# Linguistic Obstacles for Migrating Professionals in the EU Internal Market: Time for a Legislative Overhaul

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Abstract: In this article, I assess the law of the European Union (EU) as regards linguistic obstacles in the functioning of the internal market. In essence, the research aims to determine in which cases and to what extent an assessment of linguistic proficiency may be admissible under EU law for professionals seeking employment in another EU Member State than their own.

Indeed, assessing the linguistic skills of potential employees to determine their ability to communicate effectively in the workplace and with clients is quite common and widely accepted. In the same vein, self-employed private (medical) service providers who want to establish themselves in another EU Member State, or students wishing to study in another language than their own, may have to prove to possess adequate linguistic skills. However, making the threshold too high may amount to an indirect discrimination on the basis of nationality. Linguistic requirements are, furthermore, by no means limited to the exercise of a professional activity in a broad sense, but may also concern eligibiliy for social benefits, as these may be made conditional upon a certain level of proficiency in the local language.

It appears that there is a considerable degree of legal uncertainty surrounding these topics, not least with regard to self-employed professions. As it stands, EU law seems open to various interpretations as to the autonomy of EU Member States to regulate this field, not least when it comes to the intensity of language testing. The European Commission seems to focus primarily on free movement and is rather reluctant to establish clear guidelines. On a positive note, in its (limited) case law, the European Court of Justice has provided important albeit broad guidelines. It is argued that this topic is in need of a comprehensive legislative overhaul granting the EU Member States more autonomy, on the basis of clearly established criteria, to lay down and assess linguistic requirements for professionals migrating to their territory.

Keywords: European Union, Internal market, Free movement, Linguistic mequirements, Proof, scope and level of linguistic skills.



## *1. Introduction*

In works of fiction language barriers are often blotted out or at least reduced to minor and merely transitional issues. Indeed, after a brief first multilingual encounter the main characters usually find a lingua franca, mostly English, in which they can effortlessly communicate with all the subtleties required. Alternatively, linguistic issues are used as a funny gimmick. In that regard classic British comedy comes to

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mind, more particularly the unfortunate yet endearing waiter Manuel in *Fawlty Towers*, or *Allo Allo!*, a sitcom which cleverly used English in different accents so as to represent various languages.[2]

More recently, attempts are sometimes being made to better reflect the multilingual reality. A case in point is *1899*, a dystopic story about immigrants from various countries travelling from the Old to the New continent on a steamship. Crew and passengers do not have a single common language and actors perform in French, English, Cantonese, Polish, Portuguese, Spanish, Danish and German![3] The journey is suspenseful to say the least (spoiler alert: there are only few survivors), and the apparent communication problems do not help. Rather, the myriad of languages spoken, with few useful combinations for meaningful communication, contribute to a large extent to a harrowing, nightmarish athmosphere in which characters often say phrases like "none of this makes any sense", as indeed it does not.[4]

Fortunately, in day-to-day life, the situation is (slightly) less dramatic. Yet, linguistic obstacles are still a fact of life to be reckoned with in an increasingly globalised work force and world. Proficiency in one or more local, or widely spoken international languages may (quite justifiably) be required in various contexts, not least in the job market. Such linguistic requirements may, however, also generate unwanted discriminatory effects and lead to exclusion, in particular when the required level of linguistic skills is too high to attain.

So what are then, the legal do's and dont's in this respect? In this article, I will look into the law of the European Union (EU) as regards the internal market and, more particularly, endeavour to determine in which cases and to what extent an assessment of linguistic proficiency may be admissible under EU law for professionals seeking employment in another EU Member State than their own.

Indeed, assessing the linguistic skills of potential employees to determine their ability to communicate effectively in the workplace and with clients is quite common and widely accepted. In the same vein, private (medical) service providers who want to establish themselves in another EU Member State, or students wishing to study in another language than their own, may have to provide evidence they possess adequate linguistic skills. However, making the threshold too high may amount to an indirect discrimination on the basis of nationality.

Linguistic requirements are, furthermore, by no means limited to professional activity in a broad sense, but may also concern eligibiliy for social benefits. Indeed, national authorities are increasingly laying down policies so as to foster social cohesion and (linguistic) integration of newcomers in society. In that regard, they may seek various ways and incentives to ensure that those newcomers acquire minimum linguistic skills, and to that end, make certain social benefits conditional upon a linguistic requirement.[5]

Different principles may apply in the internal market which are relevant to the topic at hand (free movement of workers, freedom to provide services and of establishment, non-discrimination on the basis of nationality, …). Yet, for the sake of clarity and structure, I will not discuss or assess the relevant regulatory EU framework and case law of the European Court of Justice along those classical lines, but rather from the perspectives of respectively employees (under 2), regulated professions (self-employed or not) (under 3) and beneficiaries of social benefits (under 4). For each and every perspective, a distinction will be made between the admissibility of linguistic requirements as such, on the one hand, and the standard

[2] The French, German and Italians each speak English with a strongly discernible national accent, while the English airmen use frightfully posh voices. The inimitable Peter Sellers and his French accent in English while impersonating *Inspector Clouseau* also deserves to be mentioned here.

[3] Fortunately, subtitles are made available to the audience …

[4] See L. LATIF, 1899 – this painfully slow sci-fi show is absolutely agonising (it is dour, obtuse and oppressive), in *The Guardian*, 17.11.2022, available here.

[5] An issue that clearly remains outside the scope of EU law, however, is the acquisition of nationality. Accordingly, this topic will not be discussed in this article. Neither will immigration law be covered (such as family reunification rules, often also entailing linguistic requirements).

of proof and intensity of language requirements/testing on the other.[6] I will then pinpoint remaining grey zones, challenges and possible ways to move forward (under 4) before concluding (under 5), pleading in short for a clearer constitutional demarcation of competences between the national and the EU decision-making levels.

## *2. Employees*

### *2.1 Admissibility of language requirements*

In essence, States' sovereignty remains largely intact as to their official national language policy. They determine in principle freely, in the public spheres, which languages are to be used in such domains as public administration, courts and State-funded education.[7]

In the private spheres of employment, however, the situation is quite different as, in principle, private employers may decide on all linguistic requirements they deem necessary for their potential employees.

In EU law, the situation is more complex. Indeed, the fundamental right of free movement for workers in the EU, as enshrined in the Charter of Fundamental Rights of the EU and the Treaty on the Functioning of the EU (TFEU)[8] entails *inter alia* the abolition of any discrimination based on nationality between nationals of the EU Member States as regards employment.

To that effect, EU Regulation 492/2011 establishes detailed rules concerning the eligibility for employment so as to prevent any discrimination between EU nationals.[9] Accordingly and irrespective of their place of residence, EU nationals have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State, under the same conditions as nationals of that (host) Member State.[10]

What does this imply as to linguistic conditions for employment in the private or in the public sector in an EU Member State other than one's own?

On the one hand, EU law protects the private freedom of language.[11] This entails that national autonomy as regards linguistic regulation of private employment is limited. A case in point occurred in 2001, when the European Commission criticised Estonia during the accession screening for EU Membership. The

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[6] I will discuss case law only insofar as it concerns linguistic proficiency requirements for employment. The *Las* judgment of the European Court of Justice will therefore not be analysed, as it merely concerns the language of the contract, not of the employee (ECJ Judgment of 16 April 2013, *Las*, case C-201/11, ECLI:EU:C:2013:239).

[7] See S. VAN DER JEUGHT, *EU Language Law*, Groningen, 2015, 19 et seq. See also S. VAN DER JEUGHT, *The Loi Toubon and EU Law: a Happy or a Mismatched Couple?* in *European Journal of Language Policy*, 2016, pp. 139-152; S. VAN DER JEUGHT, *Territoriality and freedom of language: the case of Belgium,* in *Current Issues in Language Planning*, vol. 18, 2016/2, pp. 1-18; S. VAN DER JEUGHT, *Regulatory Linguistic Requirements for Product Labelling in the Internal Market of the European Union*, in *Comparative Law and Language Journal,* 2022/1 (online); H. VAN EYKEN, E. MEYERMANS SPELMANS, *Words travel worlds: language in the internal market and the national identity of Member States*, in *Comparative Law and Language Journal*, 2022/2 (online).

[8] Art. 45 and 46 TFEU; art 15 of the Charter of Fundamental rights of the EU.

[9] Art. 1, Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, OJ L 141/1 of 27.5.2011.

[10] Art. 3(1) of Regulation 492/2011. See also art. 3(2) of the same Regulation, which precludes provisions or practices of a Member State to "*(a) prescribe a special recruitment procedure for foreign nationals; (b) limit or restrict the advertising of vacancies in the press or through any other medium or subject it to conditions other than those applicable in respect of employers pursuing their activities in the territory of that Member State; (c) subject eligibility for employment to conditions of registration with employment offices or impede recruitment of individual workers, where persons who do not reside in the territory of that State are concerned.*"

[11] Art. 3(1) of Regulation 492/2011.

Commission commented on the requirements of proficiency in the Estonian language for people working in the private sector, and recalled clearly that, under the *acquis*, mandatory requirements can only be applied in very exceptional circumstances, on a case-by-case basis.[12] Poland also received negative comments from the Commission concerning too strict general language requirements applicable to private employment. The Commission urged Poland to lift disproportionate Polish language requirements for board members of service providers, particularly in the financial sector.[13] Conversely, Slovenia got good marks for amending its company law, reducing the scope of the provisions concerning the compulsory use of the Slovenian language inside companies.[14]

In the private spheres of employment, language freedom therefore reigns, thus perfectly aligning EU law with general principles of constitutional law in this regard. Yet, where it becomes interesting is that EU law also limits national competence in the traditionally *public* domain, as it makes its own distinction between public and private employment, significantly limiting the scope of the former. In short, what is considered to be public employment under national law, is not necessarily the same under EU law. Indeed, as a result of case law of the European Court of Justice, public service employment is limited to those offices in which State authority is exercised, such as in the police or the justice department.[15] Consequently, for all other jobs in the public sector, also those involving health care, transport or education, the same rules as in the purely private sector apply. Hence, national autonomy is limited and linguistic requirements must be justified and proportionate, and are not valid *per se* as is the case from a traditional constitutional law perspective.[16]

Pursuing this topic, while under Regulation 492/2011, "*conditions relating to linguistic knowledge"* may be imposed, they must be "*required by reason of the nature of the post to be filled.*"[17] In other words, EU Member States may impose linguistic requirements for employment, only insofar such linguistic knowledge is objectively required for the jobs at issue.

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[12] Estonia 2001 Progress Report, p. 41. See similar remark with regard to Latvia, which was in line with the *acquis* (Latvia 2003 Progress Report, p. 19). All the Progress Reports were available here and have been consulted by the author.

[13] Poland 2003 Progress Report, p. 24.

[14] Slovenia 2001 Progress Report, pp. 44-45.

