Free movement of lawyers and the *Torresi* judgment: a bridge too far?

European Court of Justice, Grand Chamber Judgment of 17 July 2014, Joined Cases C-58/13 and C-59/13 *Angelo Alberto Torresi and Pierfrancesco Torresi* v *Consiglio dell'Ordine degli Avvocati di Macerata*

Roberto Mastroianni & Amedeo Arena*

Introduction

Access to the legal profession in Italy is reserved to holders of a five-year university degree in law who have participated in an apprenticeship of at least 18 months and have passed a state examination, held once a year, consisting of three written tests and an oral interview on five areas of law. On average, over 61% of the applicants fail the written tests every year.[1] This has prompted a significant number of Italian law graduates to seek recognition of their university degree in other member states

*The first author is Full Professor of European Union Law, University of Naples 'Federico II' School of Law. The second author is Tenured Assistant Professor of European Union Law, University of Naples 'Federico II' School of Law, and Visiting Research Scholar, University of Tokyo Graduate Schools for Law and Policy. This case note is the result of the joint work and research of both authors. Professor Mastroianni drafted the introduction and the last section, Dr Arena wrote the three middle sections.

[1] The pass rate for the last three editions of the written tests was as follows: 47.63% in 2014; 41.11% for 2013; 36.34% for 2012; 38.32% for 2011. *See* 'Esame di avvocato 2013: risultati definitivi e ammessi agli orali', *Altalex*, 21 July 2014, <www.altalex.com/index.php?idnot=67802>, visited 18 July 2015; 'Esame di avvocato 2012: risultati definitivi e ammessi agli orali', *Altalex*, 26 June 2013, <www.altalex.com/index.php?idnot=63185>, visited 18 July 2015; 'Esame di avvocato 2011: risultati e ammessi agli orali', *Altalex*, 12 July 2012, <www.altalex.com/index.php?idnot=57596>, visited 18 July 2015.

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where access to the bar is subject to less onerous requirements and to apply for registration with a local Bar Council in Italy to practise, under their foreign professional title, as 'established lawyers' under Article 4 of Directive 98/5.[2] After three years of effective and regular practice in Italian law, established lawyers can obtain, without taking any aptitude test, admission to the legal profession in Italy as 'integrated lawyers', acquiring the same status and title ('*avvocato*') as candidates who have passed the state examination.[3] According to a recent survey, 92% of the established lawyers practising in Italy under another member state's professional title are, in fact, Italian nationals, who have returned to Italy shortly after being admitted to the legal profession in another member state – typically Spain (83%) and Romania (4%) – in some cases with the assistance of profit-making companies that specialise in expediting the necessary administrative formalities.[4]

Angelo Alberto Torresi and Pierfrancesco Torresi, two Italian brothers, obtained university law degrees from the University of Macerata (Italy) and subsequently had those degrees recognised in Spain via the procedure of *homologación*. In accordance with the Spanish legislation in force at the time,[5] on the basis of their homologation certificate, the Torresi brothers were able to enrol as '*abogados ejercientes*' in the register of the *Ilustre Colegio de Abogados de Santa Cruz de Tenerife* (Bar of Santa Cruz de Tenerife, Spain) without sitting any exam or providing any proof of professional experience. Three months later, they lodged applications with the Bar Council of Macerata in Italy to be registered in the special section of the lawyers' register devoted to established lawyers. Having received no reply within 30 days, the applicants instituted proceedings before the *Consiglio Nazionale Forense* (CNF; the Italian National Bar Council) claiming that, as the ECJ held in *Wilson,* registration in the special section was solely conditional upon the presentation of a certificate attesting to registration with the competent authority in the 'home' member state,[6] which they had obtained from the relevant Spanish authorities and attached to their applications to the Macerata Bar Council.

[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, OJ L 77, 14.3.1998, pp. 36-43.

[3] Art. 10 of Directive 98/5.

[4] CNF Ufficio Studi, 'Avvocati CNF, Avvocati stabiliti e abuso del diritto dell'unione europea: la raccolta dati dell'ufficio studi del Consiglio Nazionale Forense', 9 January 2014, <www.consiglionazionaleforense.it/site/home/pubblicazioni/dossier-ufficio-studi/documento7575.html>, visited 18 July 2015; *see also* CNF press release of 6 February 2014, <www.consiglionazionaleforense.it/site/home/area-stampa/comunicati-stampa/articolo8483.html>, visited 18 July 2015.

[5] Royal Decree no. 285 of 20 February 2004, Spanish Official Journal no. 55 of 4 March 2004.

[6] ECJ 19 September 2006, Case C-506/04, *Graham J. Wilson* v *Ordre des avocats du barreau de Luxembourg* ('*Wilson*') para 67.

