OPINION OF ADVOCATE GENERAL STIX-HACKL delivered on 11 May 2006 [1]

I — Introductory remarks

1. The present reference for a preliminary ruling concerns the relationship between the guarantees provided by 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] ('the Directive') and a national provision requiring such lawyers from other Member States to undergo an oral examination to verify their knowledge of the official languages of the host State in order to be registered in the Bar Register in the host Member State, as do the parallel infringement proceedings. [3]

2. The reference for a preliminary ruling concerns in addition the Directive's requirements as to national appeal procedures where such registration is refused.

II — Legal framework

A — *Community law*

3. Article 1(1) of the Directive provides that the purpose of the Directive is to facilitate practice of the profession of lawyer on a permanent basis in a self-employed or salaried capacity in a Member State other than that in which the professional qualification was obtained.

4. The first paragraph of Article 2 provides that 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.

5. Article 3 of the Directive, which concerns registration with the competent authority, provides:

'1. A lawyer who wishes to practise in a Member State other than that in which he

1 — Original language: German.
2 — OJ 1998 L 77, p. 36.
3 — Case C-193/05 *Commission* v *Luxembourg*.

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. It may require that, when presented by the competent authority of the home Member State, the certificate be not more than three months old. It shall inform the competent authority in the home Member State of the registration.

3. For the purpose of applying paragraph 1:

— in the United Kingdom and Ireland, lawyers practising under a professional title other than those used in the United Kingdom or Ireland shall register either with the authority responsible for the profession of barrister or advocate or with the authority responsible for the profession of solicitor,

— in the United Kingdom, the authority responsible for a barrister from Ireland shall be that responsible for the profession of barrister or advocate, and the authority responsible for a solicitor from Ireland shall be that responsible for the profession of solicitor,

— in Ireland, the authority responsible for a barrister or an advocate from the United Kingdom shall be that responsible for the profession of barrister, and the authority responsible for a solicitor from the United Kingdom shall be that responsible for the profession of solicitor.

4. Where the relevant competent authority in a host Member State publishes the names of lawyers registered with it, it shall also publish the names of lawyers registered pursuant to this Directive.'

6. Article 5 of the Directive, which concerns the area of activity, provides:

'1. Subject to paragraphs 2 and 3, a lawyer practising under his home-country professional title carries on the same professional activities as a lawyer practising under the relevant professional title used in the host Member State and may, inter alia, give advice on the law of his home Member State, on Community law, on international law and on the law of the host Member State. He shall in any event comply with the rules of procedure applicable in the national courts.

2. Member States which authorise in their territory a prescribed category of lawyers to prepare deeds for obtaining title to administer estates of deceased persons and for creating or transferring interests in land which, in other Member States, are reserved for professions other than that of lawyer may exclude from such activities lawyers practising under a home-country professional title conferred in one of the latter Member States.

3. For the pursuit of activities relating to the representation or defence of a client in legal proceedings and in so far as the law of the host Member State reserves such activities to lawyers practising under the professional title of that State, the latter may require lawyers practising under their home-country professional titles to work in conjunction with a lawyer who practises before the judicial authority in question and who would, where necessary, be answerable to that authority or with an "avoué" practising before it.

Nevertheless, in order to ensure the smooth operation of the justice system, Member States may lay down specific rules for access to supreme courts, such as the use of specialist lawyers.'

7. Article 9, which concerns statements of reasons for certain decisions on registration 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 — *National law*

8. The relevant provisions of the language regime are in the Loi du 24 février 1984 sur le régime des langues ('the Law of 1984'). [4]

9. Article 2 thereof provides that statutes and their implementing provisions shall be in French. Other regulations may be in a different language. An instrument is authentic in the language used.

10. Article 3 of the Law of 1984 provides that subject to special provisions French, German or the Luxembourg language may be used in administrative and in judicial matters.

4 — *Mémorial* A 1984, p. 196.

11. The Directive was transposed into the law of the Grand Duchy of Luxembourg by a Law of 13 November 2002 [5] amending certain provisions of Luxembourg law. [6]

12. Article 8(3) of the Law of 1991, as amended by Article 14 of the Law of 2002, provides that there are four categories of lawyers: List I (lawyers who satisfy the requirements of Article 5, namely registration, and of Article 6 concerning the requirements for registration and an oath of allegiance, and who have passed the examination the law provides for at the end of a 'stage'), List II (lawyers who satisfy the requirements of Articles 5 and 6), List III, and List IV (lawyers who practise the profession under their home-country professional titles).

13. Further provisions of national law are reproduced in the *annex* to this Opinion.

III — Facts, main proceedings and questions referred

14. Mr Graham J. Wilson, a British national, has been a barrister and a member of the Honourable Society of Gray's Inn and a member of the Bar of England and Wales since 1975. He has practised the profession of lawyer in Luxembourg since 1994.