[15] An abundant case law of the European Court of Justice exists in this regard. This is due to the fact that the notions of "public service" and "public administration" (terminology of Article 45 para. 4 TFEU in the various language versions) have always varied considerably from one EU Member State to another. In 1982, the Court of Justice held that the notions cover those "*posts which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities. Such posts in fact presume on the part of those occupying them the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality*" (ECJ judgment of 26 May 1982, *Commission of the European Communities v Kingdom of Belgium*, case 149/79, pt. 7). In subsequent case law the Court of Justice has consistently confirmed this interpretation, and has and made it clear that both criteria are not alternative but cumulative (exercising of powers conferred by public law and safeguarding general interests). The Court has ruled, for example, that jobs such as postal or railway workers, plumbers, gardeners or electricians, teachers, nurses and civil researchers may not be reserved for nationals of the host Member State. Criteria must be assessed on a case-by-case basis with regard to the nature of the tasks and responsibilities involved (see European Commission, *Staff Working Document, Free movement of workers in the public sector*, 2010, p. 11 and the case law cited, available here).

[16] See B., DE WITTE, *The impact of European Community Rules on Linguistic Policies of the Member States*, in F. COULMAS (ed.), *A Language policy for the European Community. Prospects and Quandaries*, Berlin, 1991, p. 168; see also B. DE WITTE, *Language Law of the European Union: Protecting or Eroding Linguistic Diversity?*, in R. C. SMITH (ed.), *Culture and European Union Law*, New York, 2004, 225.

[17] Art. 3(1) of Regulation 492/2011.

*Groener (1989)*

In that regard, a case was brought before the European Court of Justice in 1987. It involved a Ms *Anita Groener*, a Dutch national, who had applied for an appointment to a permanent full-time post as an art teacher in a public vocational education institution in Dublin.[18] She was, however, required by the applicable rules to hold a certificate of proficiency in the Irish language (the *Ceard-Teastas Gaeilge*). As she did not have that, she had to pass a special examination in Irish, consisting of an oral test. Ms *Groener*, unfortunately, failed that examination (even after having followed a four-week beginners course), and was therefore refused the appointment.

Ms *Groener* challenged that refusal on the grounds that the requirement of Irish was contrary to her freedom of movement under EU law.[19]

The case came before the Irish High Court, which referred a question to the European Court of Justice. The Irish judge needed guidance as to the concept of "*the nature of the post to be filled*". In other words, the judge wanted to know if in this case it was really admissible to require certain linguistic skills of employees (under a public policy). Indeed, the High Court pointed out that knowledge of the Irish language was in actual fact "*not required to discharge the duties attached to the post*", clearly backing the argument put forward by Ms *Groener*.[20]

In its Judgment, the European Court of Justice acknowledged the fact that the teaching of art, like that of most other subjects taught in Irish public vocational education schools, is conducted "*essentially or indeed exclusively*" in English.[21] However, the Court deemed that finding "*not in itself sufficient*" to assess whether the linguistic requirement was justified.[22] In what one could qualify as a daring move away from the provision in the Regulation, the Court took into account the "*special linguistic situation in Ireland*" where Irish, as the national language, is the first official language.[23]

The Court conceded that Irish is not spoken by the "*whole Irish population*", but it underscored that the Irish governments have designed a policy to promote the use of Irish as a means of expressing national identity and culture.[24] The Treaty does not "*prohibit*" such a linguistic public policy (read, it is a legitimate aim), yet its implementation "*must not encroach upon the free movement of workers*".[25]

The Court thus considerably broadened national autonomy to lay down a public language policy. Even in a situation such as in this case, where certain language skills are not necessary for the specific job that is sought, a linguistic requirement may nevertheless be legitimate if founded on a national language policy.

In this regard, it is important to note that the Court also referred to the fact that the case concerned a job as a teacher, and stressed the link between a national language policy and education: "*(t)he importance of education for the implementation of such a policy must be recognized. Teachers have an essential role to play, not only through the teaching which they provide but also by their participation in the daily life of the*

[18] ECJ judgment of 28 November 1989, *Groener*, case C-379/87, ECLI:EU:C:1989:599.
[19] Then art. 48 EEC and Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ L 257 of 19/10/1968, 2.
[20] Pt. 10 of the judgment.
[21] Pt. 15 of the judgment. Anita Groener submits that the full-time duties which she wishes to take up are not significantly different from the temporary duties which she was carrying out without any knowledge of the Irish language (pt. 15, Opinion of Advocate General DARMON in this case, ECLI:EU:C:1989:197).
[22] Pt. 16 of the judgment.
[23] Pt. 17 of the judgment.
[24] Pt 18 of the judgment. In his Opinion (pt. 15), Advocate General DARMON quotes the order making the reference according to which 33,6% of the population of Ireland professes fluency in the Irish language.
[25] Pt. 19 of the judgment.

*school and the privileged relationship which they have with their pupils. In those circumstances, it is not unreasonable to require them to have some knowledge of the first national language*."[26]

It is not entirely clear, however, whether the reasoning of the Court is limited to educational positions or has a broader scope.[27] Implicitly, the latter seems to be the case, although the Court has had no other occasion since to clarify this judgment (which was handed down more then three decades ago). At any rate, the Court found the Irish language requirement compatible with EU law and made it crystal clear that it intended to give a very broad interpretation of the compatibility of a national language policy in general.

This makes *Groener* to this day one of the most remarkable constitutional judgments of the European Court of Justice, and however often criticised,[28] and justifiably so, because the Court in essence discarded the provision of the Regulation, it has laid the foundations of respect for the national (linguistic) identity and an according language policy. In a way, the Court safeguarded the traditional sovereignty of States regarding linguistic requirements for public employment, at least with regard to publicly funded education. It must be stressed, however, that it did not give *carte blanche*, as it also established that such a linguistic policy does come under the scrutiny of EU and national courts.[29]

### *2.2 Standard of Proof*

As said, in its Groener Judgment, the Court held that "*it is not unreasonable to require [teachers] to have some knowledge of the first national language*" (my underscore).[30]

But what exactly is *some* knowledge? The Court gives some indications, defining the required level of proficiency which would qualify as admissible in this context as "*adequate knowledge (...) provided that the level of knowledge required is not disproportionate in relation to the objective pursued*".[31]

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[26] Pt. 20 of the judgment.

[27] Advocate General DARMON emphasises the educational nature of the job at issue, but the Court takes a more general approach (pt. 19 of the judgment). In his Opinion (pt. 21), the Advocate General asserts that "*(o)nce a Constitution (that is to say, all the fundamental values to which a nation solemnly declares that it adheres) recognises the existence of two official languages without limiting their use to specific parts of the national territory or to certain matters, each citizen has the right to be taught in those two languages. The fact that only 33.6% of Irish citizens use the Irish language is no justification for sweeping away that right altogether, for its importance is measured not only by its use but also by the possibility of preserving its use in the future*." In pt. 24 of the Opinion, the Advocate General concludes that *"(…) it seems to me that teaching posts fall by their nature within a field essential to the pursuit of a policy of preserving and fostering a language*." Interestingly, the Advocate General bases his reasoning mainly on the preservation of a minority language. One wonders if this holds true for a "stronger" language.

[28] According to N. N. SHUIBHNE, the *Groener* judgment leaves more questions than answers, as it is difficult to maintain the argument that a pre-employment examination of proficiency in Irish was strictly necessary in the given circumstances (*EC law and minority language policy: culture, citizenship and fundamental rights*, The Hague, 2002, pp. 87-89). See, in the same sense, P. DUPARC PORTIER, A. MASSON, *Une meilleure gouvernance linguistique est-elle possible dans l'Union européenne*, in *Revue du marché commun et de l'Union européenne*, 2007, p. 353 and pp. 356-357. CREECH argues that the ruling only applies to the specific situation in Ireland (R. CREECH, *Law and language in the European Union: the paradox of a Babel "United in Diversity"*, Groningen, 2005, p. 100 and 105; see, similarly, P. DUPARC PORTIER, A. MASSON, *op. cit.*, p. 357.). R. CREECH adds that such a policy sits rather uneasily with the integrationist aim of the EU (R. CREECH, *op. Cit*., 105-106).

[29] As B. DE WITTE aptly puts it, the idea of conditional national autonomy prevails (*Internal Market Law and National Language Policies*, in K. PURNHAGEN, P. ROTT (eds.), *Varieties of European economic law and regulation : liber amicorum for Hans Micklitz*, 2014, p. 426).

[30] Pt. 20 of the judgment.

[31] Pt. 21 of the judgment.

In his Opinion, Advocate General Darmon had suggested some more practical indications in this regard. In his view, the level of knowledge required may not be so high as to make it impossible for a foreigner to pass the examination. He also points out that out of six non-Irish candidates, four passed at the first attempt and one at the second. Furthermore, he indicates that the oral examination which *Groener* took related to topical questions and was not particularly difficult. He concludes therefore that the test was flexible in a number of ways, and limited to what was strictly necessary.[32] Interestingly, the Advocate General also discusses the possibility of applying a less strict measure, consisting, for example, in requiring a teacher, once appointed, to take lessons in Irish. In his view, this does not seem to meet satisfactorily the aim in question. First, the learning of the language would not be immediate and, secondly, the teachers involved would undoubtedly be less conscious of the necessity of having a knowledge of the Irish language.[33]

Moreover, the Court establishes other conditions as to language tests.

First and foremost, exemption from the linguistic requirement must be exercised in a non-discriminatory matter (which is less relevant in casu, but matters as a general principle).[34]

Furthermore, the Court precludes the imposition of any requirement that the linguistic knowledge in question must be acquired within the national territory.[35] This seemingly mysterious condition can be explained by reading the Opinion of the Advocate General. The argument seems to stem from the European Commission which pointed out that Irish may be studied in Paris, Bonn, Rennes, Brest and Aberystwyth.[36] However, the Irish Government stated at the hearing that EU nationals who had learned Irish outside Ireland, were not granted any exemptions.[37] Clearly, the Court took issue with that part of the Irish scheme.

The Court also clarifies that a candidate should be offered the possibility to retake the (oral) exam.[38]

In sum, the Court seems to accept the principle of a language test, which is non-discriminatory, accessible also in other EU Member States, which can furthermore be retaken, provided such a test is reasonable as to the level required (which must be assessed on a case-by-case basis in relation to the employment sought).

*Angonese (2000)*

A few years later, in the case of *Roman Angonese*, the Court had the occasion to be even more specific as to the standard of proof.[39] Residing since his birth in the Italian province of Bozen/Bolzano and having German as his mother tongue, Mr *Angonese* had spent five years (between 1993 and 1997) in Austria, working as a draughtsman[40] and doing studies in English, Slovene and Polish at the Faculty of Philosophy of the University of Vienna.[41] Additionally, he could demonstrate professional experience, practising as a draughtsman and as a Polish-Italian translator in Cracow (Poland).

