

Coping with non nationally trained applicants

I would like to thank you for offering me the possibility to speak to you about how Germany is coping with non nationally trained applicants. At first I will focus on the transposition of the Morgenbesser decision by the European Court of Justice in Germany and the first practical experience we could gain in the meantime.

I.

Brief overview of legal education in Germany

I would like to begin with a very brief overview of legal education in Germany as this allows a better understanding on how we deal with Morgenbesser style applications. The German judicial act (Deutsches Richtergesetz), a federal law, lays down in abbreviated form the outline of the legal education and the examination system, and each of the States (Länder) in Germany provides its own detailed legislation in this regard.

I will restrain myself to the law of North Rhine-Westphalia as this is the law I am most familiar with. The law studies are completed with the First Examination. The First Examination, that replaces the former First State Examination, is composed of a university exam and a state exam. The university exam mainly consists of an examination of an optional subject chosen by the student, whereas the state exam covers the mandatory subjects required by law. In the state exam students have to write six examination papers, three of them dealing with civil law, two with public law and one with criminal law. All law students in North Rhine

Westphalia, if they are passing the state exam at the same time, undertake the same examinations questions. The students also have to sit through a one day oral exam. In order to set up the final result of the First Examination the result of the university exam counts 30 % and the result of the state exam 70 %.

Having passed the first exam nearly all students begin a two- year legal traineeship, called Referendariat in Germany. This legal traineeship is common to all trainees whether they intend to become judges, lawyers, prosecutors, in-house lawyers in private companies, higher civil servants etc. The young trainee lawyers get a monthly allowance of about 900 to 1000 Euros during the two years of practical training. The legal traineeship is completed with the Second State Examination that is a prerequisite for practising a regulated legal profession in Germany.

II.

1.

The Morgenbesser decision by the European Court of Justice

In the Morgenbesser Decision the Court of Justice ruled that Community Law precludes the authorities of a Member State from refusing to enrol the holder of a legal diploma obtained in another Member State in the register of persons undertaking the necessary period of practice for admission to the bar solely on the ground that it is not a legal diploma issued, confirmed or recognised as equivalent by a university of the first State. Analyzing this decision in Germany the question was raised whether a trainee lawyer had to be considered as an employed person within the meaning of Art. 39 of the Treaty. The Kranemann Decision of 17th March 2005 brought these discussions to an end as the European

Court of Justice ruled that the employment relationship of a trainee lawyer falls within the scope of Art. 39 of the Treaty.

Following the Morgenbesser Decision applications for a legal traineeship cannot be dismissed solely on the ground that the applicant hasn't passed the First Examination in Germany. The competent authority has to examine whether and to what extent the knowledge and qualifications certified by a foreign diploma are equivalent to those certified by the First Examination. In this regard the competent authority must not only assess diplomas, certificates and other evidence of formal qualifications, but also the professional experience of the applicant wherever gained has to be taken into account.

2.

New legislation in Germany: §112a Deutsches Richtergesetz

In a first step all German States agreed on how to deal with Morgenbesser style applications. With effect from 1st January 2007 this common practice was transposed to federal law, introducing a new § 112a into the Deutsches Richtergesetz.

The main rules of this stipulation are the following:

The applicant has to be an EU national, a national of a Member State of the European Economic Area or a Swiss national. In addition, the applicant must hold a legal university diploma obtained in these countries which allows him the access to a postgraduate lawyer training.

If these formal requirements are fulfilled, the competent authority - in North Rhine-Westphalia the competent authority is the President of the

Higher Regional Court - has to conduct a comparative evaluation of qualifications. The President of the Higher Regional Court has to assess the equivalence of the applicants' qualifications objectively. Yardstick for this assessment is whether the applicants' knowledge and qualifications of German law are equivalent to those certified by the First Examination. These are the core subjects of civil, criminal and public law including the corresponding procedural law and an optional subject chosen by the student. As an optional subject, that is subject matter to the university exam, the students may choose foreign law. Therefore there are no doubts that a legal university diploma in an EU or EEA country or Switzerland is equivalent to the optional subject.

However, a more detailed examination is required as far as mandatory subjects, that are subject matters of the state exam, are concerned. In order to carry out this examination a checklist was established listing all mandatory subjects. This checklist contains very detailed indications, for example contractual obligations, possession, ownership etc. A non nationally trained applicant will hardly have equivalent knowledge of all mandatory subjects. In our view the knowledge the applicant may have for example in French contractual obligation law cannot be considered as equivalent to the required knowledge of German contractual obligation law. Even if the national legal systems may be based on the same historical roots they developed in a different way. More and more legal subjects are harmonised by Community law. However, for the EU Member States it leaves a margin in several areas while transposing Community law to national law. Thus, differences in the national legal systems will remain. An applicant who does not have equivalent knowledge of the German law will hardly reach the objective of legal traineeship: to pass the Second State Examination as a prerequisite for

practising a regulated legal profession. It is however possible that applicants may have equivalent knowledge of some mandatory subjects. This could be certified by a diploma on postgraduate studies, a PhD or a successful participation - including examination - in a specialised training for lawyers. Also professional experience may confirm equivalent knowledge of a mandatory subject, for example teaching a specific subject of German law at university.