15. On 29 April 2003 Mr Wilson was invited by the Conseil de l'Ordre des avocats du barreau de Luxembourg (Luxembourg Bar Council; 'Conseil de l'Ordre') to an oral examination under Article 3(2) of the Law of 2002.

16. On 7 May 2003 Mr Wilson attended for examination accompanied by a Luxembourg lawyer. The Conseil de l'Ordre refused to allow the latter to be present.

17. By letter dated 14 May 2003, the Conseil de l'Ordre notified Mr Wilson that it refused to register him in List IV of the Bar Register, the reason being that Mr Wilson had refused to undergo the oral examination unless accompanied by his lawyer and that the Conseil de l'Ordre was therefore not in a position to be able to assess Mr Wilson's language knowledge.

5 — *Mémorial* A 2002, p. 3202.

6 — Law of 10 August 1991 on the profession of lawyer (*Mémorial* A 1991, p. 1110) and Law of 31 May 1999.

18. The letter also notified Mr Wilson that he could appeal against this decision under Article 26(7) of the Law of 1991 to the Conseil disciplinaire et administratif (Disciplinary and Administrative Committee).

19. However, Mr Wilson appealed to the Tribunal administratif (Administrative Court), on the basis that the procedure laid down for appealing to the Conseil disciplinaire et administratif did not satisfy the requirements of either Community law or Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 ('the ECHR'), and that the Tribunal administratif was therefore required to decide the case in exercise of its universal jurisdiction.

20. However, by decision dated 13 May 2004, the Tribunal administratif declared that it had no jurisdiction.

21. On 22 June 2004 Mr Wilson lodged an appeal to the Cour administrative (Higher Administrative Court). The Cour administrative considers that it is necessary to interpret Article 9(2) of the Directive in order to decide whether the administrative courts have jurisdiction, and thus to determine whether it itself has jurisdiction. It also doubts that the language examination is compatible with the Directive's guarantees.

22. On this basis, by order dated 7 December 2004, the Cour administrative stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Should Article 9 of Directive 98/5 ... be interpreted as precluding appeal proceedings as provided for under the Law of 10 August 1991, as amended by the Law of 13 November 2002?

(2) More particularly, do appeal bodies such as the Conseil disciplinaire et administratif and the Conseil disciplinaire et administratif d'appel constitute "a remedy before a court or tribunal in accordance with domestic law" within the meaning of Article 9 of Directive 98/5 and should [that article] be interpreted as precluding a remedy which requires referral to one or more bodies of this nature before it becomes possible to refer a matter on a question of law to a "court or tribunal" within the meaning of [that article]?

(3) Are the competent authorities of a Member State authorised to make the right of a lawyer of [another] Member State to practise on a permanent basis the profession of lawyer under his home-country professional title in the

areas of activity specified in Article 5 of Directive 98/5 subject to a requirement of proficiency in the languages of [the first] Member State?

(4) In particular, may the competent authorities make the right to practise the profession subject to the condition that the lawyer sit an oral examination in all (or more than one) of the three main languages of the host Member State for the purpose of allowing the competent authorities to verify whether the lawyer is proficient in the three languages, and if so, what procedural guarantees, if any, are required?'

IV — The first and second questions: legal remedy

A — *Admissibility*

23. The Ordre des avocats du barreau de Luxembourg (Luxembourg Bar Association; 'the Ordre') and the Luxembourg Government consider the first two questions to be inadmissible, and the Commission considers the second question to be inadmissible.

24. The Ordre submits that the Court has no jurisdiction to interpret Article 9 of the Directive in relation to Luxembourg law. In addition, it regards the information relating to the first question in the order making the reference to be defective.

25. The Luxembourg Government considers it unnecessary to interpret Article 9 of the Directive, because it is for the national court to determine who has jurisdiction to decide the appeal.

26. The Commission submits that the second question is inadmissible because of deficiencies in the information supplied.

27. The Court has consistently held that it has no jurisdiction to give a preliminary ruling on a question submitted by a national court where it is quite obvious that the ruling sought by that court on the interpretation or

validity of Community law bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. [7]

28. The details on the provisions applicable to the main proceedings are indeed sparse, but the documents lodged provide sufficient information as to the essential features of the legal remedies granted.

29. Moreover, it is apparent that the interpretation of a provision of Community law is sought in order to allow the compatibility of national provisions to be determined.

30. In particular, the national court seeks an interpretation of the term 'remedy ... before a court or tribunal in accordance with the provisions of domestic law' for the purposes of Article 9 of the Directive. The answer to this question is necessary in order to enable the dispute to be decided because it will allow jurisdiction to be determined, in particular that of the court which has referred the question, in respect of the appeal against the decisions of the Conseil de l'Ordre. Of course, the Luxembourg courts will in fact determine their own jurisdiction.