[32] Pt. 25 of the Opinion.
[33] Pt. 25-26 of the Opinion.
[34] Pt. 22 of the judgment.
[35] Pt. 23 of the judgment.
[36] Pt. 32 of the Opinion.
[37] Pt. 33 of the Opinion.
[38] Pt. 23 of the judgment.
[39] ECJ judgment of 6 June 2000, *Angonese*, case C-281/98, ECLI:EU:C:2000:296.
[40] The profession is translated as "*géomètre*" in French, "*geometra*" in Italian, "*Vermessungstechniker*" in German and "*landmeter*" in Dutch (pt. 8 of the judgment in the various linguistic versions).
[41] It is clear that *Angonese* had not completed studies in Austria. Indeed, the Advocate General clearly indicates that *Angonese* had undertaken studies of philosophy and Slavic languages (pt. 3 and 33). Conversely, he does not mention any studies to become a draughtsman, only working experience. See also pt. 8 of the judgment.

However, when *Angonese* – bilingual German/Italian as the national judge found for a fact – , wanted to take part in a competition for a post with a private bank in Bozen/Bolzano (*Cassa di Risparmio*), he was not admitted on the grounds that he needed a specific certificate of bilingualism stating his proficiency in Italian and German. This certificate, commonly known as the *patentino*, is issued by the public authorities of the province of Bozen/Bolzano after an examination which is held in that province only.

*Angonese* did not possess that certificate and other evidence of his alleged linguistic proficiency was not taken into account.

In the legal proceedings which ensued, *Angonese* did not question the right of the bank at issue to assess his linguistic (bilingual) proficiency, but focused rather on the unlawfulness of the evidence which was required. He brought his case before an Italian judge (*pretore di Bolzano*) who referred a question to the European Court of Justice. According to the national court, the requirement to provide evidence solely by means of one particular diploma such as the certificate was contrary to the free movement for workers as it penalised job candidates not resident in Bolzano and could have been prejudicial to Mr *Angonese* who had taken up residence in another Member State for the purpose of studying there.[42]

The Court of Justice in essence confirmed this point of view in an admirably short and concise judgment.[43] It examined the question exclusively in light of the free movement for workers in the EU, entailing a principle of non-discrimination based on nationality applicable to both public authorities and private undertakings.[44]

The Court assessed the possibilities of obtaining the certificate. As it was available only in one province of Italy, the Court held that *"(p)ersons not resident in that province therefore have little chance of acquiring the Certificate and it will be difficult, or even impossible, for them to gain access to the employment in question.*[45] *Since the majority of residents of the province of Bolzano are Italian nationals, the obligation to obtain the requisite Certificate puts nationals of other Member States at a disadvantage by comparison with residents of the province*."[46]

The Court did concede, however, that requiring an applicant to have a certain level of linguistic knowledge could be legitimate (the issue was in actual fact undisputed). In the same vein, possession of a diploma such as the Certificate could constitute a criterion for assessing that knowledge. Yet, with the exclusiveness of the proof, a red line had been crossed: "*the fact that it is impossible to submit proof of the required linguistic knowledge by any other means, in particular by equivalent qualifications obtained in other Member States, must be considered disproportionate in relation to the aim in view*."[47]

The Court thus took a clear stance and, interestingly, a completely different one than both the European Commission and the Advocate General.

The European Commission argued in fact that the *patentino* was a justifiable condition of employment, and focused entirely on the "*practical obstacles*" in obtaining it. They were disproportionate and principally affected non-residents of the province. Hence, it would have been sufficient to make the procedure more

[42] Art. 48(1), (2) and (3) of the EC Treaty and Art. 3(1), 7(1) and (4) of Regulation (EEC) No 1612/68.

[43] The merits are discussed from pt. 21 to pt. 46 of the Judgment, on barely two pages. Moreover, most of the reasoning concerns the applicability of the non-discrimination principle to private persons (until pt. 36). The same applies to the Opinion of Advocate General FENNELLY, who dedicates only two paragraphs (42-43) to the unlawful discrimination suffered by the applicant.

[44] Pt. 28 et seq. of the judgment.

[45] Advocate General FENNELLY points out that examinations are taken almost exclusively by residents of the province and that of 20799 applications to sit the examination in 1996, only 1077 (5,18 %) were submitted by candidates residing outside the province (pt. 2, footnote 2).

[46] Pt. 39-40 of the judgment.

[47] Pt. 44 of the judgment.

accessible.[48] An online test, available all year round would probably have done the trick (admittedly, such digital possibilities were not yet common in the nineties of the previous century).

Advocate General Nial Fennely was even more dismissive. He concluded "*that there is nothing in the facts outlined to the Court which establishes the existence of covert discrimination on grounds of nationality* (…) *or which could be remedied by an assessment of the equivalence of his studies to the evidence of bilingualism afforded by the patentino*".[49] He advised the Court to rule that the bank at issue, in light of the linguistic regime in the province of Bolzano and of the linguistic make-up of its population, was entitled to require its potential employees to give evidence of bilingualism. The fact that examinations for the *patentino* were held only four times a year did not appear to him to pose a problem. Indeed, as he pointed out, the examinations for many professional qualifications are much more infrequent.[50]

The line which the Court took in the *Angonese* case (more than two decades ago) was confirmed in a more recent Belgian case (*SELOR*) in 2015,[51] following infringement proceedings. Interestingly, the Court dealt with this case in a chamber of three judges only, without an Opinion of the Advocate General, which indicated that established case law was to be followed.[52] The Judgment is again very concise. The issue concerned a requirement for candidates for posts in the local services in the French-speaking and German-speaking regions of Belgium to provide evidence of linguistic knowledge by passing an exam conducted by the selection office of the Federal Public Staff and Organisation Service (*SELOR*). Those candidates having carried out their studies in either French or German were, however, exempted.

The European Commission made reference to the *Angonese* judgment, and argued that that case law could be applied to the Belgian legislation. The Court acknowledged that it may be legitimate to require an applicant for a post in a local public service to have adequate knowledge of the language of the Region as the ability to communicate with the local administrative authorities and with the public may be relevant.[53]

However, the Court held that, to require of that applicant to provide evidence of his or her linguistic knowledge exclusively by means of one particular type of certificate, issued only by one particular Belgian body tasked with conducting language examinations was disproportionate. According to the Court, that requirement precludes any consideration of the level of knowledge which a holder of a diploma obtained in another Member State can be assumed to possess.[54] Moreover, although applicable to Belgian nationals and to those of other Member States alike, that requirement puts nationals of other Member States wishing to apply for a post in a local service in Belgium at a disadvantage (as they must most likely travel to Belgium).[55]

Arguably, the reasoning in the *SELOR* Judgment seems factually flawed. In actual fact, all diploma's in French or German were accepted, so proof was not exclusively required by means of one certificate only. Moreover, the argument that the mere travelling to a Region where one intends to go and work anyway is putting non-residents at a disadvantage is not entirely convincing as the effort required does not seem to be disproportionate as such (as a matter of fact, intra-State travel may sometimes imply a comparable burden). At any rate, digital possibilities for obtaining a certificate would do away with all the issues the Court raises.

The fact remains that there are no real criteria as to the question of the proof (except that there must be a certain leniency in assessing evidence of linguistic skills). As to the level which is required, it would seem

[48] Pt. 12 of the Opinion.
[49] Pt. 43 of the judgment.
[50] Pt. 42 of the Opinion.
[51] ECJ judgment of 5 February 2015, *Commission/Belgium*, case C-317/14, ECLI:EU:C:2015:63.
[52] The Court refers 3 times to *Angonese* (pt. 27, 29, 30) and once to *Groener* (pt. 25).
[53] Pt. 26 of the *SELOR* judgment.
[54] Pt. 29 of the *SELOR* judgment.
[55] Pt. 30 of the *SELOR* judgment.

that the only element is "proportionality", which leaves the matter entirely to national judges on a case-to-case basis.

### *3. Regulated (Self-Employed) Professionals*

#### *3.1 Admissibility of Language Requirements*

Other rules apply for so-called regulated (self-employed) professions, i.e. those where professional qualifications must be recognised by the host State before the professional in question may practise his or her profession.

As different national rules and conditions in this regard may hamper the freedom to provide services and of establishment, secondary EU law (currently mainly Directive 2005/36 regarding professional qualifications)[56] establishes specific rules in that regard.[57] More concretely, the Directive explicitly deals with medical doctors, dental practitioners, pharmacists, nurses, midwives, veterinary surgeons and architects. The Professional Qualifications Directive provides for a general framework, but when other EU secondary law lays down specific arrangements directly related to the recognition of professional qualifications (as is the case for lawyers, for instance), the latter apply.[58]

As to its principal aim, the Professional Qualifications Directive is clear: the host Member State must recognise professional qualifications which have been obtained in one or more other EU Member States.

Yet, besides conditions related to study and traineeship, linguistic issues may come into play, given the fact that the profession will most likely be exercised in another language, namely that of the host Member State. In that regard, article 53(1) of the Directive rather enigmatically lays down the principle that: *"(p)rofessionals benefiting from the recognition of professional qualifications shall have a knowledge of languages necessary for practising the profession in the host Member State*."

The provision is seemingly worded as an obligation, yet, initially, the Professional Qualifications Directive did not stipulate by whom, when or indeed to what extent the "*necessary*" language skills could be verified. It was only in 2013 that some clarifications were added (which will be discussed infra in more detail under subparagraph *3.2 Standard of Proof*).[59]

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[56] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, OJ L 255/22 of 30.9.2005, as amended by Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ("the IMI Regulation"), OJ L 354/132 of 28.12.2013 (hereafter referred to as the "Professional Qualifications Directive").

[57] Art. 3(1) of the Professional Qualifications Directive defines a "regulated profession" as: "*a professional activity or group of professional activities, access to which, the pursuit of which, or one of the modes of pursuit of which is subject, directly or indirectly, by virtue of legislative, regulatory or administrative provisions to the possession of specific professional qualifications; in particular, the use of a professional title limited by legislative, regulatory or administrative provisions to holders of a given professional qualification shall constitute a mode of pursuit.* (…)".

[58] Interestingly, notaries "*who are appointed by an official act of government*" explicitly fall outside the scope of the Professional Qualifications Directive (see Art. 2 para. 4).

[59] A previous version of the currently applicable provision read as follows: "*Member States shall see to it that, where appropriate, the persons concerned acquire, in their interest and in that of their patients, the linguistic knowledge necessary for the exercise of their profession in the host Member State*" (Council Directive 78/686/EEC of 25 July 1978 concerning the mutual recognition of diplomas, certificates and other evidence of the formal qualifications of practitioners of dentistry, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services, OJ L 233/1 of 24.08.1978). The wording of the initial provision is clearer as it seemingly

The case law of the Court of Justice has made an important contribution in this regard. The Court has outlined its views in two landmark judgments concerning dentists (*Haim*, 2000) and solicitors (*Wilson*, 2006).