The CNF, however, considered that the situation of a person who, after obtaining a legal qualification in Italy, travels to another member state in order to obtain the title of lawyer there, with a view to returning immediately to Italy and entering into professional practice as an established lawyer may constitute an attempt to abuse the rights granted by Directive 98/5 to circumvent the domestic provisions regulating access to the legal profession, which as per Section 33(5) of the Italian Constitution is conditional upon having successfully passed the state examination. Accordingly, the CNF resolved to stay proceedings and to submit two questions to the Court for a preliminary ruling.[7] First, the CNF inquired whether Article 3 of Directive 98/5, read in the light of the prohibition on abuse of rights and of the principle of respect for national identities, should be interpreted as enabling national administrative authorities to reject applications for registration in the special section of the lawyers' register where there are objective circumstances to indicate that there has been an abuse of EU law. Second, the CNF asked whether, if the answer to the first question should be in the negative, Article 3 of Directive 98/5 should be regarded as infringing the principle of respect of national identities, insofar as it enables circumvention of the constitutional and statutory provisions of a member state that make access to the legal profession conditional on passing a state examination.

Should the ECJ assess the impartiality and independence of the referring court

Before turning to the merits of the two questions referred by the CNF, both Advocate General Wahl[8] and the Court[9] carefully examined the issue of whether the CNF could be regarded as a 'court or tribunal' within the meaning of Article 267 TFEU. The Torresi brothers had argued, in particular, that since CNF members are elected by local Bar Councils, including that of Macerata, they might not provide sufficient guarantees of impartiality when they review decisions of those Councils concerning registration applications lodged by European lawyers.[10]

[7] CNF 29 September 2012, Order no. 1/2013, *Angelo Alberto Torresi* v *Consiglio dell'Ordine degli Avvocati di Macerata*; CNF 29 September 2012, Order no. 2/2013, *Pierfrancesco Torresi* v *Consiglio dell'Ordine degli Avvocati di Macerata.* The two orders have same content (except for the personal details of the parties) and paragraph numbering, thus they will be jointly referred to as 'the order for reference'.

[8] AG Wahl, Opinion 10 April 2014, Joined Cases C-58/13 and C-59/13, *Angelo Alberto Torresi and Pierfrancesco Torresi* v *Consiglio dell'Ordine degli Avvocati di Macerata* (*'Torresi* Opinion').

[9] ECJ 17 July 2014, Joint Cases C-58/13 and C-59/13, *Angelo Alberto Torresi and Pierfrancesco Torresi* v *Consiglio dell'Ordine degli Avvocati di Macerata* (*'Torresi'*).

[10] That expression is used to refer to lawyers who have obtained their professional qualification in a member state other than the one where they apply for registration as established lawyers under Directive 98/5.

The European judiciary was, so to speak, caught between Scylla and Charybdis. On the one hand, the Court in *Wilson* had ruled that a Luxembourg disciplinary body composed for the most part of lawyers could not be regarded as impartial, for its members may have a common interest to confirm a Bar Council's decision to reject registration applications by established lawyers, so as to remove from the market a competitor who has obtained his professional qualification in another member state.[11] On the other hand, more than ten years earlier, the Court in *Gebhard* had given a preliminary ruling on questions referred by the CNF, thus impliedly recognising that that organ constituted a 'court or tribunal' within the meaning of Article 267 TFEU.[12]

The Advocate General plotted a rather tortuous course through those perilous waters. First, he distinguished the legal and factual background of *Wilson* from that of the present case, noting that in *Wilson* the Court had focused on the independence and impartiality of the Luxembourg bodies not in order to assess the admissibility of a preliminary reference, but for the purposes of Article 9 of Directive 98/5,[13] which requires member states to provide judicial remedies against decisions not to enrol European lawyers in the register of established lawyers. Hence, the Advocate General argued that, when ruling on the admissibility of a reference under Article 267 TFEU, the Court is not required to carry out an in-depth assessment of a national court's independence and impartiality as it had done in *Wilson,* for that may lead to regarding a non-negligible number of national judicial organs as unable to submit preliminary references, thus ultimately undermining individuals' right to judicial protection and hampering the effectiveness of EU law.[14] In Advocate General Wahl's view, when a body is formally regarded as a judicial authority at the national level and domestic provisions are in place to ensure its impartiality, the Court should enquire no further,[15] as potential deficiencies in terms of independence and impartiality of those organs are and should remain purely domestic concerns.[16]

The Advocate General's reasoning appears distant from the Court's traditional approach in the interpretation of legal notions employed in EU norms. The Court has consistently held that those notions must be given 'an autonomous and uniform interpretation' throughout the EU and that national legal classifications are

[11] *Wilson*, *supra* n. 6, para 57.

[12] ECJ 30 November 1995, Case C-55/94, *Reinhard Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* ('*Gebhard*'). The question of the qualification of the CNF as a 'jurisdiction' for the purposes of Art. 177 EC was the object of analysis in the AG Opinion (*see* para 12-17), who concluded in the affirmative, but was not explicitly examined by the Court.

[13] *Torresi* Opinion, *supra* n. 8, para 46.

[14] Ibid., para 49.

[15] Ibid., para 53.

[16] Ibid., para 54.