31. As regards how Article 234 EC allocates jurisdiction in a reference for a preliminary ruling, it is of course not for the Court to make the final determination of whether the remedies conferred by Luxembourg law are compatible with Community law.

B — *Substance*

1. Preliminary observations

32. The first two questions in the present proceedings concern the appeal system provided for in Luxembourg against the refusal to admit a person to the profession of lawyer in Luxembourg. In essence, they concern the general compatibility of such a

7 — See Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 61; Case C-437/97 *EKW and Wein & Co.* [2000] ECR I-1157, paragraph 52; Case C-36/99 *Idéal tourisme* [2000] ECR I-6049, paragraph 20; Case C-318/00 *Bacardi-Martini and Cellier des Dauphins* [2003] ECR I-905, paragraph 42; and Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527, paragraph 76.

provision with the requirements of the Directive.

33. Whereas the first question relates generally to the appeal procedure provided by the Law of 1991, as amended by the Law of 2002, and Article 9 of the Directive, the second question refers specifically to the appellate bodies consisting of the Conseil disciplinaire et administratif and the Conseil disciplinaire et administratif d'appel (Disciplinary and Administrative Appeals Committee) and the express wording of Article 9 of the Directive.

34. However, despite the differences in wording, in substance the questions concern the same point. Against this background, the two questions are to be considered together by reference to the following issues: general Community law requirements as to the structure of an appeal system; criterion of judicial independence; and criterion of judicial impartiality. The standards by which these are to be assessed are primarily those in Article 234 EC and Article 6(1) of the ECHR.

35. Finally, it is to be recalled that in the context of judicial cooperation in references for preliminary rulings, it is for national courts to establish and to evaluate the facts of the case, whereas it is for the Court to provide the national court with such guidance on interpretation as may be necessary to enable it to decide the dispute. [8]

2. The general requirements as to the structure of the appeal system

36. Article 9 of the Directive refers to a 'remedy ... available ... before a court or tribunal in accordance with the provisions of domestic law'. This does not expressly include national professional organisations, although these are mentioned for example in Article 6(2) of the Directive.

37. On the other hand, the wording does not necessarily mean that it is always a 'court' within the traditional meaning of that word which must decide the case, in particular given that the applicable national law — as in the present case — can provide differently.

38. The Court has consistently held that in the absence of Community legislation in an area it is for the internal legal order of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to

8 — See, in particular, Case 139/85 *Kempf* [1986] ECR 1741, paragraph 12; Case C-332/88 *Alimenta* [1990] ECR I-2077, paragraph 9; and Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, paragraph 50.

safeguard the rights which individuals derive from the direct effect of Community law. [9]

39. However, such rules must not be less favourable than those governing similar domestic actions. According to the division of jurisdiction between the Court and the national courts laid down in Article 234 EC, it is for the national court to determine whether in practice the rules in question are discriminatory. [10]

40. Second, the procedure must not render virtually impossible or excessively difficult the exercise of rights conferred by Community law. The application of this principle requires that each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. [11]

9 — Case 33/76 *Rewe* [1976] ECR 1989, paragraph 5; Case C-312/93 *Peterbroeck, Van Campenhout & Cie* [1995] ECR I-4599, paragraphs 12 and 14; and Case C-224/01 *Köbler* [2003] ECRI-10239, paragraph 46.

10 — See Case 107/83 *Klopp* [1984] ECR 2971, paragraph 14.

11 — See, for example, Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 108.

41. Article 9 of the Directive and the Luxembourg legislation are to be interpreted in the light of these two principles.

42. In addition, it is appropriate to refer to the legislative history of the relevant provision of the Directive. The provision was not amended in the legislative process, and it is therefore possible to look to the reasons given by the Commission in its proposal to ascertain the legislature's intention. According to it the provision was intended to lay down minimum guarantees. [12] This indicates that the term 'court or tribunal' should be interpreted restrictively, in order to give sufficient weight to the interests of the persons granted legal protection.

3. Independence of the court

43. The first issue to consider is independence of the court, by reference to the Treaty.

44. The second paragraph of Article 234 EC does not itself contain any definition of the

12 — See COM(94) 572 final.

term 'court or tribunal'. However, the Court has laid down certain minimum requirements of Community law. [13] 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 234 EC, which is a question governed by Community law alone, it 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. Moreover, a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature.