If the comparative evaluation of qualifications comes to the conclusion that the applicants' knowledge and qualifications are equivalent to those certified by the First Examination the applicant will be conceded to the legal traineeship. In the opposite case, he may participate in an aptitude exam. The aptitude exam is no special exam established only for these purposes. The applicant has to participate in some or all examination papers of the state exam in the mandatory subjects. When he has to participate in all examination papers the applicant has to pass at least three examination papers in at least two out of the three subjects of civil, criminal and public law. In addition he has to pass at least one examination paper in civil law. An oral exam does not take place and the examination papers are not marked. In case the applicant passes the aptitude exam a certificate in this regard will be issued. The aptitude exam may be repeated once. The scope of the aptitude exam may vary from applicant to applicant and depends on the scope of the applicants' knowledge and qualifications. For example an applicant having equivalent knowledge of criminal law only has to participate in the examination papers on civil and public law.

Although the assessment of knowledge and the qualifications is taken by one State according to its own rules on legal education - and they may vary - the decision is binding the other States of Germany.

3.

First practical experiences

I would like to take the opportunity to inform you on the first practical experiences we gained with the new law and with the previous common practise. In the period of transposing the Morgenbesser decision we were expecting a large number of Morgenbesser style applications. However, the first experiences showed very clearly that most of the interested students refrain from applying in view of the conditions and prerequisites for a successful application. Until June 2007 there were only 29 applications in all of Germany. Out of these 13 applications are still to be examined, 4 applications were withdrawn, 2 applications were successful (after passing an aptitude exam) and 10 applications were rejected.

V.

Admission for European lawyers to the German bar

Besides an application for a legal traineeship European lawyers may as well request admission to the German bar. At first I would like to point out the differences between these applications: an application for a legal traineeship aims at passing the Second State Examination which allows practising each regulated legal profession in Germany. In contrast, an admission to the German bar is restricted to the profession of a lawyer and does not allow working for example as a judge or a prosecutor in Germany.

A European lawyer who has proved that he has provided legal services in Germany in the area of German law for at least three years may request admission to the German bar. The German Bar Association decides on these requests. A European lawyer who doesn't fulfil these requirements may as well request admission to the German bar. However, in this case he has to pass an aptitude exam at the examining authority in charge of the Second State Examination, the Landesjustizprüfungsamt. The German Länder created so called common examining authorities to this end. There are all together three common examining authorities, one made by the German Länder North Rhine-Westphalia, Hesse, Rhineland-Palatinate, Saarland and Thuringia, the second one by Baden-Württemberg, Bavaria and Saxony and the third common examining authority was created by Berlin, Brandenburg, Bremen, Mecklenburg-West Pomerania, Lower Saxony, Saxony-Anhalt and Schleswig-Holstein.

The applicant must be an EU national, a national of a Member State of the European Economic Area or a Swiss National who has studied at least two years in one of these countries or having at least three years of professional experience in one of these countries. In addition, the applicant must prove that he is entitled to provide legal services under the professional title of one of these countries. The aptitude exam consists in a written and an oral part and deals with examination cases from a lawyer's point of view. The examining authority may release an applicant from passing parts or the complete aptitude exam. In these cases the applicant has to prove that he acquired sufficient knowledge of German law necessary for practising as a lawyer in Germany. This knowledge can be acquired by means of legal education or by professional experience. Quite often applicants already have some

knowledge of German law because they studied for example one year at a German university and passed a Master of Law. However, in general the knowledge acquired under these circumstances cannot be considered as sufficient. The examinations in Master of Law studies very often concern specific subjects and do not cover the broad and complex subjects of civil, criminal and public law necessary for practising as a lawyer. But in some cases applicants passed the First State Examination in Germany and did - for very different reasons - not continue the legal education with the legal traineeship but left the country to study abroad. On condition that they are entitled to provide legal services under the professional title of a lawyer in the EU or EEA country or Switzerland, these European lawyers may as well request admission to the German bar. Having passed the First State Examination they will be released from the written part of the aptitude exam.

I would like to conclude my presentation by providing you with some figures referring to the request for admission to the German bar. The figures will be restricted to those requests by lawyers who have to pass an aptitude exam. In 2005 and 2006 there were 36 applications in all of Germany. Out of these, 13 applications were successful and 20 applications were rejected. In 3 cases the application was withdrawn.

I would like to thank you very much for your attention.

Richard Bühler

President of the Landesjustizprüfungsamt of North Rhine-Westphalia (NRW)

Head of Department V, Ministry of Justice NRW

Martin-Luther-Platz 40, D-40212 Düsseldorf

richard.buehler@jm.nrw.de

