OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 15 October 1998 *

I — Introduction

1. This case concerns the refusal of admission of a Spanish national, enjoying reputable qualifications in fine art restoration from a body in the United Kingdom, to a competition for a permanent post at the Museo Nacional del Prado (hereinafter 'the Prado') in Madrid. It raises, in particular, the questions whether the terms of a collective agreement providing for the acceptance only of Spanish qualifications or their recognised equivalents are sufficient to establish the existence of a regulated profession within the meaning of Community secondary legislation on the recognition of professional qualifications, and whether the requirement in question, or the system of recognition of foreign qualifications, contravenes Article 48 of the EC Treaty.

II — Legal and factual context

2. The general Community regime on recognition of professional qualifications, which complements the secondary measures adopted in respect of specific professions, is set out in 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 [1] and in Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC [2] (hereinafter sometimes referred to together as 'the Directives').

3. The seventh recital in the preamble to Directive 89/48/EEC states that 'the term "regulated professional activity" should be defined so as to take account of differing national sociological situations'. It should, therefore, also extend the reservation of access to professional activities for the holders of certain qualifications; thus, 'the professional associations and organisations which confer such titles on their members and are recognised by the public authorities cannot invoke their private status to avoid application of the system provided for by this Directive'.

4. Article 1(e) of Directive 92/51/EEC defines a 'regulated profession' as 'the regulated professional activity or range of activities which constitute this profession in

* Original language: English.

1 — OJ 1989 L 19, p. 16.
2 — OJ 1992 L 209, p. 25.

a Member State'.[3] Article 1(f) of that Directive defines a 'regulated professional activity', in terms almost identical with Article 1(d) of Directive 89/48/EEC, in relevant part, as:

'a professional activity the taking up or pursuit of which, or one of its modes of pursuit in a Member State, is subject, directly or indirectly, by virtue of laws, regulations or administrative provisions, to the possession of evidence of education and training or an attestation of competence.'

It continues, to provide:

'The following in particular shall constitute a mode of pursuit of a regulated professional activity:

— pursuit of an activity under a professional title, in so far as the use of such a title is reserved to the holders of evidence of education and training or an attestation of competence governed by laws, regulations or administrative provisions,

— pursuit of a professional activity relating to health, in so far as remuneration and/or reimbursement for such an activity is subject by virtue of national social security arrangements to the possession of evidence of education and training or an attestation of competence.

... .'[4]

The second subparagraph of Article 1(f) of Directive 92/51/EEC provides that, where a professional activity is pursued by members of a private professional association or organisation which confers educational awards and titles and enforces rules of professional conduct, and which is recognised in a special form by a Member State in order to promote and maintain high professional standards, the professional activity in question is deemed to be regulated.[5]

5. Pursuant to Article 3 of Directive 92/51/EEC, 'where, in a host Member State, the taking up or pursuit of a regulated profession is subject to possession of a diploma,... the competent authority may not, on the grounds of inadequate qualifications, refuse to authorise a national of a Member

3 — The same definition is to be found in Article 1(c) of Directive 89/48/EEC.

4 — Article 1(d) of Directive 89/48/EEC provides a corresponding definition of regulated modes of pursuit of a professional activity, by reference to the need for possession of a diploma.

5 — The second subparagraph of Article 1(d) of Directive 89/48/EEC contains a similar provision, adjusted to the narrower scope of that Directive.

State to take up or pursue that profession on the same conditions as those which apply to its own nationals', if that national satisfies one of two conditions:

'(a) if the applicant holds the diploma, as defined in this Directive or in Directive 89/48/EEC, required in another Member State for the taking up or pursuit of the profession in question in its territory, such diploma having been awarded in a Member State; or

(b) if the applicant has pursued the profession in question full-time for two years, or for an equivalent period on a part-time basis, during the previous 10 years in another Member State which does not regulate that profession within the meaning of either Article 1(e) and the first subparagraph of Article 1(f) of this Directive or Article 1(c) and the first subparagraph of Article 1(d) of Directive 89/48/EEC, and possesses evidence of education and training which [conforms to specified conditions].'

The conditions referred to in subparagraph (b) are, in summary, that the evidence of education and training of the person concerned have been awarded by a competent authority in a Member State, that it attest to successful completion of a post-secondary course of at least one year's duration, as well as any professional training which is an integral part of that course, and that it have prepared the holder for the pursuit of his profession. [6] However, a host Member State may require an applicant to provide evidence of professional experience where the period of education and training mentioned above is at least one year less than that required in the host Member State, [7] and to complete either an adaptation period of up to three years or to take an aptitude test where the theoretical and/or practical matters covered by his education and training differ substantially from those covered by the diploma required in the host Member State. [8]

6. The Prado is an autonomous administrative organ with legal personality attached to the Spanish Ministry of Culture and under the direct authority of the responsible Minister. Article 6 of the collective agreement concluded by the Prado with employee representatives in 1988 in respect of employees subject to labour law [9] provided that staff required to have a university-level qualification are to be

6 — Article 3 of Directive 89/48/EEC contains a similar, albeit narrower, provision.

7 — Article 4(1)(a) of Directive 92/51/EEC; see also Article 4(1)(a) of Directive 89/48/EEC.

8 — Article 4(1)(b) of Directive 92/51/EEC; see also Article 4(1)(b) of Directive 89/48/EEC.