*Haim (2000)*

In 1992, only three years after the landmark *Groener* judgment, the case of the Italian-Turkish dentist, Dr *Haim*, was brought to the Court of Justice. Dr *Haim* held a diploma in dentistry awarded in 1946 by the University of Istanbul (Turkey), the city in which he practised as a dentist until 1980. In 1981, he obtained permission to practise as a self-employed dental practitioner in Germany. In 1982, his Turkish diploma was recognised by the Belgian authorities. Dr *Haim* subsequently worked in Brussels as a dental practitioner. He interrupted that activity between November 1991 and August 1992 in order to work in his son's dental practice in Germany. In 1988, Dr *Haim* applied to be enrolled on the register of dental practitioners so that he could work as a dentist under the German social security scheme. That application was, however, refused on the ground that *Haim* had not completed the two-year preparatory training period as required by national law. The subsequent appeal before the German courts ended up before the Court of Justice, which ruled in favour of Dr *Haim* (the *Haim I* judgment).[60]

Following that first judgment, Dr *Haim* was enrolled, as of 1995, on the register of dental practitioners in Germany. On account of his age, he did not take steps to obtain his appointment as a dental practitioner under a social security scheme. But nonetheless he brought a further action against the German competent authority. Indeed, Dr *Haim* sought compensation for the loss of earnings he suffered by virtue of the fact that he had been unlawfully refused appointment (as confirmed by the Court of Justice in *Haim II*). That second case ended up again before the Court of Justice, and it is this judgment which is particularly relevant for the topic at hand.[61]

Indeed, the German judge raised questions about the right to reparation for Dr *Haim*, but, more relevantly, also asked whether national authorities are entitled to make the appointment as a dental practitioner under a social security scheme subject to language requirements.[62]

The Court emphasised first and foremost that the reliability of a dental practitioner's communication with his patient and with administrative authorities and professional bodies constitutes an overriding reason of general interest such as to justify making the appointment as a dental practitioner subject to language requirements.[63] The Court was clear: dialogue with patients, compliance with rules of professional conduct and law specific to dentistry in the Member State of establishment and performance of administrative tasks require an appropriate knowledge of the language of that State.[64] Accordingly, the Court ruled that the

obliges the EU Member States to proactively verify linguistic knowledge. The 2005 version is clearly weakened in that regard without apparent reason.

[60] ECJ judgment of 9 February 1994, *Haim I*, case C-319/92, ECLI:EU:C:1994:47.

[61] ECJ judgment of 4 July 2000, *Salomone Haim v Kassenzahnärztliche Vereinigung Nordrhein*, case C-424/97, ECLI:EU:C:2000:357.

[62] In light of Article 18(3) of Directive 78/686 and to the right of establishment (Art. 52 EC Treaty; currently Art. 43 TFEU). In its judgment the Court ruled out the application of Directive 78/686, as it did not apply to diplomas obtained in a non-member country (Turkey), even when recognised by a Member State.

[63] Astoundingly, the German authorities based the linguistic requirement for dentists on a general provision which precludes the exercise of the profession for a dentist "*with serious shortcomings relating to his mental state or to his person, in particular one who has been a drug addict or an alcoholic in the five years preceding the submission of his application* (…)."! Dr *Haim* argued that that provision did not, and could not, apply to linguistic shortcomings (pt. 55 of the judgment). The Court of Justice handled this issue in a diplomatic way and did not rule on the interpretation of this national provision …

[64] Pt. 59 of the Opinion.

appointment in question could be made conditional upon the linguistic knowledge necessary for the exercise of the profession at issue in the Member State of establishment.[65]

However, the Court also stressed that it is important that language requirements do not go beyond what is necessary to attain the objective. Interestingly, the Court also indicated that it is in the interest of patients whose mother tongue is not the national language that there exist a certain number of dental practitioners who are also capable of communicating with such persons in their own language.[66]

*Wilson (2006)*

A few years later, the Court ruled in another case concerning a regulated profession, namely that of solicitors. Lawyers fall outside the scope of the Professional Qualifications Directive as they are covered by a specific Directive (98/5/EC).[67] The latter Directive does, however, not contain any provision on linguistic proficiency in the language(s) of the host Member State.

The case which came before the Court of Justice was set against the Luxembourgish multilingual background.[68] In 2002, when transposing Directive 98/5/EC into Luxembourgish law, Luxembourg had added language requirements as a condition for registration to the Luxembourg Bar.[69] To be admitted, a solicitor needed to be proficient in the administrative and court languages of Luxembourg, meaning French, German and Luxembourgish.[70]

These language requirements also applied to those lawyers already admitted to the Bar in another EU Member State and wanting to exercise their profession in Luxembourg under their home-country title (the so-called *European* or *migrant* lawyers, as opposed to the *domestic* ones). In 2004, Mr *Wilson*, an English solicitor challenged these language requirements.[71] Mr *Wilson* had practised as a lawyer in Luxembourg since 1994, under his home-country title (member of the Bar of England and Wales since 1975). Following the language requirements laid down in the Luxembourgish 2002 Law, Mr *Wilson* was requested to attend a hearing to verify his language proficiency in French, German and Luxembourgish. He refused to attend the hearing without the assistance of a Luxembourgish barrister, and the case was brought before the *Cour administratif* which submitted a request for a preliminary ruling to the European Court of Justice.

[65] Pt. 61 of the Opinion.
[66] Pt. 60 of the Opinion.
[67] Directive 98/5/EC of 16 February 1998 of the European Parliament and the Council 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 77/36 of 14.3.1998.
[68] ECJ judgment of 19 September 2006, *Graham J. Wilson v Ordre des avocats du barreau de Luxembourg*, case C-506/04, ECLI:EU:C:2006:587. The Commission had also brought an infringement procedure. Both judgments were delivered on the same day, confirming incompatibility of the prior language test with Directive 98/5/EC (ECJ judgment of 19 September 2006, *Commission v Grand Duchy of Luxemburg*, case C-193/05, ECLI:EU:C:2006:588).
[69] The Directive is transposed in Luxembourg by the Law of 13 November 2002, *Mémorial* A no 140 of 17.12.2002, 3202. M. THEWES points out that the language requirements were controversial, as business lawyers in practice need other languages, such as English (*La profession d'avocat au Grand-Duché de Luxembourg*, Brussels, 2010, p. 40). The compatibility of these requirements with the Luxembourgish Constitution was, however, confirmed by the *Conseil disciplinaire et administratif d'appel,* judgment of 13 July 2004, 5/04, reprinted in M. THEWES, *op. cit*., p. 388).
[70] Art. 6(1)(d) of the Law of 10 August 1991 (*Loi sur la profession d'avocat*, *Mémorial* A no 58 of 27.8.1991, 1110), as amended.
[71] As well as the appeal procedure against the decision refusing registration (which is, however, irrelevant to the topic under discussion in this article).

In its defence, the Luxembourgish government referred to the *Haim* judgment, mentioned above, and argued that, just as is the case for dentists, solicitors need to be able to reliably communicate with clients, the authorities and professional associations.[72]

The Court of Justice ruled, however, that Directive 98/5 does not allow the registration of a European lawyer to be conditional on a hearing to determine whether the person concerned is proficient in the languages of that EU Member State.[73] The Court pointed out that the European legislature carried out a complete harmonisation of the prior conditions for the registration of European (migrant) lawyers. With a view to making it easier for those European lawyers to exercise their freedom of establishment, the legislature did not opt for a system of prior (language) testing. The argument that linguistic skills were required did not convince the Court, taking into account the various safeguards. The Court emphasised in that regard that the use of the home-country title makes it clear to clients that that lawyer has not obtained his qualification in the host Member State, and does not necessarily have the linguistic knowledge to deal with specific cases. Furthermore, such European (migrant) lawyers may be required by national authorities to work in conjunction with a local lawyer. The rules of professional conduct may also lay down sanctions when a European lawyer handles matters for which he or she is not competent, owing to lack of linguistic knowledge.

In 2007, following this ruling, Luxembourg abolished the linguistic requirements for European lawyers who wish to practise under their home-country title in Luxembourg.[74] The linguistic requirements were, however, maintained should those migrant lawyers want to become fully integrated in the Luxembourgish Bar and be entitled to plead before Luxembourgish courts or tribunals.[75]

In 2012, the European Commission sent a reasoned opinion[76] requesting Luxembourg to allow European lawyers to become fully-fledged members of the Luxembourgish Bar, without having to comply with any linguistic requirements. The Commission considered that there were less restrictive and more effective means of safeguarding the efficiency of the legal system, the protection of clients and the country's linguistic heritage. For example, it pointed to the fact that the Luxembourg Bar maintains a publicly available list of lawyers which refers to their specialisations and the languages in which they practise.

In response to these proceedings, the Luxembourgish Law was again amended in 2013, allowing European lawyers to accede to the Luxembourgish title of *avocat* if they have practised in Luxembourg for

[72] See Opinion of Advocate General STIX HACKL in case C-193/05 (*Commission vs Luxembourg*) in which more details are given on the linguistic regime. The Luxembourgish government argued that a lawyer who practises his profession under his home-country title may give advice also on Luxembourgish law and must therefore have the language knowledge necessary to enable him to read and to understand Luxembourgish legal texts. In addition, the Luxembourgish government emphasised that penalty notices issued by the police following road traffic accidents are normally written in German, as are the Luxembourgish tax laws, which makes it necessary to consult case-law and commentaries written in German (pt. 25 of the Opinion). Moreover, a Luxembourgish party who represents himself in court will normally use the Luxembourgish language before the lower courts, where there is no obligation to be represented by a member of the Bar Association (*avocat à la cour*). Furthermore, many Luxembourgish nationals speak exclusively in their native language when consulting a lawyer (pt. 26 of the Opinion). In addition, the whole of the professional rules of the Luxembourgish Bar Associations are written exclusively in French. See also L. DUPONG*, Liberté d'établissement et pratique linguistique du pays d'accueil*, in B. FAVREAU (ed.), *L'avocat dans le droit européen*, Brussels, 2008, pp. 49-55.

[73] See pt. 70 of the *Wilson* judgment. Interestingly, the Court is prudent and focuses on the "hearing", rather than on the linguistic requirement itself, although it comes down to the same thing.

[74] Law of 21 June 2007, *Mémorial A* no 101 of 26.6.2007, 1856.

[75] M. THEWES, *op. cit.*, p. 70.

[76] Second infringement proceedings, following the first ruling of the Court of Justice in case C-193/05 *Commission/Luxembourg* (see supra). See Press Release MEMO/12/708 of 27 September 2012, Infringements package: main decisions, available here.

more than three years under their home-country title provided though they are proficient in the language of legislation, namely French.[77] European lawyers in that case still have to limit their activities to those not requiring proficiency in German or Luxembourgish. Moreover, lawyers taking on activities for which they lack the necessary linguistic abilities are liable to face disciplinary sanctions. In addition, the level of language proficiency required is defined more precisely than was the case previously and is currently based on the Council of Europe common European framework of reference for languages. In particular for French, active and passive knowledge at level B2 is required.[78]

As far as can be ascertained, the Commission did not take any further action.[79] This case and in particular the follow-up by the European Commission raise some important questions.