45. The first issue in the present case is the criterion of independence, which is perhaps the most important distinction between national courts and administrative authorities. [14]

46. This requires that there must be a court which acts in the general framework of its task of judging, independently and in accordance with the law, cases coming within the jurisdiction conferred on it by law. In addition, the expression 'court or tribunal' is a concept which, by its very nature, can only mean an authority acting as a third party in relation to the authority which adopted the decision forming the subject-matter of the proceedings. [15]

47. It is the last point which is doubtful in the present case. The refusal to register is decided by the Conseil de l'Ordre, which consists of lawyers registered in List I, and is reviewed in turn by lawyers all of whom are registered in List I. Thus, although the persons required to be independent in relation to the case are not identical to one of the parties to the dispute, namely the Conseil de l'Ordre, they do not act as a third party in relation to it, but instead act as if they are 'in the same camp'. A connection may also be seen in the fact that in terms of hierarchy the President of the Luxembourg Bar Association, who is a member of the Conseil de l'Ordre, presides over all the participating lawyers in his capacity as 'Chef de l'Ordre' under Article 21 of the Law of 1991.

48. In one judgment relating to procurement law, the Court did not consider in any

13 — See, for example, Case 61/65 *Vaassen-Göbbels* [1966] ECR 261, 273, and Case C-53/03 *Syfait and Others* [2005] ECR I-4609, paragraph 29.

14 — Case 14/86 *Pretore di Salò* [1987] ECR 2545, paragraph 7, and the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-17/00 *De Coster* [2001] ECR I-9445, point 17.

15 — Case C-24/92 *Corbiau* [1993] ECR I-1277, paragraph 15.

more detail the criterion of acting as a third party in relation to the parties whose dispute is being determined, and instead laid the greatest weight on how the tasks were carried out, and specifically whether they were carried out independently and under the body's own responsibility. [16]

49. However, this is explained by the following circumstances of the case which had to be decided, which are absent from the present case: in that case, it was provided by statute that the procurement supervisory board which made the reference carried out its tasks independently and under its own responsibility. Thus, the members of the chambers were independent and subject only to observance of the law. The provisions of the German Richtergesetz (Law on Judges) concerning annulment or withdrawal of their appointments and concerning their independence and removal from office applied by analogy to official members of the chambers. Finally, the independence of the lay members was guaranteed by the fact that statute provided that they could not hear cases in which they themselves had been involved through participation in the decision-making process regarding the award of a contract or in which they were, or had been, tenderers or representatives of tenderers.

50. Accordingly, the fact that under the Luxembourg provisions the members of the professional tribunals cannot at the same time be members of the Conseil de l'Ordre appears to be insufficient. During their period of office, they must enjoy at least statutory guarantees of judicial independence and against removal from office. [17] It is also to be observed that there are no specific provisions concerning rejection or abstention of the members of the court, or any protection against undue intervention or undue pressure on the part of the executive, for example by a statutory provision guaranteeing freedom from instructions. [18] A general principle of non-interference in the activities of the State's administrative bodies, combined with a duty to withdraw, cannot be enough to guarantee the independence of the person who has to give a ruling in the dispute. On the other hand, that fundamental status of a body as a court or tribunal must be guaranteed by provisions which establish, clearly and precisely, the reasons for the withdrawal, rejection and dismissal of its members. [19]

16 — Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 34 et seq.; see also the Opinion of Advocate General Ruiz-Jarabo Colomer in *De Coster* (cited in footnote 14), point 21.

17 — See Joined Cases C-9/97 and C-118/97 *Jokela and Pitkäranta* [1998] ECR I-6267, paragraph 20, and Case C-416/96 *Eddline El-Yassini* [1999] ECR I-1209, paragraph 21.

18 — Case C-103/97 *Köllensperger and Atzwanger* [1999] ECR I-551, paragraph 21.

19 — Opinion of Advocate General Ruiz-Jarabo Colomer in *De Coster* (cited in footnote 14), point 25, and the judgments in *Syfait and Others* (cited in footnote 13), paragraph 29, and in Case C-407/98 *Abrahamsson and Anderson* [2000] ECR I-5539, paragraphs 36 and 37.

51. It must be borne in mind that the authority before which an appeal can be brought against a decision adopted by a department of an administrative authority can be regarded as a court or tribunal within the meaning of Article 234 EC, even where it has an organisational link with that administrative authority, provided that the national legal framework is such as to ensure a separation of functions between, on the one hand, the department of the administrative authority whose decision is being challenged and, on the other, the authority which rules on complaints lodged against decisions of that department without receiving any directions from the administrative authority to which that department is responsible. [20]

52. In the present case, the courts involved must determine the same questions according to the same legal provisions, and the necessary separation of functions as described above therefore does not exist.