9 — *Boletin Oficial de la Comunidad de Madrid*, 1988, No 105, Supplement. The agreement has been replaced by a similar agreement concluded in 1996, *Boletin Oficial de la Comunidad de Madrid*, 1996, No 57, Supplement. A different legal regime is applicable to State officials, whose terms and conditions of employment are chiefly governed by public law.

recruited exclusively on the basis of the results of tests in a public competition. The agreement also provided that restorers must possess a title granted by one of two Spanish schools of restoration, or a foreign title recognised as equivalent by the competent body. [10] This condition appears to reflect the content of a series of ministerial decrees, the most recent being a decree of 14 March 1989 of the Minister for Education and Science, [11] Article 6 of which provided that the title of restorer of cultural goods be granted to persons who graduated from the Spanish school of conservation and restoration, which title was to be an indispensable condition for participation in competitions for posts as restorers in State centres. However, this decree was repealed by a decree of 28 October 1991 of the Minister for Education and Science, [12] and no similar condition now exists in Spanish law. Although the exercise of a profession is, in general terms, subject to regulation only by measures having the rank of laws in the Spanish hierarchy of norms, it appears from the order for reference, none the less, that collective agreements such as that in question constitute one of the formal sources of law and may prescribe a particular qualification or level of studies for access to a specific professional category or post. Such conventions are binding *erga omnes*, at least in the sense that they affect a person such as the applicant who does not have the prescribed qualification.

7. Royal Decree No 104/88 of 29 January 1988 regarding recognition of foreign titles and studies provides for an expert committee to compare in every case the studies undertaken abroad and those prescribed in the same field in Spain for the grant of the title in question, and to make appropriate recommendations to the relevant minister. Recognition may be granted subject to conditions, such as the taking of examinations in areas not covered by the foreign course.

8. Mme Fernández de Bobadilla (hereinafter 'the applicant') is a Spanish national. She received a BA degree in the History of Art from Boston College in the United States. The applicant subsequently received an award as a result of a public competition organised by the Prado which enabled her to pursue post-graduate studies in fine art restoration, specialising in works of art on paper, at Newcastle Polytechnic (now the University of Northumbria at Newcastle) in the United Kingdom, where, after two years of full-time study, both practical and theoretical, she was granted the degree of MA in Conservation of Fine Art. This is one of only two such advanced courses in the United Kingdom, whose graduates are recognised as being qualified to work in museums and galleries, including national institutions, and fill most senior posts in that field. [13] However, the United Kingdom Department of Trade and Industry has

10 — Annex I, Definition of professional categories, Group A, Subgroup II.

11 — B.O.E. of 18 March 1989, No 66.

12 — B.O.E. of 1 November 1991, No 262.

13 — Information provided by the Conservation Unit of the United Kingdom Museums and Galleries Commission to the Spanish Ministry of Education.

informed the Commission that a qualification awarded upon completion of one of these courses is not required by law in order to engage in such work either in the public service or more generally.

9. The applicant then spent a number of years working on temporary contracts both with the Prado (from 1989 to 1992, and in 1995) and with other galleries in Spain, specialising in the restoration of works of art on paper. She also worked for a time in Italy and successfully followed a number of supplementary professional courses in Spain, the United States and Japan.

10. A vacancy for a permanent post as restorer of works of art on paper was advertised by the Prado on 17 November 1992. [14] Article 4(b) of the notice of competition stated that candidates were required to comply with the conditions set out in the collective agreement then applicable. The applicant was informed by a letter of 3 February 1993 that she had not been permitted to compete for the post because she did not have the requisite title of restorer of cultural goods. She had applied to the Ministry of Education and Science on 9 October 1992 for recognition of her MA degree as equivalent to one of the prescribed Spanish titles. On 9 December 1993, the expert committee which compared her studies with those required for the grant of her title recommended that recognition be made conditional on her passing further examinations in 24 theoretical and practical fields. In response to the applicant's written submissions, the Minister confirmed the earlier recommendation by a resolution of 20 April 1995. This process of comparison of studies did not take into account either the applicant's experience subsequent to the award of her MA degree or her other studies.

11. On 27 November 1996, the applicant applied to the Juzgado de Lo Social (Social Court) No 4 de Madrid (hereinafter 'the national court') for the annulment of the provisions of the Prado collective agreement concerning the qualifications required of restorers. As regards the application of Community law, the national court took the view, in reliance on the Court's judgment in *Kraus* v *Land Baden-Württemberg*, [15] that the legal situation was not purely internal to Spain. The national court also considered that Article 48 of the Treaty could apply to a collectively negotiated agreement between parties whose relationship is subject to private law, [16] especially given the status of collective agreements in Spanish law.

12. The national court did not deem art conservation and restoration to be a regulated profession in Spain. It suggested that, if a particular qualification could be required of candidates, there was no alternative to the long, complex and rigorous

14 — It appears that this post was subject to ordinary labour law, rather than to the special regime for State officials.

15 — Case C-19/92 [1993] ECR I-1663, hereinafter '*Kraus*'.

