

JUDGMENT OF THE COURT (Fourth Chamber)

22 December 2010 *

In Case C-118/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Oberste Berufungs- und Disziplinarkommission (Austria), made by decision of 16 March 2009, received at the Court on 1 April 2009, in the proceedings brought by

Robert Koller,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, K. Schiemann and L. Bay Larsen (Rapporteur), Judges,

* Language of the case: German.

Advocate General: V. Trstenjak,
Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Mr Koller, by himself, abogado,
- the Austrian Government, by C. Pesendorfer, acting as Agent,
- the Czech Government, by M. Smolek, acting as Agent,
- the Greek Government, by E. Skandalou and S. Vodina, acting as Agents,
- the Spanish Government, by J. López-Medel Báscones, acting as Agent,

— the Commission of the European Communities, by C. Hermes and H. Støvlbæk, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 2 June 2010,

gives the following

Judgment

- ¹ The reference for a preliminary ruling concerns the interpretation of Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher education diplomas awarded on completion of professional education and training of at least three years' duration (OJ 1989 L 19, p. 16), as amended by Directive 2001/19/EC of the European Parliament and of the Council of 14 May 2001 (OJ 2001 L 206, p. 1; 'Directive 89/48 as amended').
- ² The reference was made in a dispute between Mr Koller and the Rechtsanwaltsprüfungskommission of the Oberlandesgericht Graz (Lawyers' Examination Board at the Higher Regional Court, Graz) concerning the refusal of the chairman of that body to admit him to the aptitude test for the profession of lawyer in Austria or to exempt him from that test.

Legal context

European Union law

- 3 According to Article 1(a), (b) and (g) of Directive 89/48 as amended:

‘For the purposes of this Directive the following definitions shall apply:

- (a) diploma: any diploma, certificate or other evidence of formal qualifications or any set of such diplomas, certificates or other evidence:
 - which has been awarded by a competent authority in a Member State, designated in accordance with its own laws, regulations or administrative provisions;
 - which shows that the holder has successfully completed a post-secondary course of at least three years’ duration, or of an equivalent duration part-time, at a university or establishment of higher education or another establishment of equivalent level and, where appropriate, that he has successfully completed the professional training required in addition to the post-secondary course, and

- which shows that the holder has the professional qualifications required for the taking up or pursuit of a regulated profession in that Member State,

provided that the education and training attested by the diploma, certificate or other evidence of formal qualifications were received mainly in the Community

...

The following shall be treated in the same way as a diploma, within the meaning of the first subparagraph: any diploma, certificate or other evidence of formal qualifications or any set of such diplomas, certificates or other evidence awarded by a competent authority in a Member State if it is awarded on the successful completion of education and training received in the Community and recognised by a competent authority in that Member State as being of an equivalent level and if it confers the same rights in respect of the taking up and pursuit of a regulated profession in that Member State;

- (b) host Member State: any Member State in which a national of a Member State applies to pursue a profession subject to regulation in that Member State, other than the State in which he obtained his diploma or first pursued the profession in question;

...

- (g) aptitude test: a test limited to the professional knowledge of the applicant, made by the competent authorities of the host Member State with the aim of assessing the ability of the applicant to pursue a regulated profession in that Member State.

In order to permit this test to be carried out, the competent authorities shall draw up a list of subjects which, on the basis of a comparison of the education and training required in the Member State and that received by the applicant, are not covered by the diploma or other evidence of formal qualifications possessed by the applicant.

The aptitude test must take account of the fact that the applicant is a qualified professional in the Member State of origin or the Member State from which he comes. It shall cover subjects to be selected from those on the list, knowledge of which is essential in order to be able to exercise the profession in the host Member State. The test may also include knowledge of the professional rules applicable to the activities in question in the host Member State. The detailed application of the aptitude test shall be determined by the competent authorities of that State with due regard to the rules of Community law.

...

4 Article 3(a) of Directive 89/48 as amended provides:

‘Where, in a host Member State, the taking up or pursuit of a regulated profession is subject to possession of a diploma, the competent authority may not, on the grounds of inadequate qualifications, refuse to authorise a national of a Member State to take up or pursue that profession on the same conditions as apply to its own nationals:

- (a) if the applicant holds the diploma required in another Member State for the taking-up or pursuit of the profession in question in its territory, such diploma having been awarded in a Member State ...’