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irrelevant to that effect,[17] as the meaning of EU law cannot be adapted to suit the unilateral and uncoordinated preferences of the various national systems.[18] A number of Court rulings have applied that approach to the notion of 'courts and tribunals' for the purpose of Article 267 TFUE.[19] Advocate General Wahl's reliance on domestic legal classifications, instead, entails the risk of enabling member states to restrict at will the scope of Article 267 TFEU, eluding, in the case of courts of last instance, the duty to submit preliminary references to the Court.[20]

It is thus commendable that the Court followed another, more direct course to navigate between *Wilson* and *Gebhard*. After recalling *Gebhard* in the narrative part of the judgment,[21] the Court noted that, although – just like in *Wilson* – CNF members are elected by Bar Councils that in turn are elected by lawyers, other safeguards are in place to ensure that CNF members act impartially when reviewing Bar Council decisions concerning registration applications by European lawyers: first, CNF members cannot be simultaneously members of a local Bar Council; second, the CNF is subject to constitutional safeguards on the independence and impartiality of the judiciary as well as to the abstention and recusal rules laid down in the Italian Code of civil procedure; third, the CNF is not a party in proceedings before the *Corte suprema di cassazione* against its decisions ruling on the actions brought against local Bar Councils, thus acting as a third party in relation to those Bar Councils; fourth, in the case at hand, in accordance with standard practice, the CNF member from the Bar Council whose decision had been challenged before the CNF did not take part in the formation of the judgment by the CNF.[22]

In view of those arrangements, the Court concluded that the CNF met 'the requirements of independence and impartiality which are characteristic of a court

[17] *See*, e.g., ECJ 19 September 2013, Case C-140/12, *Pensionsversicherungsanstalt* v *Peter Brey*, para 49: 'According to settled case-law, the terms used in a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope are normally to be given throughout the Community an autonomous and uniform interpretation which must take into account the context of the provision and the purpose of the legislation in question'.

[18] AG Saggio, Opinion 29 September 1998, Case C-90/97, *Robin Swaddling* v *The Adjudication Officer*, para 16.

[19] ECJ 13 February 2014, Case C-555/13, *Merck Canada* v *Accord Healthcare et al.*, para 16. (holding that determining whether a body making a reference is a 'court or tribunal' within the meaning of Art. 267 TFEU 'is a question governed by EU law alone'); ECJ 31 January 2013, Case C-394/11, *Belov*, para 38.

[20] The Italian Constitutional Court, for instance, has, ever since its judgment no. 13 of 1960, consistently refused to submit preliminary questions to the ECJ insofar as it did not consider itself a 'court or tribunal' within the meaning of Art. 267 TFEU. That Court changed its mind on the matter only recently and referred questions to the ECJ both in the context of adversarial proceedings (order no. 103 of 2008) and preliminary proceedings (order no. 207 of 2013).

[21] *Torresi*, para 14.

[22] Ibid., paras 21-24.

or tribunal within the meaning of Article 267 TFEU' and turned to examine the questions referred by that court.[23]

First things first: abuse of rights and field pre-emption

The Court has consistently held that member states can take measures to prevent their nationals from attempting, under cover of the rights created by EU law, improperly to circumvent their national legislation.[24] Before delving into the topic of abuse of rights, however, the Court had to overcome another stumbling block: the pre-emptive effects of Directive 98/5.

In its 2006 judgment in *Wilson,* the Court had ruled that Article 3 of that Directive entailed a complete harmonisation of the prior conditions for practising the legal profession in the host state under the professional title acquired in another member state[25] and that, as a consequence, the presentation of a certificate attesting to the registration with the competent authority of the home state was the only condition that the authorities of that state could attach to registration of European lawyers.[26] Accordingly, the Court had found that Article 3 of the Directive had to be interpreted as precluding the Luxembourg authorities from requiring migrant lawyers to pass a test of proficiency in the three languages used in that country's legislation.[27]

That approach, referred to by some scholars as 'field pre-emption' in line with the United States constitutional lexicon,[28] is designed to preserve the 're-regulatory bargain' struck by the EU legislature between different goals:[29]

[23] Ibid., para 25.

[24] ECJ 30 September 2003, Case C-167/01, *Inspire Art*, para 136; ECJ 9 March 1999, Case C-212/96, *Centros*, para 24; ECJ 12 September 2006, Case C-196/04, *Cadbury Schweppes and Cadbury Schweppes Overseas*, para 35; and ECJ 23 October 2008, Case C-286/06, *Commission* v *Spain*, para 69.

[25] *Wilson*, *supra* n. 6, para 66.

[26] Ibid., para 67.

[27] Ibid., paras 70 and 77.

[28] *See*, *generally*, A. Arena, *Il principio della preemption in diritto dell'Unione Europea* (Editoriale Scientifica 2013); E. Cross, 'Pre-emption of Member State Law in the European Economic Community: A Framework for Analysis', 29 *CMLRev* (1992) p. 447; A. Goucha Soares, 'Pre-Emption, Conflicts of Powers and Subsidiarity', 23 *ELRev* (1998) p. 132; R. Schütze, 'Supremacy Without Pre-emption? The Very Slowly Emergent Doctrine of Community Pre-emption', 43 *CMLRev* (2006) p 1023; M. Waelbroeck, 'The Emergent Doctrine of Community Pre-emption: Consent and Redelegation', in T. Sandalow and E. Stein (eds.), *Courts and Free Markets: Perspectives from the United States and Europe*, vol. 2 (OUP 1982) p. 548.

