

# **Expert Report**

## **Legal requirements for the founding of medical training and research centres in Germany**

**written by**

**Prof Dr jur Max-Emanuel Geis**

Professor at the Friedrich Alexander University of  
Erlangen-Nuremberg  
Valentin-Rathgeber-Straße 1, D 96049 Bamberg

and

**Prof Dr jur Kay Hailbronner, LL.M.**

Emeritus Professor at the University of Konstanz  
Toggenbühl 7, CH 8269 Fruthwilen

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## **A. Questions addressed by the report**

In recent times models for delivering the independent training of doctors in cooperation with universities abroad (“franchising models”) have been developed at various clinic or hospital locations in Germany. One pilot project was the cooperative venture between the University of Groningen, the Netherlands, and the University of Oldenburg, as well as local clinics. The German Science Council has made a detailed response to this pilot project:

*German Science Council, response to the founding of a university medical department at the Carl von Ossietzky University, Oldenburg on the basis of the idea of a European Medical School Oldenburg-Groningen, 12<sup>th</sup> November 2010 (Drs 10345-10).*

Further examples of such cooperative ventures are the *Asklepios Campus Hamburg* (a cooperative venture between the Semmelweis University, Budapest, Hungary and the Asklepios Group, Hamburg), and the *Kassel School of Medicine* (a cooperative venture between the University of Southampton, UK and the Gesundheit Nordhessen Holding AG). At the moment, the private Paracelsus University, Salzburg, Austria and Nuremberg Clinic are planning to set up a *Nuremberg Medical School*.

These cooperation models are characterized by the fact that as a rule they locate the first part of the medical studies (“pre-clinical studies”) at the partner university abroad but carry out the second part exclusively in the cooperating hospitals by means of so-called “bedside teaching”.

According to German law, which in this regard implements Article 24 of the European Union Directive 2005/36/EG, the medical training of a doctor requires a course of study “at a scientific/academic university of at least six years, of which at least eight and at most twelve months must be devoted to practical training in hospitals or suitable medical facilities.”

Section 3, sub-section 1, sentence 1, no. 4 of the Federal German Medical Practitioners Act

This raises the question as to whether and to what extent cooperative ventures like these are subject to the regulations of domestic German law (Federal German Medical Practitioners Act, Federal German Regulations on Medical Licensing), whether they meet the requirements of domestic German law, and who is responsible for monitoring compliance with the legal framework conditions.

The German Association of Medical Faculties has asked the signatories to this report to conduct an expert investigation into whether and to what extent models like these are permissible and to what extent the supervisory rights of the state apply.

## B. Summary of findings

1. Section 3, sub-section 1, sentence 1, no. 4 of the Federal German Medical Practitioners' Act requires a course of study at a **scientific/academic university**. The practical training of doctors must be carried out "under the supervision of the university" (Article 24 of European Union Directive 2005/36/EG). In this situation – a so-called principal-agent relationship - the university acquires the role of the **principal**, which must enforce its interests vis à vis the hospital, which is the agent and which for its part is pursuing its own interests. In the case of franchising arrangements between foreign universities and domestic hospitals a **supervisory relationship** can only be established by contractual agreements which have to expressly concede to the universities **monitoring rights and rights to information** and, where necessary, **rights of intervention**.
2. Where there is competition between the foreign university and the state's **duty of supervision**, state supervision must in the end prevail over the influence that can be exerted by the foreign university. For the state not to take any kind of supervisory action in accordance with its statutory duty will normally be regarded as a defective application of its discretionary powers.
3. **A mere "franchise agreement"**, which essentially just consists of transferring the practical training to hospitals outside of the university without ensuring that there is the necessary interlinking of theoretical and practical training, **does not meet the requirements**.
4. If a private hospital participates in a franchising model like this, a **conferral** (of the powers of the state) is necessary so that the state can fulfil its warranty obligation in respect of the training of doctors. A hospital formed under private law, which, however, is to a substantial extent publicly owned is also bound by the regulations of the Federal German Medical Practitioners' Act and the Federal German Regulations on Medical Licensing. The **final responsibility of the state has to be preserved in each case**. For this reason, the necessary powers in research-based teaching have to be **conferred** on the domestic cooperation partner in these cases as well.
5. A course of training which does not offer sufficient appropriate freedom for **researched-based teaching** as opposed to the demands of patient care does not, in cases of doubt, meet these requirements.
6. Cooperation agreements must provide for suitable **conciliation mechanisms**, for example conciliation boards or arbitration agreements, in case there are conflicts between the interests of teaching and research and patient care needs.
7. A branch of a foreign university cannot "take with it" the laws of the foreign state in total. The aim of the branch must be to provide a **scientific course of study**. A hospital formed under public law, if it is involved in the area of medical training for doctors, is not allowed to enter any contractual ties which circumvent German law, i.e. it is not allowed, in particular, to enter into any cooperation agreements which are not in line with the requirements of the **Federal German Medical Practitioners' Act** and the **Federal German Regulations on Medical**

**Licensing.** Such an **agreement** would be at any rate **unlawful** according to section 59 of the Administrative Procedures Act.

8. If there is reason to assume that the relevant course of study does not meet the **minimum requirements defined in Article 24 of the European Union Directive 2005/36/EG** (even if confirmation of compliance has been given by the state), infringement proceedings are possible, which can be initiated by the European Commission or at the request of a member state. In exceptional cases, an **objection concerning conduct which is an abuse of legal rights** can stand in the way of the recognition of a foreign professional qualification if the automatic recognition envisaged by the directive on the recognition of professional qualifications is being exploited in order to specifically undermine the minimum requirements defined in Article 24 of the European Union Directive 2005/36/EG. This applies if key training components or the entire course of medical training are carried out at one or several hospitals ("**bedside teaching**") without sufficient provision being made for scientific training at a university. This would **go so far as to constitute an abuse of legal rights** with regard to the standards set out in the directive. Thus, insofar as the desire for recognition of diplomas is **consciously** aiming to **undermine** the standards set out in the directive, this constitutes an abuse of legal rights.
9. If certificates have been issued even though the minimum requirements defined in Article 24 of the European Union Directive 2005/36/EG have **not been adhered to**, there are options to proceed according to Article 50(2) of the directive and, where necessary, also Article 50(3) of the directive. A member state which issues certificates for a professional qualification despite its failure to adhere to these requirements is therefore in breach of its obligations under the law of the European Union. If it can be seen from a certificate that these pre-conditions under European law have not been met, then this is a case of a certificate which does not justify the principle of mutual trust. In addition, if an adherence to the requirements of the directive has been certified even though, in the opinion of this member state, it should not have been permitted for this adherence to be certified, the member state can request that **the European Commission** initiates review proceedings and, where necessary, **infringement proceedings** or can even **itself initiate infringement proceedings before the European Court of Justice**.
10. **Scientific teaching** must be sufficiently research-based. This requires that there is an appropriate number of full-time professors, who have been recruited in formal appointment procedures or equivalent procedures. It must be ensured in cooperation agreements that such professors are given sufficient time for teaching and research. If the teaching is predominantly covered by lecturers without tenure or by supernumerary professors, this will not meet this requirement in the long term.
11. According to the laws of some federal states, the (supernumerary) **title of professor** can be **withdrawn** if the individual concerned obtains a teaching position at another university or teaches in a comparable capacity or obtains a comparable legal status abroad. If **the supernumerary professor**, by teaching within the context of a franchising model, **operates, as it were, in competition**

**with the university from which he originates**, then, according to the law on universities in many federal states, **a removal** (of the title) **because of unworthiness can be considered or**, in certain circumstances, **a cancellation of the right to hold the title of professor** according to section 49, sub-section 2 of the Administrative Procedures Act of the relevant federal state.

12. An **accreditation** of courses of study is only possible if, on the basis of corresponding agreements, the academic quality of the training and, therefore, an adherence to the minimum requirements of the directive has been provided for **and** if corresponding supervision, as described above, has been provided for and is exercised in reality as well.

13. European Union law and, in particular, the directive on the recognition of professional qualifications do not require that permission be granted for a person to work as a doctor on a temporary basis pursuant to section 10, sub-section 5 of the Federal German Medical Practitioners Act. If member states demand a licence to practise medicine and restrict the temporary practice of medicine to exceptional cases, this is in compliance with European Union Law.

## **C. Legal explanations**

### **I. Framework conditions of German national law regarding scope of cooperation options for domestic medical facilities**

#### **1. The question of the validity of national law**

The implementation of the directive on the recognition of professional qualifications (2005/36/EG) in the member states of the EU meant that the cross-border activities of foreign universities were simplified significantly. The reason for this is that the diplomas and other course completion certifications issued are mutually and – to a large extent – automatically recognised. In particular, the non-recognition of diplomas by the authorities of the host state on the basis of doubts about the quality of the education or training is not possible insofar as the relevant course of study is accredited in its country of origin or state-recognised in some other way. Accordingly, domestic authorities no longer have, as a rule, the right to carry out their own examination of the contents of a course.

Please see Part II below for further details on this point.

This also means that the directive on the recognition of professional qualifications and/or its implementation at the level of the member state -

for Germany this is made possible by the law on the implementation of Directive 2005/36/EG of the European Parliament and the European Council regarding the recognition of professional qualifications for the medical professions of 2<sup>nd</sup> December 2007 (Federal Law Gazette I, 2686) -

makes it possible, in particular, to establish branches of foreign universities. However, the directive and/or the implementation legislation do not clarify whether and under which circumstances cooperative ventures between foreign universities

and domestic hospitals in the form of so-called “franchising models” are permissible. In particular, the law does not provide relief from the obligation to examine the legal obligations which cooperation partners are subject to *domestically* or the minimum requirements of a scientific/academic course of medical training which have to be met. Neither the right to freedom of establishment (Article 49 of the Treaty on the Functioning of the European Union), nor the ban on discrimination (Article 18 of the Treaty on the Functioning of the European Union), nor Directive 2005/36/EG, nor, finally, relevant case law at the European Court of Justice

for example, the decision on *Tennez/Durez*, case no. C-110/01, see Part II, 3a below for details

create as it were a legal vacuum in the recipient state to the extent that domestic clinics or hospitals are allowed to be involved – without further ado – in education and training “according to foreign law” without have to pay regard to German public law and without being subject to domestic state supervision. To this extent, the same rules apply here as they do in general in intra-European legal affairs. Accordingly, the relevant case law of the European Court of Justice has, for example, concluded that the freedom of establishment makes it permissible for foreign company structures like, particularly, Ltd., S.A.R.L. and BV to take part in German legal relations.

