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CHRONOLOGY (I), ANALYSIS (II) AND GUIDANCE (III) TO BARS AND LAW SOCIETIES REGARDING CASE C-313/01 *CHRISTINE MORGENBESSER V CONSIGLIO DELL'ORDINE DEGLI AVVOCATI DI GENOVA*, 5TH CHAMBER (13 NOVEMBER 2003)

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Chronology (I), Analysis (II) and guidance (III) to Bars and Law Societies regarding Case C-313/01 *Christine Morgenbesser v Consiglio dell'Ordine degli avvocati di Genova*, 5th Chamber (13 November 2003).

I. OUTLINE CHRONOLOGY

Judgment of the Court of Justice in case C-313/01 *Morgenbesser v Consiglio dell'Ordine degli avvocati di Genova*

1996
Christine Morgenbesser, a French national was awarded the title of *maîtrise en droit* (law degree) in France, but still required the certificate of aptitude necessary for qualification as an *avocat.* Ms Morgenbesser spent some time training with a law firm in France and then in April 1998 commenced working with a legal practice in Genoa. It is while she was there, that Ms Morgenbesser decided to apply for enrolment at the *registro dei praticanti* (register of trainee lawyers). Such enrolment is required as part of the process of qualifying as a lawyer in Italy.

October 1999
On 27 October 1999, Ms Morgenbesser applied to the Bar Council of Genoa for entry onto the register of trainee lawyers (*praticanti*). On 4 November 1999 her application was refused. The Bar Council cited point 4 of the first paragraph of Article 17 of Decree-Law No 1578/33. This states that enrolment on the register of *praticanti* can only be made by those holding a legal diploma issued or confirmed by an Italian university.

May 2000
Ms Morgenbesser appealed to the *Consiglio Nazionale Forense* (the National Bar Council). On 12 May 2000, the Council dismissed her appeal. This was on the ground that she was neither qualified to carry on the profession of lawyer in France nor did she hold the necessary professional qualification for enrolment on the register of *praticanti* in Italy.

Ms Morgenbesser then applied to the *Università degli Studi di Genova* for recognition of her *maîtrise en droit*. The *Consiglio di Corso di Laurea in Giurisprudenza* (Law Faculty Board) agreed that this could be done provided she completed a course of two years, passed 13 examinations and submitted a thesis.

Ms Morgenbesser appealed against the latter decision before the *Tribunale Amministrativo Regionale della Liguria* (Italy). This court upheld the appeal, but it was then subject to a challenge by the *Consiglio di Stato* (Italy).

Ms Morgenbesser then appealed on a point of law against the decision of the *Consiglio Nazionale Forense* of 12 May 2000. The *Corte suprema di cassazione* stayed proceedings and referred the question to the Court of Justice for a preliminary ruling.

April 2001
By order of 19 April 2001, received at the Court on 8 August 2001, the *Corte suprema di cassazione* referred to the Court of Justice for a preliminary ruling under Article 234 EC a question on the interpretation of Articles 10 EC, 12 EC, 14 EC, 39 EC, 43 EC and 149 EC.
http://europa.eu.int/cj/en/transitpage.htm

March 2003
Opinion of the Advocate General
The Advocate General concluded that Directive 89/48/EEC governing the supervision of all regulated professions was not applicable here as Ms Morgenbesser was not a fully qualified lawyer. The Opinion also stated that the Italian authorities must examine the skills and aptitudes already gained by Ms Morgenbesser in France and Italy. If there is a shortfall in the knowledge required for the admission to the register of trainee lawyers, the Italian authorities can ask and determine how this gap should be fulfilled.
http://europa.eu.int/jurisp/cgi-bin/form.pl?lang=en

November 2003
Judgment of the European Court of Justice (Case C-313/01)
On 13 November 2003, the Court held that Italy was wrong to obstruct Ms Morgenbesser's entry to the Italian register of trainee lawyers because her legal education took place in France. The governing authorities must take an overall look at the experience and skills obtained by the candidate. If there was a gap in the legal education Ms Morgenbesser gained in France when compared with the requirements stipulated by Italy, it may then require any gaps to be compensated for.
http://europa.eu.int/jurisp/cgi-bin/form.pl?lang=en

