Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 10 April 2014 [1]

Joined Cases C-58/13 and C-59/13

Angelo Alberto Torresi
v
Consiglio dell'Ordine degli Avvocati di Macerata
Pierfrancesco Torresi
v
Consiglio dell'Ordine degli Avvocati di Macerata

(Requests for a preliminary ruling from the Consiglio Nazionale Forense (Italy))

(Notion of 'court or tribunal of a Member State' — Consiglio Nazionale Forense — Independence — Impartiality — Article 3 of Directive 98/5/EC — Validity — Practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained — Abuse of rights — Respect for national identities)

1. Mr Angelo Alberto Torresi and Mr Pierfrancesco Torresi ('Messrs Torresi') are Italian nationals who, after acquiring the right to use the professional title 'abogado' in Spain, applied to the competent Bar Council in Italy for registration in order to be able to practise the profession of lawyer in Italy. Their applications were based on the Italian laws implementing Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained. [2]

2. Since the local Bar Council did not give a decision on those applications within the prescribed period, Messrs Torresi both lodged an appeal before the Consiglio Nazionale Forense (CNF) (National Bar Council). In the course of those proceedings, the CNF decided to refer to the Court of Justice, under the preliminary ruling procedure, two questions concerning the interpretation and validity of Directive 98/5 in light of the principles prohibiting 'abuse of rights' and calling for 'respect for national identities'.

3. In my view, the answer to those questions is quite clear. However, before turning to the substantive issues raised by the present case, there is an issue of a procedural nature which must be addressed first: is the CNF, in the main proceedings, competent to refer questions to the Court under the preliminary ruling procedure?

4. First and foremost, this issue requires consideration of the scope and function of the criteria of independence and impartiality in relation to the notion of 'court or tribunal of a Member State' for the purposes of Article 267 TFEU.

1 — Original language: English.
2 — OJ 1998 L 77, p. 36.

I – **Legal framework**

A – *EU law*

5. The first paragraph of Article 2 of Directive 98/5 provides:

‘Any lawyer shall be entitled to pursue on a permanent basis, in any other Member State under his home-country professional title, the activities specified in Article 5.’

6. Article 3 of Directive 98/5, entitled ‘Registration with the competent authority’, states:

‘1. A lawyer who wishes to practise in a Member State other than that in which he obtained his professional qualification shall register with the competent authority in that State.

2. The competent authority in the host Member State shall register the lawyer upon presentation of a certificate attesting to his registration with the competent authority in the home Member State. …’

7. Article 9 of Directive 98/5, entitled ‘Statement of reasons and remedies’, provides:

‘Decisions not to effect the registration referred to in Article 3 or to cancel such registration and decisions imposing disciplinary measures shall state the reasons on which they are based.

A remedy shall be available against such decisions before a court or tribunal in accordance with the provisions of domestic law.’

B – *Italian law*

8. Italy implemented Directive 98/5 by means of Legislative Decree No 96 of 2 February 2001 (‘Legislative Decree No 96/2001’). [3]

9. Pursuant to Article 6(1) to (3) of Legislative Decree No 96/2001, in order to practise the profession of lawyer in Italy under a title obtained in the country of origin, nationals of the Member States must, in the district where they have their permanent residence or professional establishment, apply for entry in the special section of the Bar Register for lawyers who have qualified outside Italy. The application must be accompanied by documents proving that the applicant is an EU citizen, the applicant’s place of residence or professional establishment, and registration with the professional organisation of the home Member State.

10. Under Article 6(6) of Legislative Decree No 96/2001, within 30 days of submission or completion of the application, the local Bar Council, ‘having verified that the necessary conditions have been fulfilled and that there are no reasons to prevent it, shall order registration in the Special Section and shall notify the corresponding authority in the home Member State’. In turn, Article 6(8) of the same legal instrument provides that, if the local Bar Council fails to act within the prescribed period, the applicant may, within 10 days of the expiry of that period, bring an application before the CNF, which is to decide ‘on the substance of the registration’.

3 — Attuazione della direttiva 98/5/CE volta a facilitare l’esercizio permanente della professione di avvocato in uno Stato membro diverso da quello in cui è stata acquisita la qualifica professionale (GURI No 79 of 4 April 2001, Ordinary Supplement).

11. At the material time, the composition, role and activities of the CNF were primarily governed by Royal Decree-Law No 1578 of 27 November 1933 ('Decree-Law No 1578/1933'),[4] Royal Decree No 37 of 22 January 1934 ('Decree No 37/1934'),[5] and other secondary legislation.[6]

12. The CNF has an office in Rome, at the Ministry of Justice, and is composed of 26 members (corresponding to the number of districts for which there is a Court of Appeal), elected by their peers from among the lawyers with a right of audience in the higher Italian courts.

13. Under Articles 31 and 54 of Decree-Law No 1578/1933, the CNF hears legal actions against decisions of local Bar Councils relating to entries in the Bar Registers and disciplinary matters. By virtue of Article 56 of that decree, an appeal against decisions of the CNF can be brought before the Corte di Cassazione, Sezioni Unite (Court of Cassation, Combined Chambers) on grounds of 'lack of competence, misuse of powers and error in law'.

II – **Facts, procedure and the questions referred**

14. Messrs Torresi each obtained a university degree in law (Licenciado en Derecho) in Spain and, on 1 December 2011, were enrolled as 'abogado ejerciente' by the Ilustre Colegio de Abogados de Santa Cruz de Tenerife (Bar of Santa Cruz de Tenerife).

15. On 17 March 2012, Messrs Torresi each lodged an application with the Ordine degli avvocati di Macerata (Macerata Bar) for enrolment in the special section of the Bar Register for lawyers qualified abroad. The Bar Council of Macerata did not, however, take a decision on the applications within the period of 30 days prescribed by Italian law.[7]

16. On 19 April 2012, therefore, Messrs Torresi each lodged an application with the CNF for a decision on the substance of their registration.[8]

17. Entertaining doubts as to the interpretation and validity of Article 3 of Directive 98/5, the CNF decided to stay the proceedings and to refer the following questions for a preliminary ruling:

'(1) In light of the general principle which prohibits any abuse of rights and Article 4(2) TEU, relating to respect for national identities, is Article 3 of [Directive 98/5] to be interpreted as obliging national administrative authorities to enter in the register of lawyers qualified abroad Italian nationals who have conducted themselves in a manner which abuses EU law, and as precluding a national practice which allows such authorities to reject applications for entry in the register of lawyers qualified abroad where there are objective circumstances to indicate that there has been an abuse of EU law, without prejudice either to respect of the principles of proportionality and non-discrimination or to the right of the person concerned to institute legal proceedings in order to argue a possible infringement of the right of establishment and, consequently, the possibility of judicial review of the administrative action in question?