European Court of Justice, judgement of 9<sup>th</sup> March 1999, case no. C-212/97 – *Centros*; European Court of Justice, judgement of 5<sup>th</sup> November 2002, case no. C-208/00 – *Überseering*; European Court of Justice, judgement of 30<sup>th</sup> September 2003, case no. C-167/01 – *Inspire Art*; European Court of Justice, judgement of 13<sup>th</sup> December 2005, case no. C-411/03 – *SEVIC Systems*; European Court of Justice, judgement of 28<sup>th</sup> February 2008, case no. C-293/06 – *Deutsche Shell*.

However, this does not mean of course that the corresponding branches of such companies operate as it were in a legal vacuum. On the contrary, they are subject to the public, commercial and tax law etc. of the recipient state – not that of the country in which the company is actually based.

See, for example, the course of study at the Asklepios University, Hamburg, which is guided by the Hungarian curriculum, “which is well-known for imparting knowledge in a way that has a clear practical application”. (cf. [http://www.asklepios.com/ams\\_Ueber-uns.Asklepios](http://www.asklepios.com/ams_Ueber-uns.Asklepios), version 8th December 2013).

So the branch cannot “take on” in total the legal system of the foreign state.

Cf. European Court of Justice, Grand Chamber, judgement of 16<sup>th</sup> December 2008, case no. C-210/06 – *Cartesio*.

## **2. The permissibility of branches of foreign universities**

The founding of a branch of a foreign university is subject to the regulations for private universities. First and foremost, it is in accordance with section 70 sub-section 1 of the German Higher Education Act, which - following the changes brought about by the federalism reform - remains valid subsidiarily as federal law (Article 125a (1), sentence 1 of the German Basic Law). So, if "medical schools", which, being constructed according to the franchising model, are definitively not state universities, are founded (whatever legal form they adopt) in Germany as the branch of a foreign university, they are subject to the regulations governing private universities, which subject private educational institutions to a recognition caveat.

*Lorenz*, in: Hailbronner/Geis (eds.); Higher Education Law at Federal Government and State Government Level, section 70 of the German Higher Education Act, note 137.

The pre-conditions for recognition are stipulated in greater detail in section 70, sub-section 1, nos. 1 to 5 of the German Higher Education Act. In particular, according to no. 1, it must be ensured that the course of study is guided by the aim stated in section 7 of the German Higher Education Act. Section 7 states that the goal is a professional qualification that is guided by academic research, i.e. the course of study must be scientific/academic in nature.

*Epping*, in: Hailbronner/Geis (eds.); Higher Education Law at Federal Government and State Government Level, section 7 of the German Higher Education Act, note 7.

The requirements which must be met by a scientific/academic course of study in Germany are determined by the Federal German Medical Practitioners' Act and the Federal German Regulations on Medical Licensing. According to section 1, sub-section 1 of the Federal German Regulations on Medical Licensing the course of study must be based on the current state of research. Whether the pre-conditions for recognition have been met or not is dependent in almost all federal states - on various legal bases - on a positive accreditation by the German Science Council.

Cf., for example, section 70, sub-section 1, sentence 6 of the Federal Higher Education Act of Baden-Württemberg; section 76.

There is no change to these stipulations insofar as sections 70 and 7 of the German Higher Education Act have been superseded by the subsequent law of the individual federal state in accordance with Article 125a(1), sentence 2 of the German Basic Law. The higher education acts of the individual federal states have taken on completely the requirement of recognition for non-state universities. However, it is important to differentiate between two categories. The first category contains *no* special regulations for the branches of universities from EU member states,

cf. Article 76 of the Higher Education Act of Bavaria; section 123 of the Higher Education Act of Berlin; section 114 of the Higher Education Act of Hamburg; section 76 of the Higher Education Act of Schleswig Holstein; section 101 of the Higher Education Act of Thuringia. According to the legal situation in

Bavaria, moreover, the interaction of Article 138 (1), sentence 2 of the Bavarian Constitution with Article 76 of the Higher Education Act of Bavaria makes it clear that the recognition constitutes at the same time the required authorisation (see also *de Wall*, in: Geis, Higher Education Law in the Free State of Bavaria, 2009, Chapter VI/Section II, note 6; *Reich*, Higher Education Act of Bavaria, 5<sup>th</sup> ed. 2007, Article 76, note 1).

However, the second category does:

for example, section 75, sub-section 2 of the Higher Education Act of North-Rhine Westphalia; section 70, sub-section 1, sentence 5 of the Higher Education Act of Baden-Württemberg; section 72, sub-section 1 of the Higher Education Act of Baden-Württemberg; section 81, sub-section 3 of the Higher Education Act of Berlin; section 112, sub-section 2 of the Higher Education Act of Bremen; section 91, sub-section 7 of the Higher Education Act of Hessen; section 108, sub-section 3 of the Higher Education Act of Mecklenburg-Vorpommern; section 64 of the Higher Education Act of Lower Saxony; section 117 of the Higher Education Act of Rhineland Palatinate.

In these latter cases there are a variety of constructions under administrative law. In some cases, state recognition of a branch in Germany can be dispensed with if the original universities are state-recognised in their state of origin, confer exclusively university qualifications of their state of origin, confer exclusively degrees which are recognised in their state of origin and if quality controls are assured by the country in which the university is based. In other cases, authorisation must be granted if these conditions (and only these!) have been met. In others, the conditions are recognised as having been met by operation of law, and in yet others the responsible education ministry makes an administrative decision, ascertaining that these conditions have been met. These various regulations with their restricted checking procedures are in the end following the logic of automatic recognition according to Article 21 of Directive 2005/36/EG.

However, all these regulations do not automatically apply to cooperative ventures between universities and institutions run by other legal bodies in other member states (namely hospitals) which, on the basis of Article 24 (2) of Directive 2005/36/EG, are intended to take on parts of professional training "under the supervision" of the universities. As far as one can tell, the only relevant norm is provided by section 81, sub-section 4 of the Higher Education Act of Brandenburg. According to this law, institutions that are not branches of universities from member states of the European Union can be allowed to run such university courses of study on the basis of cooperative ventures if

1. only candidates are accepted who fulfil the requirements for acceptance at a corresponding state university,
2. the course of study on offer has been accredited by a recognised accreditation institution and

3. checking procedures regarding the performance of the required study and examination work and regarding the university conferring the degree are assured throughout the entire course of the study programme.

Two things about this regulation are worthy of note. Firstly, this is a discretionary regulation. This means that the law does not extend the mechanism of automatic recognition, which applies to “pure” branches, to cooperative ventures with domestic institutions (hospitals). Rather, the regulation concedes to the ministry the authority to examine by itself if the pre-conditions for recognition have been met or if the application is to be rejected because a pre-condition has not been met.

See on this point *Topel/Peine* in: Knopp/Peine (eds.), Higher Education Act of Brandenburg, 2<sup>nd</sup> ed. 2012, section 81, note 34.

So the ministry must examine independently if the pre-conditions determined by the Federal German Medical Practitioners’ Act and the Federal German Regulations on Medical Licensing have been met.

Secondly, the ministry is required to obtain the vote of a **recognised accreditation institution**. This can be either the German Science Council (accreditation committee for institutional accreditation) or an accreditation agency (for the accreditation of programmes or courses of study), which for its part has been accredited by the Accreditation Council.

Cf. *Hermann*, in: Knopp/Peine (eds.), Higher Education Act of Brandenburg, 2<sup>nd</sup> ed. 2012, section 17, note 23.

In any case, this is to all intents and purposes a *domestic accreditation*, which is in contrast to section 81, sub-section 3 of the Higher Education Act of Brandenburg, which regards the recognition (and, where appropriate, the accreditation) of “pure” branches by the state of origin as sufficient. To conclude, the competent authorities are not prevented from carrying out checks of course content etc. in the case of cooperative ventures with domestic institutions because the automatic recognition envisaged by the directive on the recognition of professional qualifications does not extend to such cooperative ventures.

### **3. Cooperative ventures between foreign universities and domestic hospitals**

The above-mentioned regulations set out in the higher education acts of the individual federal states relate to the standard situation where the entire training is provided at a university in an EU member state and where the state in which this university is based is able to fulfil and has fulfilled its checking and monitoring obligations. It is only this constellation which justifies – as explained above – the automatic recognition procedure set out in Article 21 of Directive 2005/36/EG. However, the situation is different when part of the training, which is subject to foreign regulations, is to be delivered in a German hospital. In this case, and following the example of the Brandenburg regulation, which, to this extent, serves as an example, the conditions under which German hospitals are allowed to take part in such a cooperative venture have to be examined. It is necessary here to distinguish between hospitals formed on the basis of public law, hospitals formed on the basis of

private law but operated by public (often local authority) bodies, and hospitals operated by bodies formed on the basis of private law.

### **a) Hospitals formed under public law**

#### **aa) Alternative legal structures**

Hospitals formed under public law are, as a rule, set up as institutions or foundations under public law. Accordingly, the right exists in Bavaria (according to Article 89 ff. of the Bavarian Municipal Code and Article 77 ff. of Bavarian District Administration Code and Article 75ff. of the Bavarian Local Borough Code), in North-Rhine Westphalia (according to section 114a of the Municipal Code of North-Rhine Westphalia), in Mecklenburg-Vorpommern (sections 70 ff. of the Local Government Constitution of Mecklenburg-Vorpommern, law of 13<sup>th</sup> July 2011, Law and Ordinance Gazette of Mecklenburg-Vorpommern, 777), Saxony-Anhalt (Act concerning Companies under Public Law of 3<sup>rd</sup> April 2001, Law and Ordinance Gazette, p. 136) and Schleswig-Holstein (Act concerning Strengthening of Local Authority Self-Government of 25<sup>th</sup> June 2002, Law and Ordinance Gazette, p. 126) to run local authority hospitals as so-called local authority companies with the legal form of an institution under public law.<sup>1</sup> This possibility also exists in Rhineland-Palatinate, Lower Saxony and Brandenburg. However, in these federal states the term "local authority company" is not used. Alternatively, hospital bodies can also be foundations under public law<sup>2</sup>. In reality, local authority hospitals are up to now, for the main part, only run in Bavaria as local authority companies.