16 — Case 36/74 *Walrave* v *Union Cycliste Internationale* [1974] ECR 1405 (hereinafter '*Walrave*'); Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others* v *Bosman and Others* [1995] ECR I-4921 (hereinafter '*Bosman*').

process of validation, because of the very different educational systems of the Member States. However, it thought that the requirement that candidates for a post have a particular qualification, or equivalent, could constitute disguised discrimination, contrary to Article 48 of the Treaty, because it forced differently qualified persons to undergo the validation process in order to compete, thus 'in practice rendering ineffective the qualification obtained in another Community country'. All candidates' qualifications, whatever their origin, could instead be assessed on their merits as part of the competition process.

13. The national court referred the following question to the Court for a preliminary ruling pursuant to Article 177 of the Treaty:

'Does the provision contained in the Collective Agreement of an Autonomous Organization of the Spanish State which requires, for pursuit of the profession of Restorer (a non-regulated profession), prior validation of the academic qualification obtained in another Community country — such validation involving a comparison of the study programmes in Spain and in the other country and the passing of theoretical and practical tests in the subjects in the Spanish programme of studies which do not appear in the programme of studies of the other Community country in question — infringe the right to freedom of movement for workers?'

III — Observations before the Court

14. Written observations have been received from the applicant, the Ministerio Fiscal (the Spanish Public Prosecutor), the Kingdom of Spain, the Republic of Finland and the Commission. Oral observations were also presented by the applicant, Spain and the Commission.

15. Finland suggested that the profession of restorer of fine art might, in fact, be deemed to be regulated within the meaning of Directives 89/48/EEC and 92/51/EEC. Account had to be taken of different national sociological realities and, in this case, of the character of collective agreements in Spanish law. Community law accepted that collective agreements could in certain circumstances be used to implement directives, [17] and the achievement of the Directives' objectives might be frustrated if they did not apply where conditions were imposed on the exercise of a profession by these means.

17 — Case 143/83 *Commission* v *Denmark* [1985] ECR 427, paragraph 8; Article 2(4) of the agreement on social policy concluded between the Member States of the European Community with the exception of the United Kingdom of Great Britain and Northern Ireland, annexed to the Protocol to the Treaty on social policy.

16. As a result, the Court posed a question to the parties, the Commission and the Member States, to be addressed at the hearing, regarding whether a profession could be deemed to be regulated where a decree required persons to hold a specified title in order to exercise that profession in the public service, or where a collective agreement entered into by an autonomous State organ required that title, or an equivalent, of persons practising that profession in their employment. Unfortunately, despite reference having been made in the report for the hearing to the Ministerial Decree of 14 March 1989, which was cited by the Ministerio Fiscal in its written observations, the Court was only informed at the hearing of its repeal by the Decree of 28 October 1991, thus rendering the first part of the question superfluous. Neither the applicant nor Spain considered that a collective agreement could regulate a profession; it simply reflected 'the conditions prevailing on the employment market in that Member State'. [18] Spain argued that a collective agreement involved the State solely in its capacity as employer, and that even regulation by law of the qualifications required for exercise of a profession in the public service would not constitute regulation for the purposes of the Directives if its exercise in other contexts was unaffected. The Commission submitted that State measures prescribing possession of particular qualifications in order to practise a profession in the public service would constitute a regulation of one of the 'modes of pursuit' of that profession, as referred to in Article 1(d) of Directive 89/48/EEC and in Article 1(f) of Directive 92/51/EEC. However, it argued that the ambit of the collective agreement in question, affecting as it did a single organ of the State, was too limited to be considered to regulate the exercise of the profession of restorer, even in respect of access to the public service.

17. Concerning the application of Article 48 of the Treaty, the applicant submitted that the requirement of validation of her United Kingdom qualification was a grave restriction of her freedom of movement, particularly because it failed to take account of her professional experience and further studies after the award of that degree, contrary to the Court's rulings in *Vlassopoulou* [19] and *Aranitis*, [20] and because she was not entitled to opt for a practical demonstration of her skills. Finland made a similar argument. The applicant also stated that paragraphs 3 and 4 of Article 48 of the Treaty did not permit Spain to maintain such an obstacle. The Commission submitted that the specification of the qualifications required of employees, including the possibility of recognising equivalent foreign qualifications, was an appropriate subject of autonomous negotiations among the social partners, and did not, in itself, appear to have a discriminatory effect. However, it took the view that the validation process was ill-adapted to the assessment of qualifications and experience for professional purposes, as required by the *Vlassopoulou* and *Aranitis* judgments, mentioned above.

18 — Case C-164/94 *Aranitis* v *Land Berlin* [1996] ECR I-135, paragraph 23 (hereinafter '*Aranitis*').

19 — Case C-340/89 [1991] ECR I-2357, paragraphs 19 and 20.

20 — Loc. cit., paragraphs 31 and 32.

18. The Ministerio Fiscal and Spain argued that the qualification requirement for the post of restorer was indistinctly applicable, and that permitting the holders of foreign qualifications which did not correspond to those granted in Spain to compete for such posts would constitute reverse discrimination against persons who had pursued comparable studies in Spain. However, the agent for Spain was unable to name any such comparable Spanish courses at the hearing. Spain argued that it was entitled to impose such conditions in the interests of preserving its national heritage (in the case of the Prado, a reservoir of art of world renown), a general interest already recognised by the Court in the '*Tour guides*' cases. [21] All of the conditions set out in *Unectef* v *Heylens* [22] for assessment of the equivalence of qualifications were respected by the commission on validation. Furthermore, comparison of two academic qualifications should not be confused with the logically subsequent task of assessing a person's professional capacity; only at the latter stage should periods of practical experience be taken into account. This was not contradicted by the judgment in *Vlassopoulou*, because the Court stated that Member States could require that an individual prove that he had aptitudes not attested to by his academic qualification, [23] as the applicant in this case was required to do. In any event, an employer was entitled to impose whatever conditions he thought necessary for the performance of tasks in his employment, while unions were entitled to press for the fixing by collective agreement of objective employment criteria.