4 — Ordinamento delle professioni di avvocato e procuratore (GURI No 281 of 5 December 1933).

5 — Norme integrative e di attuazione del R.D.L. (27 November 1933, No 1578), sull'ordinamento della professione di avvocato (GURI No 24 of 30 January 1934).

6 — Legislative Decree No 382 of 23 November 1944, Norme sui Consigli degli Ordini e Collegi e sulle Commissioni centrali professionali (GURI No 98 of 23 December 1944) ('Legislative Decree No 382/1944'), and Legislative Decree No 597 of 28 May 1947, Norme sui procedimenti dinanzi ai Consigli degli ordini forensi ed al Consiglio nazionale forense (GURI No 155 of 10 July 1947) ('Legislative Decree No 597/1947'). The matter is now governed by Law No 247 of 31 December 2012, Nuova disciplina dell'ordinamento della professione forense (GURI No 15 of 18 January 2013), which entered into force on 2 February 2013 ('Law No 247/2012').

7 — Article 6(6) of Legislative Decree No 96/2001.

8 — Article 6(8) of Legislative Decree No 96/2001.

(2) If Question 1 should be answered in the [affirmative], is Article 3 of [Directive 98/5], thus interpreted, to be regarded as invalid in light of Article 4(2) TEU, in that it enables circumvention of the rules of a Member State which make access to the legal profession conditional on passing a State examination, given that the Constitution of that Member State makes provision for such an examination and that the examination forms part of the fundamental principles safeguarding consumers of legal services and the proper administration of justice?'

18. Written observations have been submitted by Messrs Torresi, by the Italian, Spanish, Austrian, Polish and Romanian Governments, by the Parliament, the Council and the Commission. Messrs Torresi, the Italian and Spanish Governments, as well as the Parliament, the Council and the Commission also presented oral argument at the hearing on 11 February 2014.

III – **Analysis**

A – *Jurisdiction*

19. According to settled case-law, in order to determine whether a body making a reference is a 'court or tribunal' for the purposes of Article 267 TFEU, which is a question governed by EU law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent. [9]

20. Importantly, the Court has made clear that a national body may be classified as a court or tribunal under Article 267 TFEU whenever it is performing judicial functions, even if it is not recognised as such when exercising functions of an administrative nature. Thus, in the case of a body entrusted by law with different categories of function — like, as we will see, the CNF — the Court has pointed out that it is necessary to determine in what capacity that body is acting within the particular legal context in which it seeks a ruling under Article 267 TFEU. [10] In that regard, the Court has accorded particular importance to whether there is 'a dispute' pending before that body and whether it is called upon to give a ruling in proceedings intended to lead to a decision of a judicial nature. [11]

21. In the present case, Messrs Torresi put forward two grounds for their contention that the CNF is not a 'court or tribunal of a Member State' for the purposes of Article 267 TFEU. First, the CNF does not, in their view, fulfil the criterion of independence, since its members cannot be considered to be impartial. Second, they argue that the functions exercised by the CNF are merely administrative, in so far as the decision taken at the end of the procedure is of an administrative nature.

22. In the following, I will illustrate the reasons why I am of the view that, in the main proceedings, the CNF is competent to refer questions to the Court under the preliminary ruling procedure. To that end, I will first examine the two criteria the fulfilment of which is contested by Messrs Torresi. After that, I will briefly analyse whether the other criteria set out in the Court's case-law are met.

9 — See, inter alia, Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 23; Case C-53/03 *Syfait and Others* [2005] ECR I-4609, paragraph 29; and Case C-196/09 *Miles and Others* [2011] ECR I-5105, paragraph 37.

10 — See, for example, order of 26 November 1999 in Case C-192/98 *ANAS* [1999] ECR I-8583, paragraphs 22 and 23, and Case C-394/11 *Belov* [2013] ECR, paragraphs 40 and 41.

11 — See, especially, Case C-111/94 *Job Centre* [1995] ECR I-3361, paragraphs 9 to 11, and Case C-178/99 *Salzmann* [2001] ECR I-4421, paragraphs 14 and 15.

1. Independence and impartiality

23. In the first place, Messrs Torresi expressed doubts as to the impartiality of the CNF. This body is, indeed, composed exclusively of qualified lawyers, who might thus have a common interest in excluding from the market potential competitors who have obtained their qualifications abroad. In that respect, Messrs Torresi refer in particular to the Court's ruling in *Wilson*.[12]

24. At the outset, it should be pointed out that, in *Gebhard*,[13] the Court has already accepted a request under the Article 267 TFEU procedure for a ruling on questions referred by the CNF on the interpretation of Directive 77/249/EEC to facilitate the effective exercise by lawyers of freedom to provide services.[14] Despite the fact that the decision in *Gebhard* does not explicitly address the Court's ability to respond to the reference, it cannot be inferred that the Court overlooked that aspect of the dispute. Indeed, in his Opinion, Advocate General Léger did deal with that aspect and found that, in the main proceedings in that case, the CNF had to be regarded as a 'court or tribunal' for the purposes of Article 267 TFEU.[15] Moreover, it is well known that issues regarding the Court's jurisdiction, including its jurisdiction under Article 267 TFEU, are a matter of public policy and, as such, can — and, as the case may be, must — be raised *ex officio* by the Court.[16] Accordingly, I believe that, had the reference in *Gebhard* been inadmissible for lack of jurisdiction, the Court would have (and should have) raised it of its own motion, particularly in view of the fact that the Advocate General at the time had flagged that issue.

25. However, since *Gebhard* dates back to 1995, one may wonder whether the notion of 'court or tribunal' under Article 267 TFEU has evolved in the meantime. In particular, one may question whether the ruling in *Gebhard* on that point has not been implicitly overruled by the more recent judgment in *Wilson*.

26. Personally, I am not opposed in principle to the idea that the interpretation of the criteria elaborated in the Court's case-law may develop over time and that it may sometimes be appropriate to apply those criteria more rigorously now, in light of present-day conditions.

27. I believe that it is in fact of the utmost importance that the Court retain a certain flexibility with regard to its assessment of the relevant criteria under Article 267 TFEU. The reason for this is twofold. On the one hand, the differences between the legal systems of the — by now — 28 Member States are too significant to be encapsulated into a single and omnivalent definition of 'court or tribunal'. On the other hand, it is undeniable that those legal systems, including the structure and organisation of the judiciary, undergo continuous evolution. It is imperative, in my view, that the Court's case-law take into account such changes occurring at national level, and evolve in harmony with those developments.

28. Furthermore, on other occasions, I have argued in favour of a more rigorous approach when it comes to examining various aspects of admissibility in relation to requests for preliminary rulings.[17]

12 — Case C-506/04 [2006] ECR I-8613.