[29] *See* S. Weatherill, 'Beyond Preemption? Shared Competence and Constitutional Change in the European Community', in O'Keeffe and Twomey (eds.), *Legal Issues of the Maastricht Treaty* (Chancery Law Publishing 1994) p. 13 at p. 52-57.

the freedom of establishment, on the one hand, and the protection of consumers and the proper administration of justice, on the other.[30]

While some EU instruments, such as Directive 89/48 and Directive 2005/36, struck that balance by making *access* to the legal profession in the host state conditional upon passing an aptitude test or undergoing an adaptation period[31] but thereafter allowing unhindered *exercise* as a full-fledged member of the host state's legal profession, other items of EU legislation, such as Directive 77/249 and Directive 98/5, strongly facilitate *access*, by excluding any prior testing of knowledge,[32] yet impose some restrictions on *exercise*, such as requiring European lawyers to practise under their home-country professional title,[33] to work in conjunction with lawyers of the host state[34] and to comply with the rules of professional conduct both of the home and of the host state.[35] Against that background, it is plain to see that the Court could not allow the Luxembourg authorities to require Mr Wilson to pass a language test as a condition for registration as an established lawyer, as doing so would have substantially upset the balance struck by the European legislature.[36]

The real crux of field pre-emption, however, lies in its inflexibility.[37] Indeed, if the Court finds that the EU legislature has comprehensively harmonised a certain matter, member states are precluded from imposing *any* requirement other than those laid down in EU legislation,[38] including innocuous formalities and arrangements designed to pursue other goals worthy of protection, such as the prevention of abuse of rights. How could the European judiciary enable member states to take measures to prevent European lawyers from abusing their rights under Directive 98/5 without opening the floodgates to a proliferation at the national level of additional registration requirements?

The Court brilliantly solved that conundrum by assuming that the prohibition on abuse of rights comes into play at an earlier stage than the pre-emptive effects of

[30] *See* ECJ 7 November 2000, Case C-168/98, *Luxembourg* v *Parliament and Council*, para 32 and 33; *Wilson*, *supra* n. 6, para 71.

[31] *See* Directive 89/48 recital no. 10 and Art. 4(1)(b); Directive 2005/36, Art. 14(3).

[32] *See* Directive 77/249, Art. 2; Directive 98/5, Art. 2.

[33] *See* Directive 77/249, Art. 3; Directive 98/5, Art. 4.

[34] *See* Directive 77/249, Art. 5; Directive 98/5, Art. 5(3).

[35] *See* Directive 77/249, Art. 4(2); Directive 98/5, Art. 6.

[36] *See* A. Arena, 'La sentenza Wilson', 3 *Studi sull'integrazione europea* (2008) p. 147 at p. 164-165.

[37] On the arguments the ECJ employs to overcome previous findings of field preemption *see* Arena, *supra* n. 28, p. 57-58 (discussing how the ECJ in *Michaniki* distinguished *La Casina*).

[38] E. Cross, 'Pre-emption of Member State law in the European Economic Community: A framework for analysis', 29 *CMLRev*, (1992) p. 447 at p. 459: 'all Member State measures in an occupied field will be considered invalid, even when such measures are not contrary to, or do not obstruct the objectives of, Community legislation in any way'.

EU legislation. Put differently, an EU act carrying out comprehensive harmonisation of a given matter does not preclude member states from taking measures to prevent abuse of that act, because in cases of abuse of rights the EU act in question does not apply in the first place,[39] hence it cannot pre-empt action by member states. Accordingly, the prohibition on abuse of rights, and the ensuing power to adopt anti-circumvention measures at the national level, should be conceived as a sort of 'implied term' present in every EU instrument, regardless of its pre-emptive effects.

Abuse of rights under Directive 98/5: migrant lawyers or migrant professional qualifications?

With the question of pre-emption out of the way, the Court could finally turn to the heart of the preliminary reference: could the conduct by the Torresi brothers be regarded as an abuse of the rights conferred to them under Directive 98/5?

In order to answer that question, the Court recalled its well-established case law on abuse of rights,[40] whereby a finding of abuse requires a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved (objective element)[41] and the intention to obtain an advantage from the EU rules by creating artificially the conditions laid down for obtaining it (subjective element).[42]

The Court examined the objective element first and looked at the purpose of Directive 98/5. It averred that, since the goal pursued by the European legislature was to facilitate the practice of the profession of lawyer in a member state other than that in which the professional qualification was obtained,[43] EU nationals can freely choose the member state in which they wish to acquire their professional qualifications and the member state in which they intend to practise their profession.[44] Moreover, the Court noted that Directive 98/5 does not make the right to practise under the home country professional title conditional upon completion of a period of practical experience in the home country.[45] Accordingly, the Court inferred that the objective of Directive 98/5 is fully achieved when a

[39] *See* K. Sørensen, 'Abuse of rights in Community Law: a Principle of Substance or Merely Rhetoric?', 43 *CMLRev* (2006) p. 423 at p. 427-431 (providing a number of examples of how the CJEU defined the scope of EU rights so as to take abusive conduct outside the scope of the EU provisions).

[40] *See* ECJ 14 December 2000, Case C-110/99, *Emsland-Stärke*, para 52 and 53.

[41] *See* ECJ 13 March 2014, Case C-155/13, *SICES and Others*, para 32.

[42] *See* ECJ 12 March 2014, Case C-456/12, *O. and B.*, para 58.

[43] *Torresi*, para 35 (recalling Art. 1(1) of Directive 98/5).