5 Article 4(1) and (2) of the said directive provide:

‘Notwithstanding Article 3, the host Member State may also require the applicant:

(a) to provide evidence of professional experience, where the duration of the education and training adduced in support of his application, as laid down in Article 3(a) and (b), is at least one year less than that required in the host Member State. ...

...

(b) to complete an adaptation period not exceeding three years or take an aptitude test:

— where the matters covered by the education and training he has received as laid down in Article 3(a) and (b), differ substantially from those covered by the diploma required in the host Member State, or

— where, in the case referred to in Article 3(a), the profession regulated in the host Member State comprises one or more regulated professional activities which are not in the profession regulated in the Member State from which the applicant originates or comes and that difference corresponds to specific education and training required in the host Member State and covers matters which differ substantially from those covered by the diploma adduced by the applicant, or

...

If the host Member State intends to require the applicant to complete an adaptation period or take an aptitude test, it must first ascertain whether the knowledge acquired by the applicant in the course of his professional experience in a Member State or in a third country, is of a nature to cover, in full or in part, the substantial difference referred to in the first paragraph.

Should the host Member State make use of this possibility, it must give the applicant the right to choose between an adaptation period and an aptitude test. By way of derogation from this principle, for professions whose practice requires precise knowledge of national law and in respect of which the provision of advice and/or assistance concerning national law is an essential and constant aspect of the professional activity, the host Member State may stipulate either an adaptation period or an aptitude test. ...

2. However, the host Member State may not apply the provisions of paragraph 1(a) and (b) cumulatively.’

National law

- ⁶ Chapter 3 of the Federal law on the free movement of services and the establishment of European lawyers in Austria (Bundesgesetz über den freien Dienstleistungsverkehr und die Niederlassung von europäischen Rechtsanwälten in Österreich, BGBl.

I, 27/2000, in the version published in BGBl. I, 59/2004 ('the EuRAG') includes in particular Paragraphs 24 to 29. Paragraph 24 of the EuRAG states:

'1. Nationals of the Member States of the European Union ... who have obtained a diploma which shows that the holder meets the professional requirements necessary for immediate access to a profession listed in the annex to this federal law must, on application, be registered in the list of lawyers if they have successfully passed an aptitude test.

2. Diplomas within the meaning of subparagraph 1 are diplomas, certificates or other evidence of formal qualifications within the meaning of Directive 89/48 ...'

7 Paragraph 25 of the EuRAG reads:

'The aptitude test is a State examination relating exclusively to the professional knowledge of the candidate, with the aim of assessing his ability to pursue the profession of a lawyer in Austria. The aptitude test must take account of the fact that the candidate is professionally qualified to pursue the profession of a lawyer in a Member State of the European Union.'

8 Paragraph 27 of the EuRAG provides:

'On application by the candidate, at the latest four months after submission of the complete documentation by the candidate, the chairman of the Lawyers' Examination Board shall decide, in consultation with the local Chamber of Lawyers for the Oberlandesgericht, on admission to the aptitude test.'

9 Paragraph 29 of the EuRAG provides:

‘On application, the chairman of the Lawyers’ Examination Board must, in consultation with the Chamber of Lawyers which is competent under Paragraph 26, waive test subjects if the candidate proves that during his previous training or his previous professional activity in a test subject he has acquired the substantive and procedural law knowledge of Austrian law required for professional practice as a lawyer in Austria.’

10 Paragraph 1 of the Lawyers’ Code (Rechtsanwaltsordnung, RGBL. 96/1868, in the version published in BGBl. I, 128/2004; ‘the RAO’) states:

‘(1) An official appointment is not required for the purposes of professional practice as a lawyer in [Austria]; it is merely necessary to prove that the following requirements have been fulfilled and that the lawyer is registered in the list of lawyers ...

(2) Those conditions are as follows:

...

(d) practical experience of the nature and duration required by law;

(e) successful completion of the lawyers’ examination;

...’

- 11 Under Paragraph 2(2) of the RAO, the practical experience must last five years, including at least nine months at a court or public prosecutor's office and at least three years with a lawyer in Austria.