13 — Case C-55/94 [1995] ECR I-4165.

14 — Council Directive of 22 March 1977 (OJ 1977 L 78, p. 17).

15 — See Opinion of Advocate General Léger in *Gebhard*, points 12 to 17 (especially point 16).

16 — See Case C-313/12 *Romeo* [2013] ECR, paragraph 20 and case-law cited.

17 — See Opinions in Joined Cases C-159/12 to C-161/12 *Venturini and Others* [2013] ECR, points 16 to 63; Case C-470/12 *Pohotovosť* [2014] ECR, points 20 to 38; and Case C-482/12 *Macinský and Macinská*, request for a judgment retracted on 31 December 2013, points 32 to 58.

29. However, unlike Messrs Torresi, I am not convinced that, in the wake of *Wilson*, the criterion of independence under Article 267 TFEU has developed — or, in any event, should develop — in the direction of greater stringency. Accordingly, I will first explain why, in my view, the Court did not, in *Wilson*, intend to overrule *Gebhard*. After that, I will illustrate the reasons why, in any event, I do not think that the Court *should* overrule *Gebhard* by extending the reasoning of *Wilson* to a different legal context.

a) *Wilson* did not overrule *Gebhard*

30. In *Wilson*, the Luxembourg Cour administrative (Higher Administrative Court) referred to the Court questions concerning the system for reviewing decisions refusing to admit a person to the profession of lawyer in Luxembourg. In essence, those questions concerned the compatibility of some provisions of Luxembourg law with the requirements under Directive 98/5.

31. In its decision, the Court ruled that the review procedures before the 'Disciplinary and Administrative Committee' or the 'Disciplinary and Administrative Appeals Committee' ('the Committees') established by the Luxembourg Law of 10 August 1991 on the profession of lawyer did not constitute an adequate 'remedy before a court or tribunal' for the purposes of Article 9 of Directive 98/5. The Court found that the Committees, composed exclusively or mainly of lawyers of Luxembourg nationality, did not offer sufficient guarantees of impartiality. [18]

32. At the outset, it is important to point out that, in *Wilson*, the Court did not dismiss a request for a preliminary ruling from one of the Committees for lack of jurisdiction; rather, it was merely asked, by an administrative court, to establish the compatibility of the relevant Luxembourg law with Article 9 of Directive 98/5. It is in that specific context that the Court 'borrowed' the principles developed under Article 267 TFEU to interpret that provision. Thus, the perspective from which the Court approached its analysis in that case was different. This is a crucial point to which I will return later.

33. Fundamentally, *Wilson* belongs in my view to the line of authority by which the Court held that national bodies hearing challenges to decisions taken by professional bodies may, [19] or may not, [20] fulfil the concept of 'court or tribunal' for the purposes of Article 267 TFEU, according to the specific circumstances of each case.

34. In that respect, I would call to mind that, beginning with *Corbiau*, the Court has explained that the concept of independence must be understood as a requirement that, in the context of the main proceedings, the national body must act 'as a third party in relation to the authority which adopted the decision forming the subject-matter of the proceedings'. [21]

35. In *Wilson*, the Court pointed out that the concept of independence has two aspects, one external and one internal. The external aspect presumes that the body requesting a preliminary ruling is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them. I will refer to this aspect as that of independence *stricto sensu*.

18 — *Wilson*, paragraph 54 et seq.

19 — See Case 61/65 *Vaassen-Göbbels* [1966] ECR 261; Case 246/80 *Broekmeulen* [1981] ECR 2311; Case C-166/91 *Bauer* [1992] ECR I-2797; *Gebhard*; and, more recently, Case C-118/09 *Koller* [2010] ECR I-13627. Notably, in the latter case, decided after *Wilson*, the Court found that the Austrian Oberste Berufungs- und Disziplinarkommission (Lawyers' Appeals and Disciplinary Board) constituted a 'court or tribunal' for the purposes of Article 267 TFEU.

20 — See Case 138/80 *Borker* [1980] ECR 1975, and Case 318/85 *Greis Unterweger* [1986] ECR 955.

21 — Case C-24/92 [1993] ECR I-1277, paragraph 15. See also Case C-516/99 *Schmid* [2002] ECR I-4573, paragraph 36, and *Wilson*, paragraph 49.

36. The internal aspect is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject-matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law. I will refer to this aspect as that of impartiality.

37. According to the Court, those requirements of independence (*stricto sensu*) and impartiality require 'rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it'. [22]

38. In *Wilson*, after an analysis of the relevant legal background, the Court came to the conclusion that those guarantees were not present. In the first place, under Luxembourg law, there were no specific provisions concerning rejection or abstention of members of the Committees; nor was any provision made for protection against undue intervention or undue pressure on the part of the executive, for example through a statutory provision guaranteeing freedom from instructions. In the second place, the Court found that, under Luxembourg law, the members of the Committees were all, or mainly, lawyers of Luxembourg nationality [23] elected from the two local Bar Associations, that is to say, from the very bodies whose decisions would be the subject of any review. Furthermore, the Court observed that the members of the local Bar Associations and of the Committees shared a common interest: to confirm a decision to remove from the market a competitor who had obtained his professional qualification in another Member State.

39. In contrast, the Italian laws which are relevant in the present case do contain provisions designed to guarantee both the independence *stricto sensu* and the impartiality of CNF members.

40. In particular, Article 49 of Decree-Law No 1578/1933 and Article 2 of Legislative Decree No 597/1947 provide that, in proceedings before the CNF, the parties can object to one of the members sitting on the case on the same grounds as, under the Italian Code of Civil Procedure, they could object to ordinary judges. Those provisions also state that CNF members called upon to hear a case are obliged to abstain if they become aware of the existence of any of those grounds, even if no party has raised any objection to that effect. [24]

41. In addition, there are rules to ensure security of tenure for members of the CNF. They are elected for a period of three years and remain in office until the new formation of the body takes office following an election. [25] Neither the Minister for Justice nor any other public authority has any power to dismiss a member of the CNF, or to have him resign. [26] There is, in fact, no link, either hierarchical or functional, with those public authorities. Nor has the President of the CNF himself any power over the other members of the CNF, or over decisions of the CNF with which he disagrees. [27]

22 — *Wilson*, paragraphs 51 to 53. See also order of 14 May 2008 in Case C-109/07 *Pilato* [2008] ECR I-3503, paragraph 24, and order of 14 November 2013 in Case C-49/13 *MF 7* [2013] ECR, paragraph 23.

23 — *Wilson*, paragraphs 18 and 54.