IV — Analysis

19. I should state at the outset that I agree with the national court's view that the present case falls within the field of application of Community law, because it involves a national of a Member State who, owing to the fact that she has lawfully resided on the territory of another Member State and has there acquired a vocational qualification, is, with regard to her State of origin, in a situation which may be assimilated to that of any other persons enjoying the rights and liberties guaranteed by the Treaty. [24]

20. Although the national court has acted on the basis that the profession of fine art restorer is not a regulated profession in Spain, that assumption has been challenged by Finland. The Court pursued this matter by posing a question, in advance of the hearing, to the parties, the Commission and the Member States. This approach was influenced by the mistaken assumption that Spanish law continued to reserve the title of restorer of cultural goods and access to State posts to graduates of the Spanish courses mentioned above. Furthermore, it

21 — Case C-154/89 *Commission* v *France* [1991] ECR I-659, paragraph 17; Case C-198/89 *Commission* v *Greece* [1991] ECR I-727, paragraph 21.

22 — Case 222/86 [1987] ECR 4097, paragraph 13, hereinafter '*Heylens*'.

23 — Loc. cit., paragraph 19.

24 — *Kraus*, loc. cit., paragraph 15; see also paragraphs 16 to 18.

is clear that, were the profession deemed to be regulated within the meaning of Directives 89/48/EEC and 92/51/EEC, the detailed provisions of those Directives could, in certain circumstances, provide the applicant with a more satisfactory remedy than that likely to result from the direct application of Article 48 of the Treaty. It is therefore appropriate, in order to furnish the national court with a useful answer to its question which will assist it in deciding the case before it, to examine first the validity of its assumption. This does not entail any recasting of the national court's question (other than ignoring the reference to 'a non-regulated profession'), as the provisions of those Directives are part of the corpus of Community law guaranteeing the right to freedom of movement of workers. I shall then examine, in addition, the distinct issues raised by the application of Article 48 of the Treaty to the facts of the present case.

The application of Directives 89/48/EEC and 92/51/EEC

21. Directive 92/51/EEC is the more immediately relevant of the two Directives. Directive 89/48/EEC is confined to diplomas granted upon completion of courses of at least three years' duration. Although Directive 92/51/EEC appears to be principally concerned with post-secondary courses of shorter duration leading to the grant of vocational qualifications below the level of a third-level degree, its provisions are also applicable, in my view, to post-graduate courses, which rarely last more than three years. The Court has already remarked on the importance of such courses for career development and on the consequent importance of their recognition for the freedom of movement of workers. [25] None the less, it is clear that the two Directives perform complementary roles in accordance with a common scheme, and that they should be read together. [26]

(i) The status of collective agreements

22. I shall first address the question whether a provision of a collective agreement between an organ of the public administration and employee representatives can constitute a 'law, regulation or administrative provision' which, directly or indirectly, subjects one of the modes of pursuit of a professional activity to the possession of specified qualifications. In my opinion, it can, depending on the legal and factual context, for reasons close to those put forward by Finland.

25 — *Kraus*, loc. cit., paragraphs 17 to 23.

26 — See the fourth and fifth recitals in the preamble to Directive 92/51/EEC.

23. As a preliminary matter, it is necessary to examine the status of collective agreements in the legal system of the particular Member State. Many Member States' legal systems attribute to the social partners the function of negotiating collective agreements regarding working conditions, including conditions of access to employment, which are not only binding on the parties and their members but are also binding, or produce effects, on third parties. For example, an employer may be bound, subject to formalities such as registration, upon conclusion of a collective agreement by a body representative of his trade or industry, to extend its benefits and conditions even to persons who are not members of the participant trade unions. In other cases, particularly as regards employment as a State official, such effects are dependent on ratification of the agreement by a competent public body.

24. Where a collective agreement is attended by such consequences, whether by operation of law or through its approval by a public body, it should, in my view, be deemed to be a law, regulation or administrative provision capable of regulating a professional activity. This reasoning applies irrespective of the identity of the parties to the collective agreement, that is, the participating employers or employer-representative bodies may be either public or private. In either case, what is important is that an agreement between actors in the labour market is given more general application, thereby affecting third parties, including workers from other Member States, which effect is supported by public authority. It thus constitutes, for the purposes of the Directives, a form of attribution of regulatory power by the State to economic actors who are invested with its authority. The fact that the State may not control the exact content of such agreements, in the absence of an overriding legislative measure, does not reduce their public and normative character. [27] As Finland has pointed out, Community law already recognises the potential normative character of collective agreements in certain circumstances. [28]

25. The order for reference states that collective agreements, including provisions on access to particular professional categories or posts, are one of the formal

27 — It is quite another question whether the Directives would be directly effective against private employers, if the national implementing measures could not be interpreted to extend to such situations. As Advocate General van Gerven observed in his Opinion in Case C-188/89 *Foster and Others* [1990] ECR I-3313, paragraphs 11 and 16, the definition of the State or of public authority in Community law varies according to the underlying purpose or reasoning of particular rules.