With a little imagination it is possible to find grounds for the assertion that the running of a university medical training course can be subsumed under the local authority self-government responsibility for public teaching (in this case, in the tertiary sector).

See on this point, for example *Wollenschläger/Faber*, Local Authorities as Bodies Operating Universities: university medical training as a new local authority responsibility, in: Jochum/Fritzemeyer/Kau (eds.), *Crossing Frontiers*, commemorative publication for Kay Hailbronner, 2013, p. 811 (815ff.).

However, it should not be overlooked that the main point of the model that is the subject of this analysis is that it is a cooperative venture with an external (in most cases, foreign) university with a view to triggering the automatic recognition process required by the directive on the recognition of professional qualifications. The cross-border nature of such a cooperative venture is, therefore, by no means envisaged just as a "possible feature" but is the actual purpose of the construction.

For a different view, see *Wollenschläger/Faber*, as above, p. 821.

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<sup>1</sup> Examples of this in Bavaria are the Klinikum Nord in Nuremberg and the Zentralklinikum in Augsburg.

<sup>2</sup> For example, the Sozialstiftung Bamberg, the Spitalstiftung Konstanz or the Stiftungsklinik Weißenhorn.

## **bb) The principle of the lawfulness of public administration**

The fact that local authorities can possibly set up educational institutions in the tertiary sector does not change the fact that, when setting these institutions up, they have to observe the **principle of the lawfulness of public administration** in accordance with Article 20 (3), sentence 2 of the German Basic Law as one of the central manifestations of the principle of the rule of law.

*Badura*, Constitutional Law, note D54f.; *Schmidt-Aßmann*, in: Isensee/Kirchhof (eds.), Manual on Constitutional Law, volume II, 3<sup>rd</sup> ed., section 26, note 61ff.

If hospitals which are formed under public law take part in such cooperative ventures – whether as independent local authority companies or as “other institutions under public law” – they are, as part of the executive, directly bound by the stipulations of German public law.

On the statutory obligations of local authority companies, cf. *Geis*, Local Authority Law, 3<sup>rd</sup> ed. 2013, section 12, note 70.

The effect of this obligation constitutes the duty to comply with the provisions of the law (**compliance requirement**) or to otherwise respect them in their legal effectiveness

*Sachs*, in: id. (ed.), Basic Law, 6<sup>th</sup> ed. 2011, article 20, note 110

and the duty not to deviate from existing laws (**deviation prohibition**)

*Schultze-Fielitz*, in: Dreier (ed.), German Basic Law – Commentary, volume II, 2nd ed. 2006, Article 20, note 92 aE.; *Ossenbühl*, in: Isensee/Kirchhof (eds.), Manual of Constitutional Law, volume V, 2007, section 101, note 6.

The deviation prohibition prevents not only a failure to observe the law in the sense of a clear breach of the law but also any efforts to frustrate the law with the help of interpretations that go beyond the scope of the law (*praeter legem*) or with the help of circumventory constructions which contradict the purpose of the law.

Cf. on this point *Ossenbühl*, as mentioned above, note 7.

According to prevailing opinion, the substantive legal concept – this includes ordinances as well – determines the scope and extent to which a local authority is bound by the law.

*Stern*, Constitutional Law I, 2<sup>nd</sup> edn. 1984, p. 803; *Sachs*, as mentioned above, note 118.

So, if (local authority) hospitals constituted under public law participate in the training of doctors via a cooperative venture, the regulations of the Federal German Medical Practitioners’ Act and the Federal German Regulations on Medical Licensing, which for their part have implemented the regulations of the European directive on

the recognition of professional qualifications (Directive 2005/36/EG), apply to them. Specifically, the Federal German Medical Practitioners' Act and the Federal German Regulations on Medical Licensing apply directly and without restriction whereas the European directive on the recognition of professional qualifications is only directed at the national legislative body, which has complied with its implementation obligations through its law of 2<sup>nd</sup> December 2007 (Federal Law Gazette I, 2686). The normative effect of the Federal German Medical Practitioners' Act and the Federal German Regulations on Medical Licensing remains in place at any rate for the duration of an implementation period in the event of a possible amendment to the directive.

This means that a hospital constituted under public law, if it becomes involved in the training of doctors, is not allowed to enter into any contractual commitments which circumvent German law. In particular, it is not allowed to enter into any cooperation contracts which are not in compliance with the requirements of the Federal German Medical Practitioners' Act and the Federal German Regulations on Medical Licensing. This applies irrespective of whether such a contract qualifies as a private law or as a public law contract. If the contract comes about with another domestic or foreign juristic person under public law, then, as a rule, this is a contract between parties with equal status, as defined by sections 54ff. of the Administrative Procedures Act. In this case, section 54, sentence 1 of the Administrative Procedures Act ("insofar as legal requirements do not prevent this") provides grounds for a ban on regulatory content which restricts freedom of contract because the principle of the lawfulness of public administration applies without restriction to contracts under administrative law as well.

*Henneke*, in: Knack (ed.), Administrative Procedures Act, 8<sup>th</sup> edn. 2003, section 54, note 25; *Bonk*, in: Stelkens/Bonk/Sachs (eds.), Administrative Procedures Act, section 54, note 108.

According to section 59 of the Administrative Procedures Act such a contract would be void if the requirements of the Federal German Medical Practitioners' Act and the Federal German Regulations on Medical Licensing are to be interpreted as a violation of the statutory prohibition of a circumventory construction, as defined in section 134 of the German Civil Code. However, there is consensus in the dogma of administrative law that not every "simple" statutory violation leads to a contract being void in accordance with section 134 of the German Civil Code. Rather, a "qualified" statutory violation is necessary.

Collection of the decisions of the Federal Administrative Court 89, 7 (10); 92, 56 (63); German Administrative Gazette 1990, 438 f; *Bonk*, in: Stelkens/Bonk/Sachs (eds.), Administrative Procedures Act, section 59, note 50.

The dogma on this point has established three pre-conditions, which must exist cumulatively:

1. There must be a violation of an imperative legal norm;
2. The legal success which is (objectively) achievable with this violation must be absolutely excluded by the wording, sense and purpose of a legal norm;

3. The contract must impair public affairs or interests of some importance.

*Bonk*, as mentioned above, note 52.

According to the wording and the logic of the Federal German Medical Practitioners' Act the pre-conditions for the licensing of a doctor are absolutely binding and do not permit – in the interests of public health – any exceptions. This is confirmed by section 3 of the Federal German Medical Practitioners Act. However, it is not *a priori* forbidden to construct professional training of this type on the basis of cross-border agreements (cf. the Groningen/Oldenburg model). The question as to whether such an agreement is unlawful because it does not fulfil the requirements of the Federal German Medical Practitioners' Act or Directive 2005/36/EG does not in itself lead to the agreement being void, but leads at most to the contract being unlawful, whereby its legal effectiveness remains in principle unaffected.

Cf. *Bonk*, in: Stelkens/Bonk/Sachs (eds.), *Administrative Procedures Act*, section 59, note 9.

However, in this case it is possible to terminate the contract for cause according to section 60 of the Administrative Procedures Act or, because very often this is a matter of a contract for the performance of a continuing obligation, according to section 62 of the Administrative Procedures Act, in conjunction with section 314 of the German Civil Code. The important reason for the termination in the latter case is that an adherence to a construction which is not in compliance with statutory requirements is not tolerable on the grounds that public administration is bound by the law. This is what the local authority body, which for its part is bound by the principle of lawfulness, must aim to achieve.

### ***cc) Obligation towards the Federal German Medical Practitioners' Act and the Federal German Regulations on Medical Licensing***

In particular, it should be pointed out that the automatic procedure envisaged by the European directive on the recognition of professional qualifications – as presented in Part II and as implemented in section 3, sub-section 1, sentence 2 and sub-section 6 of the Federal German Medical Practitioners' Act – does not in any way authorise a public body to undermine the substantive requirements of applicable national law. The reason for this is that the envisaged automatic procedure is based on the assumption that there is mutual trust and that the responsible member states have checked carefully to ensure that a corresponding franchise model satisfies the requirements of Article 24 (2) of the EU directive.

According to section 3, sub-section 1, sentence 1, no. 4 of the Federal German Medical Practitioners' Act in its current version, the formal pre-condition for licensing a doctor is a course of study of at least six years at a scientific/academic university, which must contain practical training of at least eight and at most twelve months in hospitals or suitable facilities for the delivery of patient care by doctors. So, a clear distinction is drawn between the "scientific/academic" and the "practical" components. If the time periods allocated to the "scientific/academic" and "practical"

components are intertwined and, in this way, made impossible to identify, this is a violation of this clear distinction.

***dd) Key characteristics of scientific/academic teaching***

The German Science Council has explained in several documents what constitutes scientific/academic training at a university.

In particular, it is absolutely necessary that the teaching is research-based. In addition, a sufficiently broad range of research methods must be conveyed.

*German Science Council*, response to the founding of a university medical department at the Carl von Ossietzky University, Oldenburg on the basis of the idea of a European Medical School Oldenburg-Groningen, 12<sup>th</sup> November 2010 (Drs 10345-10), p. 99f.

Section 27, sub-section 1 of the currently valid version of the Federal German Regulations on Medical Licensing requires for the second (clinical) stage evidence of knowledge in 21 compulsory subjects, an optional subject and in 14 cross-disciplinary areas. In 2004, with a similar distribution of subjects, the German Science Council set – as a lower limit for obtaining or (further) developing research-based teaching in medicine - the number of approximately 60 full-time professors, of which approximately 20% were for the clinical area. In addition, further part-time academic staff (e.g. supernumerary professors, honorary professors and lecturers without tenure) can complement this spectrum and the range of research specialisms. However, such persons may not make up the “majority” of the teaching staff; the training must in essence be provided by full-time, specialist professors.

*German Science Council*, comments on the capacity, resources and dimensions of university-medical facilities of 11<sup>th</sup> November 2005 (Drs. 6913-05), p. 45 f.