24 — For the importance of similar provisions, see Case C-103/97 *Köllensperger and Atzwanger* [1999] ECR I-551, paragraph 22. See also *Pilato*, paragraphs 24 and 29, and *Schmid*, paragraph 41.

25 — Article 15 of Legislative Decree No 382/1944. On the importance of such an element, see Case C-246/05 *Häupl* [2007] ECR I-4673, paragraph 18, and *MF 7*, paragraphs 22 to 24.

26 — Pursuant to Article 8 of Legislative Decree No 382/1944, the Minister for Justice has the power to dissolve the local Bar Councils only when these bodies 'cannot function regularly', in which case their functions are temporarily exercised by a special commissioner, for a maximum of 90 days, before the new Council is elected. However, as far as I understand, there is no similar provision with regard to the CNF.

27 — Cf. *Schmid*, paragraphs 41 and 42.

42. Furthermore, there cannot be any personal link between the CNF and local Bar Councils because, under Article 13 of Legislative Decree No 382/1944, membership of a local Bar Council is incompatible with membership of the CNF. Moreover, there is no provision under Italian law which limits CNF membership to lawyers of Italian nationality. [28] It is important perhaps not to overlook the fact that, on a par with any other lawyer entered in the Bar Register, lawyers entered in the special section of the Bar Register for lawyers qualified abroad also have the right to vote in the elections for the appointment of CNF members. [29] In addition, it would be far-fetched to say that any member of the CNF would be in more or less direct competition with the lawyers qualified abroad seeking registration: apart from being registered in different sections of the Bar Register, [30] they are active in different Court of Appeal districts. [31]

43. The statutory requirement that the CNF be neutral in disputes brought before it is further confirmed by the fact that, unlike the competent local Bar Council, the CNF cannot be party to special appeal proceedings before the Corte di Cassazione against its decisions, 'because of its position as a third party with respect to the dispute'. [32]

44. In conclusion, I consider that *Gebhard* and *Wilson* must be distinguished, one from the other, because of the marked difference between the underlying legal and factual contexts. I do not find any element in the text of the more recent judgment which could be interpreted as implying that the Court intended to overrule the earlier decision.

b) *Wilson* should not overrule *Gebhard*

45. More importantly, I am of the opinion that the Court, in any event, should not overrule *Gebhard* by applying *ipso facto* the reasoning developed in *Wilson* to another legal context.

46. As mentioned above, in *Wilson* the Court did not declare inadmissible a request for a preliminary ruling, but only answered questions, referred to it by the Luxembourg Cour administrative, on the compatibility of the relevant Luxembourg law with Article 9 of Directive 98/5.

47. It is evident to me that, if Article 9(2) of Directive 98/5 is to be correctly implemented into national law, provision must be made for a legal remedy which — amongst other characteristics — is fully consistent with the requirements under Article 6 of the European Convention on Human Rights ('the ECHR') and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'). [33] Conversely, it is by no means evident to me that, within the EU legal order, Article 267 TFEU would impose such a high threshold for a national court to be able to seise the Court of Justice under the preliminary ruling procedure.

48. On the contrary, the very reasons which plead in favour of a strict application of Article 6 of the ECHR and Article 47 of the Charter seem rather to urge a less rigid interpretation of the concept of 'court or tribunal' for the purposes of Article 267 TFEU.

28 — See Articles 33 and 34 of Decree-Law No 1578/1933 and Article 21 of Legislative Decree No 382/1944.

29 — Article 6(9) of Legislative Decree No 96/2001.

30 — The applicants seek to be enrolled in the special section of the Bar Register for lawyers qualified abroad, kept by the local Bar Council (see Article 6 of Legislative Decree No 96/2001), whereas Members of the CNF must be enrolled in the special section of the Bar Register for lawyers with a right of audience in the highest courts, kept by the CNF itself (see Article 33 of Legislative Decree No 1578/1933 and Article 21 of the Legislative Decree No 382/1944).

31 — According to an established praxis of the CNF, any CNF member who has been elected from the Court of Appeal district to which the Bar Council whose decision is subject to judicial review belongs, does not sit in the formation hearing the case.

32 — Cassazione Civile, Sezioni Unite, order of 11 January 1997, No 12. For the importance of this aspect, see *Belov*, paragraph 49, and the Opinion of Advocate General Tizzano in *Schmid*, point 31.

33 — See the reference to the case-law of the European Court of Human Rights in paragraph 57 of *Wilson*.

49. A strict application of the requirements under Article 6 of the ECHR and Article 47 of the Charter is necessary to strengthen the protection of individuals and ensure a high standard of protection of fundamental rights. However, an overly strict application of the criteria laid down in the Court's case-law on the admissibility of references under Article 267 TFEU would risk producing the opposite result: individuals would be deprived of the possibility to have the 'natural judge' (the Court of Justice) hear their claims based on EU law and, as a consequence, the effectiveness of EU law throughout the European Union would be weakened.

50. To be clear: I am not suggesting that the Court should adopt a lax attitude towards the criterion of independence (or, for that matter, towards any other criterion).

51. The drafters of the Treaties clearly envisaged the preliminary ruling procedure as an instrument of 'judge to judge' dialogue. It should not be overlooked, in this context, that two crucial principles which lie at the heart of the EU judicial architecture are those of subsidiarity and procedural autonomy. [34] The preliminary ruling procedure is, accordingly, the procedure that, more than any other procedure established by the EU Treaties, was conceived to ensure that national courts and EU Courts work together as if they belonged to *one* legal community. [35] In this context, all the evidence suggests that the criteria of independence *stricto sensu* and of impartiality have an important function to fulfil, in so far as they are requirements which are inherent in the notion of 'a court or tribunal' in modern legal and political thinking. [36]

52. I do, however, warn against treating *Wilson* as a precedent which, by grafting an innovation on to previous case-law, would now impose on the Court an in-depth analysis of all the possible grounds which might give rise to some suspicion about the impartiality (or the independence *stricto sensu*) of the referring body.

53. Whenever it is clear that a national body is formally accorded the *status* of a judicial body in its own legal system, and that — in compliance with the Court's case-law — there are sufficient rules under national law to guarantee the independence *stricto sensu* and the impartiality of that body and of its members, I do not believe that the Court's analysis should go any further on that point. As the Court itself stated in *Köllensperger and Atzwanger*, it is not for the Court to infer that such national provisions may be applied in a manner contrary to the principles enshrined in the domestic legal order or 'the principles of a State governed by the rule of law'. [37]

54. Thus, unless there are specific provisions of EU law (such as Article 9(2) of Directive 98/5) which require such an assessment, the question whether the national system of remedies leaves something to be desired in terms of independence or impartiality may be an issue for the national legislature (or the national judiciary) to evaluate and, as the case may be, to correct, but it is clearly not a question of EU law.