[44] Ibid., para 48 (recalling *Commission* v *Spain*, C-286/06, para 72).

[45] Ibid., para 51 (recalling paras 93 and 94 of the *Torresi* Opinion).

national of member state A travels to member state B to obtain admission to the legal profession under more favourable conditions than in member state A and soon thereafter travels back to member state A to practise as a lawyer there. As the Court found no evidence of the objective element, it concluded, without looking at the subjective element,[46] that no abuse of rights had taken place.[47]

However, upon closer examination, the Court's reasoning appears somewhat incomplete. In particular, both the Court and the Advocate General failed to take any account of the Court's judgment in *Cavallera.*[48] Such omission is rather remarkable, given that it was a reading of that ruling that had prompted several Italian Bar Councils to reject registration applications by European lawyers in the presence of circumstances pointing to an abuse of EU law.[49] Moreover, in the order for reference, the CNF had expressly referred to some passages of the *Cavallera* judgment as the source of its uncertainties as to the interpretation of Article 3 of Directive 98/5.[50] The contents of that ruling, therefore, must be briefly analysed.

In *Cavallera*, the Court ruled that the provisions of Directive 89/48 on a general system for the recognition of higher education diplomas could not be relied on, for the purpose of gaining access to the profession of engineer in Italy, by an Italian national who had obtained a decision of the Spanish ministry of education that homologated his Italian university degree and enabled him to pursue the profession of engineer in Spain, but did not attest any education or training in Spain and was not based on either an examination taken or professional experience acquired in that member state.[51] As Advocate General Maduro noted in his Opinion, the purpose of Directive 89/48 is to facilitate the 'effective exercise of the freedom of movement',[52] that is to say a genuine 'economic and social interpenetration within the [EU]'[53] that can only be deemed to exist when an EU national has acquired academic or professional education and training in a member state *other* than his or her

[46] Given the circumstances of the case, it is quite obvious that the subjective element of the abuse was also fulfilled, i.e. the intention to practice the legal profession in Italy without taking the Italian state examination.

[47] Ibid., para 52.

[48] ECJ 29 January 2009, Case C-311/06, *Consiglio Nazionale degli Ingegneri* v *Ministero della Giustizia and Marco Cavallera.*

[49] In the wake of the *Cavallera* judgment, the CNF adopted Opinion no. 17 of 25 June 2009 and Notice no. 9 of 5 May 2011 where it argued that local Bar Council was entitled to check whether registration applications by European lawyers were based on 'purely formal' foreign professional qualifications that were not associated with any professional experience abroad.

[50] CNF, Order of 29 September 2012, para 19.

[51] ECJ 29 January 2009, Case C-311/06, *Consiglio Nazionale degli Ingegneri* v *Ministero della Giustizia e Marco Cavallera* ('*Cavallera*'), paras 58 and 59.

[52] Opinion of AG Poiares Maduro of 28 February 2008, *Cavallera* ('*Cavallera* Opinion'), para 48.

[53] Ibid. (recalling ECJ 12 September 2006, Case C-196/04, *Cadbury Schweppes and Cadbury Schweppes Overseas*, para 53).

state of origin.[54] In contrast, Mr Cavallera's situation was a 'purely domestic' one that had been brought within the scope of EU law 'by artificial means'.[55] Accordingly, he could not be allowed to exploit Directive 89/48 with the purpose of 'circumventing the provisions of national law for the purpose of taking up a profession in a Member State without fulfilling the relevant requirements'.[56]

Arguably, the same holds true, *mutatis mutandis*, for Directive 98/5. As the Court acknowledged in *Luxembourg* v *Parliament and Council*,[57] in passing that directive 'the Community legislature, with a view to *making it easier for a particular class of migrant lawyers to exercise the fundamental freedom of establishment,* has chosen […] a plan of action' involving 'gradual assimilation of knowledge through practice, that assimilation being made easier *by experience of other laws gained in the home Member State*'.[58] Moreover, Directive 98/5 expressly acknowledges that it 'does not lay down any rules concerning *purely domestic situations*' and 'is without prejudice in particular to *national legislation governing access* to and practice of the profession of lawyer'.[59] The preamble of that directive also states that 'by enabling lawyers to practise under their home-country professional titles on a permanent basis in a host Member State, [Directive 98/5] *meets the needs of consumers of legal services* who, owing to the increasing trade flows resulting, in particular, from the internal market, seek advice when carrying out cross-border transactions in which international law, Community law and domestic laws often overlap'.[60]

Apparently, those excerpts point to the situation of lawyers with an established practice in member state A who move to member state B carrying with them the competence and skills acquired in the former state, so as to provide a better service for clients. That situation, in all fairness, is hardly comparable to that of some Italian nationals, who, with the assistance of profit-seeking companies, were able to obtain the title of '*abogado*' without ever leaving the Italian territory: after attending some online courses they obtained the homologation of their Italian university degree by taking a multiple-choice test at the Italian campuses of select Spanish universities, then had their homologation certificate sent to Spain for registration with a *Colegio de Abogados* and finally had the relevant documents forwarded to an Italian Bar Council with a view to inclusion in the register of established lawyers.[61]

[54] Ibid., para 50 (recalling ECJ 2 July 1998, Joined Cases C-225/95, C-226/95 and C-227/95, *Kapasakalis and others*, para 22).