The German Science Council has emphatically stressed this principle on several occasions. In its comments on the medical training at the University of Witten-Herdecke the excessive number of so-called “extra-mural professors” at the cooperating hospitals was criticised. The German Science Council expressed concern that the majority of the teaching staff members were, in terms of their public sector contracts, attached primarily to the cooperating hospitals, and that this could mean that the interests of research and teaching would not be sufficiently assured. Furthermore, the German Science Council went on to argue that, in the case of “extra-mural” teaching staff, basic provision for research and research-based teaching has to be made to ensure that these things can be provided irrespective of the specific conditions in patient care.

*German Science Council*, comments on the revised concept for the study of medicine within the context of the accreditation procedure of the “Private University of Witten-Herdecke gGmbH” – UWH, 7<sup>th</sup> July 2006 (Drs 7340-06), p. 21

In its comments on the re-accreditation of the University of Witten-Herdecke the German Science Council makes it clear that to convey clinical research competence that is based on first principles, as is characteristic of research-based teaching, presupposes an appropriate supply of full-time ("intra-mural") professors (i.e. with sufficient time for research and teaching work).

*German Science Council*, comments on the re-accreditation of the Private University of Witten/Herdecke (UW/H), 8<sup>th</sup> July 2011 (Drs. 1395-11), p. 14 f.; cf. also the evaluation report printed in the appendix, p. 87.

Training which does not allow enough free time for research-based teaching vis à vis the demands of patient care does not, in cases of doubt, meet these pre-conditions.

See, for example, on this point the *German Science Council*, comments on the further development of university medicine teaching in Schleswig Holstein, 8<sup>th</sup> July 2011 (Drs. 1416-11), p. 98.

In its comments on Oldenburg/Groningen it was similarly pointed out by the German Science Council that for the curriculum to be taught overwhelmingly by supernumerary professors was not sufficient for the purpose of covering the required range of academic and scientific work in clinical teaching and research. The Council added that this can only be accepted for a limited introductory period and would have to be replaced as quickly as possible by the appointment of full-time professors in formal appointment procedures or their equivalent.

*German Science Council*, comments on the establishment of university medical teaching at the Carl von Ossietzky University of Oldenburg, based on the idea of a "European Medical School Oldenburg/Groningen" of 12<sup>th</sup> October 2010 (Drs. 10345-10), p. 107 f.

### **ee) "Under the supervision of a university"**

An acceptance that a course of study is scientific/academic in nature presupposes that parts of the training which are provided outside of a university have to be *under the supervision* of a university (see here Article 24(2.1) of the Directive 2005/36/EG). Very often this is understood to mean the practical year or practical periods in blocks. The term "supervision" that is used here goes beyond what is traditionally understood by the term "supervision", where a hierarchical relationship between the body carrying out the supervision and the body being supervised is required. This hierarchical relationship doesn't exist in the case of inter-state relationships. In particular, there are no rights – which can be normatively justified – to issue instructions in this case. For this reason, the term "supervision" has to be interpreted in terms of its actual purpose. Firstly, supervision is necessarily and logically connected with having the opportunity to gather comprehensive **information** about the operational procedures of the body under supervision and to **check** if certain prescribed standards are being met by the body under supervision. Inextricably linked with this is the legal power to be able, if necessary, to bring about a change in the actions of the body under supervision. Secondly, Article 24(2) of Directive 2005/36/EG makes it clear that it must always be possible for the university – as the body carrying out the supervision – to represent the interests of

teaching and research vis à vis the interests of patient care. To express things in terms of institutional economics, the university – in a so-called **principal-agent relationship** - acquires the role of the principal, which must enforce its interests vis à vis the agent that is the hospital, which in turn is pursuing its own interests.

Cf. *Richter/Furubotn*, *New Institutional Economics*, 4<sup>th</sup> ed. 2010, p. 173 ff.; *Sacksofsky*, in: Hoffmann-Riem/Schmidt-Aßmann/Voßkuhle (eds.), *Basic Principles of Administrative Law*, volume II, 2<sup>nd</sup> ed. 2012.

In the case of franchising arrangements between foreign universities and domestic hospitals a supervisory relationship can only be based on contractual agreements which expressly grant the university rights to obtain information and to carry out checks as well as, if necessary, rights to intervene. In addition, preventive conciliation mechanisms – for example in the form of special, internal, independent conciliation boards or arbitration agreements – have to be agreed for conflicts between the interests of teaching and research on the one hand and those of patient care on the other.

Cf. also *German Science Council*, Recommendations regarding Public Private Partnerships (PPP) and privatisations in patient care in university medical studies of 27<sup>th</sup> January 2006 (Drs. 7063-06), p. 59/60.

Furthermore, in cooperative ventures between foreign universities and domestic hospitals constituted under public law it is the case that the latter are at the same time subject to state supervision.

Cf. Article 91(3) of the Bavarian Municipal Code as an example for companies under public law.

So, two conflicting supervisory mechanisms confront each other here: on the one hand, the supervision by the university of its cooperation partner, the hospital, where the interests of teaching and research vis à vis those of patient care have to be represented, and on the other hand the state (local authority) supervision of the hospital – which is owned and run by a public body – which extends to ensuring compliance with the law. It remains open to question how the parties should proceed in the event of a conflict. The state can, of course, to a certain extent “outsource” its supervisory activities by first of all providing for a level of consensual, self-regulating conflict resolution – particularly in the form of the above-mentioned conciliation procedures. However, because the state has the important function of conferring democratic legitimacy, it cannot dispense with its final right to carry out checks.

As a foundation, *Böckenförde*, in: Isensee/Kirchhof (eds.), *Manual of Constitutional Law*, volume 1, 1<sup>st</sup> ed. 1987, section 22, note 21; *Kahl*, in: Hoffmann-Riem/Schmidt-Aßmann/Voßkuhle (eds.), *Fundamental Principles of Administrative Law*, volume III, 2<sup>nd</sup> edn. 2013, section 47, note 64; *Burgi*, *Basic Principles*, in: Erichsen/Ehlers (eds.), *General Administrative Law*, section 7, note 29.

The state must be able to prevail in a supervisory conflict about intervention options between itself and the foreign university. Whilst it is true that, according to the

recent so-called pluralistic legitimisation theory, Article 20(2), sentence 1 of the German Basic Law does not demand in every case the proviso of the state's authority to give instructions as long as a satisfactory level of legitimisation is achieved, in this particular case further compensatory legitimisation factors are necessary.

*Kahl*, as mentioned above, note 66, with further evidence.

A compensatory legitimisation factor is the recognition of the course of study by the host state in accordance with the directive on the recognition of professional qualifications, since it is now undisputed that the mutual recognition of administrative acts ("transnational administrative acts") in the area of the EU represents a permissible restriction of the rights of scrutiny.

Cf. instead of many, *Happe*, The cross-border effect of national administrative acts. At the same time, a contribution to the problems of recognition following the Cassis de Dijon ruling of the European Court of Justice, 1987; *Burbaum*, Legal protection against transnational administrative acts, 2003, passim; v. *Danwitz*, European Administrative Law, 2008, p. 646 ff.; *Hill/Martini*, in: Hoffmann-Riem/Schmidt-Aßmann/Voßkuhle (eds.), Fundamental Principles of Administrative Law, volume II, 2<sup>nd</sup> edn. 2012, section 34, note 85d

However, not all inter-state supervisory rights can be sublimated in this way. Whilst the compensatory legitimisation effect of the directive on the recognition of professional qualifications extends to the validity of transnational administrative acts – in this case, the recognition of the courses of study in another EU member state by the host state – it does not suspend the obligation of cooperating facilities to be in compliance with the law. For this reason, state supervision must in the end prevail over the influence that can be exerted by the foreign university.

#### ***ff) Effects of an involvement of supernumerary professors in franchising models***

Furthermore, the title of a supernumerary professor has usually been conferred in relation to his/her teaching activity at another university (normally the university of origin of the lecturer without tenure). If the obligations arising from the teaching that is connected with this title are not fulfilled, then the title can be withdrawn again by the university or is lost by operation of law.

e.g. Article 30 in conjunction with Article 27(1.2) of the Bavarian Higher Education Personnel Act; section 26, sentence 2 in conjunction with section 25, sub-section 2, sentence 3 of the Hessen Higher Education Act; section 48, sub-section 3, sentence 3 of the Higher Education Act of Saxony-Anhalt; section 35a, sentence 2 and 3 of the Higher Education Act of Lower Saxony; section 61, sub-section 3, sentence 4 and sub-section 2, sentence 2 of the Higher Education Act of Rhineland-Palatinate. In North Rhine Westphalia, Hamburg and the Saarland the universities themselves set the rules for withdrawing or cancelling titles (section 41, sub-section 4, sentence 2 of the Higher Education Act of North Rhine Westphalia; section 17, sub-sections 1 and 4 of the Hamburg Higher Education Act; section 43, sub-section 2,

sentence 3 in conjunction with section 42, sub-section 1, sentence 3 of the University Act of the Saarland).

In this regard there must be a careful check as to whether the often ambitiously defined teaching activities, e.g. "bedside teaching", in the context of a franchising model leave enough time for the teaching connected with the teacher's title, or if this teaching is being neglected given the demands of patient care.

According to some of the higher education acts of the individual federal states the title can also be withdrawn if the person concerned is given a licence to teach at another university or does comparable teaching work or is given comparable legal status abroad.

E.g. Article 30(1), sentences 1 and 2 of the Bavarian Higher Education Personnel Act in conjunction with Article 27(1.1) of the Bavarian Higher Education Personnel Act.

If the supernumerary professor, by teaching within the context of a franchising model, operates, as it were, in competition with the university from which he originates, then, according to the law on universities in many federal states, a removal (of the title) because of unworthiness can be considered

E.g. section 65, sub-section 3, sentence 2 in conjunction with section 69, sub-section 5 of the Higher Education Act of Saxony.

or, in certain circumstances, a cancellation of the right to hold the title of professor according to section 49, sub-section 2, no. 3 of the Administrative Procedures Act of the relevant federal state. Thus, a pronounced involvement of supernumerary professors in the curriculum not only constitutes a minus in qualitative terms compared to a full-time team of professors that has been generated by an appointments procedure, it also carries with it a considerable risk arising from the instability of this construction.

Overall, therefore, the franchising models that currently exist are to be viewed with scepticism regarding the requirement that teaching should be sufficiently research-based.