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 12 On 25 November 2002, Mr Koller, an Austrian national, obtained from the University of Graz (Austria) the degree of 'Magister der Rechtswissenschaften', namely a diploma awarded on completion of a cycle of university law studies lasting at least eight semesters.
- 13 By decision of 10 November 2004, the Spanish Ministry of Education and Science recognised the degree of 'Magister der Rechtswissenschaften' as equivalent to that of 'Licenciado en Derecho', as the applicant had followed courses at the University of Madrid and passed additional examinations in accordance with the homologation procedure laid down by domestic Spanish law.
- 14 On 14 March 2005, the Madrid Chamber of Lawyers, having established that Mr Koller held the degree of 'Licenciado en Derecho', authorised him to use the title 'abogado'.
- 15 On 5 April 2005, Mr Koller applied to the Rechtsanwaltsprüfungskommission at the Oberlandesgericht Graz for admission to the aptitude test for the profession of lawyer. At the same time, he applied for the waiver under Paragraph 29 of the EuRAG in respect of all the subjects constituting the aptitude test.

- 16 By decision of 11 August 2005, on the basis of Paragraph 27 of the EuRAG, the chairman of the Rechtsanwaltsprüfungskommission rejected the application for admission to the aptitude test. At that time, Mr Koller was carrying on the profession of lawyer in Spain. Mr Koller appealed against that decision to the Oberste Berufungs- und Disziplinarkommission (Appeals and Disciplinary Board; 'OBDK').
- 17 By decision of 31 January 2006, the OBDK dismissed the applicant's claims. It based its reasoning, first, on the fact that in Spain, by contrast with the rules applicable in Austria, practical experience is not required in order to pursue the profession of a lawyer. The OBDK concluded that Mr Koller's application was designed to circumvent the requirement for five years' practical experience required by the Austrian rules.
- 18 Secondly, the OBDK took the view that the degree of 'Licenciado en Derecho' was not sufficient for admission to the aptitude test according to Chapter 3 of the EuRAG. In that respect, the second indent of Article 1(a) of Directive 89/48 as amended differentiated between the successful completion of a cycle of post-secondary studies lasting at least three years and the professional training required in addition to that cycle of studies. In those circumstances, it was to be presumed that the EuRAG aptitude test was a test limited to assessing the professional knowledge of the applicant. Since Mr Koller did not have any professional knowledge, he could not, in the view of the OBDK, be admitted to the aptitude test. Finally, the combination of the application for admission to the aptitude test and the request for waiver of the same test together amounted to a deliberate attempt to circumvent the Austrian legislation.
- 19 By judgment of 13 March 2008, following an appeal by Mr Koller, the Verfassungsgerichtshof (Constitutional Court, Austria) set aside that decision on the ground, inter alia, that there was no evidence of abuse on Mr Koller's part. Accordingly, the OBDK had to rule again on Mr Koller's application for admission to the aptitude test for the profession of lawyer.

20 It is in those circumstances that the OBDK decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

‘(1) Is Directive 89/48 ... applicable to the case of an Austrian national if he

- (a) successfully completed his diploma course in law in Austria and was awarded by decision the academic degree of “Magister der Rechtswissenschaften”,
- (b) after taking supplementary examinations at a Spanish university, which however involved less than three years of study, was then granted, by a certificate of recognition from the Ministry of Education and Science of the Kingdom of Spain, the entitlement to use the Spanish title “Licenciado en Derecho”, which is equivalent to the Austrian title, and
- (c) by registering with the Madrid Chamber of Lawyers gained the entitlement to use the professional title “abogado” and actually pursued the profession of a lawyer in Spain for three weeks before making the application and for five months at the most before the first instance decision?

(2) In the event that Question 1 is answered in the affirmative:

Is it compatible with Directive 89/48 ... to interpret Paragraph 24 of the ... EuR-AG as meaning that obtaining an Austrian degree in law and attaining the entitlement to use the Spanish title “Licenciado en Derecho” after taking supplementary

examinations at a Spanish university over a period of less than three years of study is not sufficient for admission to the aptitude test in Austria under Paragraph 24(1) of the EuRAG without proof of the practice required under national law (Paragraph 2(2) of the RAO), even if the applicant has been admitted as an “abogado” in Spain without a comparable requirement for practice and had pursued the profession there for three weeks before making the application and for five months at the most before the first instance decision?’