34 — Cf. Rodríguez Iglesias, G.C., 'L'évolution de l'architecture juridictionelle de l'Union européenne', in A. Rosas, E. Levits, Y. Bot (eds.), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law*, Asser Press, The Hague: 2013, pp. 37 to 48, at pp. 43 and 44.

35 — As the Court forcefully stated in Opinion 1/09 [2011] ECR I-1137, paragraph 85, referring in particular to the system set up by Article 267 TFEU, 'the tasks attributed to the national courts and to the Court of Justice respectively are indispensable to the preservation of the very nature of the law established by the Treaties'.

36 — For example, according to Principles 1 and 2 of the 'Basic Principles on the Independence of the Judiciary' endorsed by the United Nations General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985: '1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. … 2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.'

37 — *Köllensperger and Atzwanger*, paragraph 24.

55. By the present orders for reference, the Court has not been asked whether the appeal system before the CNF complies with Article 9(2) of Directive 98/5; nor is that an issue which the Court may raise *ex officio*. To the extent that the guarantees required by its case-law are complied with (as they are, in my view, in the case of the CNF), there is no basis for the Court to refuse to give a ruling because of an alleged lack of impartiality or independence *stricto sensu* on the part of the referring body.

56. That would be, in fact, a worrisome development. A cursory glance at the legal systems of the Member States reveals that, in many countries, there are courts or tribunals which are composed, in whole or in part, not of professional judges but of representatives of professions or of social and economic groups. By way of example, the seminal *Laval Un Partneri*[38] case, decided by the Grand Chamber of the Court in 2007, concerned a request for a preliminary ruling from the Arbetsdomstolen, the Swedish Labour Court, in which members representing the interests of employers and employees sit alongside professional judges.

57. If one were to push the reasoning in *Wilson* to the extreme, as argued for by Messrs Torresi, the Court should have wondered whether some members of the Arbetsdomstolen might not have a common interest in excluding foreign competition from the Swedish building sector. That line of conjecture might have led the Court to decline jurisdiction.

58. Likewise, I note that the Court accepted requests for a preliminary ruling from the Arbejdsret (the Danish Labour Court)[39] and from the Faglige Voldgiftsret (the Danish Industrial Arbitration Board),[40] which not only have a composition similar to that of the Arbetsdomstol,[41] but also form part of a system of dispute resolution which — albeit established and governed by statutory law — to a certain extent exists in parallel to that of the ordinary Danish courts.

59. However, an overly strict interpretation of the impartiality criterion would also be difficult to reconcile with the position that, under certain circumstances, an arbitration tribunal could also be regarded as 'a court or tribunal' for the purposes of Article 267 TFEU.

60. The consequences of interpreting *Wilson* as imposing upon the Court the need to conduct a new, in-depth, analysis to determine whether national courts and tribunals have the requisite independence and impartiality, going beyond the formal verification that the national laws provide sufficient guarantees in that respect, would thus have far-reaching consequences. A not insignificant number of national judicial bodies would risk falling outside the notion of 'court or tribunal' for the purposes of Article 267 TFEU, with the result that the system of protection for individuals would be weakened, hindering the effectiveness of EU law.

61. I would thus conclude that the criterion of independence seems to be fulfilled by the CNF.

38 — Case C-341/05 [2007] ECR I-11767.

39 — Case 287/86 *Ny Mølle Kro* [1987] ECR 5465.

40 — Case 109/88 *Danfoss* [1989] ECR 3199.

41 — For the sake of completeness, one might add that there are a number of cases, currently pending before the Court, which concern references from the Työtuomioistuin (the Finnish Labour Court), a court with a statute similar to the Arbetsdomstolen and the Arbejdsretten; Case C-533/13 *AKT*, and Joined Cases C-513/11 and C-512/11 *Ylemmät Toimihenkilöt YTN and Terveys- ja sosiaalialan neuvottelujärjestö TSN*. To my knowledge, no party has taken issue with the nature of the referring body. Nor has Advocate General Kokott, in her Opinion in *Ylemmät Toimihenkilöt YTN and Terveys- ja sosiaalialan neuvottelujärjestö TSN*, deemed it necessary to raise the issue of her own motion.

2. Exercise of judicial functions

62. In the second place, Messrs Torresi contend that, regarding entries in the Bar Register, and by contrast with disciplinary matters, the CNF merely exercises administrative functions. In fact, the decision taken by the CNF at the end of the procedure should be regarded as an act of an administrative nature.

63. However, it should not be overlooked that, in *Gebhard*, the CNF was seised of two actions lodged by Mr Gebhard, a German lawyer established in Italy: one challenging a disciplinary penalty imposed by the Bar Council of Milan and the other challenging the implied rejection, by the same Bar Council, of his application for entry in the Bar Register.

64. If one were to consider the arguments put forward by Messrs Torresi to be correct, it would mean that, in *Gebhard*, the Court established its jurisdiction exclusively on the basis of the former action, and not by reference to the latter. However, nothing in the judgment in *Gebhard* seems to confirm such a reading of that decision. On the contrary, in that judgment, the Court stressed the links between the two actions brought by Mr Gebhard.[42] Moreover, in his Opinion in the case referred to above, Advocate General Léger came to the conclusion that, in the case of both actions, the CNF was exercising judicial functions.[43] I find the considerations developed by Mr Léger on that point persuasive.

65. In any event, it seems to me that the similarity between the two procedures which were pending before the CNF in *Gebhard* stems from the Italian laws applicable. Both procedures are essentially regulated by the same provisions: Articles 54 and 56 of Decree-Law No 1578/1933, and Articles 59 to 65 of Decree No 37/1934.

66. Lastly, no difference between the two procedures can be found in the daily practice of the CNF. The Rules of Procedure of the CNF establish a clear distinction between 'judicial sittings' (Articles 9 to 11) and 'administrative sittings' (Articles 12 to 16) of that body.[44] In the CNF's calendar of activities, Saturday 29 September 2012 — the day on which the case of Messrs Torresi was heard — was reserved for the judicial sittings of the CNF.

67. However, Messrs Torresi point to one possible difference between the two procedures: when the CNF hears actions on disciplinary matters, there is always an administrative decision of the local Bar Council which undergoes review, whereas that element would appear to be missing if a local Bar Council fails to take a decision on an application for entry in the Bar Register. Messrs Torresi refer to Article 6(8) of Legislative Decree No 2001/96, under which the applicant may, within 10 days of the expiry of a period of 30 days from the submission of the application, bring legal proceedings before the CNF, which will decide on the substance of the application if the local Bar Council has not yet decided on the application.