***gg) Monitoring by federal state body with responsibility for supervising local authority administrative acts***

If a clinic/hospital that is owned by a public (local authority) body participates in franchising models of this sort, it is the task of the body in the relevant federal state with responsibility for supervising the legality of local administrative acts to ensure that the requirements of national law, namely the stipulations of the Federal German Medical Practitioners' Act and the Federal German Regulations on Medical Licensing, are being observed, particularly if the local authority refuses to proceed against unlawful actions carried out by a public law company under local authority control. The supervisory body has to examine whether there are unlawful actions by making use of its right to information and, where necessary, by bringing in external expertise, for example in the form of an evaluation by the German Science Council or

by other independent boards of experts. In the last resort, the supervisory body has to consider working to secure the termination of unlawful cooperation contracts. Whilst it is true that supervisory activity is normally at the discretion of the supervisory authorities,

*Geis, Local Authority law, 3<sup>rd</sup> edn., 2013, section 24, note 4.*

for them to dispense in general with any supervisory activity should normally be seen as an erroneous exercise of discretion given the importance of highly qualified medical training to public health. Given the automatically binding effect of Directive 2005/36/EG, this applies particularly to other member states.

### ***b) Hospitals belonging to public bodies but formed under private law***

However, hospitals belonging to public bodies can also be organised in the legal form of a private stock corporation like a limited liability company (with charitable status) or of a listed stock corporation.<sup>3</sup>

Hospitals formed under private law but owned by public bodies are definitely incorporated enterprises, i.e. public (listed) limited companies or private companies with limited liability. If over 50% of the shares of the company are owned by legal entities under public law, then, according to prevailing opinion, the company must be treated as a legal entity under public law. The obligation to observe public law regulations results in this case from the general ban on circumvention in the area of law dealing with the operation of private companies by public authorities ("no escape into private law").

For the basic principles on this point, see *Maurer, General Administrative Law, 18<sup>th</sup> edn. 2011, section 3, note 9.* An example of more recent case law is, for example, the Berlin Constitutional Court, judgement of 21<sup>st</sup> October 1999, Constitutional Court of Hessen 10, 96 (100 ff.); the Administrative Court of Hessen, decision of 9<sup>th</sup> February 2012 – 8 A 2043/10.

Accordingly, a hospital formed under private law but principally owned by a public law body is bound by the provisions of the Federal German Medical Practitioners' Act and the Federal German Regulations on Medical Licensing. Therefore, we can essentially refer to our comments above under a) (p. 11 ff.).

However, the problem of supervisory intervention is rather more difficult because the federal state body with responsibility for supervising local authority administrative acts does not have a direct right of intervention in respect of companies under private law that are owned outright or in part by the local authority. In this case, the aim should be to enable the local authority to retain sufficient concrete options for intervention by designing the articles of association or the memorandum of association accordingly. To this extent the supervisory body can demand of the local

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<sup>3</sup> Examples are: in Hessen – Klinikum Hanau GmbH (owned by the town of Hanau) and Klinikum Kassel (owned by the local authority body Gesundheit Nordhessen Holding AG), in Berlin – Vivantes-Netzwerk für Gesundheit GmbH as the largest local authority group of hospital companies, and Baden-Württemberg – the Gemeinnützige Krankenhausbetriebsgesellschaft Hegau-Bodensee Kliniken mbH.

authority that unlawful contracts involving its wholly or partly owned companies are terminated or dissolved.

### **c) Hospitals belonging to private bodies**

The situation could look different in the case of a private hospital which is not owned by a public body or in which a public body holds less than 50% of the shares. In such a case, the view is held overwhelmingly that obligations under public law do not automatically exist. One must first of all determine here whether this is a cooperative venture between a domestic hospital and a domestic university or between a domestic hospital and a foreign university.

The first of the above has been implemented several times in Germany either in whole or in part; in part, for example, in Berlin-Buch, Dresden, Greifswald, Leipzig, Regensburg and Ulm.

In detail, *German Science Council*, Recommendations regarding Public Private Partnerships (PPP) and privatisations in patient care in university medical studies of 27<sup>th</sup> January 2006 (Drs. 7063-06), p. 41 ff.

However, if a private hospital operator takes over completely the functions of a university clinic (an example of this being Gießen/Marburg), it is necessary for the purpose of safeguarding the particular interests of teaching and research in relation to those of patient care that the state remains the body with mandatory responsibilities – namely in the field of teaching and research. To this extent, a conferral of powers under public law is necessary.

German Science Council, as mentioned above, p. 46, 70.

By doing this, the state is fulfilling its warranty obligation in respect of high-quality medical training. By means of this conferral the private clinic/hospital is subject to legal supervision on the part of the responsible federal state ministry. It is not permitted for this supervision to only “exist on paper”; it must be carried out “effectively”, i.e. by actively monitoring events.

Cf. for legal supervision of hospital bodies with the legal form of foundations under public law, Federal Administrative Court 2 C 15.08E 135, 286 (note 47); *Geis*, in: Merten/Papier (eds.), *Manual of Basic Rights*, volume IV, section 100, note 36. For bodies on which public responsibilities have been conferred – irrespective of their legal form – nothing else can apply.

This supervisory power includes the possibility that the state demands periodic evaluation and accreditation procedures at the expense of the owning body.

Cf., by way of an example, Article 85(4) of the Higher Education Act of Bavaria and, on this point, *de Wall*, in: *Geis* (ed.), *University Law in the Free State of Bavaria*, 2009, chapter VI, section IX, note 56.

Moreover, provision must be made for suitable (preventive) conflict resolution mechanisms in the event of a conflict of aims between teaching and research

matters on the one hand and patient care matters on the other (for example, conciliation and mediation procedures).

For details, see *German Science Council*, Recommendations regarding Public Private Partnerships (PPP) and privatisations in patient care in university medical studies of 27<sup>th</sup> January 2006 (Drs. 7063-06), p. 80 f. (sub. IV.2.d).

In particular, the state is not allowed to transfer its warranty obligation completely onto mechanisms within the university. The ultimate responsibility of the state must be preserved in each case. This also applies because the state is responsible towards other states for proper training, as the obligations arising from Directive 2005/36/EG towards other member states make clear.

However, nothing different can apply in the case of a foreign university and a domestic hospital. The authorisation of foreign branches of universities is a form of public law recognition. It only replaces the recognition which is necessary domestically but does not lead to a general privatisation of education. For this reason, there can and must be in these cases a conferral on the domestic cooperation partner of the necessary powers, namely in teaching. This conferral, for its part, opens up the supervisory powers of the state. To this extent, we can refer to what we have said above.

#### **4. The granting of permission to practise medicine on a temporary basis as a component of cross-border medical training for doctors**

Section 10 of the Federal German Medical Practitioners' Act provides for permission to practise medicine on a temporary basis in the case of persons who provide evidence of having completed their training as doctors. This rule goes back to the earlier requirement of proof of a period of work as a "medical intern". Temporary permission to work as a doctor is not given to applicants (sub-section 1, sentence 2) who have proof of having completed their medical training, where this proof was issued in another EU/EEA member state. An exception to this rule is only permissible if there is a particular public interest with regard to the intended work as a doctor. Apart from this, permission to work as a doctor on a temporary basis can also be granted in exceptional cases to persons who have acquired their medical qualification outside of the territory of the Federal Republic of Germany but who have not completed their training. The pre-condition is that the applicant has acquired the entitlement to practise as a doctor in a limited capacity on the basis of an examination abroad which completes the course of university study and that the work to be done on the basis of the permission granted is necessary for the medical training to be completed.

According to EU law the regulations set out in Directive 2005/36/EG are not applicable to the granting of permission in accordance with section 10 of the Federal German Medical Practitioners Act. The reason for this is that the directive does not deal with an entitlement qualifying a person to practise medicine. For this reason, to exclude persons who hold a diploma acquired in another EU/EEA state is, in terms of EU law, unproblematic.

Insofar as in exceptional cases the permission to practise medicine temporarily in order to acquire knowledge serves the purpose of enabling that person to complete their foreign medical training, this is a limited permit to work which serves the purpose of enabling a person to continue with their overall medical training. The granting of such a limited work permit is in principle at the discretion of the responsible authorities and is not an imperative requirement in EU law. The directive on the recognition of professional qualifications does not restrict the scope of this discretion. Restrictions on the basis of EU law can arise at most from the freedom to provide services and the freedom of establishment. Accordingly, it is in principle in compliance with EU law if member states demand a licence to practise as a doctor and only allow the practice of medicine on a temporary basis in exceptional cases. It should be noted on this point that section 10, sub-section 5 of the Federal German Medical Practitioners' Act only considers cases where such proof of medical work is imperative for the completion of medical training. This means that this is not a training qualification which must be mutually recognised, as defined in the directive and according to the Federal German Medical Practitioners Act.

## **II. Framework conditions under European law for the acquisition and recognition of a diploma obtained in another EU or EEA member state qualifying the holder to practise medicine, and the recognition of study completed abroad as part of theoretical or practical medical training**

### **1. Legal basis**

The pre-conditions for the recognition of a professional qualification for practising medicine which has been obtained in another EU member state are set out in national law in the Federal German Medical Practitioners' Act of 16<sup>th</sup> April 1987 (Federal Law Gazette I, p. 1218; last amended by law of 20<sup>th</sup> February 2013, Federal Law Gazette I, p. 277). The regulations in the Federal German Medical Practitioners' Act are based, for their part, on Article 74(1), no. 19 of the German Basic Law and on secondary legislation in EU law, in particular the regulations in chapter III of the Directive 2005/36/EG of 9<sup>th</sup> July 2005 concerning the recognition of professional qualifications (EU Law Gazette, L 255/22 of 30<sup>th</sup> September 2005).

The directive distinguishes between the recognition of professional qualifications which are acquired on the basis of the minimum training requirements agreed across all EU member states and professional qualifications where, in the absence of corresponding provisions in EU law, these pre-conditions are not met. For proof of training in the first category the principle of automatic recognition applies. Medical training comes under this first category. Exceptions to this are specially provided for (e.g. in Article 10 a) and g) of the directive 2005/36/EG). Article 21(1) of Directive 2005/36 formulates the following principle: Every member state shall recognise the evidence of formal qualifications (this includes, for example, the certificate showing that the general basic medical training has been completed) set out in Annex V to this directive which meet the minimum requirements of medical training according to Articles 24 and 25 ff. and which permit the holder to practise as a medical doctor or as a specialist medical doctor. The member state shall confer upon these formal qualifications the same status with regard to taking up and practising the medical profession in its sovereign territory as it does to the formal qualifications which it

issues itself. It is also necessary that these formal qualifications are issued by the responsible bodies in the member states and, where necessary, are accompanied by the certificates which are listed in Appendix V under the corresponding numbers 5.1 etc. The certificates must provide evidence that the relevant person has acquired the knowledge and competences prescribed in the directive "in the course of their entire period of training". Otherwise, the taking up and practice of medical work cannot be permitted (Article 21(6)). Article 50 of Directive 2005/36 contains a concluding provision concerning the documents and certificates necessary for the recognition of a professional medical qualification.