[55] Ibid, para 56.

[56] Ibid, para 54.

[57] ECJ 7 November 2000, Case C-168/98, *Luxembourg* v *Parliament and Council*.

[58] Ibid., para 43 (emphasis added).

[59] Directive 98/5 recital no. 7 (emphasis added).

[60] Ibid., recital no. 9 (emphasis added).

[61] *See*, e.g., <www.avvocatospagnaeurolex.com/avvocato-spagna-avvocato-stabilito-in-3-mosse>, visited 22 July 2015.

Accordingly, one can reasonably wonder what 'effective exercise of the freedom of movement' – what 'economic and social interpenetration within the [EU]' – took place in those cases, where, as the Italian Council of State aptly put it in *Cavallera*, there was no 'migrant holder of professional qualifications' but rather a 'migrant degree' that was mailed to another member state and subsequently sent back to Italy to be relied upon under a different guise?[62] Since the Court held in *Cavallera* that certificates issued by a member state can only be regarded as a 'diploma' for the purposes of Directive 89/48 if they attest to additional qualifications or experience acquired, in whole or in part, in that member state, it would have appeared consistent for the Court to rule that nationals of a member state admitted to practise the legal profession in another member state can only be regarded as 'lawyers' for the purposes of Directive 98/5 if they obtain some real additional education or professional experience in the latter member state. But the Court found otherwise.

The two-fold dimension of the principle of respect for national identity

In order to analyse the answer given by the Court to the second question, it is important to point out that the Italian Constitution expressly provides that those seeking to exercise the profession of lawyer must have passed a state examination (Article 33, para 5).[63] Against this background, the referring Court presents to the Court of Justice a question that brings into the picture a controversial basic principle enshrined in Article 4(2) TEU, namely the 'national identity' clause. According to that provision, the Union is required to 'respect the equality of member states before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'.[64]

[62] Italian Council of State 30 November 2009, no. 7496, *Consiglio Nazionale degli Ingegneri* v *Ministero della Giustizia and Marco Cavallera*.

[63] Article 33, para 5 of the Italian Constitution reads as follows: 'State examinations are prescribed for admission to and graduation from the various branches and grades of schools *and for qualification to exercise a profession*' (emphasis added). *See* Parliamentary Information, Archives and Publications Office of the Italian Senate, 'Constitution of the Italian Republic', available at: <www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf>, visited 18 July 2015.

[64] For a deeper analysis on this principle *see inter alia* A. von Bogdandy and S. Schill, 'Overcoming Absolute Supremacy: Respect for National Identity under the Lisbon Treaty' 48 *CMLRev* (2011) p. 1431; B. Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflicts: the Ordinary Functions of the Identity Clause', 31 *Oxford Y.B. Eur. L.* (2012) p. 263; G. van der Schyff, 'The Constitutional Relationship between the European Union and its Member States: the Role of National Identity in Art. 4(2) TEU', 37 *ELRev* (2012) p. 563; F.-X. Millet, *L'Union européenne et l'identité constitutionnelle des États membres* (LGDJ 2013).

As apparent from the (admittedly not very numerous) judgments of the Court, and in line with the views expressed by some legal scholars, since its introduction in the primary law of the Union, the national identity clause has acted as a constraint on the EU legislature imposed by the basic Treaties.[65] In fact, the principle of respect for national identities can be invoked before the Court as a ground for judicial review of EU acts – even if adopted, as in the present case, before the codification of that principle – both in direct actions under Article 263 TFEU [66] and in the context of a preliminary reference on validity under Article 267 TFEU.[67] What appears interesting in these judgments is that the Court, far from considering the text of Article 4(2) TEU as a mere statement of principle, adopted a literal interpretation of the clause, deciding on the basis of its own evaluation (and not on the basis of the unilateral indications from the member states concerned)[68] whether or not an EU act impinges upon the 'national identity' of member states.[69]

[65] In other cases the clause is invoked by member states or private persons concerned as a tentative justification of national measures introducing restrictions on free movement and market freedoms, or as a rule of interpretation of existing internal market grounds for derogation. *See* Guastaferro, *supra* n. 64, p. 293ff.

[66] ECJ 15 March 2005, Case C-160/03, *Spain* v *Eurojust*.

[67] ECJ 1 October 2010, Case C-3/10, *Affatato* v *Azienda Sanitaria Provinciale di Cosenza* ('*Affatato*'), where an Italian tribunal referred a question of validity of clause 5 of the framework agreement on fixed-term work, annexed to Directive 1999/70. As in the present case, on the basis of the interpretation given to the above mentioned provision of the Directive, the Court excluded any negative impact of the clause with the Italian constitutional provision according to which permanent posts in the public service must be filled on the basis of public competition (Art. 97).

[68] *See* L. Besselink et al., *National Constitutional Avenues for Further EU Integration*, document requested by the European Parliament's Committees on Legal Affairs and on Constitutional Affairs (Brussels 2014), <www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493046/IPOL-JURI_ET(2014)493046_EN.pdf>, visited 18 July 2015, p. 8: 'Accordingly, if the Union should fail to respect these national identities as inherent in their fundamental constitutional and political structures, it would infringe not only those identities, but also the Treaty obligation to respect them. *Whether this is indeed the case is, as a matter of EU law, to be decided ultimately by the Court of Justice of the Union, and not unilaterally by the Member States*' (emphasis added).