It should be borne in mind that the *Wilson* judgment applies only to a particular class of European (migrant) lawyers, namely those practising under their home-country title. The Commission seemed to take it one step further, and also took issue with linguistic requirements for those lawyers wanting to obtain the Luxembourgish title. It would seem that the European Commission is of the opinion that in the absence of explicit rules, the autonomy of national authorities to impose linguistic requirements is limited. Indeed, though the Commission eventually accepted the requirement of proficiency in French, it would not have agreed with a full multilingual requirement (proficiency in French, German and Luxembourgish). Admittedly, it is rather difficult for non-Luxembourgish to fulfill that trilingual requirement, yet, doesn't that also hold true to some extent for a bilingual situation or with regard to lesser widely spoken languages such as Gaelic or Maltese, to name but two? Furthermore, it may also depend on the level of proficiency which is required. Under 5, the particular situation of multilingual EU Member States will be discussed further.

### *3.2 Standard of Proof*

The Professional Qualifications Directive contains, in its current version, some indications as to language testing. As was explained above, the principle is established that professionals need "*a knowledge of languages necessary for practising the profession in the host Member State*."

Yet, initially, Article 53(1) did not stipulate by whom, when or indeed to what extent the (undefined) *necessary* language skills could be verified.

What is more, the European Commission has shown itself clearly reluctant to any general testing scheme. It has consistently held that systematic language tests for foreign professionals are disproportionate. Only on a case-by-case basis language tests would be compatible with EU law.[80] Instead, foreign professionals should be able to prove their language knowledge by other means, such as a diploma acquired in the relevant language, professional experience or a language certificate.[81] Furthermore, language tests could take place only after the end of the recognition procedure and could not be a reason for refusing recognition of professional qualifications as such.[82]

As a consequence of increasing migration of professionals in the internal market as of 2005, however, the issue became acutely controversial, particularly with regard to health professionals working in direct

[77] Loi modifiant la loi modifiée du 10 août 1991 sur la profession d'avocat, 13 June 2013, *Mémorial A* no 102 of 21.6.2013, 1478.

[78] For Luxembourgish and German, a mere passive knowledge at level B2 is required and an active knowledge at level B1.

[79] No case was ever brought to the Court of Justice

[80] Commission Green Paper Modernising the Professional Qualifications Directive, 22 June 2011, COM/2011/367, under "Language requirements".

[81] See Green Paper, COM/2011/367, at footnote 27.

[82] *Idem.*

contact with patients.[83] Examples of medical malpractice due to lack of local language knowledge were reported by the media and led to public outcry.[84]

In 2011, under pressure, the Commission proposed amendments to the Professional Qualifications Directive,[85] aiming at striking a balance between, on the one hand, the need for an effective mobility of professionals in the internal market and, on the other, the protection of consumers, notably patients who expect adequate language skills from health professionals.[86]

Surprisingly though, instead of proposing substantial amendments to the Professional Qualifications Directive in order to tighten the language requirements and to increase testing possibilities, the Commission essentially confirmed its views on the issue, as set out above.

Indeed, in its current version, the Professional Qualifications Directive does still not define the vacuous notion of *necessary* knowledge.

Furthermore, language tests may take place only for professions entailing "*patient safety implications*".[87] For other professions, tests may be imposed only "*in cases where there is a serious and concrete doubt about the sufficiency of the professional's language knowledge in respect of the professional activities that that professional intends to pursue*".[88] That is quite restrictive, because it puts the burden of proof on the authorities, rather than on the professionals. In addition, there may be no testing in advance, but only after the recognition procedure is completed.

A further restriction to the testing of linguistic skills is that, at any rate, such assessments are limited to "*the knowledge of one official language of the host Member State, or one administrative language of the host Member State provided that it is also an official language of the Union*." This aspect will be discussed further, under 5).

Last but not least, it is explicitly stipulated as well that any "*language controls shall be proportionate to the activity to be pursued. The professional concerned shall be allowed to appeal such controls under national law*".[89]

The rather odd and restrictive manner in which the possibility of tests (*controls* in typical Euro-English jargon) is provided, by implicitly allowing that these may take place, yet only in specific situations and as

[83] See Green Paper, COM/2011/367, under "Language requirements".

[84] See X., *Roemeense en Bulgaarse verpleegkundigen brengen Britse patiënten in gevaar*, *Het Laatste Nieuws* (online), 9 September 2011 (own archive). In Belgium, an incident was reported involving a medical doctor in the emergency room of a Brussels hospital not speaking Dutch and only little French (X., *Taalkennis als voorwaarde voor beroepsuitoefening*, *Het Nieuwsblad* (online), 8 February 2011, available here.

[85] European Commission Proposal for a Directive of the European Parliament and of the Council amending Directive 2005/36/EC on the recognition of professional qualifications and the Regulation on administrative cooperation through the Internal Market Information System, COM/2011/883 final of 19.12.2011 (hereafter referred to as "Commission Proposal COM/2011/883").

[86] Commission Proposal COM/2011/883, Explanatory Memorandum, pt. 1.1.

[87] Art. 53(3), Professional Qualifications Directive. The original Commission proposal limited this possibility even further. Indeed, the Commission suggested that, for professions with patient safety implications, checks could be organised only at explicit request by the national health care system, or for self-employed professionals not affiliated to the national health care system, by representative national patient organisations. The European Parliament, however, amended this provision. See also Article 7, which obliges a service provider for professions that have patient safety implications, to make a declaration about the applicant's knowledge of the language necessary for practising the profession in the host Member State.

[88] Art. 53(3), Professional Qualifications Directive.

[89] Art. 53(4), Professional Qualifications Directive.

to one language only, apparently conveys a clear reluctance by the European Commission to a general language testing scheme, as it fears that free movement might be hampered too much.

*4. Beneficiaries of Social Benefits*

*4.1 Admissibility of Language Requirements*

National authorities may also use the granting of social benefits as an incentive to further integration of newcomers in society, by making these benefits conditional on a specific level of proficiency in the local language.

First and foremost, it should be stressed that such a policy is by all means precluded for EU citizens as to the social benefits to which they are entitled.[90]

Likewise, third-country nationals who have acquired EU long-term resident status may not be subjected to any linguistic requirements, yet only with regard to *core* social benefits. The crucial assessment is therefore whether a specific social benefit is one of the *core* benefits within the meaning of article 11(4) of Directive 2003/109.[91] In actual fact, this is up to national courts and the European Court of justice to determine on a case-to-case basis.

Recently, the Court of Justice handed down a Judgment concerning a housing allowance in Austria, which was made conditional on proven proficiency in German.[92]

The case concerned a Turkish national (KV), who had lived since 1997, with his wife and their three children, in Austria where he had long-term resident status.[93] Up to the end of 2017, he received housing assistance pursuant to Austrian law. However, in 2018, the Austrian legislation was tightened and such aid for third-country nationals was made conditional upon proof of basic command of German. Failing to come up with the requisite proof, KV had been refused that social benefit.

KV brought his case before the Austrian courts. He argued that the language requirement put him at a disadvantage on the basis of his ethnic origin. He also argued that making the housing allowance dependent on knowledge of German was contrary to his status as a long-term resident, as this allowance was, according to him, a *core* social benefit.

On higher appeal, the Austrian judge asked guidance of the European Court of Justice as to the qualification of the housing allowance. The Court clearly leaned towards an affirmative answer as to the core nature of the allowance, yet left the final decision to the Austrian court.[94]

It was the first time that the Court explicitly confirmed that a language requirement for the granting of a core social benefit is contrary to the right to equal treatment of long-term residents. Hence, there may be no linguistic requirement of basic German for long-term residents, if the national judge decides that the housing allowance is a core social benefit.

However, an aspect of the case that has remained under the radar is that the Court implicitly confirmed that, as to third-country nationals (without long-term resident status), such a linguistic policy is, as a matter

[90] See Art. 4, Regulation (EC) No 883/2004 of the European parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166/1 of 30.4.2004.
[91] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents OJ L 16/44 of 23.1.2004.
[92] ECJ judgment of 10 June 2021, *Land Oberösterreich v KV*, case C-94/20, ECLI:EU:C:2021:477.
[93] Within the meaning of Art. 2(b) of Directive 2003/109.
[94] Pt. 43 of the judgment.

of fact, legally possible under EU law.[95] Indeed, the Court namely also confirmed that the language requirement is not an (indirect) discrimination based on ethnic origin.[96] The Austrian linguistic requirement is applicable to all third-country nationals without distinction, and hence does not place persons of a particular ethnic origin at a disadvantage, the Court holds.[97]

Ultimately, this leaves room for language requirements linked to social benefits for third-country nationals in the context of an integration policy. Indeed, EU law leaves this theme largely to the EU Member States, which can decide for themselves on integration paths for third-country nationals, whether or not in combination with language tests. In that regard, the Court seems to confirm earlier case law in which it confirmed the importance of language acquisition for newcomers and the policy scope for the EU Member States in that respect.[98]

### *4.2 Standard of Proof*

The same case (C-94/20 KV Oberosterreich) also contains some elements as to the standard of proof of the required linguistic proficiency. The Austrian regulation may serve as an example in that regard, as it prescribes that the applicant must demonstrate the required language knowledge of German on the basis of, in short, an examination at an official body or a recognised language diploma/certificate of German at A2 level. Language knowledge is also considered proven if the person concerned has obtained a "satisfactory" mark for German during secondary education or has successfully completed a vocational training period.

Unfortunately, however, the Court does not assess the standard of proof. It is true that it is able to answer the national court's questions without a more in-depth assessment of that aspect of the case. By contrast, Advocate General Hogan does provide some insights. He asserts that the applicant has mastered German to the required level, but does not have the requested formal proof of his language knowledge.[99] The Advocate General argues that evidence through certain established certificates or diplomas is "*unsuitable*" if the knowledge can reasonably be established by any other equivalent means that is sound and lends itself to objective evidence. Regrettably, however, the Advocate General does not give any more concrete indication of possible equivalent evidence, which somewhat weakens his argument. Ultimately, he suggests leaving this matter to the referring court.[100]

## *5. Challenges and Recommendations*

It clearly appears from the research undertaken in this article that a significant degree of legal insecurity surrounds linguistic proficiency requirement as to the free movement of professionals in the EU. More in particular, the following issues may be discerned.

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[95] In 2012, the Court of Justice handed down a judgment about a housing benefit for low-income tenants in the Italian Region of Bozen/Bolzano, which was open to third-country residents only insofar sufficient funds were available. While the facts in this case were set agains the backdrop of the multilingual context of the Region, there was no direct link with any linguistic requirement (ECJ judgment of 24 April 2012, *Kamberaj*, case C-571/10, ECLI:EU:C:2012:233).

[96] Art. 2, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180/22 of 19.7.2000.

[97] Pt. 56-57 of the judgment.

[98] See ECJ judgment of 4 June 2015, *P and S v Commissie Sociale Zekerheid Breda and College van Burgemeester en Wethouders van de gemeente Amstelveen*, case C-579/13, ECLI:EU:C:2015:369 (pt. 47) as to the importance of social cohesion and integration. See, in the same vein, ECJ judgment of 22 December 2022, *Udlændingenævnet*, case C-279/21, ECLI:EU:C:2022:1019, pt. 23.