Annex V.1 to the directive lists the proof of formal qualifications which was communicated to the Commission by the member states in accordance with Article 21(7). The Commission publishes in the Official Gazette of the European Union a statement showing the names - which have been determined by the member states - of the formal qualifications, the body which issues the proof of the formal qualifications, the additional certificates involved and, where necessary, the corresponding professional title - which are listed in Annex V, nos. 5.1 ff. - and the reference date or the relevant academic year (cf. Commission communication 2013/C 183/02, EU Gazette of 28<sup>th</sup> June 2013).

Annex VII to the directive sets out the documents and certificates which can be demanded by member states as a pre-condition of recognition pursuant to Article 50(1). In the area of doctors' diplomas (chapter III of the directive) no. 1b of the annex about demanding further proof of the comparability of the professional qualification is inapplicable. However, in order to make it easier to apply the regulations in chapter III, Annex V, no. 2 provides that the member states can demand that applicants who meet the required pre-conditions for a professional qualification produce - along with the proof of their formal qualifications - a certificate from the responsible authorities of the member state which makes clear that these formal qualifications correspond to the proof required in the directive.

In principle, citizens of the EU/EEA member states and family members, who enjoy equal status with regard to freedom of movement, can invoke the provisions of Directive 2005/36/EG. Moreover, on the basis of Article 11 of Directive 2003/109 and Article 14 of Directive 2009/50 third country nationals with a long-term residence permit and qualified foreigners who possess a blue card also have the right to demand the recognition of their diploma in compliance with the directive, insofar as they possess a diploma which entitles the holder to practise medicine in an EU member state and which was issued in compliance with requirements under EU law.

As a basic principle, only diplomas and examination certificates which have been issued by an EU/EEA member state fall within the scope of the directive. According to Article 2(2) of Directive 2005/36 every member state can allow the citizens of member states to do qualified work on the basis of a diploma obtained in a non-member state. However, with regard to diplomas which qualify the holder to practise medicine, recognition is only possible in compliance with the national regulations if the minimum requirements stated in Directive 2005/36/EG are observed. According to Article 3(3) professional qualifications issued by a non-member state must be afforded equal status if the holder of the qualification can provide proof with a corresponding certificate that s/he has three years of professional experience in the

territory of the member state which recognises the diploma. The initial recognition by a member state presupposes in turn that the recognition has been given according to Article 2(2) of Directive 2005/36.

The determination under EU law of the minimum standards for basic medical training excludes the possibility that an EU member state awards a medical diploma which does not meet the requirements of EU law. This means that medical diplomas which do not correspond to any of the categories listed in Directive 2005/36/EG are not permissible (cf. European Court of Justice of 19<sup>th</sup> June 2003, Case no. C-110/01 "*Tennah-Durez*", note 54). Concerning *the certification* of a professional medical qualification Article 21 refers to Article 24, which sets out the fundamental requirements of basic medical training. These include:

- At least six years of training or 5,500 hours of theoretical or practical teaching.
- The training must be provided at a university or under the supervision of a university.

Article 24(3) goes on to set out minimum requirements concerning the knowledge and skills to be acquired in basic medical training.

The requirements of the directive regarding the recognition of a certificate of qualification are implemented at national level by section 3, sub-section 1, sentence 1, no. 4 of the Federal German Medical Practitioners Act. Accordingly, a licence to practise has to be awarded upon application if the applicant

“following the study of medicine at a scientific/academic university for at least six years, of which eight and at most twelve months have to be devoted to practical training in hospitals or suitable medical facilities for patient care, has passed a medical doctor’s examination within the scope of application of this law.”

However, a medical qualification completed in one of the other member states of the European Union or the EEA is deemed to be a qualification in this sense if evidence of it is provided by producing proof of a formal qualification of a member state of the EU/EEA that was issued after 20<sup>th</sup> December 1976 and is listed in the Annex to this law.

## **2. Pre-conditions for acquisition of a diploma qualifying the holder to practise as a doctor**

### ***a) General principles***

The aim of Directive 2005/36/EG is, like that of its predecessors (e.g. 93/16/EWG, 77/452/EWG, 77/453/EWG, 89/48 EWG and 92/51/EWG), the removal of barriers to the free movement of persons and the free trade of services between the member states. For the practice of medicine this means that it is made possible to be employed or self-employed as a doctor in a member state of the European Union irrespective of the member state in which the medical qualification was acquired and irrespective of the national regulations in that member state that apply to such a

qualification. However, the pre-condition for this is that a qualification as a doctor is acquired in accordance with the minimum standards – both in terms of their form and their content – of the directive. The member states are not prevented from establishing their own rules for the professional training of doctors and the pre-conditions for examinations. However, the training standards of the directive are obligatory for acquiring a professional qualification which allows the holder to practise medicine.

Member states which issue certificates for professional qualifications that entitle the holder to practise medicine as defined in the directive without the pre-conditions of the directive being fulfilled are guilty of a breach of EU law. However, the same is true for all state activities or the activities of private bodies which can be attributed to the state, e.g. the activities of universities or clinics which are formed under private law. The requirements of EU law concerning medical training are just as obligatory for them as they are for the state (be it at the level of central government, the individual federal state or the local authority), which issues certificates or carries out medical training.

The obligations of the member states under EU law regarding the organisation and the content of medical training should be viewed separately from the recognition of a professional qualification that is awarded in another EU member state. The distinction between minimum standards regarding training and the pre-conditions for recognition is a central element in the directive on the recognition of professional qualifications. The directive presupposes as a matter of principle for areas like medical training, in which consistent training standards under EU law apply, that the irrefutable assumption is made that the standards under EU law are being observed. For this reason, the non-recognition of professional qualifications to practise medicine is only possible within the narrow limits set by EU law – irrespective of the fact that a member state might be failing to observe EU law by issuing a certificate.

#### ***b) Pre-conditions in form and content for the acquisition of a qualification to practise as a doctor***

In relation to basic medical training Article 24 of Directive 2005/36/EG prescribes the pre-conditions for being admitted to a course of study and it also prescribes the content and duration of the training.

Article 24(1) makes admission dependent on holding a diploma or an examination certificate which enables admission to a university for the relevant course of study. This pre-supposes that access to the study of medicine is being made dependent on the acquisition of a qualification which is based on the holder having suitable skills and abilities to complete a course of study in medicine successfully. EU law does not prescribe to member states how and on the basis of what procedures a qualification should be acquired which makes admission to the study of medicine possible. For this reason, member states are free to go beyond general admission requirements for university and to grant other persons, e.g. on the basis of their professional work, the right to be admitted to the study of medicine. Given the purpose of the requirement that the member state should ensure that an assessment is made of the probable suitability of the candidate to complete a course of medical study at university, the entitlement to study should not be based on merely formal

requirements but must be related to imparting successfully the knowledge and skills listed in Article 24(3) of Directive 2005/36/EG. An unconditional acceptance of all applicants or an acceptance of applicants on the basis of a "selection interview" or similar procedures at private universities or "medical schools" – with no requirement for a state-recognised diploma or examination certificate which make possible in general terms access to the study of medicine – does not meet the requirements of Directive 2005/36/EG. In all of this, regard must be paid to the following pre-conditions:

### ***aa) University education***

Basic training as a doctor must be **university training**. According to the wording and the purpose of Article 24 of Directive 2005/36/EG the **entire** course of medical training must meet university standards and be carried out at a university. The wording of Article 24(2), whereby the theoretical and practical "teaching" can be carried out "under the supervision" of a university, does not contradict this requirement but confirms it. In contrast to other courses of study, the requirement of a link between theoretical knowledge and practical experience applies in particular to a course of medical training. For this reason, Article 24(3d) of Directive 2005/36/EG includes the imparting of appropriate clinical experience with corresponding guidance in hospitals in its canon of knowledge and skills to be acquired. However, the practical experience in hospitals is inextricably combined with the theoretical abilities or knowledge imparted by a course of medical training at university. So the inclusion of theoretical or practical teaching as a component in a course of medical training under the supervision of the university means nothing other than to guarantee that university standards in medical training are being observed even where the teaching is taking place outside of university facilities.

According to Article 24 of Directive 2005/36/EG a **university** is not only a state university but can also be an "education and training institution which is recognised as a university" and which is run by a private body. EU law does not define the term "university" and does not prescribe to member states any criteria which have to be taken into consideration when it comes to the state recognition of an education and training institution. However, this does not mean that EU law does not impose any limits on the powers of member states to establish their own regulations for recognising private education and training institutions and/or to grant permission for courses of medical training to be carried out. Insofar as a successfully completed "university course of medical studies" leads to the award of a diploma which is intended to entitle the holder to an EU-wide recognition of his/her qualification to practise medicine, there are barriers in EU law which arise from the requirements under EU law regarding the scientific/academic nature of medical training and from the specific requirements regarding the training itself as set out in Directive 2005/36/EG.

Therefore, it is also necessary for private universities and medical schools, which are organised and structured differently, to ensure that the medical training is provided on the basis of and in conjunction with independent medical research, and that the persons teaching at the education and training institution are able - on the basis of their qualifications and duties – to train doctors in a way that is scientific/academic.

### **bb) University standards**

The term "university standards" means having regard for fundamental requirements regarding the scientific/academic delivery of medical content and knowledge. This includes the use of scientific methods and procedures, and knowledge of the basic principles in natural sciences which underpin the work of a doctor. Knowledge about identifying and treating diseases, which has been acquired merely intuitively and empirically, does not meet this requirement. The model for a university course of medical training is the scientifically trained doctor who has been given the ability to constantly further his/her scientific development, and to both respond to and engage critically with medical research, not the "medicus" of the Middle Ages, who essentially acquired his abilities through "bedside teaching" (even accepting that this is a key aspect of medical training).