[69] *Affatato*, *supra* n. 67, para 41. In the same direction *see* ECJ 1 March 2012, Case C-393/10, *O'Brien*. The Court held on that occasion that its conclusion, reached in the same judgment, that judges might be regarded as 'workers' within the meaning of clause 2.1 of the Framework Agreement on part-time work annex to Council Directive 97/81/EC, in no way undermines the principle of the independence of the judiciary. This solution, in the opinion of the Court, cannot be questioned on the basis of the argument that the application of EU law to the judiciary has the result that the national identities of the member states are not respected, contrary to Art. 4(2) TEU. In reply to this argument advanced by one of the governments in the written procedure, the Court held that 'the application, with respect to part-time judges remunerated on a daily fee-paid basis, of Directive 97/81 and the Framework Agreement on part-time work cannot have any effect on national identity, but merely aims to extend to those judges the scope of the principle of equal treatment, which constitutes one of the objectives of those acts, and to protect them against discrimination as compared with full-time workers' (para 49).

This approach needs to be reconciled with the Court's well-established doctrine that EU law takes precedence over national constitutions.[70] It also appears to diverge from the view expressed by certain commentators,[71] according to which the identity clause codifies the doctrine of *counter-limits*, thus empowering constitutional courts to rule whether an EU law provision undermines fundamental values enshrined in their respective constitutions. It is also true, though, that in its decisions the Court has maintained a strong deference *vis-à-vis* the discretionary powers of EU action,[72] by avoiding, at least so far, to annul or declare void an EU legal measure for violation of Article 4(2) TEU.

The *Torresi* judgment appears in line with this judicial path. In the context of the first preliminary question, the CNF referred to the 'national identity' clause as a tool for the interpretation of the directive and of the principle of abuse of rights in this specific situation. According to the CNF, the Court should pay due regard to the Italian national identity when interpreting Directive 98/5, thus espousing an interpretation of that directive that does not undermine the constitutional principle that the admission to the profession of lawyer in Italy is conditional upon passing the state examination. In the second question, instead, the CNF invoked the national identity clause as a parameter of validity of the Directive, in case that the interpretation of Article 3 of the directive leads to the conclusion that no abuse of right has taken place in the specific activities carried out by the applicants in the domestic proceedings. In the words of the CNF:

> If the first question should be answered in the negative, is Article 3 of [Directive 98/5], thus interpreted, to be regarded as invalid in the light of Article 4(2) TEU, in that it permits circumvention of the rules of a member state which make access to the legal profession conditional on passing a state examination, given that the Constitution of that member state makes provision for such an examination and that the examination forms part of the fundamental principles of protecting consumers of legal services and the proper administration of justice?

Both Advocate General Wahl and the Court focused on the principle of national identity only in the context of the second preliminary question, which they both

[70] *See* ECJ 17 December 1970, Case C-11/70, *Internationale Handelsgesellschaft mbH* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, para 3. *See also* ECJ 16 December 2008, Case C-213/07, *Michaniki*, para 61ff.; for a more 'generous' approach *see* ECJ 22 December 2010, Case C-208/09, *Sayn-Wittgenstein*, para 83ff.

[71] *See* on this point M. Kumm and V. Ferrerres Comella, 'The primacy clause of the constitutional treaty and the future of constitutional conflict in the European Union', 3 *ICON* (2005) p. 476; von Bogdandy and Schill, *supra* n. 64, p. 1419; L. Besselink, 'National and Constitutional Identity Before and After Lisbon', 6 *Utrecht Law Review* (2010) p. 36.

[72] Guastaferro, *supra* n. 64, p. 300.

answered in the negative. That answer flows from the limited scope of Article 3 of Directive 98/5, namely to lay down the registration procedure migrant lawyers must follow to be admitted to practise under their home country professional title in the host member state. As interpreted by the Court, Article 3 of the Directive does not concern access to the profession of lawyer nor the practice of that profession under the professional title issued in the host member state. It necessarily follows, that an application for registration in the register of lawyers qualified abroad, submitted pursuant to Article 3 of Directive 98/5, 'is not such as to make it possible to evade the application of the legislation of the host Member State relating to access to the profession of lawyer'[73]. Finding comfort in the position expressed by the Italian government at the hearing, the Court held that Article 3 of Directive 98/5, in so far as it enables nationals of a member state who obtain the professional title of lawyer in another member state to practice the profession of lawyer in the state of which they are nationals under the professional title obtained in the home member state, was not capable of affecting either the fundamental political and constitutional structures or the essential functions of the host member state within the meaning of Article 4(2) TEU.[74] Accordingly, the Court upheld the validity of Article 3 of Directive 98/5.