28 — See paragraph 14 above. The Community legislator also implicitly recognised the potential normative character of collective agreements in Article 7(4) of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement of workers within the Community, OJ, English Special Edition, First Series 1968 (II), p. 475, most recently considered by the Court in Case C-15/96 *Schöning-Kougebetopoulou v Freie und Hansestadt Hamburg* [1998] ECR I-47, paragraph 12.

sources of law in Spain and have the effects just described, at least as regards persons employed under ordinary labour law. By virtue of the legal force given to the collective agreement, it would appear that the Prado was not, in fact, free to admit persons to the competition for the post of fine art restorer who did not possess the qualifications specified. Thus, the agreement affected persons not party to it either directly or through membership of a representative body. This distinguishes the situation in the case of an enforceable collective agreement producing effects on third parties very markedly from that in *Aranitis*.[29] In that case, there was no legal regulation of the use for professional purposes of the academic title in question. In practice, only persons holding that title sought such professional employment and, thus, nearly the entire body of practitioners of the profession possessed the title. The applicant had experienced difficulties with his qualification awarded in another Member State and sought to have it declared equivalent to the host-State title, in reliance on Directive 89/48/EEC. The Court stated that '[w]hether or not a profession is regulated depends on the *legal situation* in the host Member State and not on the conditions prevailing on the employment market in that Member State'.[30]

26. An approach to identifying regulated professional activity which is adapted to the individual features of the legal situation in a host Member State is in keeping with the admonition in the seventh recital in the preamble to Directive 89/48/EEC that the term 'should be defined so as to take account of differing national sociological situations'. It should also be noted that the Directives expressly refer to another form of attributed public authority. Where a professional activity is pursued by members of a private professional association or organisation which confers educational awards and titles and enforces rules of professional conduct, and which is recognised in a special form by a Member State in order to promote and maintain high professional standards, the professional activity in question is deemed to be regulated.[31] As the recital states, such associations and organisations 'cannot invoke their private status to avoid application of the system provided for by this Directive'. Because a collective agreement can, in the circumstances outlined above and by virtue of the attribution of public normative authority, have an effect on access to a profession equivalent to that of regulation of a professional activity by a publicly recognised professional association or organisation, I would reject Spain's argument that a collective agreement is invariably purely private in character. I would add, finally, that a flexible approach is envisaged by the language of the Directive where it emphasises even *indirect* effects of 'laws, regulations and administrative pro-

29 — Loc. cit.

30 — Ibid., paragraph 23, emphasis added.

31 — Second subparagraph of Article 1(d) of Directive 89/48/EEC; second subparagraph of Article 1(f) of Directive 92/51/EEC.

visions' in requiring a prescribed educational qualification.

(ii) The scope of regulation

27. It is also necessary, however, in the light of the circumstances of the present case and of the question posed by the Court before the hearing, to assess what kinds of educational requirements can constitute regulation of a professional activity. It is my view that, if direct or indirect (including delegated) State provisions of a legal, regulatory or administrative character require persons to possess evidence of education and training or an attestation of competence in order to take up or pursue a professional activity only in certain limited contexts, rather than for all purposes, the professional activity in question may, none the less, constitute, to that extent, a regulated professional activity for the purposes of Article 1(f) of Directive 92/51/EEC. I agree with the Commission that this was envisaged by the Community legislator through its reference to a professional activity 'or one of its modes of pursuit'. [32] The specific possibility that the State might subject the exercise of a professional activity in the public service, or with the assistance of public funds, to educational conditions which are not generally applicable was foreseen in Article 1(f), which deems health professions to be regulated in so far as a qualification is required for reimbursement under social security rules.

28. None the less, as has also been suggested by the Commission, State regulation of a professional activity must apply at some minimum level of generality. This arises from the scheme of the Directives themselves. The definition of a regulated professional activity, and, consequently, of a regulated profession, is not only essential for the purposes of identifying the circumstances in which a host Member State is obliged to comply with the Directives, it is also central, by virtue of Article 3 of both Directives, to the determination of the educational qualifications which the host State is obliged to recognise. The applicant has not, however, established that she meets the requirements of either Article 3(a) or (b) of Directive 92/51/EEC.

29. Article 3(a) does not refer expressly to a regulated profession or professional activity, but it speaks, in the case of Directive 92/51/EEC, of a 'diploma... required in another Member State for the taking up or pursuit of the profession in question in its territory', which implicitly invokes the test in Article 1(f) of that Directive.

32 — The same analysis applies, subject to appropriate adjustment with regard to the educational qualifications required, to Article 1(d) of Directive 89/48/EEC.

30. It would be possible to argue, as regards the host State, that a professional activity is regulated by the State within the meaning of Article 1(f) of Directive 92/51/EEC where a Community worker who applies for a post encounters a legislative, regulatory or administrative provision requiring a particular qualification, even if that requirement only applies to the post or the employer in question rather than being of more general application.

