113, at 27 (stating that professional organizations have been responsible in part for slow progress towards mutual recognition of diplomas because they want to safeguard their own standards).

171. 1988 Directive, *supra* note 2, art. 1(f).

172. *Id.* art. 9(3).

173. *Id.*

174. See J.-P. DE CRAYENCOUR, *supra* note 3, at 135 (listing the European professions).

175. See J.-P. DE CRAYENCOUR, *supra* note 3, at 47 (noting that one of the principles underlying work towards mutual recognition of diplomas was to set training criteria at the highest possible level).

176. Hansbury, 1992 and Professionals' Freedom of Establishment, 133 SOLIC. J. 712, 713 (1989). Currently foreign lawyers have some ability to practice in France without becoming members of the *Conseils Juridiques*. *Id.* at 713.

tions.¹⁷⁷ They submit that because the directive simplifies obtaining recognition of foreign qualifications, they may institute new restrictions to protect their consumers.¹⁷⁸

V. RECOMMENDATIONS AND CONCLUSION

While the 1988 Directive is an important step toward supplying professionals with the ability to choose where to practice their trades, it allows Member States to continue to discriminate against non-nationals.¹⁷⁹ When the Council changed its approach to mutual recognition, it did not eliminate the discrepancies between training programs that prevented it from issuing directives in the past.¹⁸⁰ Although the 1988 Directive provides general guidelines which Member States must follow, it merely shifts responsibility for evaluating the discrepancies between training programs in individual states from the Community authorities to individual Member States.¹⁸¹ The philosophy underlying the Directive assumes that Member States will cooperate to provide citizens with an accurate assessment of their qualifications.¹⁸² The Commission, however, should remember the conflicts that arose during consideration of proposed directives in the 1970's and diligently assess and amend the current system.¹⁸³

The Council should consider measures that would require states to involve professional groups in the implementation of the program.¹⁸⁴ By requiring states to invite professionals from the field to evaluate apti-

177. *Id.*

178. *Id.*

179. *See supra* notes 163-178 and accompanying text (discussing the ways in which states may discriminate against non-nationals under the Directive).

180. *See supra* notes 32-38, 49-55 and accompanying text (discussing the inherent difficulties in mandating free movement for professionals and the factors which contributed to slow progress towards mutual recognition of diplomas).

181. *See, e.g. 1988 Directive, supra* note 2, art. 1(f) (authorizing Member States to establish rules for the adaptation period, its evaluation, and the status of applicants who must submit to an adaptation period); *id.* art. 1(g) (permitting Member States to develop an aptitude test to evaluate a non-national's ability to practice a profession); *id.* art. 9 (authorizing Member States to designate an official to evaluate applications and apply the Directive's guidelines).

182. *See 1985 DIRECTIVE PROPOSAL, supra* note 138, at 4 (stating that trust is an essential component of a general system for the recognition of professional qualifications).

183. *Id.*; *see also 1988 Directive, supra* note 2, art. 13 (requiring the Commission to evaluate the implementation of the Directive and recommend improvements to the Parliament). *Id.*

184. *See, e.g. ECONOMIC AND SOCIAL COMMITTEE, Opinion on the Proposal for a Council Directive on a General System for the Recognition of Higher Education Proposals*, 29 O.J. EUR. COMM. (No. C 75) 5, 9 (1986) (noting a proposed amendment to require official involvement of both national and European professional bodies).

tude tests, the Council could help to ensure that state authorities do not bias test questions against non-national professionals. Input from and involvement of professional bodies in the implementation process would also relieve state administrative staff of workload in areas in which they do not have expertise.¹⁸⁵ These measures would ensure effective administration of the program in different fields and would guarantee the support of professional organizations in the implementation process.

The Commission should strictly evaluate any state request to require professionals to undergo a three year adaptation period.¹⁸⁶ Preserving a requirement to give applicants the choice between an aptitude test and an adaptation period would maintain the high quality of applicants. Moreover, it would prevent the adaptation period from becoming a disincentive to professionals who wish to move but do not wish to undergo up to three years of supervision.

Finally, the Council should amend the Directive to prohibit states from passing legislation that places further restrictions on professional practice and rationalizing their actions by claiming that the Directive provides easier access to qualification.¹⁸⁷ While the Directive relies on mutual trust,¹⁸⁸ the Community should not forget the threat the Directive poses to well established national structures.¹⁸⁹ The Council must monitor state legislation to ensure that states comply with both the word and the spirit of the Community's Treaty.

185. See 1988 Directive, *supra* note 2, art. 9(2) (authorizing states to appoint one person to ensure the uniform application of the Directive to all the professions); see also J.-P. DE CRAYENCOUR, *supra* note 3, at 135 (naming 70 professions to which the Directive could apply). An administrative staff is unlikely to have the expertise to implement the program equally in all the professions.

186. See *supra* note 165 and accompanying text (discussing the Directive's provisions which permit such a request).

187. See *supra* notes 177-179 and accompanying text (discussing France's proposed legislation).

188. 1985 DIRECTIVE PROPOSAL, *supra* note 138, at 4.

189. See U. EVERLING, *supra* note 6, at 99 (discussing the problematic nature of the right of establishment).