53. In *Broekmuelen*, the Court was concerned in particular with professional bodies. [21] In that judgment, the Court held that if, under the legal system of a Member State, the task of implementing provisions of Community law was assigned to a professional body acting under a degree of governmental supervision, and if that body, in conjunction with the public authorities concerned, created appeal procedures which might affect the exercise of rights granted by Community law, it was imperative, in order to ensure the proper functioning of Community law, that the Court should have an opportunity of ruling on issues of interpretation and validity arising out of such proceedings.

54. In the present case, the only apparent governmental supervision, or at the most cooperation, is that on appeal two professional judges participate in the decisions in question. However, this does not afford sufficient protection, because the judges may be overruled by the participating lawyers who form the majority, of whom there are three.

55. Even if some academic writing regards professional bodies as courts or tribunals without any further analysis, [22] one must not

20 — Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577, paragraphs 39 and 40, and Case C-516/99 *Schmid* [2002] ECR I-4573, paragraph 37.

21 — Case 246/80 [1981] ECR 2311, paragraph 16; Anderson, D., *References to the European Court*, 1995, paragraph 2-016.

22 — See, for example, Middeke, A., *Handbuch des Rechtsschutzes in der Europäischen Union*, Second edition, 2003, Section 10 B I 2, paragraph 23.

forget that independence is not an ancillary matter but an essential characteristic of courts. [23]

56. Having regard to what has already been said about the present reference for a preliminary ruling, and to the fact that the decision at first instance is made exclusively by Luxembourg lawyers registered in List I who may well be considered to have a tendency to protect 'their market' from foreign competition, neither the Conseil disciplinaire et administratif nor the Conseil disciplinaire et administratif d'appel can be regarded as a court or tribunal for the purposes of Article 234 EC.

57. In addition, it is appropriate to make a comparison with provisions of other directives which are similar in content to Article 9 of the Directive.

58. There is a particular category of provisions of directives which expressly provides that the appeal body to be established by the Member States need not necessarily be a court or tribunal within the meaning of Article 234 EC. [24]

59. However, there are no such provisions in the present case. In any event, such provisions always require that the competent body is independent of the parties. Thus, the requirements those provisions lay down as to membership of administrative bodies are not less demanding in that regard, even if the bodies need not satisfy the normal definition of a court.

60. A final category of provisions of directives requires that decisions which are not subject to 'judicial supervision' be at least subject to review by a body which is independent of the body which made the decision and which is a court or tribunal within the meaning of Article 234 EC. [25]

61. Again, the directive applicable in the present case does not provide for such a review.

62. Accordingly, a comparison with provisions of other directives having similar

23 — On the importance of independence, see the Opinion of Advocate General Ruiz-Jarabo Colomer in *De Coster* (cited in footnote 14), point 92 et seq.

24 — Article 4(1) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (OJ 2002 L 108, p. 33); Article 12 of Directive 2002/30/EC of the European Parliament and of the Council of 26 March 2002 on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Community airports (OJ 2002 L 85, p. 40).

25 — Article 2(8) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), and Article 2(9) of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14).

content does not allow the conclusion that administrative bodies whose members are all lawyers constitute courts or tribunals within the meaning described above or that review by a court is sufficient.

63. Finally, the criterion of independence is to be considered also by reference to the case-law on Article 6 of the ECHR.

64. Although the express wording of this provision concerns only the guarantees which are essential to a fair trial, these would be ineffective unless it were recognised that there must be a prior right to judicial protection. [26]

65. Community case-law has also recognised the right of access to a court which enables individuals to enforce effectively the rights and interests conferred on them by the legal system of the European Union before a competent court. Articles 6 and 13 of the ECHR enshrine a general legal principle which is fundamental to the common constitutional traditions of the Member States.

66. For the purposes of the ECHR, independence requires first that the judge is independent of the administrative authorities and of the parties. [27] The fact that the administrative authorities appoint the members of the court is immaterial, provided that they are not able to give instructions as regards the task to be carried out. [28] However, this is doubtful in the present case. What has been said above applies to this point mutatis mutandis.

67. It is not necessary for the members of an administrative body to constitute a court or tribunal within the traditional meaning of those terms. In particular in technical areas (for example patents), there can be good reasons for a different composition. [29] However, the present case does not arise in such a specialised area requiring particular, or even technical, knowledge.

26 — See the Opinion of Advocate General Ruiz-Jarabo Colomer in *De Coster* (cited in footnote 14), point 88.

27 — European Court of Human Rights, *Le Compte, Van Leuven and De Meyere v. Belgium*, judgment of 23 June 1981, Series A no. 43, § 55 et seq., and *Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, Series A no. 80, § 78.

28 — European Court of Human Rights, *Campbell and Fell* (cited in footnote 27), § 79, and *Bryan v. the United Kingdom*, judgment of 22 November 1995, Series A no. 335-A, § 38.