### **cc) "Under the supervision of a university"**

The directive does not specify the requirements which arise with regard to the teaching carried out "**under the supervision of a university**" at a facility which is not part of a university. Of relevance here is the normal meaning of the term "supervision" and the purpose of the regulation. By "supervision" we generally understand in day-to-day language a check on or a scrutiny of the actions of a person, combined with the power, where necessary, to intervene in the person's actions and to impart instructions - either of an individual or a general nature - to the person performing the supervised actions. In the context of Article 24(2) of Directive 2005/36/EG this is clearly about ensuring the scientific/academic nature of the medical training and the achievement of the goals of basic medical training as defined in Article 24(3).

In general, an *agreement* will be needed, in which the organisational structures are clarified by means of which the training goals prescribed by a university course of medical training are to be achieved. Because supervision presupposes ongoing scrutiny, it will be necessary to involve boards at the university - depending on the scale of the extra-mural teaching taking place - in the design and structure of the teaching and the formulation of the learning outcomes in the clinical training phase, which must be in line with the training requirements of the university. A mere "franchise agreement", which basically consists of transferring the practical training to clinics and hospitals outside of the university, without ensuring the necessary link between theoretical and practical medical training, does not meet these requirements. However, the university can only assume responsibility for the fact that every graduate of the medical training course has really acquired the knowledge and ability which EU law makes a pre-requisite for taking up the practice of medicine if - for a *part of the training carried out at non-university facilities* - the involvement of the university in planning and carrying out the clinical phase of medical training according to scientific standards and in monitoring the delivery of this clinical phase is guaranteed - and not just by dint of normative requirements.

#### ***dd) Possibilities for cross-border cooperative ventures***

Directive 2005/36/EG does not exclude the possibility of **cross-border cooperative ventures** of universities in an EU/EEA member state with hospitals and clinics organised under public or private law of other member states or of non-EU/EEA states. This can be inferred indirectly from Article 50(3), which permits the recognition of certificates of proof of training courses which "have been completed in whole or in part at a facility legally based in the sovereign territory of another member state."

So EU law is not opposed to the setting up of cross-border courses of study. As a matter of principle, this applies both to a part of overall medical training completed in another EU member state and to medical training which for the most part has been completed in a non-member state of the EU. In the *Tennah-Durez* judgement of the European Court of Justice of 19<sup>th</sup> June 2003 (C-110/01) the European Court of Justice obliged the French authorities to recognise a medical diploma which had been obtained at the Belgian University of Gent and which was based on a one-year medical course of study in Belgium and on a recognition – which came with a proviso – of medical training which had previously been completed in Algeria.

Contrary to the position adopted by the European Commission and some member states, the European Court of Justice refused to determine - in quantitative or qualitative terms - for certain parts of medical training (final stage, theoretical training etc.) requirements with regard to *intra-community training* in relation to parts of training completed in a non-EU member state. Admittedly, the legal position has changed since this court ruling was announced to the extent that the requirement that professional training be completed predominantly within the community is now anchored in the directive (Article 3(1c)). However, irrespective of this, the thinking of the European Court of Justice in respect of its interpretation of Article 24(2) of Directive 2005/36 is transferrable to overall medical training which has been completed *within several EU member states*. So Directive 2005/36/EG does not provide a basis for limiting the required training to a "core training programme" which has been completed in the member state that is being asked to provide recognition.

The fact that the completion of a part of overall medical training in another EU member state or in a non-EU member state is in principle permissible under the directive means that it is possible to have cooperative training models under the overall responsibility and according to the regulations of a state university or a state recognised private university which is based in another EU member state with private or local authority clinics or hospitals which are based in Germany. This also applies if the training is for the most part intended to satisfy a need for doctors in Germany.

Insofar as universities from two EU member states cooperate, legal problems do not emerge as a rule because the observance of the scientific/academic standards of medical training can be regarded as being guaranteed by the university status of both institutions. However, problems concerning supervision can emerge when non-university clinics or hospitals are involved if – because of the structure, size and ownership of an institution – supervision by the responsible (private) university to ensure compliance with the requirements of EU law is not seriously assured. As a

matter of principle, the EU member state responsible for issuing the medical diploma has a **responsibility to scrutinise**. If medical courses of study are for the most part or substantially being completed abroad, then an accreditation of these courses of study will only be possible if the scientific/academic quality and, therefore, compliance with the minimum requirements of the directive is guaranteed on the basis of corresponding agreements, if corresponding supervision is provided for in the way described above, and if this supervisory work is actually performed.

### ***ee) Minimum duration of basic medical training***

Article 24(2) of Directive 2005/36/EG prescribes as a **minimum duration of medical training** a course of study of at least six years or 5,500 hours of theoretical and practical classes. It is a matter of dispute whether this wording describes the requirements for the study of medicine cumulatively or as alternatives. In the overwhelming majority of EU member states Article 24(2) is interpreted as meaning a compulsory six-year course of study which must involve at least 5,500 hours of classes. However, some EU member states have recently started to offer five-year courses of study with 5,500 hours of classes.

What speaks in favour of an interpretation of this wording as a **cumulative requirement**, where the number of class hours is merely intended to clarify that the duration of the course of study alone is not sufficient to ensure a sufficient intensity of basic medical training, is the way in which this provision emerged over time and the logic of the directive itself. For permission to progress to further training as a medical specialist, Article 25(1) requires a six-year course of study in the context of the training mentioned in Article 24(1). In so doing, it makes unequivocally clear that a six-year course of study, within which 5,500 hours of theoretical or practical classes have been completed, is necessary before one can be allowed to progress to further training as a medical specialist. However, it would contradict the whole thinking of the directive if requirements in addition to the successful completion of basic medical training were to be made. For this reason, the European Commission has initiated infringement proceedings against some member states which envisage a five-year course of study.

*EU Commission, Evaluation of Professional Qualifications Directive 2005/36, Brussels 5<sup>th</sup> July 2011, no. 8.5.3.*

The way the clause emerged over time and the purpose of the clause also justify an interpretation of this provision as a cumulative requirement. Article 23(2) of the preceding directive 93/16/EG contained the same wording about a minimum duration of study of six years or 5,500 hours of theoretical and practical classes. Moreover, Article 1(2) of Directive 75/363/EWG, the first coordination directive for medical doctors, contained the same wording. As far as one can tell, the requirement of a minimum number of hours as an additional element in the harmonisation of basic medical training under EU law has never been called into doubt. For this reason, the clause was taken into Directive 2005/36/EG without further discussion.

On the history of the directive, cf. Commission documentation 2202/119 of 30<sup>th</sup> July 2002; 2004/317 of 20<sup>th</sup> April 2004; *Haage, The New Medical Studies Programme, 2003, p. 66, no. 5.2.2.1.1*

### **3. Pre-conditions for recognition of a diploma obtained in another EU member state qualifying the holder to practise medicine**

#### ***a) Automatic recognition***

The wording, logic and purpose of the provisions in the directives mentioned above and of the Federal German Medical Practitioners' Act are such as to make it clear that, according to the **principle of automatic recognition**, it is not permitted to carry out either an examination of a qualification compared to the content of the training set down in the Medical Licensing Regulations or a check of a qualification against the standard of the minimum requirements for basic medical training as set out in Article 24 of Directive 2005/36/EG insofar as valid proof of medical training in accordance with Annex V, 5.1.1 of the directive for doctors is produced.

Articles 21(1) and 21(6) of Directive 2005/36/EG differentiate in their wording and purpose between the requirements under EU law regarding the presentation of certificates which are proof that the qualification of medical doctor has been acquired and the minimum requirements concerning the content of medical training. The minimum content requirements set out in Article 24 are of course binding on the member states when issuing a certificate which proves that a medical qualification has been acquired. Therefore, a member state that provides a certificate for a professional qualification even though these requirements have not been met is in violation of its obligations under EU law. Irrespective of this, member states are bound, as a matter of principle, to recognise a certificate which has been issued in a way that is formally correct. According to EU law, an examination of course content is, as a matter of principle, not permissible.

In contrast, the directive contains detailed specifications about how a check on equivalence should be made in the case of professional qualifications which come under the general regulation but which have not already been harmonised in accordance with EU law on the basis of minimum training content. In these cases it remains possible for the member states to determine a comparable minimum level of the necessary qualification for the purpose of quality assurance (cf. Recital 11 to the directive). Accordingly, section 3 of the Federal German Medical Practitioners' Act distinguishes between applicants who prove that they have completed medical training by producing a certificate as specified in the appendix to the Federal German Medical Practitioners' Act and applicants who do not meet the requirements of section 3, sub-section 1, sentence 1, no. 4 (or sub-section 1, sentence 2). Only for these latter applicants – where medical training has been completed in another EU/EEA state - does the requirement regarding the equivalence of the level of training apply pursuant to section 3, sub-section 2, sentence 1. For the requirements regarding the check on equivalence, see sub-section 2, sentence 3, nos. 1 to 3.

However, for a critical view of the applicability of the above, see *Haage*, Medical Law 2013, volume 12.

The European Court of Justice has explained in several rulings that the principle of automatic recognition does not permit either a check of equivalence in comparison to domestic training standards or a check on compatibility with the training standards

harmonised under EU law. In its judgement of 19<sup>th</sup> June 2003 (case no. C-110/01, *Tennah-Durez/Conseil national de l'ordre médecin, EWS (a legal publication) 2003, 426*) the court established the following in respect of a medical diploma:

“This recognition is automatic and unconditional in the sense that the member states are required to recognize the equivalence of certain diplomas without being allowed to demand of the affected parties that they observe other conditions than those which are established in the relevant directives (judgement of 14<sup>th</sup> September 2000 in case no. C-238/98 – *Hocsmann*, Collection 2000, I-6623, note 33). The basis for this recognition is the mutual trust of the member states that the medical diplomas issued in other member states are sufficient. This trust is based, for its part, on a standard of training, the standard of which has been established by agreement.”

Although this was a decision made with regard to the preceding directive 93/16/EG, there can be no doubt that it is also applicable to Directive 2005/36/EG. This is already made clear by the recitals to the directive, which refer to the systematic procedure for recognition created by the preceding directive and which develop this procedure further (cf. Recitals 18 to 20).

The **principle of mutual trust** in the certificates issued by other member states for the acquisition of certain qualifications, the possession of which is necessary for the exercise of employees' freedom to provide services and their freedom of establishment, has been confirmed by the European Court of Justice as a general principle of EU law in numerous cases.