II. ANALYSIS

1. *Essential Facts*
Christine Morgenbesser, a French national, with a French *Maitrise en droit* (1996) joined an Italian firm of *avvocati* in Genoa in April 1998 after undertaking eight months legal work in Paris. In October 1999 she applied to the Genoa Bar for admission as a *praticanti* (trainee lawyer) and was rejected on the grounds that she did not have the necessary qualifications for admission to the roll of *praticanti*, namely she lacked the *laurea in giurisprudenza* or other diploma confirmed as equivalent to the Italian law degree. An appeal to the *Consiglio Nazionale Forense* (National Bar Council) was dismissed and the *Corte suprema di cassazione* asked the European Court of Justice whether the French diploma could be relied on in Italy.

2. *The notion of "regulated profession" does not include a traineeship*
The European Court of Justice dismissed the notion that the "traineeship" itself could be "a regulated profession". Thus Directive 89/48/EEC[1] did not apply in this case nor did Directive 98/5/EC[2] apply as Ms Morgenbesser was not a fully qualified professional in her home State (at §§52-55 of the judgment).

3. Either Article 39EC or 43EC could provide a legal basis for a migrant professional's right to have his or her professional qualifications taken into account (at §§60-61).

4. *A holistic approach: All the competences of the applicant have to be taken into account wherever acquired*
In *Morgenbesser* the Court of Justice ruled that national "authorities" must taken into consideration "the professional qualification" of an applicant including diplomas, certificates or other formal qualifications and any professional experience **wherever** acquired (at §§57 and 58). The qualification should then be compared to those required nationally.

5. *The context of the training received by an applicant can be taken into account*
Qualifications should be assessed "having regard to the nature and duration of the studies and practical training" (at §§67-68). Member States are entitled to take account of objective differences in the context of training. In the case of lawyers the different legal frameworks of the profession and the different fields of activity of the profession in the Member States of origin could be taken into account including the differences between the national legal systems (at §69).

6. *Academic equivalence*
The Court ruled that whilst academic equivalence of diplomas is important in other contexts, it is unnecessary in the context of assessment of the migrant's qualifications under Articles 39 and 43 EC (at §§63-66). All qualifications of the migrant had to be taken into account in the assessment of his whole training, which must enable the authority of the host member state to assess the equivalence of the candidates' qualifications objectively. The qualifications need not be identical.

7. *Partial equivalence*
If, after this examination, the qualifications of the migrant are deemed equivalent then they must be accepted. If they are only partially equivalent the host state can require the applicant to show the acquisition of the knowledge, skills and qualifications that are lacking (at §70). The applicant can show this by learning and skill acquired in the host State or elsewhere.

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[1] 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 (1989) OJ L 19/16, as amended by Directive 2001/19/EC of the European Parliament and of the Council of 14 May 2001 amending Council Directives 89/48/EEC and 92/51/EEC on the general system for the recognition of professional qualifications and Council Directives 77/452/EEC, 77/453/EEC, 78/686/EEC, 78/687/EEC, 78/1026/EEC, 78/1027/EEC, 80/154/EEC, 80/155/EEC, 85/384/EEC, 85/432/EEC, 85/433/EEC and 93/16/EEC concerning the professions of nurse responsible for general care, dental practitioner, veterinary surgeon, midwife, architect, pharmacist and doctor (2001) OJ L206/1.

[2] 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 (1998) OJ L 77/36.

III. GUIDANCE

ASSESSMENT OF THE JUDGMENT AND GUIDANCE TO BARS AND LAW SOCIETIES

A. Main import of the judgment

a. The judgment, in essence, extends the right of mobility to those still in training and not yet fully-qualified lawyers. It thus goes beyond the requirements of Directive 89/48, Article 5 of which made this optional.[3] Articles 39 and 43 EC provide the legal basis for the ruling (at §§60-62).

b. Competent authorities have an EC law duty to take into account all the qualifications of such EU nationals seeking entry into their professions.