[99] Pt. 24 of the Opinion. It is not clear on which evidence the Advocate General relies.

[100] Pt. 83 of the Opinion.

- *As to employees, a conditional national autonomy reigns (thanks to the European Court of Justice), but some degree of legal uncertainty nevertheless remains*

The important role the European Court of Justice has played in this context cannot be underestimated. Indeed, whereas EU secondary legislation considerably limits national autonomy with regard to language requirements for employment, not only in the private but also in the public sector, the Court has safeguarded public national language policies.

The reasoning of the Court seems to reflect ideas on the protection of national identity, which makes the landmark *Groener* Judgment (1989) surprisingly relevant and topical. The French Advocate General Marco Darmon, who delivered the Opinion in this case, clearly understood its potential ramifications, when he argued that: *"(t)he case before the Court today* (…), *relates to one of the most sensitive aspects of cultural identity. The importance of the Court's reply and its consequences for the Member States and for the diversity of the Community as a whole are so evident that I need not dwell upon them, for at issue here is the power of a State to protect and foster the use of a national language.*"[101]

In actual fact, the Court in essence simply discards the relevant provisions of the Regulation (492/2011). Instead, the Court's reasoning in *Groener* is based directly on the Treaty. Accordingly, the Court deems a language requirement of Irish to be justified (on the basis of the general and coherent Irish linguistic policy) and proportionate (if certain limited conditions are met). In sum, where the intention of the European legislator was to limit national autonomy, by making linguistic requirements conditional upon an established link with the employment that is sought, the Court moved completely in the opposite direction and simply assessed the justification of the linguistic policy as such.

Interestingly, at the time of the *Groener* judgment, in 1989, the principle of respect for linguistic diversity had not yet been enshrined in the Treaties. In recent judgments (such as *Boriss Cilevičs*),[102] the Court has referred to the latter principle, confirming that the objective of promoting and encouraging the national language(s), constitutes a legitimate interest which, in principle, justifies a restriction on the free movement of workers.[103]

It seems therefore that the *Groener* case law is alive and kicking, although there is still a precarious element to be reckoned with, in the sense that such a public language policy always falls within the scope of EU scrutiny (by the EU Court and national judges).[104] National autonomy in this regard is conditional at best. Furthermore, it would seem that the lenient view of the Court of Justice may be influenced by the apparent importance it attaches to the education system in connection with a given language policy. That element clearly transpires in both the *Groener* and *Boriss Cilevičs* judgments.[105]

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[101] Pt. 1 of the Opinion.

[102] ECJ judgment of 7 September 2022, *Boriss Cilevičs and others*, case C-391/20, ECLI:EU:C:2022:638.

[103] *Groener* has been quoted in the major case law of the Court of Justice related to linguistic issues: ECJ judgment of 5 March 2009, *Unión de Televisiones Comerciales Asociadas (UTECA) v Administración General del Estado*, case C-222/07, ECLI:EU:C:2009:124; ECJ judgment of 13 December 2007, *United Pan-Europe Communications Belgium SA and Others v Belgian State*, case C-250/06, ECLI:EU:C:2007:783; ECJ judgment of 21 June 2016, *New Valmar BVBA v Global Pharmacies Partner Health Srl*, case C-15/15, ECLI:EU:C:2016:464; see also other case law that has been discussed in this article (*Angonese*, *Commission/Belgium* (SELOR), C-317/14).

[104] Interestingly, the Latvian Constitutional Court held the obligation to teach exclusively in Latvian to be unconstitutional! (Constitutional Court, judgment of 11 June 2020, case 2019-12-01, available here.

[105] See also ECJ judgment of 2 July 1996, *Commission of the European Communities v Grand Duchy of Luxemburg*, case C-473/93, ECLI:EU:C:1996:263. See, in particular, pt. 35-36 of that judgment, in which the Court discards the possibility of excluding non-Luxembourgish nationals from jobs in education, yet explicitly mentioning that language requirements may still be imposed on Luxembourgish and non-Luxembourgish candidates for positions in the educational system. See also Advocate General STIX HACKL (Opinion in C-193/05, *Commission v Luxembourg*), who

If the assumption is correct that the case law of the Court of Justice essentially applies to employment in education, what then about other employment situations? Or employment in Member States in which there is no apparent public language policy, yet in cases in which private (or public) employers set out linguistic conditions for specific job vacancies?

Surprising as it may seem, the Court of Justice has never been interrogated on issues regarding linguistic requirements concerning purely private employment.[106] Obviously, the general principles and provisions of EU law on non-discrimination on the basis of nationality or other criteria should apply in such cases. In actual fact, this implies that the link with the specific job to be filled should be clearly established. Indeed, the (private) employer most likely has to prove that the linguistic requirements imposed on potential employees are indeed justified and needed. Yet, it may be safely assumed that diverging practices exist in the various EU Member States, which have not been tested through cases before the EU Courts. To give one example, in Denmark proficiency in the Danish language is reportedly required to obtain a bus driving licence, whereas other EU Member States may take a more lenient approach.[107] The issue does, by the way, not concern only the use of one or more local languages, but also the requirement of proficiency in English, which is, unsurprisingly, in high demand throughout the EU according to a recent OECD paper.[108]

In sum, one cannot fail to notice that there is a fair amount of legal insecurity as to what is compatible with EU law in this regard and what is not. Most of these issues probably remain under the legal radar.[109]

In this regard, I would recommend to amend the relevant provisions of Regulation 492/2011 in order to clarify them and bring them in line with the case law of the Court of Justice. It should be clearly stipulated that for employment involving the exercise of State authority (army, police, judges, …), but also with regard to education and maybe also public health (especially when patient safety is at stake), national autonomy should prevail. National (or regional) authorities should therefore be able to impose the linguistic requirements they deem necessary for employment in these sectors. Guiding principles should be public security, patient safety and consumer protection.

As to all other (private) employment, it should be made clear that the link between linguistic requirements and job vacancies must be firmly established, so as to prevent any cases of covert discrimination. The level of linguistic proficiency must not be unattainably high either and commensurate with the actual tasks (see, in this regard, infra, concerning the "native speaker" level).

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argues that the reasoning of the Court in *Groener* "*was also based on the fact that through teaching and the privileged relationship which they had with their pupils, teachers had an essential role to play in the national policy of maintaining national identity and culture*". As to solicitors, however, that reasoning is not valid according to her (pt. 53).

[106] Admittedly, the case of Roman Angonese (see supra) concerned private employment, but the issue of linguistic proficiency as such was not dealt with by the Court of Justice, only the required proof.

[107] S. ADAMO, *What comes first, language or work? : linguistic barriers for accessing the labour market*, in S. DE VRIES, E. IORIATTI, P. GUARDA, E. PULICE (eds.), *EU citizens' economic rights in action*, 2018, p. 238.

[108] G. MARCONI, L. VERGOLINI, F. BORGONOVI, *The demand for language skills in the European labour market - Evidence from online job vacancies*, in *OECD Social, Employment and Migration Working Papers No. 294*, June 2023, available here. This paper investigates the demand for language skills in 27 EU Member States and the United Kingdom in 2021. Evidence indicates that although Europe remains a linguistically diverse labour market, knowing English confers unique advantages in certain occupations. Across countries, a knowledge of English was explicitly required in 22% of all vacancies and English was the sixth most required skill overall. A knowledge of German, Spanish, French and Mandarin Chinese was explicitly demanded in between 1% and 2% of all vacancies. On average, one in two positions advertised on line for managers or professionals required some knowledge of English.

[109] This is not a merely theoretical issue. Recent figures show that in Belgium 15% of workers have a non-Belgian background (B. HAECK, *Het probleem met de Roemeense tandarts*, in *De Tijd*, 23/8/2023, available here.

Furthermore, the scope of Regulation 492/2011, which is currently limited to public language policy seems rather artificial and inadequate. Rules should in principle apply across the board, that is to all migrating professionals in the EU (with the exception of regulated professions).

- *As to regulated medical professions, national autonomy should be increased as well*

It would appear that the degree of legal uncertainty as to linguistic requirements for regulated professions clearly exceeds that with regard to employees.

Within the scope of the Professional Qualifications Directive, linguistic requirements may be imposed, provided they are *necessary*. In the case of *Haim* (admittedly on the basis of an older version of the Directive and in rather specific circumstances), the Court showed itself quite lenient with regard to linguistic requirements for dentists.[110]

Yet, at the same time, EU law significantly restricts national autonomy to assess linguistic proficiency for (medical) service providers. Although the Professional Qualifications Directive was amended in 2013, the fact remains that only limited testing possibilities are available for national authorities (which are, moreover, mainly limited to professions with patient safety implications).

There is also some degree of legal uncertainty as to the timeline in that regard, i.e. the moment on which such (limited) linguistic assessment may be performed. At any rate it may not take place before the recognition procedure is completed, yet, it seems rather odd that a medical professional may start practicing without any assessment of his or her knowledge of the local language(s). In this regard, Advocate General Mischo offers some valuable considerations in his Opinion in the *Haim* case. He argues that "*there is no reason why such tests should not be carried out when an application for appointment as a* (…) *dental practitioner is being considered, but they could also be carried out on some other occasion (provided the applicant has had a reasonable amount of time to acquire the necessary knowledge)*." Yet, the Advocate General suggests it might be better to require a minimum knowledge of the language at an earlier stage, when authorisation is granted to practise in a particular Member State as a "*lack of understanding between a dentist and his patient may have dramatic consequences, whilst a lack of understanding between a dentist and the sickness fund would only lead to administrative problems*".[111]

In addition, the Professional Qualifications Directive does not give any indication about the level of linguistic skills which may be required.

Again, Advocate General Mischo offers some thoughts, arguing that it is essential in the relationship between a medical practitioner and the patient consulting him, that they can communicate. In clear terms the Advocate General asserts that "*no-one would attempt to deny that in order for a doctor or dentist to provide effective treatment to a patient it is essential both that the practitioner is able fully to understand the problem which the patient has described to him in order for it to be treated, and that the explanations provided as to the nature of the problem and the advice accompanying the recommended treatment should be fully understood by the patient so that he can assist his own recovery*".[112]

Furthermore, the Advocate General states that "*the quality of care, the central objective of any public health policy, depends on the possibility of a genuine dialogue between the practitioner and the patient*".[113] These are strong and convincing words of the Advocate General as it does indeed not seem unreasonable for patients to expect health practitioners and other service providers to be able to interact with them in their

[110] See, on the particular context of the *Haim* case, the Opinion of Advocate General STIX HACKL, pt. 54-58, C-193/05.
[111] Opinion of Advocate General MISCHO in the *Haim* case, see, in particular, pt. 95-96, 116, 118 and 120.
[112] Pt. 105 of the Opinion.
[113] Pt. 107 of the Opinion.

language, not least in light of the unavoidably unpleasant and stressful situations in which these services usually take place.[114]

Yet, what it essentially seems to come down to in practice is that it is entirely up to national authorities to establish a language assessment scheme at any time after the professional has taken up his or her activities (and as far as such assessments are admissible). Any proportionality assessment of such language assessments is also left to the national judicial spheres.