The jurisdiction of the Court of Justice

- 21 As a preliminary point, it is necessary to ascertain whether the OBDK is a court or tribunal within the meaning of Article 234 EC and whether the Court therefore has jurisdiction to make a ruling on the questions referred to it.

- 22 In that regard, it should be borne in mind that, according to settled case-law, in order to determine whether the body making a reference is a court or tribunal for the purposes of Article 234 EC, 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 (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-246/05 *Häupl* [2007] ECR I-4673, paragraph 16).

- ²³ In this case, as the Advocate General has stated in point 52 of her Opinion, the OBDK, whose jurisdiction, as all parties agree, is compulsory, exhibits all the features necessary in order to be classified as a court or tribunal within the meaning of Article 234 EC.
- ²⁴ In those circumstances the Court has jurisdiction to reply to the questions raised by the national court.

The questions referred

The first question

- ²⁵ By its first question, the referring court asks, in essence, whether, with a view to gaining access, subject to passing an aptitude test, to the regulated profession of lawyer in a Member State, the provisions of Directive 89/48 as amended may be relied upon by a person who holds a degree issued in that Member State on completion of a cycle of post-secondary studies lasting more than three years, and who also holds an equivalent degree issued in another Member State after additional training of less than three years and enabling him, in that latter State, to have access to the regulated profession of lawyer, which he was actually practising in the latter State on the date on which he applied for admission to the aptitude test.
- ²⁶ It should be noted that the concept of a ‘diploma,’ as defined in Article 1(a) of Directive 89/48 as amended, constitutes the cornerstone of the general system for the recognition of higher education diplomas laid down by that directive (see, in particular, Case C-286/06 *Commission v Spain* [2008] ECR I-8025, paragraph 53).

- ²⁷ Subject to the provisions of Article 4 of Directive 89/48, subparagraph (a) of the first paragraph of Article 3 of that directive entitles any applicant who holds a ‘diploma’, within the meaning of that directive, enabling him to pursue a regulated profession in one Member State to pursue the same profession in any other Member State (*Commission v Spain*, paragraph 54).
- ²⁸ With regard to qualifications such as those relied on by Mr Koller, it must be recalled that a ‘diploma’, within the meaning of Article 1(a) of Directive 89/48 as amended, may consist of a set of qualifications.
- ²⁹ As regards the condition referred to in Article 1(a), first indent, of Directive 89/48 as amended, it should be noted that, in Case C-311/06 *Consiglio Nazionale degli Ingegneri* [2009] ECR I-415, the Court held, in paragraph 48 of its judgment, that that condition was satisfied in relation to the qualifications relied on by a person who had sought enrolment in the register of engineers in Italy, in that each of those qualifications was awarded by a competent authority, designated respectively in accordance with Italian and Spanish legislation. That condition is likewise satisfied in relation to qualifications such as those of Mr Koller, each of them having been awarded by a competent authority, designated respectively in accordance with Austrian and Spanish legislation.
- ³⁰ As regards the condition referred to in Article 1(a), second indent, of Directive 89/48 as amended, it should be noted that a person such as Mr Koller, as the Court also held in paragraph 49 of its judgment in *Consiglio Nazionale degli Ingegneri* in relation to the person at issue in that case, satisfies the condition that the holder must

have successfully completed a post-secondary course of at least three years' duration at a university. That fact is expressly evidenced by the degree certificate which was awarded to Mr Koller by the University of Graz.

- ³¹ As regards the condition referred to in Article 1(a), third indent, of Directive 89/48 as amended, it is clear from the recognition decision by the Spanish Ministry of Education and Science, and in any event from Mr Koller's enrolment with the Madrid Chamber of Lawyers, that Mr Koller has the professional qualifications required for access to a regulated profession in Spain (see, to that effect, *Consiglio Nazionale degli Ingegneri*, paragraph 50).
- ³² Moreover, unlike the homologation certificate relied on by the person at issue in *Consiglio Nazionale degli Ingegneri*, which gave no evidence of any training under the Spanish educational system and was based neither on examination nor on professional experience acquired in Spain, the Spanish qualification relied on by Koller attests his acquisition of an additional qualification over and above that obtained in Austria.
- ³³ Therefore, whilst it is true that a document attesting to professional qualifications cannot be assimilated to a 'diploma' within the meaning of Directive 89/48 as amended without there having been an acquisition, in whole or in part, of qualifications under the educational system of the Member State which issued that document (see, to that effect, *Consiglio Nazionale degli Ingegneri*, paragraph 55), that is not the case with the degree relied upon by Mr Koller in the main proceedings.