B. Who are the competent authorities?

The competent authority for this "new" mode of entry to the legal professions may not have been designated in national law and practice. It will be the authority that admits applicants to the traineeship (post-academic) stage of preparation for becoming a lawyer. In most cases this will be a Bar or Law Society.[4] There is some merit in having a centralised approach to help ensure uniformity of decision-making and to prevent conflicting precedents from arising. **Bars and Law Societies, should seek to get national law altered to designate and allocate them, or a central authority where relevant, the task of this comparative assessment.** It is true that in the absence of such clarification, EC law still operates to require them to undertake this task anyway, but EC law nevertheless requires certainty and a lack of proper "routes" for migrants could be deemed a "hindrance" to mobility and in itself be an infringement of EC law.

C. Duties of the Competent Authority in relation to the comparative evaluation of qualifications

a) The duty of the competent authority is to assess applicants' competences holistically, that is to say they must assess all the applicant's abilities, knowledge and competences to carry out the professional role of "lawyer" in the host country.

b) The knowledge, learning and skills of applicants have to be taken as a whole, and **there can be no prior requirement of equivalence of the academic stage of training**.[5]

c) The competent authority must assess not only the academic and other stages of training but also the professional experience of the migrant. This has been a requirement since the *Vlassopoulou*[6] case whose ruling in this respect has since been incorporated into Directive 89/48/EEC.[7]

d) The "professional qualification" of the migrant, **wherever** gained (at §58), has to be taken into account.

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[3] Directive 89/48 (note 1) Article 5:
Without prejudice to Articles 3 and 4, a host Member State may allow the applicant, with a view to improving his possibilities of adapting to the professional environment in that State, to undergo there, on the basis of equivalence, that part of his professional education and training represented by professional practice, acquired with the assistance of a qualified member of the profession, which he has not undergone in his Member State of origin or the Member State from which he has come.

[4] Though in countries where the State regulates access to the *stage* it could be the organ of the State that is the competent authority, for example the State authorities in the German Laender who admit candidates to the *Referendarzeit*.

[5] See case C-234/97 *Teresa Fernández de Bobadilla v Museo Nacional del Prado, Comité de Empresa del Museo Nacional del Prado and Ministerio* Fiscal [1999] ECR I-4773, noted at (2001) 50 *ICLQ* 168.

[6] Case C-340/79 *Vlassopoulou* [1991] ECR I-2357 and re-affirmed in case C-238/98 *Hocsman* [2000] ECR I-6623.

[7] Directive 89/48/EEC was amended by Directive 2001/19, see note 1.

e) National competent authorities should have already a "list of subjects" required in their own Member States. This list should be normally reduced to a smaller list of topics "knowledge of which is essential in order to be able to exercise the profession" (Article 1(g) of Directive 89/48/EEC). **This is the yardstick against which the migrant applicant's professional qualification should be judged, taking into account objectively justified contextual differences mentioned in items 5 above and f) below.**

f) Objective differences in the context of training and legal practice however can be taken into account. (See item 5 above).

D. Assistance in making assessments

a. Whilst academic equivalence cannot be a prerequisite for the comparative examination of qualifications, it does not seem, from the *Morgenbesser* judgment, that the competent authority cannot avail itself of help from experts or bodies able to assist them in making "an objective" and holistic assessment of a migrant's qualification. The process would need to be undertaken in a speedy (timely) fashion and have as its aim assessment of the abilities of the applicant to undertake the professional role sought in the host State. It is for the migrant to make out a case.

b. **It is recommended that the national competent authorities extend the exchange of information regarding qualifications, through the medium of the CCBE.** Data could be added to the ELIXIR website which can be found at http://elixir.bham.ac.uk/.This website outlines the training and admission requirements for legal professionals in the 15 Member States. Such a central resource would make the task of assessment easier for all concerned. The CCBE will work to find and promote commonalities in the training of European lawyers.