It may be regretted that there is no case law of the Court of Justice on this aspect of the topic at issue.

As it stands, EU law leaves a fair amount of legal insecurity which may lead to quite varying practices in the EU Member States. In Denmark, for instance, the linguistic practice seems quite stringent. Reportedly, although a prior certificate of proficiency in Danish is required only for non-EU medical professionals, before hiring EU medical professionals, the employer must always make sure that they have adequate proficiency in Danish for the job they are applying for. In cases where this expectation is not met, the employer is under the obligation to terminate the employment.[115] This rather broad interpretation of EU law has not been tested in national or EU Courts, yet does not seem to be incompatible *per se*.

At any rate, the topic is of great political relevance, not least in EU Member States with an important influx of foreign medical practitioners. In the current state of affairs, it is rather difficult to avoid the perception that EU law is more concerned with mobility (logically, the primary aim in creating the internal market) than with the quality of health care and the safety of patients.

Therefore, the Professional Requirement Directive should be amended and simply allow for linguistic assessments to be imposed, in a general and uniform manner, to be performed preferably *ex ante*, before granting permission to the professionals at issue to practise on the national territory, while also establishing clear and uniform criteria as to the level of linguistic proficiency which may be required.

- *As to regulated professions, outside the scope of the Professional Qualifications Directive, the situation is quite unclear*

For regulated professions which do not fall within the scope of the Professional Qualifications Directive, other secondary EU legislation may apply. This is the case for solicitors (whose situation is dealt with by Directive 98/5/EC on the profession of lawyer). Unfortunately, the latter Directive remains utterly silent on any linguistic requirements in the host country.

In its *Wilson* judgment, the Court of Justice made it very clear that EU Member States may not impose any additional (linguistic) conditions to the free exercise of the profession of solicitor, as the Directive fully harmonises entry to the profession. National autonomy is therefore completely restricted. Indeed, as B. de Witte aptly notes, whenever a field has been "occupied" by the European legislator, national autonomy concerning language requirements disappears.[116]

Admittedly, the *Wilson* judgment deals with the specific situation of European lawyers, operating under their home-country title. The idea that such a foreign title serves as a warning for potential clients that that particular lawyer does not necessarily speak any of the local languages may be convincing.

What remains highly unclear, however, is the situation of those European lawyers who have been operating under a foreign title for at least three years, and then ask to become fully integrated in the legal profession of the host country under the local title (a path provided for by the Directive). May national authorities in such cases still request evidence of linguistic proficiency?

[114] B. HAECK, *loc. cit.*
[115] S. ADAMO, *What comes first, language or work?: linguistic barriers for accessing the labour market*, cit., p. 235.
[116] B. DE WITTE, *Internal Market Law and National Language Policies*, cit., p. 428.

It may be recalled that in the follow-up of the *Wilson* judgment, the European Commission has, eventually, accepted that proficiency in at least one language (French) could be required from migrating lawyers to become fully-fledged *avocats* in Luxembourg. Although this interpretation seems to run counter to the judgment of the Court of Justice (the Directive does not stipulate any linguistic conditions), it does not seem to be unreasonable at all. Common sense indeed dictates that such a solicitor should be able to communicate at least at a basic level in a local language when he or she wants to be fully integrated and acquire a local title.

Most individual citizens and small businesses really may prefer a lawyer that speaks their language,[117] and may rightly expect all solicitors holding a local title to be able to cater for that need. The argument that many business lawyers work exclusively in English does not convince, as in that case, keeping their foreign title does not seem to be disproportionate.

The situation remains in any case unclear, and currently only Luxembourg (French) and Hungary (Hungarian) seem to check linguistic proficiency of solicitors choosing this path towards full integration.[118] Yet, command of the local language may, in actual fact, be an implied condition, as often tests of local legal knowledge is a requirement. As to Malta, for instance, it is clearly stated that non-Maltese legal professionals from other EU Member States wishing to practise their profession in Malta, will be able to do so without demonstrating linguistic proficiency in either English or Maltese, under their home-country professional title. However, should such professionals aspire full integration in the legal profession of Malta, they would have to apply for a local warrant.[119] The latter can, however, be obtained only by those who possess "*a full knowledge of the Maltese language as being the language of the Courts*".[120]

It is therefore suggested that Directive 98/5/EC on the profession of lawyers should be amended to align it with the Court's case law, on the one hand, and clarify the state of affairs as to linguistic requirements for those solicitors seeking full integration in the legal profession under a local title, on the other.

- *As to beneficiaries of social benefits, EU law leaves the matter of linguistic requirements largely to the Member States*

It is noteworthy that the Court of Justice seems to be very lenient as to linguistic conditions for obtaining social benefits. Indeed, as explained above, the Court has implicitly confirmed that a certain level of language knowledge may be required as a condition for the granting of non-core social benefits to long-term resident third-country nationals.[121] Moreover, even more far-reaching is the implicit recognition of the compatibility with EU law of language knowledge conditions for other third-country nationals (who have not obtained long-term resident status) in connection with the granting of social benefits.

It should be borne in mind, however, that national Constitutional Courts may look at this issue from a different legal angle and decide otherwise. As a matter of fact, in 2023, the Belgian Constitutional Court annulled a Flemish decree which made the granting of certain social allowances conditional upon obtaining an integration certificate (which included an assessment of proficiency at a basic level of Dutch). The Court found the condition to be discriminatory.[122] There could, therefore, be diverging legal decisions in various Member States, as EU law seems to leave that issue to the national level.

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[117] S. CLAESSENS, M. VAN HAEFTEN, N. PHILIPSEN, B.J. BUISKOOL, H. SCHNEIDER, S. SCHOENMAECKERS, D.H. GRIJPSTRA, H.J. HELLWIG, *Evaluation of the Legal Framework for the Free Movement of Lawyers. Final Report*, Panteia and the University of Maastricht, Zoetermeer, 2012 (online), p. 8.

[118] See an overview in S. CLAESSENS and others, cit., pp. 109-110, pt. 3.7.

[119] See Chamber of Advocates of Malta, available here.

[120] Art. 81 of the Code of Organization and Civil Procedure (Cap. 12), under e).

[121] ECJ judgment of 10 June 2021, *Land Oberösterreich v KV*, case C-94/20, ECLI:EU:C:2021:477.

[122] Grondwettelijk Hof/Cour constitutionnelle, judgment of 20 July 2023, 7738, available here.

The question may be raised, therefore, whether it would not be better to have a uniform EU approach to this topical issue.

- *The lack of clear and uniform EU criteria on the standard of proof may lead to covert discrimination*

It clearly follows from the case law of the Court of Justice (in *Angonese*) that assessments of linguistic proficiency should not be based on one exclusive proof. Although the Italian regional *patentino* as a proof of Italian/German bilingualism was considered to be relevant, the bank in question was not allowed to assess the linguistic proficiency of potential employees solely on the basis of that certificate.

The question may be raised if this (older) case law is still entirely relevant. An important element in the Court's reasoning was the accessibility of the test in question for people not residing in the EU Member State at issue. That argument seems to be obsolete taking into account all the online testing possibilities currently available.

Interpreting the *Angonese* judgment, however, as requiring that an individual assessment is made and that different elements of proof should be taken into account, maintains its relevance.

Potential issues regarding student mobility may be mentioned in this respect.

Indeed, as internationalisation of higher education in the EU is still on the rise, a growing number of university bachelor's and master's programs in the EU are offered in English. During the screening of prospective students, higher education institutions therefore assess proficiency in English of potential students, often by imposing a specific language test.[123]

In light of the *Angonese* case law, accepting only one specific test could be problematic in that regard. It is true that the *Angonese* case related to a very specific language test. There could be other circumstances where the requirement of a specific test, which is more easily accessible (taken in different countries or institutes), would be acceptable. Yet, even when one or more international tests are taken into account, other equivalent evidence and qualifications such as (international) language certificates and diplomas may be relevant as well. Knowledge of language could possibly also be proven by previous education in English or even an English speaker family background. The question therefore arises whether in such cases sufficient room is left for an individual assessment, allowing a student to demonstrate the required language knowledge of English on the basis of other evidence and qualifications.

Pursuing this topic further, it must be mentioned that discrimination issues may also occur in this regard, as a Dutch Bill on selection tests for English taught university programs in the Netherlands demonstrated. The Bill provided that a prospective student with a Dutch diploma was automatically exempted from any English language test requirement if he or she had followed the appropriate prior education. However, it was not specified which prior education was the appropriate one, nor was it clarified what the (minimum) proportion of language instruction in English in that prior education should be. Some (EU) students with a foreign degree could also be exempted from taking a language test, if they had received their prior education in English, or if they held a diploma of secondary education from certain countries. While students from Belgium (Flemish education only), Denmark, Germany, Estonia, Finland, Hungary, Latvia, Lithuania, Luxembourg, Norway, Austria, Romania, Slovakia and Sweden were automatically exempted, Italian, Spanish or Portuguese students, for instance, were not and had to pass the English language test. The Bill was based on the assumption that in the former countries the level of the teaching of English is adequate

[123] Such as the International English Language Testing System (IELTS), the Test or English as a Foreign Language (TOEFL), the Test of English for International Communication (TOEIC) and the Cambridge English grades & scale. Universities may also choose to use a test they establish themselves. In Belgium the universities of Antwerp, Brussels, Ghent and Leuven have established the Interuniversity test of academic English.

and sufficient. Arguably, such a general scheme does not leave sufficient room for individual assessments. Indeed, language knowledge may strongly depend on the individual background of a student. To give a random and hypothetical example to illustrate this point: an Italian student who, through self-study and travel has built up a very good level of English, will still have to take a language test, whereas a Finnish student who may have had many hours of English at a high level, but has no particular interest in languages, got very low grades and has a rather low level of English, would nevertheless in principle be exempted from the language test in order to begin university studies in the Netherlands.

It is suggested, therefore, that the European Commission provide general guidance as to linguistic requirements and testing concerning student mobility in the EU, as diverging practices may hamper student mobility and could have discriminatory effects.

- *The lack of clear and uniform EU criteria on the level of linguistic proficiency may also lead to covert discrimination*

A major grey area exists with regard to the level of the linguistic skills which may be required, in all contexts discussed in this article. The Court has consistently steered clear of any concrete indications. Likewise, relevant provisions of EU law provide, if anything, only vacuous definitions such as "necessary" knowledge. Yet, important issues of discrimination could occur, which are not easily detectable.[124] In that regard, conceivably, the frequently used requirement of *native speaker* in job advertisements, for instance, could very well constitute a form of indirect discrimination. The European Commission is of the opinion that an employer may not require that a specific language be the native tongue of an employee.[125] No case has, however, ever been brought before the European Court of Justice in that respect.