68. Yet, my understanding of Italian legislation is that failure on the part of the local Bar Council to decide on an application from a lawyer regarding entry in the Bar Register is deemed to constitute an implicit decision refusing the application. It follows that the CNF does not merely decide on the application *in lieu of* the local Bar Council (because of the latter's inaction). Rather, the CNF exercises a power of review over a decision (albeit implicit) taken by a local Bar Council, rejecting that application. Only if it finds that a local Bar Council has erroneously refused an application, does the CNF decide on the substance of that application, in a fashion similar to administrative courts which, under Italian law, are empowered to do this in certain cases.[45]

42 — See *Gebhard*, in particular, paragraphs 10 to 12.

43 — See Opinion of Advocate General Léger in *Gebhard*, points 12 to 17 (especially point 16).

44 — See 'Regolamento interno per le attività del Consiglio Nazionale Forense' (1992), published in *Rassegna forense*, 1992, p. 135.

45 — See, in particular, Article 7 of the Italian Code of Administrative Procedure.

69. My understanding of the relevant Italian laws appears to be borne out by the minutes of the hearing of 29 September 2012 before the CNF, included in the national case-file forwarded to the Court, where it is indicated that the hearing concerned '*the legal action of Mr Angelo Alberto Torresi against the silence of the Bar Council of Macerata*'. In this connection, I regard as even more telling the language employed by the CNF in some judgments which concerned cases similar to those of Messrs Torresi. The CNF speaks specifically of '*decisions of silence-refusal*', adopted by local Bar Councils on applications for admission to the Bar, against which the applicants lodged appeals before the CNF. [46]

70. In this context, it is scarcely necessary to point out that 'negative silence' and 'positive silence' rules are common not only under Italian administrative law, [47] but also under the administrative laws of other Member States, [48] as well as in the EU legal order. [49]

71. At this juncture, it may also be interesting to note that, whereas the rule that silence entails refusal applies with regard to applications made to the local Bar Councils, it does not apply with regard to applications made to the CNF. [50] This element lends further support to the idea that, while the decisions of the former are of an administrative nature, those of the latter are judicial.

72. Finally, it is true that, unlike Law No 247/2012, [51] Decree-Law No 1578/1933 did not expressly categorise as 'judicial' the activity of the CNF regarding appeals against decisions of local Bar Councils on entries in the Bar Register. [52] However, it is undisputed that, within the Italian legal order, the CNF has been consistently recognised as enjoying in that regard the status of a 'specialised judicial body', which takes decisions 'that are not administrative acts, but judgments, [53] handed down following an *inter partes* procedure'. [54] As the Italian Constitutional Court held, the CNF exercises 'judicial functions in the public interest, an interest which is different from and superior to that of the professional group [which it represents]'. [55]

46 — See, notably, Consiglio Nazionale Forense (pres. Ricciardi, rel. Sanino), judgment of 10 October 1996, No 128; Consiglio Nazionale Forense (pres. Cagnani, rel. De Mauro), judgment of 15 October 1996, No 133; and Consiglio Nazionale Forense (pres. Alpa, rel. Merli), judgment of 15 December 2011, No 179.

47 — Notably, under Italian law, citizens are generally allowed to appeal against the silence of the public administration before the competent administrative courts: see especially Article 31 of the Italian Code of Administrative Procedure.

48 — For an example pertaining to Spanish law, see Case C-400/08 *Commission* v *Spain* [2011] ECR I-1915, paragraph 119 et seq.

49 — By way of example, regarding positive silence rules, see Article 10(6) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ 2004 L 24, p. 1); regarding negative silence rules, see Article 8(3) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

50 — See Cassazione Civile, Order of 4 March 1994, No 157.

51 — Article 36 of Law No 247/2012 explicitly states that the CNF has 'jurisdiction' ('competenza giurisdizionale') in both disciplinary matters and entries in the Bar Register. Moreover, Article 37 of that law states that 'as it concerns actions provided for in Article 36, the CNF shall rule in accordance with Articles 59 to 65 of Decree No 37/1934, applying, where necessary, the rule and principles of the [Italian] Code of Civil Procedure'. This means that the newly enacted Law No 247/2012, far from modifying the procedure in force when Messrs Torresi brought their actions, essentially confirms the validity thereof.

52 — Article 54 of Decree-Law No 1578/1933 states, inter alia, that the CNF 'shall rule on legal actions brought before it pursuant to the present law'.

53 — In fact, like any other judgment in Italy, the judgments handed down by the CNF are pronounced 'in nome del popolo italiano' ('in the name of the Italian people'), in conformity with Article 101 of the Italian Constitution.

54 — See, in particular, Cassazione Civile, Sezioni Unite, judgment of 12 March 1980, No 1639. More recently, see also Cassazione Civile, Sezioni Unite, judgment of 7 December 2006, No 26182; and Cassazione Civile, Sezioni Unite, judgment of 20 December 2007, No 26810.

55 — Corte Costituzionale, judgment of 18 June 1970, No 114. More recently, see also Corte Costituzionale, judgment of 16-27 May 1996, No 171.

73. Clearly, the fact that, under Italian law, the CNF exercises judicial functions is not decisive for the purposes of Article 267 TFEU. Yet, I do not think that the Court should lightly disregard the classification of a body under national law, either. Especially where the Court does not have before it clear and concurrent indicia that point to a different conclusion under EU law.[56] However, the elements in the applicable national laws which we have examined do not support any different conclusion in the present case.

3. Other criteria

74. Moreover, it seems to me that, in the present case, the other criteria set out in the Court's case-law as concerns the notion of 'court or tribunal' for the purposes of Article 267 TFEU also point to that conclusion, and to no other.

75. To begin with, in the light in particular of Decree-Law No 1578/1933 (and, more recently, of Law No 247/2012), there can be no doubt that the CNF is established by law and has a permanent character.

76. Likewise, it is clear that the jurisdiction of the CNF is compulsory for the parties. The competence of the CNF as regards enrolments in the Bar Register is, in fact, mandatory,[57] and does not depend upon any agreement by the parties to that effect.[58] Indeed, for Messrs Torresi, it is the sole legal means of challenging the decisions of the Bar Council of Macerata with respect to their applications.[59]

77. It is true that decisions of the CNF can be subject to special appeal before the Corte di Cassazione, Sezioni Unite. Yet, such an appeal lies on points of law only.[60] This would mean that the effectiveness of the preliminary ruling mechanism provided for in Article 267 TFEU would be weakened if the CNF's status as a 'court or tribunal' were not to be recognised by this Court.[61]

78. It is, moreover, undisputed that the CNF must apply rules of law. In particular, in the case of Messrs Torresi, the CNF is called upon to apply the provisions of Legislative Decree No 96/2001, in accordance with the rules provided for in Directive 98/5.