29 — European Court of Human Rights, *Campbell and Fell* (cited in footnote 27), § 76; *Lithgow and Others v. the United Kingdom*, judgment of 8 July 1986, Series A no. 102, § 201; and *British-American Tobacco Company Ltd v. the Netherlands*, judgment of 20 January 1995, Series A no. 331, § 77.

68. Above all, doubts can arise if the members of a court are appointed or proposed by interest groups and the court has to decide about the interests of such a group or its members. [30] That is precisely the case in the present reference for a preliminary ruling.

69. On the other hand, in principle no doubts arise out of the fact that the judges in a professional tribunal include members of the profession. [31] Indeed, such persons may form the majority in the administrative body, provided always that they have a status conferred by law which protects them against external pressure. [32]

70. In its judgment in *Le Compte, Van Leuven and De Meyere v. Belgium*, the European Court of Human Rights held that independence was guaranteed where there was an equal number of judges sitting, and who included the chairman who had a casting vote where the votes were equal. [33]

71. However, again in the present case there is no such provision. There must also be taken into account the fact that the present proceedings concern the question of admission to the status of practising lawyer, which is far more important than the issues which arose in *Le Compte, Van Leuven and De Meyere v. Belgium*. Whereas prosecution of infringements of professional rules may still be regarded as an 'internal matter' for the legal profession, this is doubtful as regards admission to and the taking-up of practice, in particular because the applicant's legal position is far more seriously affected.

72. For that reason, there must be at least a statutory provision requiring the participants to be independent, this being normal in the case of judges both personally and as regards the substance of the matter.

73. The same problem arises as regards the appellate body, because the two judges may be outvoted by the three practising lawyers.

74. Administrative bodies such as the Conseil disciplinaire et administratif and the Conseil disciplinaire et administratif d'appel are therefore not independent within the meaning of the case-law of the European Court of Human Rights.

30 — See Grabenwarter, C., *Europäische Menschenrechtskonvention: ein Studienbuch*, Second edition, 2005, § 24, paragraph 33.

31 — Jarass, H., *EU-Grundrechte: ein Studien- und Handbuch*, 2005, § 40, paragraph 28.

32 — Velu, J. and Ergec, R., *La convention européenne des droits de l'homme*, Volume VII, 1990, paragraph 539.

33 — European Court of Human Rights, *Le Compte, Van Leuven and De Meyere v. Belgium* (cited in footnote 27), § 57.

4. Impartiality of the court

75. From the foregoing analysis, it may also be concluded that in addition the Conseil disciplinaire et administratif and the Conseil disciplinaire et administratif d'appel lack the impartiality required of a court by Article 6(1) of the ECHR, in particular given that there is a functional connection between independence and impartiality, the former being a necessary condition of the latter. [34]

76. At the same time, it is appropriate to make a comparison with the case of *De Moor v. Belgium* on this point. That case also concerned a dispute arising out of a refusal to admit a person to legal practice, decided by a disciplinary council composed exclusively of practising lawyers. [35]

77. The plaintiff called into question the structural and personal impartiality of the members of the disciplinary council. He submitted that they would merely defend their own financial and moral interests.

78. The government of the State concerned opposed this submission only on the facts of the particular case, but the European Commission of Human Rights in essence supported the plaintiff's argument. The European Court of Human Rights did not itself go into this issue, but decided the case by reference to the principle of a fair and public hearing.

79. Under Luxembourg law, the decision at first instance is made exclusively by Luxembourg lawyers in List I, who clearly could have an interest in protecting 'their market' from foreign competition.

80. For that reason, the competent administrative body under Luxembourg law is not impartial.

81. The case-law of the European Court of Human Rights recognises that the availability of a subsequent review by a court may be enough. [36] However, the final review proceedings under Luxembourg law lack the

34 — Grabenwarter, C. (cited in footnote 30), paragraph 39.

35 — European Court of Human Rights, *De Moor v. Belgium*, judgment of 23 June 1994, Series A no. 292-A.

36 — European Court of Human Rights, *Bryan v. the United Kingdom* (cited in footnote 28), § 40; Grabenwarter, C., *Verfahrensgarantien in der Verwaltungsgerichtsbarkeit*, 1997, Part 4, p. 359 et seq.

necessary comprehensive power to review questions of fact and law. [37]

82. In summary, it may be said that an appeal system such as that in the main proceedings does not satisfy the requirements of Community law.

5. Interim conclusion

83. Accordingly, the answer to the first two questions is that Directive 98/5 is to be interpreted as precluding appeal proceedings as provided for under the Law of 1991, as amended by the Law of 2002.

V — The third and fourth questions: language knowledge examination

84. In substance, the third and fourth questions concern questions of law which arise also in the infringement proceedings in *Commission* v *Luxembourg*. They correspond to the questions of law which the Commission has raised in that case by its first plea in law.