31. However, such an approach does not enable it to be determined whether a professional activity is regulated in the Member State where a qualification was awarded, for the purposes of Article 3(a) of Directive 92/51/EEC, or whether it is not regulated in the Member State where an applicant has acquired professional experience, for the purposes of Article 3(b) of that Directive. In such circumstances, it would be inconsistent with the Directives' underlying motivation of mutual recognition of Member States' requirements for the exercise of professions if a narrowly applicable regulation, confined, perhaps, to a single aspect of professional activity or to a single institution, in the Member State where the Community worker's qualifications were obtained, were deemed to give rise to an obligation on the part of the host State to permit him to enter any branch of the corresponding profession, no matter how demanding its own regulations might be.

32. How is one to reconcile, on the one hand, the evident wish of the Community legislator, expressed in Article 1(f) of Directive 92/51/EEC, to provide for situations where the exercise of a professional activity is regulated only in part (regarding one of its modes of pursuit) in the host State with the need, for the purposes of Article 3, to identify whether the exercise of a professional activity is, in general and abstract terms rather than in a particular concrete case, regulated in the Member State where a Community worker has previously studied or worked? The response to this question must take into account the differing sociological realities in the Member States and, in particular, their different mechanisms of distributing legislative, regulatory and administrative authority between various levels of government.[33] In my view, where an organ of government, whether national or regional, specifies the qualifications required for such aspects of the exercise of a professional activity as fall within its competence, either for the purposes of public sector employment or for the purposes of general economic life, the profession in question should be deemed to be regulated for the purposes of the Directives. If such general regulation, at any level of government, of the qualifications for pursuit of a professional activity in either the public or private sectors (whether, in the latter case, as an employed person or in a self-employed capacity) were to escape the reach of the Directives, the achievement of their objectives would very probably be fatally frustrated. Similarly, for reasons outlined above, the imposition of requirements of similar scope on the basis of legislative, regulatory or administrative

33 — See, for example, the discussion of the powers of the autonomous communities in Spain to regulate the exercise of the profession of tour guide in Case C-375/92 *Commission* v *Spain* [1994] ECR I-923.

authority attributed by such an organ of government to private bodies should be held to constitute regulation within the meaning of the Directives.

33. The educational requirement at issue in the present case is, however, as far as the Court has been made aware, confined to a single autonomous State institute. For that reason, it does not appear to me to have a sufficiently general scope of application to constitute, on its own, regulation of a professional activity in Spain. It seems to me that the situation would be different if the national court found a similar legacy of the now-repealed ministerial decrees in the provisions of collective agreements entered into individually by other public museums and galleries, especially if this were found to be the consequence of an administrative policy adopted by the Ministry of Education and Culture or by some other competent organ of government, or if these agreements were held to have been ratified by such a governmental body. However, the Court has not been informed of any such phenomenon.

34. By reason of the limited scope of application of the collective agreement described in the order for reference, and in the absence of evidence of legislative, regulatory or administrative provisions (including, possibly, a collective agreement or a series of such agreements) of more general application, I conclude that the profession of fine art restorer is not a regulated profession in Spain for the purposes of Directives 89/48/EEC and 92/51/EEC. It is necessary, therefore, to examine whether the applicant can derive a remedy from the other provisions of Community law regarding the freedom of movement of workers and, in particular, from Article 48 of the Treaty.

Article 48 of the Treaty

35. Both before and since the coming into force of the Directives, the Court has consistently stated that Member States are also subject to certain obligations, by virtue of Article 48 of the Treaty, in respect of the recognition of diplomas awarded elsewhere in the Community. It has always acknowledged that '[i]n the absence of harmonisation of the conditions of access to a particular occupation, the Member States are entitled to lay down the knowledge and qualifications needed in order to pursue it and to require the production of a diploma certifying that the holder has the relevant knowledge and qualifications'. [34] However, it has also observed that the lawful imposition of such requirements, even if applied without any discrimination on grounds of nationality, constitutes a restriction on the effective exercise of the freedom of establishment or of the freedom of movement of workers guaranteed by the Treaty, and that

34 — *Heylens*, loc. cit, paragraph 10; see also *Vlassopoulou*, loc. cit., paragraph 9; Case C-104/91 *Borrell and Others* [1992] ECR I-3003, paragraph 7 (hereinafter '*Borrell*').

the Member States are bound, by virtue of Article 5 of the Treaty, to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty.[35] Thus, such national rules, even when they pursue a legitimate objective compatible with the Treaty and justified by pressing reasons of public interest, must be appropriate for ensuring the attainment of the objective they pursue and must not go beyond what is necessary for that purpose.[36] In determining the level of education and expertise appropriate, the Spanish authorities are entitled to be influenced by the richness of the artistic heritage of which the Prado is custodian.[37] On the other hand, a disproportionate obstacle is posed to the exercise of the right to freedom of movement of workers if national rules on access to a profession fail to take due account of the knowledge and qualifications already acquired by the person concerned in another Member State.[38]

36. The Court stated, therefore, in *Vlassopoulou* that a Member State which receives a request to admit a person to a profession subject to such rules 'must take into consideration the diplomas, certificates and other evidence of qualifications which the person concerned has acquired in order to exercise the same profession in another Member State by making a comparison between the specialised knowledge and abilities certified by those diplomas and the knowledge and qualifications required by the national rules'.[39] The Court continued:

'That examination procedure must enable the authorities of the host Member State to assure themselves, on an objective basis, that the foreign diploma certifies that its holder has knowledge and qualifications which are, if not identical, at least equivalent to those certified by the national diploma. That assessment of the equivalence of the foreign diploma must be carried out exclusively in the light of the level of knowledge and qualifications which its holder can be assumed to possess in the light of that diploma, having regard to the nature and duration of the studies and practical training to which the diploma relates.[40]

...