- ³⁴ Moreover, the fact that that Spanish document does not attest to professional training of three years undertaken in Spain is irrelevant in that respect. Article 1(a), first paragraph, of the directive does not require that the cycle of post-secondary studies lasting at least three years, or lasting for an equivalent duration part time, be undertaken in a Member State other than the host Member State.
- ³⁵ Thus, a person such as Mr Koller is indeed the holder of a ‘diploma’ within the meaning of Article 1(a) of Directive 89/48 as amended.
- ³⁶ Therefore, the answer to the first question is that, with a view to gaining access, subject to passing an aptitude test, to the regulated profession of lawyer in a Member State, the provisions of Directive 89/48 as amended may be relied upon by a person who holds a degree issued in that Member State on completion of a cycle of post-secondary studies lasting more than three years, and who also holds an equivalent degree issued in another Member State after additional training of less than three years and enabling him, in that latter State, to have access to the regulated profession of lawyer, which he was actually practising in the latter State on the date on which he applied for admission to the aptitude test.

The second question

- ³⁷ By its second question, the referring court asks, in essence, whether Directive 89/48 as amended must be interpreted as precluding the competent authorities of the host Member State from refusing to authorise a person in a situation such as that of the applicant in the main proceedings to take the aptitude test for the profession of lawyer

without proof of completion of the period of practical experience required by the legislation of that Member State.

- 38 As the holder of a 'diploma' within the meaning of Article 1(a) of Directive 89/48 as amended, a person such as Mr Koller enjoys, in accordance with Article 3, first paragraph, subparagraph (a), of that directive, access to the regulated profession of lawyer in the host Member State.
- 39 However, since the profession is one the exercise of which requires a precise knowledge of national law and an essential and constant element of which is the provision of advice and/or assistance concerning national law, Article 3 of Directive 89/48 as amended does not prevent the host Member State from requiring, pursuant to Article 4(1)(b) of the latter, that the applicant take an aptitude test, provided that State first verifies whether the knowledge acquired by the applicant in the course of his professional experience is capable of covering, in whole or in part, the substantial difference referred to in the first subparagraph of that latter provision.
- 40 Since the applicant is subject, in the host Member State, to an aptitude test whose very purpose is to ensure that he is capable of exercising the regulated profession in that Member State, the latter cannot, by virtue of Article 4 of Directive 89/48 as amended, deny to a person in a situation such as that of the applicant in the main proceedings authorisation to take such a test on the ground that he has not completed the period of practical experience required by the legislation of that Member State.
- 41 Therefore, the answer to the second question is that Directive 89/48 as amended must be interpreted as precluding the competent authorities of the host Member State from denying to a person in a situation such as that of the applicant in the main

proceedings authorisation to take the aptitude test for the profession of lawyer without proof of completion of the period of practical experience required by the legislation of that Member State.

Costs

- ⁴² Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. With a view to gaining access, subject to passing an aptitude test, to the regulated profession of lawyer in a Member State, the provisions of Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher education diplomas awarded on completion of professional education and training of at least three years' duration, as amended by Directive 2001/19/EC of the European Parliament and of the Council of 14 May 2001 may be relied upon by a person who holds a degree issued in that Member State on completion of a cycle of post-secondary studies lasting more than three years, and who also holds an equivalent degree issued in another Member State after additional training of less than three years and enabling him, in that latter State, to have access to the regulated profession of lawyer, which he was actually practising in the latter State on the date on which he applied for admission to the aptitude test.

2. **Directive 89/48, as amended by Directive 2001/19, must be interpreted as precluding the competent authorities of the host Member State from denying to a person in a situation such as that of the applicant in the main proceedings authorisation to take the aptitude test for the profession of lawyer without proof of completion of the period of practical experience required by the legislation of that Member State.**

[Signatures]