85. For that reason, for the analysis of the third and fourth questions, reference is made to the discussion of the first plea in law in my Opinion in the parallel infringement proceedings. [38]

86. Accordingly, the third question and the first part of the fourth question are to be answered as follows: the Directive is to be interpreted as precluding a national provision according to which the authorities of a Member State may make the practice of the profession of lawyer under the home-country professional title in a Member State other than that in which the qualification was obtained conditional on passing a prior language examination.

87. On the basis of this interpretation, it is unnecessary to answer the second part of the fourth question.

37 — See European Court of Human Rights, *Capital Bank AD v. Bulgaria*, judgment of 24 November 2005, no. 49429/99, § 98.

38 — Opinion in *Commission* v *Luxembourg* (cited in footnote 2).

VI — Conclusion

88. For the foregoing reasons, I would suggest to the Court that it answer the questions referred as follows:

(1) 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 is to be interpreted as precluding appeal proceedings as provided for under the Law of 1991, as amended by the Law of 2002.

(2) Directive 98/5 is to be interpreted as precluding a national provision according to which the authorities of a Member State may make the practice of the profession of lawyer under the home-country professional title in a Member State other than that in which the qualification was obtained conditional on passing a prior language examination.

Annex

Provisions of national law

Law of 10 August 1991 on the profession of lawyer

...

Article 6

(1) In order to be registered in the Bar Register [of an Ordre des avocats (Bar Association) established in the Grand Duchy of Luxembourg] a person must:

(a) satisfy the requirement of good character;

(b) prove that he fulfils the requirements for admission to a traineeship.

By way of exception the Bar Council (Conseil de l'Ordre) may exempt applicants who have completed their professional training in their home

State and who can prove that they have practised the profession for at least five years from certain requirements for admission to a traineeship.

(c) be of Luxembourg nationality or a national of a Member State of the European Communities. An applicant who is a national of a State which is not a member of the European Community may be exempted by the Bar Council from this requirement after it has consulted the Minister for Justice and has been provided with proof of mutuality on the part of the State in question. The same applies for applicants who have the status of political refugee and who are granted asylum in the Grand Duchy of Luxembourg.

...

Article 24

(1) By this Law, there is constituted a Disciplinary and Administrative Committee (Conseil disciplinaire et administratif) consisting of five lawyers registered in List I of the Bar Register, of whom four shall be elected by the Luxembourg Bar Association in general meeting by simple majority, and of whom one shall be elected by the Diekirch Bar Association in general meeting by simple majority. The Luxembourg Bar Association in general meeting shall elect four substitutes and the Diekirch Bar Association in general meeting shall elect one substitute. Where a member is prevented from acting, a substitute appointed by the Bar Association to which he belongs shall act in his place, according to the order of seniority; and if the substitutes elected by his own Bar Association are unable to act, the member shall be represented by a substitute elected by the other Bar Association.

(2) The members shall serve for a term of two years from the 15 September following their election. If the office of a member or of a substitute falls vacant, the Disciplinary and Administrative Committee shall appoint a replacement. The term of office of a replacement member and of a replacement representative shall end on the day on which the term of office of the elected member or substitute he replaces would have ended. The members of the Disciplinary and Administrative Committee may be re-elected.

(3) The Disciplinary and Administrative Committee shall elect a chairman and a vice-chairman. Where the chairman and vice-chairman are unable to act, the longest serving member shall preside. The most recently appointed member of the Committee shall act as secretary.

(4) Members of the Disciplinary and Administrative Committee shall be Luxembourg nationals who have been registered in List I of the Bar Register for at least five years, and shall not be members of the Bar Council.

(5) If it is impossible for the Disciplinary and Administrative Committee to be constituted according to the foregoing provisions, its members shall be appointed by the Council of the Bar Association to which the members to be replaced belong.

...

Article 26

...

(7) Where a lawyer registered in the register has been passed over, registration or re-registration of a lawyer has been refused, or the seniority of a registered lawyer has been disputed, as well as in the cases falling within Articles 22(2), 23, 34(3) and 40(1), the person concerned may apply to the Disciplinary and Administrative Committee within 40 days of the delivery, issue, or communication under the procedure provided for in paragraph 6 of the decision complained against. It is not necessary to appoint a representative for the proceedings.

...

Article 28 (as amended by the Law of 2002)

(1) The parties to the proceedings, the State Attorney's Office and the relevant Bar Association Council may appeal against all decisions of the Disciplinary and Administrative Committee with the exception of those specified in Article 22(2).

(2) For that purpose there shall be appointed a Disciplinary and Administrative Appeals Committee (Conseil disciplinaire et administratif d'appel), which shall consist of two judges of the Cour d'appel (Court of Appeal) and three lawyers registered in List I of the Bar Register sitting as assessors.