79. It is also important to emphasise in this context that the rules governing the procedure before the CNF provide for *inter partes* proceedings.[62] The local Bar Council whose decision is under review is a necessary party to the procedure (as defendant) and any error in the notification of the proceedings by the applicant to the Bar Council entails the nullity of the procedure because of 'a serious infringement of the rights of the defence and of the principle of *audi alteram partem*'.[63]

56 — Cf. Opinion of Advocate General Tesauro in *Dorsch Consult*, point 20.

57 — See order of 11 July 2003 in Case C-161/03 *Cafom and Samsung*, paragraph 14.

58 — See, on this issue, *Danfoss*, paragraph 7, and Case 102/81 *Nordsee* [1982] ECR 1095, paragraph 11.

59 — Cf. Case C-125/04 *Denuit and Cordenier* [2005] ECR I-923, paragraph 15.

60 — On the facts, the Corte di Cassazione is thus, in principle, bound by the findings of the CNF. For the importance of this element, see Case C-411/00 *Felix Swoboda* [2002] ECR I-10567, paragraphs 26 to 28.

61 — Cf. *Belov*, paragraph 52.

62 — I also take note of the fact that the Pubblico Ministero (the Public Prosecutor) is also party to the proceedings before the CNF regarding entries in the Bar Register (as well as in the special appeal proceedings before the Corte di Cassazione), by contrast with the procedure before the local Bar Councils. As the Italian Government pointed out, the participation of the Public Prosecutor in an administrative procedure would be rather anomalous.

63 — Cassazione Civile, judgment of 8 August 2001, No 10959.

80. In addition, the procedure includes both a written and an oral phase, in which the parties may put forward their submissions challenging the errors supposedly made by the local Bar Council, and submit evidence in support of those arguments. With regard to that evidence, there are specific rules on discovery and on the minimum period of time which must be granted to the parties to consult the case-file and prepare their defence before the case is discussed at the hearing. [64]

81. In light of the above considerations, I am of the view that, in the present proceedings, the CNF falls to be regarded as a 'court or tribunal' for the purposes of Article 267 TFEU.

B – *Consideration of the questions referred*

82. I will now turn to the substance of the two questions referred by the CNF. However, the answer to those questions is, to me, quite evident. For this reason, this part of my Opinion will be rather brief.

1. Question 1

83. By its first question, the CNF is substantially asking whether Article 3 of Directive 98/5 precludes the practice, on the part of a Member State, of refusing, on grounds of abuse of rights, to enter in the Bar Register, in the special section for lawyers qualified abroad, nationals of that Member State who, soon after obtaining the professional title in another Member State, return to the former Member State ('the national practice at issue').

84. According to settled case-law, EU law cannot be relied on for abusive or fraudulent ends. [65] However, a finding of abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved. Second, that finding requires a subjective element consisting in the intention to obtain an advantage from the EU rules by creating artificially the conditions laid down for obtaining it. [66]

85. It is, in principle, for the national court to establish the existence of those two elements, evidence of which must be adduced in accordance with the rules of national law, provided that the effectiveness of EU law is not thereby undermined. [67] In particular, it is not open to national courts, when assessing the exercise of a right arising from a provision of EU law, to alter the scope of that provision or to compromise the objectives pursued thereby. [68]

86. However, in the present proceedings, it is quite obvious that a practice such as the national practice at issue is likely to undermine, in that Member State, the correct functioning of the system established by Directive 98/5 and thereby seriously to compromise the objectives pursued by that legal instrument.

87. Indeed, Article 1 of Directive 98/5 states that the purpose of that directive is to 'facilitate practice of the profession of lawyer on a permanent basis … in a Member State other than that in which the professional qualification was obtained'. So, as the Polish and Romanian Governments have correctly observed, the national practice at issue is, in essence, tantamount to treating as abusive conduct which, conversely, constitutes one of the very forms of conduct that the EU legislature intended to

64 — See the provisions mentioned in point 65 above.

65 — See Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraph 68 and case-law cited.

66 — See Case C-110/99 *Emsland-Stärke* [2000] ECR I-11569, paragraphs 52 and 53.

67 — Ibid., paragraph 54.

68 — Case C-367/96 *Kefalas and Others* [1998] ECR I-2843, paragraph 22.

permit. Paraphrasing the Court's remarks regarding Directive 89/48/EEC on the recognition of diplomas,[69] I would say that the right of nationals of a Member State to choose the Member State in which they wish to acquire their professional title is inherent in the exercise, in a single market, of the fundamental freedoms guaranteed by the EU Treaties.[70]

88. In that regard, no relevance can be attributed to the fact that the lawyer is a citizen of the host Member State; or to the fact that he may have chosen to obtain the professional title abroad in order to profit from more favourable legislation; or, lastly, to the fact that, as the case may be, his request for registration is made soon after obtaining the professional title abroad.

89. On the first point, I observe that Article 1(2)(a) of Directive 98/5 defines 'lawyer' as '*any person who is a national of a Member State* and who is authorised to pursue his professional activities under one of the professional titles [listed in the same provision]'. Likewise, Article 2 of Directive 98/5 provides that '[*a*]*ny lawyer* shall be entitled to pursue on a permanent basis, in any other Member State under his home-country professional title, the activities specified in Article 5 [of the same directive]'.[71]

90. There is no indication, therefore, that the EU legislature wished to make it possible for Member States to engage in reverse discrimination by excluding their own citizens from the rights created by Directive 98/5.[72] Besides, that would seem rather at odds with the objective of establishing an internal market.

91. In fact, as the Court has held, the fact that an EU citizen seeks to profit from advantageous legislation in force in a Member State other than his State of residence cannot in itself deprive him of the right to rely on the freedoms provided for in the EU Treaties.[73] This brings me to the second point.

92. In that respect, drawing on a well-established line of authority, I believe that the mere fact that a citizen chooses to acquire a professional title in another Member State for the purpose of benefitting from more favourable legislation does not in itself suffice to constitute an abuse of rights.[74]

93. Lastly, on the third point, I would call to mind that the Court has made it clear that, by Article 3 of Directive 98/5, the EU legislature fully harmonised the pre-conditions for the exercise of the right conferred. Consequently, the presentation to the competent authority of the host Member State of a certificate attesting to the registration with the competent authority of the home Member State is the *only condition* that may be attached to registration of the person concerned in the host Member State, enabling that person to practise in the latter Member State under his home-country professional title.[75]

94. Accordingly, the Court has held that Directive 98/5 does not permit the registration of a lawyer with the competent authority of the host Member State to be made conditional on the fulfilment of other conditions, such as a hearing to determine language proficiency.[76] I would add that, by the same token, Directive 98/5 does not permit such registration to be made conditional upon completion of a

69 — Council Directive 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 (OJ 1989 L 19, p. 16).