If that comparative examination of diplomas results in the finding that the knowledge and qualifications certified by the foreign diploma correspond to those

35 — Case 11/77 *Patrick* v *Ministre des Affaires Culturelles* [1977] ECR 1199, paragraph 10; Case 71/76 *Thieffry* v *Conseil de l'Ordre des Avocats à la Cour de Paris* [1977] ECR 765 (hereinafter '*Thieffry*'), paragraph 16; *Heylens*, loc. cit., paragraphs 11 and 12; *Vlassopoulou*, loc. cit., paragraph 15; *Borrell*, loc. cit., paragraph 10; see also *Kraus*, loc. cit., paragraphs 28 and 31.

36 — *Thieffry*, loc. cit., paragraphs 12 and 15; Case C-106/91 *Ramrath* v *Ministre de la Justice* [1992] ECR I-3351, paragraphs 29 and 30; *Kraus*, loc. cit., paragraph 32.

37 — On the general interest in the protection of national treasures possessing artistic, historic or archaeological value, see Article 36 of the Treaty and Case C-180/89 *Commission* v *Italy* [1991] ECR I-709, paragraph 20.

38 — *Vlassopoulou*, loc. cit., paragraph 15; *Borrell*, loc. cit., paragraph 10.

39 — Loc. cit., paragraph 16; see also *Borrell*, loc. cit., paragraph 11; *Commission* v *Spain*, loc. cit., paragraph 12; *Aranitis*, loc. cit., paragraph 31. The Court referred in *Heylens*, loc. cit., paragraph 11, to such an obligation, where the Member State's laws and regulations provided for the possibility of recognition of equivalent foreign diplomas.

40 — See also *Heylens*, loc. cit., paragraph 13, which was cited by the Court.

required by the national provisions, the Member State must recognise that diploma as fulfilling the requirements laid down by its national provisions. If, on the other hand, the comparison reveals that the knowledge and qualifications certified by the foreign diploma and those required by the national provisions correspond only partially, the host Member State is entitled to require the person concerned to show that he has required the knowledge and qualifications which are lacking. In this regard, the competent national authorities must assess whether the knowledge acquired in the host Member State, either during a course of study or by way of practical experience, is sufficient in order to prove possession of the knowledge which is lacking.' [41]

37. The fact that I have concluded above that the profession of fine art restorer is not regulated in Spain within the meaning of the Directives does not affect the above principles. My earlier conclusion is drawn principally from the scheme and economy of the Directives. There is no corresponding reason to restrict the application of the general principles on recognition derived from Article 48 of the Treaty to generally applicable State measures setting the conditions of access to a profession. The Court's case-law applies equally well where Member States or their subsidiary public bodies restrict professional access in narrowly defined circumstances, in the case of a single State institution. The same is true, of course, of acts by private professional bodies which have similar effects, [42] and thus, by logical extension, of the imposition of restrictions through the medium of a collective agreement between a public body and the representatives of its employees. As the Court stated in *Walrave*, 'Article 48... extends... to *agreements* and rules which do not emanate from public authorities'. [43] In any event, in the present case, the reference in the notice of competition to the conditions set out in the collective agreement permits the restriction to be attributed directly to the Prado.

38. Moreover, the requirements of this case-law have also been held to apply to situations where a particular qualification is not, as such, required in order to gain access to a profession. In *Aranitis*, the Court was concerned with the classification of a person with a Greek diploma in geology by the employment service of another Member State. In that case, the Arbeitsamt (Labour Office) of Berlin had initially classified the applicant as an 'unskilled assistant'. He was subsequently authorised to use his Greek title, which was translated into German in the certificate of authorisation. Having decided that the profession of geologist was not a regulated profession in Germany for the purposes of the Directives, the Court referred [44] to the above-quoted paragraph 16 of its judgment in *Vlassopoulou* and continued:

'The same holds true for professional activities which are not subject by virtue of legal provision to the possession of a

41 — Loc. cit., paragraphs 17, 19 and 20; see also *Borrell*, loc. cit., paragraphs 12 and 14; *Commission* v *Spain*, loc. cit., paragraph 13.

42 — *Walrave*, loc. cit., paragraphs 17 to 19 and 21; Case 13/76 *Donà* v *Mantero* [1976] ECR 1333, paragraph 17; *Bosman*, loc. cit., paragraphs 82 to 84.

43 — Loc. cit., paragraph 21, emphasis added; see also *Bosman*, loc. cit., paragraph 84; see further Article 7(4) of Regulation No 1612/68, cited above.