The members of the Committee who are judges, their substitutes and the clerk appointed to the Committee shall be appointed for a term of two years by Grand Ducal Order on a proposal by the Cour supérieure de justice (Supreme Civil Court). Their remuneration shall be fixed by Grand Ducal Regulation.

The assessors and their substitutes shall be appointed for a term of two years by Grand Ducal Order. They shall be appointed from a list of five lawyers, who have been registered for at least five years in List I of the Bar Register, to be submitted by each Bar Association Council for each vacancy.

Members of a Bar Association Council and members of the Disciplinary and Administrative Committee shall not be eligible for appointment as a legal assessor.

The Disciplinary and Administrative Appeals Committee shall sit in the offices of the Cour supérieure de justice, whose administrative division shall also carry out any tasks arising.

The longest serving judge shall preside in the Disciplinary and Administrative Appeals Committee.

(3) An appeal shall be lodged at the offices of the Cour supérieure de justice within a period of 40 days, which shall be commenced in respect of the parties to the proceedings, the State Attorney's Office and the Council of the relevant Bar Association by the notice issued by the chairman of the Disciplinary and Administrative Committee by registered post.

(4) The provisions of Article 26 concerning hearings and procedure shall apply mutatis mutandis to the Disciplinary and Administrative Appeals Committee.

Article 29

(1) The parties to the proceedings, the State Attorney's Office and the Council of the relevant Bar Association may apply for constitutional review of the judgment given on the appeal.

(2) The civil procedure rules shall apply mutatis mutandis to the application for constitutional review, the conduct of hearings and the decision. The time-limit for applying for constitutional review shall start to run on the day that the appeal decision is notified by an authorised official by registered post.

Law of 13 November 2002 transposing 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, and

1. **Amending the Law of 10 August 1991 on the profession of lawyer, as amended,**

2. **Amending the Law of 31 May 1999 on authorising acceptance of service on behalf of companies**

...

Article 3

(1) In order to practise the profession of lawyer in the Grand Duchy of Luxembourg under a home-country professional title, a European lawyer must be registered with one of the Bar Councils of the Grand Duchy of Luxembourg.

For that purpose he must submit a complete application in French to the president (bâtonnier) of the Bar Council of the court district in which he wishes to establish himself. In addition to the submission of the documents and information specified in paragraph 2, the European lawyer must state in his application whether he is member of a category of lawyers in his home State and, if so, provide all relevant details of the category.

(2) The Bar Council of the Grand Duchy of Luxembourg, when considering a European lawyer's application to practise the profession of lawyer under his home-country professional title, shall register him in the Bar Register of the Bar Association following a hearing enabling the Bar Council to verify whether the European lawyer is proficient in at least the languages specified in Article 6(1)(d) of the Law of 10 August 1991, and upon presentation of the documents specified in Article 6(1)(a), (c), first sentence, and (d) of the Law of 10 August 1991, and the certificate of registration of the European lawyer in question with the competent authority of his home Member State, the Bar Association Council shall register the European lawyer in the register of lawyers who are members of that Bar Association. The aforementioned certificate from the home Member State shall be submitted anew each year in January and shall not be more than three months old.

If the certificate is not submitted the Bar Association Council may cancel the European lawyer's registration.

Registration of a European lawyer in the Bar Register of the Bar Association shall be effected by registration in List IV as designated by point 4 of Article 8(3) of the Law of 10 August 1991, which comprises lawyers who practise the profession of lawyer under their home-country professional title.

The Bar Association Council which effects registration shall notify the competent authority of the home Member State thereof.

(3) Decisions to refuse registration under paragraph 2 or to cancel such registration shall state the reasons on which they are based. Such decisions must be notified to the European lawyer by registered post. Such decisions may be challenged on

the conditions and subject to the rules laid down in Article 26(7) et seq. of the Law of 10 August 1991.

(4) If one of the Bar Associations of the Grand Duchy of Luxembourg publishes the names of lawyers registered with it, it shall also publish the names of the European lawyers registered with it who practise the profession of lawyer under their home-country professional title.

(5) If the competent authorities of a Member State other than Luxembourg register a lawyer who is registered with one of the Bar Associations of the Grand Duchy of Luxembourg, the information specified in Article 3(2) of Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 shall be provided to the president of the Bar Association of the Grand Duchy of Luxembourg with which the lawyer is registered.

...

Article 14

The Law of 10 August 1991 on the profession of lawyer, as amended, is amended as follows:

...

III. The following letter (d) shall be inserted into Article 6(1):

'(d) be proficient in the language of statutory provisions as well as the administrative and court languages as provided for by the Law of 24 February 1984 on the language regime.'