70 — See Case C-286/06 *Commission* v *Spain* [2008] ECR I-8025, paragraph 72.

71 — Emphasis in both provisions added.

72 — See, by analogy, Case C-19/92 *Kraus* [1993] ECR I-1663, paragraphs 15 and 16.

73 — Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraph 36 and case-law cited.

74 — Ibid., paragraph 37.

75 — *Wilson*, paragraphs 66 and 67.

76 — Ibid., paragraph 70.

certain period of practical experience or of activity as a lawyer in the Member State of origin.[77] After all, if no previous experience is required in order to practise, for example, as an 'abogado' in Spain, why would such experience be required in order to practise under the very same professional title ('abogado') in another Member State?

95. That being so, it need scarcely be added that, if the authorities of the host Member State find, in an individual case, that the two conditions mentioned in point 84 above are fulfilled, they are not prevented from refusing an application on grounds of an abuse of rights. Indeed, there may be particular elements, in some specific cases, which give rise to a legitimate suspicion of fraudulent conduct. In those specific (and — one can assume — relatively infrequent) cases, a more in-depth examination into the possible existence of abusive conduct may be legitimate, before registration is granted. In that context, the authorities of the host Member State may also, pursuant to Article 13 of Directive 98/5, request the cooperation of the authorities of the home Member State.[78] Should the authorities of the host Member State then gather unequivocal evidence that the applicant has obtained the professional title in the home Member State by fraudulent or illegal means (such as forgery, bribery or misrepresentation), they would be entitled to refuse registration on grounds of abuse of rights.

96. I therefore propose that the Court state in answer to Question 1 that Article 3 of Directive 98/5 precludes the practice, on the part of a Member State, of refusing, on grounds of abuse of rights, to enter in the Bar Register, in the special section for lawyers qualified abroad, nationals of that Member State who, soon after obtaining the professional title in another Member State, return to the former Member State.

2. Question 2

97. By its second question, which is proposed in the event of an affirmative answer to Question 1, the CNF essentially asks whether Article 3 of Directive 98/5 is invalid for breach of Article 4(2) TEU, under which the European Union is to respect Member States' national identities, inherent in their fundamental structures, political and constitutional.

98. According to the CNF, Article 33(5) of the Italian Constitution provides that a 'State examination must be passed in order to qualify for the profession', and the term 'profession' refers also to that of a lawyer. Admitting Italian nationals qualified abroad to practise in Italy would, it is argued, have the effect of circumventing the Italian Constitution, which calls for a state qualification exam, thereby undermining the constitutional national identity.

99. At the outset, I must admit that I have serious difficulties in following the reasoning of the CNF. It is not clear to me why the admission to the Bar of EU citizens who have obtained a professional title in another Member State would pose such a threat to the Italian legal order that it could be considered to undermine the Italian national identity.

77 — See *Koller*, paragraphs 34 and 40. See also, by analogy, Case C-212/97 *Centros* [1999] ECR I-1459, paragraph 29.

78 — According to the relevant part of Article 13, '[i]n order to facilitate the application of this Directive and to prevent its provisions from being misapplied for the sole purpose of circumventing the rules applicable in the host Member State, the competent authority in the host Member State and the competent authority in the home Member State shall collaborate closely and afford each other mutual assistance'.

100. In that regard, it is true that the Court has, in certain specific circumstances, afforded Member States the possibility of derogating from obligations imposed by EU law, such as respect for the fundamental freedoms, on grounds of the protection of their national identity. [79] However, that does not mean that any rule enshrined in a national constitution can limit the uniform application of EU provisions, [80] let alone constitute a parameter for the legality of those rules. [81]

101. Accordingly, as the Parliament and the Council have argued, the mere fact that a provision in the Italian Constitution provides that a State examination must be passed before it is permissible to practise as a lawyer does not mean that Directive 98/5 undermines the Italian national identity for the purposes of Article 4(2) TEU. This position was also confirmed, at the hearing, by the Italian Government, which stated that it did not agree with the considerations set out by the referring court in the requests for a preliminary ruling regarding a possible conflict between Directive 98/5 and Article 33(5) of the Italian Constitution.

102. More fundamentally, however, the question referred by the CNF seems to be based on a mistaken premiss.

103. Messrs Torresi have not asked the competent authorities for entry in the Bar Register under the professional title of the host country ('avvocato'), but only to be entered in the special section of that register, for lawyers qualified abroad. Thus, they have asked to be allowed to practise the profession of lawyer in Italy under the professional title of the Member State of origin ('abogado'), in conformity with Article 4(1) of Directive 98/5. This means that they would only be permitted to carry out the professional activities referred to in Article 5 of Directive 98/5, while being subject to the rules of professional conduct indicated in Article 6 of that directive.

104. That being so, I do not see any circumvention of the rules laid down in the Italian Constitution, let alone any encroachment upon the Italian national identity. As was correctly pointed out by the Spanish and Polish Governments, and by the Parliament and the Commission, Italy will continue to exercise its competence regarding access to the profession of 'avvocato'. However, denying its nationals the possibility of practising as an 'abogado' in Italy — when that title has been lawfully obtained in Spain — would essentially call into question the fulfilment of the requirements for that professional title, in respect of which Italy has no competence. As a result, that would not only impinge on competences reserved to the Kingdom of Spain, but also undermine the principle of mutual recognition which lies at the heart of the system established by Directive 98/5.

105. On that basis, I am of the view that Article 3 of Directive 98/5 does not constitute a breach of Article 4(2) TEU and that, accordingly, it is not invalid.

IV – **Conclusion**

106. In light of the foregoing, I propose that the Court answer the questions referred by the Consiglio Nazionale Forense as follows:

(1) Article 3 of Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained precludes the practice, on the part of a

79 — See, in particular, Case C-36/02 *Omega* [2004] ECR I-9609, paragraph 35 et seq., and Case C-208/09 *Sayn-Wittgenstein* [2010] ECR I-13693, paragraph 83 et seq.

80 — Cf. Opinion of Advocate General Poiares Maduro in Case C-213/07 *Michaniki* [2008] ECR I-9999, point 33.

81 — See, in particular, Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, paragraph 3, and Case C-212/06 *Government of the French Community and Walloon Government* [2008] ECR I-1683, paragraph 58.

Member State, of refusing, on grounds of abuse of rights, to enter in the Bar Register, in the special section for lawyers qualified abroad, nationals of that Member State who, soon after obtaining the professional title in another Member State, return to the former Member State.

(2) Consideration of the second question referred has disclosed nothing to affect the validity of Article 3 of Directive 98/5.