In essence, it all comes down to proportionality. The question may be raised if such an unclear situation does not unavoidably lead to diverging practices in the various EU Member States. As far as could be ascertained, only limited data or research is currently available on this topic.[126]

In a broader perspective, consideration should be given to a better alignment of language teaching in English in secondary education in the EU. The Bologna Declaration on the European Higher Education Area, the resulting unified bachelor/master educational structure and the transfer of study credits may serve as an example in this regard.[127] The starting point, in my view, should be that students who have completed a program consisting of a certain number of hours per week/year, expressed in credits, as part of language courses in secondary education, should in principle be sufficiently qualified to enrol in EU higher education institutions of the same language, or indeed, work in that language. However, as in practice the level of language teaching in the different Member States may vary considerably, schools in the EU could also offer students a (free) standardised language test at the end of the secondary education. These EU language tests (in various languages) should be developed by mutual agreement between the participating countries, following the example of the recognised international (commercial) tests. However, employers or educational establishments would still have the possibility to determine the level of linguistic proficiency and require a specific minimum score on the EU language test at issue.

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[124] E. HULSTAERT, *Taal als struikelblok op de arbeidsmarkt: "Het wordt gebruikt als stok achter de deur"*, 11 August 2023, available here.

[125] Commission Communication on the free movement of workers: achieving the full benefits and potential, COM/2002/694 of 11.12.2002, 7, pt. 28: "*the Commission considers that while a very high level of language may, under certain strict conditions, be justifiable for certain jobs, a requirement to be mother tongue is not acceptable*".

[126] See S. ADAMO, T. BINDER, who express the fear that national legislators could interpret their discretion as to language requirements too broadly (Union citizens and the recognition of professional qualifications: where do we go from here?, in S. DE VRIES, E. IORIATTI, P. GUARDA, E. PULICE (eds.), cit., p. 55.

[127] The text of the Bologna Declaration is available here (last consulted on 9.9.2023).

In this way, every student who completes an EU secondary school curriculum would be able to demonstrate, in an objective manner, his or her level in the languages studied and would incur no special extra costs, thus making international language tests in the EU unnecessary. Implementation of such a scheme will, of course, take some time, but nothing is stopping certain EU Member States with a larger mobility of workforce and students, from taking the lead. Another advantage would be that such a scheme could give a renewed purpose and relevance to the study of languages in the EU, often in dire competition with scientific courses which are held in high(er) esteem in the current school systems.

- *The Paradox of EU multilingualism and the multilingual State*

It is clear that the linguistic burden for a professional aspiring to work in another EU Member State may increase if that Member State is multilingual. Indeed, a professional migrating to Belgium to work in the private sector must often master Dutch and French (apart from English). Likewise, in Luxembourg, it is very common to find job advertisements requiring French, German, Luxembourgish as well as English.

Yet, as to regulated professions, the Professional Qualifications Directive specifies that any tests to ascertain whether the foreign professional has the necessary language knowledge to practise in the host country must be limited to the knowledge of *one* official or administrative language of the host Member State, provided furthermore that the latter is also an EU official language.[128]

This restriction, which was introduced in 2013, is unnecessary, unfortunate and a clear regression compared to the previous version of the Directive. *Necessary* linguistic knowledge may after all also imply proficiency in more than one language.

The amendment may be quite understandable from an internal market perspective. Multilingualism can of course be a daunting obstacle. On the other hand, this limit interferes in the delicate sociological and linguistic balance of the Member States concerned, and admittedly (and paradoxically) also sits rather uneasily with the highly acclaimed value of multilingualism in the EU.

Furthermore, the position of those languages which do not have EU language status is quite unclear. The concept of an administrative language of an EU Member State is a novelty in EU law. This raises, for instance, the question whether the co-official languages in Spain may be considered official languages in the sense of this provision. If they fall under the concept of administrative language, testing is excluded, as they are certainly not EU official languages.[129] Likewise, the status of Luxembourgish as the national language of Luxembourg (yet without EU language status) remains to be seen.

Besides, the fact that knowledge of only one language of the host EU Member State may be tested, raises specific problems for other multilingual EU Member States. In Belgium, for instance, language requirements depend on the linguistic region in which the applicant seeks to provide services. In this regard, the Directive does not specify that the applicant must be proficient in the language of the specific language area in which practitioners aspire to provide their services. Amendments to remedy that were tabled by

[128] Art. 53(2), Professional Qualifications Directive. It was stressed that this should not preclude host Member States from "encouraging" professionals to acquire another language at a later stage if necessary for the professional activity to be pursued. Employers should also continue to play an important role in ascertaining the knowledge of languages necessary to carry out professional activities in their workplaces (see Position of the European Parliament, pt. 26).

[129] It follows clearly from the French language version that only the administrative language must be a language that enjoys EU official status: *"(…) soit limité à la connaissance d'une langue officielle de l'État membre d'accueil, ou d'une langue administrative de l'État membre d'accueil sous réserve que cette dernière soit également une langue officielle de l'Union*."

members of the European Parliament, but were not adopted.[130] It is therefore not clear whether the host EU Member State may impose a test of the local language or whether the applicant may freely choose one of the official languages of the host EU Member State. Significantly, the Commission's original proposal stipulated clearly that any language verification should be limited to the knowledge of only one of the official languages of the Member State according to the choice of the person concerned. The latter specification has, however, not been included in the final version.

The transposition of the Professional Qualifications Directive in Luxembourg seems to support the idea of one freely chosen language. In Luxembourg, for instance, it is a mandatory condition to have knowledge of *one* of the three national languages of Luxembourg (Luxembourgish, French or German) to obtain recognition of a qualification obtained in another EU Member State.[131] In Belgium, criticism has been voiced recently about the lack of linguistic skills of foreign health practitioners (the number of which is currently estimated at more than 10.000).[132] The competent minister has announced that he is preparing more stringent measures, without however imposing general tests. Linguistic knowledge will in any case be limited to one national language (French, Dutch or German) without, seemingly, an apparent link with the linguistic Region concerned.[133]

An unexplored issue may occur as well: could EU law provisions in this regard lead to "reverse" discrimination, in the sense that for own nationals (which have not made use of the free movement under EU law), in theory, multilingual requirements could be imposed, which may not be imposed on nationals of other EU Member States? Could a local medical doctor in Bozen/Bolzano, of Italian nationality, be asked to be bilingual (German/Italian), while his or her colleague from Austria may exercise the same profession in the same Region in one language only? On the basis of the current state of affairs, the answer seems to be affirmative.

Similarly, Ireland dropped the linguistic condition to be proficient in Irish to become a solicitor.[134] Indeed, such a linguistic requirement would be possible for purely domestic lawyers, yet would probably have been incompatible with EU law as to European lawyers acceding to the profession after having practised in Ireland for at least three years under their home country title.[135] Good news for lawyers'

[130] See European Parliament Report of 13 February 2013, Proposal for a Directive of the European Parliament and of the Council amending Directive 2005/36/EC, amendment 130, amendments of the Committee on the environment, public health and food, nb. 7 and 82.

[131] Art. 26, Loi du 19 juin 2009 ayant pour objet la transposition de la Directive 2005/36/CE pour ce qui est a) du régime général de reconnaissance des titres de formation et des qualifications professionnelles et b) de la prestation temporaire de service; modifiant la loi du 17 juin 1963 ayant pour objet de protéger les titres de l'enseignement supérieur et abrogeant la loi du 13 juin 1992 portant a) transposition de la Directive du Conseil (89/48/CEE) relative à un système général de reconnaissance des diplômes d'enseignement supérieur qui sanctionnent des formations professionnelles d'une durée minimale de trois ans et b) création d'un service de coordination pour la reconnaissance de diplômes à des fins professionnelles (*Mémorial*, Partie A, 2009-07-02, n° 156, pp. 2310-2321, available here. Interestingly, for jobs in teaching, the linguistic requirements are stronger, as knowledge of all three national languages is required: "*Par dérogation, pour pouvoir bénéficier de la reconnaissance des qualifications professionnelles des professions réglementées de l'enseignement, les demandeurs doivent avoir la connaissance du luxembourgeois, de l'allemand et du français*" (Art 26.2). The question may arise if this is not a violation of the Directive as it stands.

[132] N. SCHILLEWAERT, *Recordaantal buitenlandse artsen actief in ons land: Goeie zaak, maar ze spreken vaak de taal niet*, 21/8/2023, VRT NWS, available here.

[133] A. WILLEMS, *Minister Vandenbroucke werkt aan striktere regels voor artsen: "Wie taal patiënt niet spreekt, kan erkenning verliezen"*, 21/8/2023, VRT NWS, available here.

[134] See also P. DUPARC PORTIER, A. MASSON, *op. cit.*, p. 353, at footnote 35.

[135] At present, there are no linguistic requirements in either English or Irish to become a solicitor in Ireland (see information on the website of the the Law Society of Ireland, available here and confirmed by Mr Nicola Kelly (Law Society of Ireland) by mail of 21/9/2023.

mobility, but not really enhancing Irish public language policy (which was, ironically, highly acclaimed in the landmark *Groener* judgment).

*6. Concluding Remarks*

The freedom of movement of workers, the freedom to provide services and of establishment, as well as the principle of non-discrimination on the basis of nationality are cornerstones of EU integration and have been well-established in EU law and case law of the European Court of Justice for decades. Yet, there is still one surprising legal elephant in the internal market room: linguistic obstacles.

EU legislation has always shied away from that delicate and potentially divisive issue. Relevant legal provisions remain vague, seeking to strike a balance between the aim to create a single internal market, while preserving the acclaimed language diversity. This has resulted in texts with rather limited practical relevance, leaving most issues that may arise to judges.

In a few landmark judgments (of which the unjustifiedly underrated *Groener* judgment), the European Court of Justice has laid a clear foundation for the protection of national language and identity and thus preserved the essence of national linguistic autonomy. Yet, its classical legal toolbox cannot provide for comprehensive answers. Although important guidance has been given by the Court, the fact remains that the EU legislator should act.

A more constitutional approach is needed, with a clearer division of competences between the EU and the Member States and above all clearer criteria for language requirements in all professional contexts.

In this article, it is suggested that a legislative overhaul be undertaken in this topical field. It should be clearly stipulated that for employment involving the exercise of State authority (army, police, judges, …), but also with regard to education and maybe also public health (especially when patient safety is at stake), national autonomy should prevail. National (or regional) authorities should therefore be able to impose the linguistic requirements they deem necessary for employment in these sectors. Guiding principles should be public security, the quality of health care and patient safety, as well as consumer protection.

The divisive potential of the issue is in my view underestimated and could lead to broad resentment among EU citizens (both, on the one hand, those aspiring to make use of their free movement and being thwarted by unclear and possibly discriminatory linguistic requirements, and those citizens, on the other, who, for instance as patients, not unreasonably expect to be able to interact with medical staff or other service providers in their own language).

Pursuing the metaphor from the animal world: the EU should leave its ostrich policy behind and look the (linguistic) elephant in the eye.

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