44 — Loc. cit., paragraph 31.

diploma, so far as concerns the conditions for taking them up or pursuing them. In such circumstances, the competent authorities of the host Member State responsible for classifying the nationals of other Member States, which will affect their chances of finding work on the territory of the host Member State, are required when carrying out that classification to take into consideration the diplomas, knowledge, qualifications and other evidence of qualifications that the person concerned has obtained in order to pursue a profession in the Member State of origin or from which he comes.'[45]

39. This ruling regarding classification of workers by a State employment service, which affects their chances of employment in that State, must apply *a fortiori* to the case of an official national validation procedure for foreign qualifications. If there were any doubt about the possibility of the results of such a process affecting a person's chances of employment, it is resolved by the fact that the collective agreement and notice of competition at issue in the present case expressly require fine art restorers and candidates for such posts at the Prado to possess a specified Spanish title or a foreign qualification which has been deemed to be equivalent by virtue of this official procedure. One can speak, thus, of a twin obligation: a validation procedure must be established in Spain which respects the requirements of Article 48 of the Treaty; and the Prado, when setting its conditions of employment and assessing the eligibility of candidates, must set those conditions and conduct those assessments in compliance with the requirements of Article 48. Thus, if the official validation procedure does not satisfy those requirements, it is not lawful for the Prado to exclude, without further examination of their qualifications and experience, candidates who have not succeeded in gaining recognition, through that procedure, of the equivalence of their qualifications to those awarded in Spain.

40. In order to identify the requirements of Article 48 of the Treaty for the purposes of the present case, it is particularly important to note the reference in paragraph 20 of the judgment in *Vlassopoulou* to the obligation of Member States, where there is only partial correspondence between a worker's qualification and that used as a bench-mark in the host State, to assess whether knowledge acquired by the person concerned either during a subsequent course of study or by way of practical experience is sufficient to establish equivalence. The same requirement is reflected, in my view, by the reference in the above-quoted passage from *Aranitis* to 'the diplomas, *knowledge*, qualifications and *other evidence of qualifications* that the person concerned has obtained';[46] this displays the same concern with establishing the *actual* knowledge and aptitude of the person at the moment of assessment, as distinct from the purely academic content of the original diploma.

41. The purpose of such a validation process is to assess the specialised knowledge and aptitude of a Community worker who possesses a qualification from one of the Member States, relative to the knowledge and aptitude evidenced by the qualification normally granted in the host Member State.

45 — Ibid., paragraph 32.

46 — Emphasis added.

For that reason, even periods of study or of practical experience outside the Community should, in my view, be taken into account where they complement the Community worker's basic qualification acquired in a Member State other than the host State; otherwise, a false picture may emerge of the Community worker's actual knowledge and aptitudes.

42. Spain objected that a process of validation of academic degrees could not take into account practical experience or subsequent studies. It is true that the Court has outlined a two-stage process of assessment. Since *Heylens*, it has stated that the assessment of the equivalence of the foreign diploma must be carried out exclusively in the light of the knowledge and qualifications of which it is evidence, having regard to the nature and duration of the studies and practical training to which the diploma relates. [47] However, in *Vlassopoulou* and subsequent cases, the Court has insisted on a second stage of assessment, of evidence that indicates that the person concerned possesses knowledge and aptitudes not provided for in his original studies. This stage cannot be avoided without posing a disproportionate obstacle to the exercise of the right of freedom of movement. The manner in which the assessment process is organised is not important, provided the ultimate assessment, which affects the Community worker's chances of employment, reflects the real situation. In the circumstances of the present case, mere comparison of the academic composition of the applicant's United Kingdom degree and of the corresponding Spanish curriculum does not reflect her actual position, and does not suffice in order to determine her eligibility to compete for a post in the public service defined by reference to the Spanish title or equivalent foreign qualifications.

43. In order to complete this account of the requirements of Article 48 of the Treaty, I wish to make reference to the requirements, first mentioned in *Heylens*, that reasons be given in respect of all such assessment decisions, and that a judicial remedy be available against them. [48] In addition, as the Court ruled in *Kraus*, the procedure for authorisation to use a foreign academic title 'must be easy of access to interested parties, and should not, in particular, be dependent on the payment of excessive administration fees'. [49] As a corollary of the requirement of ease of access, and in order that Community workers' right to avail of employment opportunities in other Member States not be frustrated, the assessment procedure should result in a decision within a reasonable time. What is reasonable in any given case will depend, of course, on a number of factors, including the degree of cooperation afforded to the validation body by the interested person.

47 — *Heylens*, loc. cit., paragraph 13; *Vlassopoulou*, loc. cit., paragraph 17; *Borrell*, loc. cit., paragraph 12; *Commission* v *Spain*, loc. cit., paragraph 13.

48 — Loc. cit., paragraph 17; *Vlassopoulou*, loc. cit., paragraph 22; *Borrell*, loc. cit., paragraph 15.

49 — Loc. cit., paragraph 39.

V — Conclusion

44. In the light of the foregoing analysis, I recommend that the Court respond as follows to the question referred by the Juzgado de Lo Social No 4 de Madrid:

Where a provision contained in a collective agreement of a public body, or in a notice of competition published by such a body, requires, for the pursuit of a profession in its employment, that applicants for such employment should possess either an educational qualification granted in that Member State or a qualification from another Member State recognised as equivalent by the competent authorities in that Member State, the recognition procedure must satisfy the requirements of Article 48 of the Treaty. In particular, where there is only a partial correspondence between the knowledge and aptitude certified by the foreign qualification and those certified by the qualification awarded in the host Member State, the competent authorities must assess whether knowledge and aptitude acquired by other means, either during a separate course of study or by way of practical experience, are sufficient in order to prove possession of the necessary knowledge and aptitude to which the foreign qualification does not attest. If the official validation procedure does not comply with this requirement, the employing public body must itself assess the equivalence of the qualifications awarded in another Member State to Community nationals who apply for employment in the light of these criteria.