That conclusion is far from surprising. In *Luxembourg* v *European Parliament and Council*,[75] in response to the arguments put forward by the Grand Duchy of Luxembourg in an action for the annulment of Directive 98/5, the Court had taken the view that the circumstance that 'domestic' and 'established' lawyers are treated differently under that directive is not at odds with the principle of equality. This is because, in the Court's view, their situations are not comparable:[76] 'domestic' lawyers may engage in all the activities reserved to the profession of lawyer in that state, whereas 'established' lawyers may be precluded from engaging in certain activities and in the representation or defence of a client in legal proceedings, and may be subject to certain obligations.[77] Since the Court had already upheld the validity of the Directive in the light of the principle of equality, it is understandable that it swiftly dismissed another question of validity concerning the same situation, even if framed in the context of the application of the national identity clause.

However, this is only part of the picture. The answer given by the Court, indeed, fails to consider – probably because the CNF did not expressly highlight this aspect in the order for reference – the connection between Article 3 of

[73] *Torresi*, para 57.
[74] Ibid., para 58.
[75] ECJ 7 November 2000, Case C-168/98, *Luxembourg* v *European Parliament and Council*.
[76] Ibid., para 23-29.
[77] Directive 98/5, Art. 5.

Directive 98/5 and Article 10(1) thereof, whereby a lawyer practising under his or her home-country professional title who has, for a period of at least three years, effectively and regularly pursued an activity in the host member state 'in the law of that State including Community law' may be admitted to the profession of lawyer in the host member state without being required to meet the condition of an adaptation period not exceeding three years or of an aptitude test. In other words, Article 10 enables 'foreign' lawyers to become 'national' lawyers after a period of three years, without any evaluation of their professional knowledge of the law of the 'host' state.

The advantage given by this provision, arguably, appears nothing short of unwarranted in the case of 'Italian *abogados*'. As mentioned in the first part of this comment, in particular when the registration with the Italian authorities takes place immediately after the acquisition of the Spanish professional title, many of the Italian nationals concerned have never really left the Italian territory, so that it will be rather simple for them to meet the requirement of 'effectively and regularly' practising Italian law in Italy. In spite of the precautions laid down in Articles 4 (obligation to use the title of the 'home' state') and 5 (obligation to work in conjunction with a lawyer of the 'host' state), such practice often takes place before and after the three-year period, without any prior assessment of knowledge and abilities.

It follows that the suggestion made by the European Commission in its submissions before the Court, on the basis of elements taken by Directive 2005/36 on recognition of higher education diplomas,[78] namely that after the three-year period established lawyers could be precluded from obtaining the Italian professional title of *avvocato* if they acquired no additional professional experience in that country, not only appears incompatible with the wording and purpose of Article 10 Directive 98/5, but also misses the point, namely the acquisition of a fully-fledged professional title by individuals who may well have not acquired the necessary knowledge or professional experience to practise in Italy.

This begs the question whether the Court would have reached a different solution if the CNF had referred to Article 10 in its order for reference. Considering the 'pro-integration' interpretation that the Court has consistently given to the directive[79] and to the 'national identity' clause, the answer probably ought to be in the negative. But it is hard to deny that in the 'Italian *abogados*' case important constitutional values were at stake. It is worth remembering that the same Court of Justice has constantly held, in the light of member states' constitutional traditions, that the application of professional rules to lawyers, in

[78] *See* on this point F. Capotorti, 'Abogados senza limiti?', 97 *Rivista di diritto internazionale* (2014) p. 1175.

[79] The judgments in cases *Luxembourg* v *Parliament and Council, Wilson* and *Torresi* (all cited above) clearly follow the same line of reasoning.

particular those relating to organisation, qualifications, professional ethics, supervision and liability, provides ultimate consumers of legal services with necessary guarantees of integrity and experience and ensures the sound administration of justice.[80] Accordingly, it is difficult to understand why a member state cannot pursue the same objectives in a situation, such as that of the Italian *abogados*, where a person seeks to acquire a full professional title of practising lawyer in that member state without providing proof of practical experience in any law or sitting a Bar exam. Admittedly, the Court in *Luxembourg* v *EP and Council* conceded that the 'gradual assimilation of knowledge through practice' that a 'migrant' lawyer enjoys under the directive is 'made easier' and therefore justified by 'experience of other laws gained in the home Member State'.[81] But in the situation submitted to the Court in *Torresi* no such 'experience of other laws' takes place, at least not as a practitioner, since many Italian *abogados* decided to leave Spain immediately after the acquisition of the relevant title, and this behavior was not regarded as 'abusive' by the Court in the answer given to the first preliminary question. Viewed from this perspective, it is not so obvious that the Directive fully respects the national identity of the Italian state, as expressed in Article 33(5) of its Constitution.

Perhaps a different answer to the questions posed by the Italian court would have indirectly called into question the Spanish system of qualifications of lawyers, according to which (at least before the 2006 amendment of the relevant rules, which came into force in its entirety only in 2014)[82] access to the legal profession is automatic with the acquisition of the *licenciatura en derecho* and registration with a *Colegio de abogados*. Therefore, also in the light of other more or less 'abusive' practices on the horizon, a fuller harmonisation of the national rules concerning the acquisition of the title of 'lawyer' appears to be the way forward.

[80] *See inter alia* ECJ 12 December 1996, Case C-3/95, *Reisebüro Broede* v *Sandker*, para 38.

[81] ECJ 7 November 2000, Case C-168/98, *Luxembourg* v *European Parliament and Council*, para 43.

[82] Ley 34/2006.

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