Cf., for example, regarding a driving licence, European Court of Justice of 29<sup>th</sup> April 2004, case no. C-476/01, *Kapper, NJW (a legal journal) 2004, 1725*; ruling of 26<sup>th</sup> April 2004, case no. C-415/10 (on the obligation to recognise a driving licence issued in the Czech Republic following the expiry of a drink driving ban).

As a matter of principle, the Court of Justice does not accept a plea regarding the protection of the general public, but merely points in general terms to the fact that, according to the principle of mutual trust, it is the business of the member state which is giving permission to examine these aspects and to take them into consideration on the basis of the provisions of EU law. The same applies to an even greater extent to diplomas and examination certificates which qualify the holder to practise a particular profession on the basis of training regulations harmonised under EU law.

However, it does not follow from the obligation to “unconditionally” recognise certificates of professional medical qualifications issued in another EU member state that member states are forbidden from carrying out any check on the certificates presented by the applicant. An obligation to recognise only exists in the case of a certificate which satisfies the pre-conditions set out in Directive 2005/36, specifically in Annex V to the directive. Where there are justified doubts – e.g. concerning the authenticity of the document, but also concerning the question of whether the minimum requirements under EU law for the corresponding qualification have been

met – a member state is allowed to demand from the issuing member state the corresponding certificates as proof (Article 50(2) of the directive).

The certificates must prove that medical studies have been completed *at a university or under the supervision of a university* for a minimum period of six years or at least 5,500 hours. If it can be seen from a certificate that these pre-conditions under EU law have not been met, then a certificate which would justify the principle of mutual trust has not been presented.

### ***b) Authority to review diplomas, examination results and training certificates***

According to the rulings of the European Court of Justice the resulting powers of scrutiny are, of course, very limited. In its decisions of 23<sup>rd</sup> October 2008 (case no. C-274/05, Commission/Greece, and case no. C-286/06, Commission/Spain) the European Court of Justice had to rule on the extent of the obligation of an EU member state to recognise diplomas which, following courses of study in its own sovereign territory, had been issued on the basis of franchise agreements with a recognised university in another EU member state by the authorities of that state. In both cases the authorities of the affected states refused to recognise the training courses which had been completed at private institutions in their sovereign territory – where these institutions had been recognised within the context of so-called “confirmatory agreements” by the responsible authorities of another EU member state for the purpose of issuing a diploma – as “a university or higher education qualification as defined in Directive 89/48/EG on the recognition of professional qualifications” and refused to recognise the “diplomas based on such a training course”. Greece took the view that diplomas issued by another member state on the basis of training which had been completed wholly or substantially in its own sovereign territory and which did not comply with its own legal requirements could not possibly be recognised and that, moreover, the Greek authorities were allowed to examine whether the institution responsible for the training met the requirements of a “university” or “institution of higher education”.

The European Court of Justice rejected both these objections. First of all, it pointed out that the term “training” as used in the directive covers both training which has been obtained completely in the member state which issued the diploma and “training which has been obtained [partly] or completely in another member state” (ruling Commission/Greece, note 28; likewise European Court of Justice of 29<sup>th</sup> April 2004, case no. C-102/02 – Beuttenmüller, note 41). The court then went on to explain that, according to the system of rules, a diploma is not “recognised on the basis of the value inherent in the training which it certifies but because it opens the way to a regulated profession in the member state in which it has been issued or recognised” (as mentioned above, note 29). The European Court of Justice went on to make the following observations about Greece’s objections:

“In this context it should be pointed out that the host member state is expressly obliged in Article 8(1) of Directive 89/48 to recognise in all cases the certificates issued by the responsible authorities of the other member states as proof of the fact that the pre-conditions for the recognition of a diploma have been met. It follows from this that the host state cannot examine the

basis on which these certificates were issued. However, it is possible for the host state to carry out checks in respect of those pre-conditions in Article 1a of Directive 89/48/EG which have clearly not yet been met with regard to the wording of the certificates.

For this reason, the question as to whether the educational institution in which the holder of the diploma completed his training is "a university or a higher education institute" or "another education and training institution with an equivalent level" as defined in Article 1a (1) of Directive 89/48/EG can only be examined in relation to the regulations which apply in the context of the professional training system of the member state to which the authority that issues a diploma belongs. Consequently, the authority responsible for issuing the diploma must make an assessment of this question. It must be certain that the diploma is only issued to persons who are sufficiently qualified to work in the regulated profession to which the diploma provides access."

In the judgement *Valentina Neri* (European Court of Justice of 13<sup>th</sup> November 2003, case no. C-153/02) the European Court of Justice had to rule on the refusal of the Italian authorities to recognise a university diploma which had been issued by a British private university to Italian citizens on the basis of a distance learning programme which had been substantially completed in Italy. The European Court of Justice invoked the concept of market freedoms in rejecting Italy's position, which was that a member state can in principle refuse to recognise a course of study which has been completed in its sovereign territory on the basis of a "franchise agreement" between a domestic institution and a university of another member state. Even if the reasons for the court's decision say nothing about the legal consequences of a degree award that has possibly not been made properly (the case was about the refusal in principle of the Italian authorities),

Cf. *Hailbronner*, Academic degrees from foreign EU universities in the Distance Learning Association with limited companies as training providers, *EuZW (a legal publication)* 2007, 39.

it can still be inferred from the judgement that the European Court of Justice refuses to deny to commercial professional training that is organised on a cross-border basis an equal status with a domestic course of training.

The conclusions reached by the European Court of Justice regarding Directive 89/48/EG on the recognition of diplomas for regulated professions where the content of the training course has not been harmonised under EU law and for which, for this reason, unconditional and automatic recognition is not prescribed can be applied to diplomas harmonised under EU law in respect of the scope of the obligation of member states to recognise qualifications and their powers to scrutinise.

This is also indirectly confirmed by the judgement of the European Court of Justice of 19<sup>th</sup> June 2006 in the case *Tennah-Durez* (case no. C-110/01). The question referred to the European Court of Justice by the national court was whether the national authorities of another member state are bound by the medical diploma issued by the Belgian authorities, where this diploma had been issued by the responsible Belgian authorities on the basis of medical training which had only been partly completed in

Belgium. The response of the Court of Justice to this question was that it is solely the responsibility of the authority issuing the diploma to ensure that the training requirements have been met to a full extent in terms of both quality and quantity. The court went on to say that the issuing authority must take into consideration in such a matter that the medical diploma gives the holder a medical "passport" with the guarantee of freedom of movement without the host member state being allowed to cast doubts on this professional qualification. It then concluded that, for these reasons, it was not possible to achieve a restriction of the obligation to recognise qualifications by means of a criterion that the "training [should be completed] predominantly at a university in the European community."

Following the logic of this argument, the European Court of Justice states that it is in favour of a *strict binding effect*. In its view, the principle of automatic and unconditional recognition would be seriously undermined if member states were free to question the grounds on which the responsible institution of another member state made its decision to award a diploma (judgement, note 75). This is only different if the training has been overwhelmingly completed in a non-member state.

On the question of the circumstances in which "**justified doubts**" exist concerning the compliance of a medical diploma with EU law the European Court of Justice merely refers to the option of obtaining an additional certificate regarding the completion of a course of training which meets the requirements of the directive or of requesting confirmation from the issuing member state. In both cases, the host member state (i.e. the member state in which recognition is being applied for) is bound by such a certificate or confirmation (note 78). In this regard the European Court of Justice refers to a general principle that member states, where serious doubts are expressed, are obliged to check the certificate and, where necessary, to withdraw it.

It follows from this that member states are indeed allowed to carry out a formal check of the medical diplomas and examination certificates issued by other EU member states to see if they comply with the requirements under EU law set out in Article 24 of Directive 2005/36/EG. However, when it comes to recognising a medical diploma that has been properly issued in another member state, recognition cannot be denied to basic medical training that has been completed in part or in whole at institutions in Germany organised under private or public law with the argument that the part of the training completed in Germany does not satisfy requirements under EU law or those of the Federal German Regulations on Medical Licensing.

Even though this means that it is not possible to call into question directly the legal effectiveness of a corresponding qualification or certificate from another member state, the other member state still has the obligation to ensure that it only furnishes those training courses with corresponding proof if they meet the minimum requirements of Directive 2005/36/EG. A member state is in breach of EU law if, as part of a franchise training programme, the part of the training completed abroad is carried out neither at a university nor under (sufficient) supervision by its own university and if the state still issues corresponding proof of training. In such a case, the EU member state that is in breach of EU law can be required to conduct itself in future in a way that is in compliance with EU law. If necessary, it can be forced to do this by infringement proceedings. In addition, it is also possible for the authorities in

the member state in which part of the training is carried out for a university abroad to proceed against an involvement in such a franchise agreement if it is clear that proof of training is being issued in the participating member state where this proof is clearly not based on the specifications of Directive 2005/36/EG (cf. Part I of the expert report).

This interpretation is based on Article 50(2) of the directive. According to this provision, a member state can, where it has "justified doubts", demand from the responsible authorities of a member state confirmation of the *authenticity* of the certificates and proof of training issued in that member state and, where necessary, confirmation of the fact that, for the professions stated in Chapter III, the applicant fulfils the minimum training requirements that are required in Articles 24 ff. of Directive 2005/36/EG. It can be inferred indirectly from this provision that the (formal) authority to scrutinise the certificates presented by the applicant relates not only to the authenticity of the certificates presented but also to what they actually contain. It must be clear from the certificate that is presented that the completed training corresponds in its content to the stipulations of EU law and that the studies completed by the holder of the certificate were completed in the context of a programme of medical studies at a university or at institutions under the supervision of a university.

Article 50 of Directive 2005/36/EG does not contain any specifications about the amount of university training compared with the amount of training provided at other (training) institutes under the supervision of a university. At any rate, it can be seen from the wording that the university bears the overall responsibility for the training and that practical medical training, insofar as it is carried out at non-university institutions, must be carried out under the supervision of the medical faculties of a "university" that are responsible for the entire medical training. This must also be clear to see from the certificates that are presented and, where necessary, must be shown by express confirmation which can be demanded where there are justified doubts. The term "under the supervision of a university" should be interpreted with regard to the purpose of the provision, which is to ensure that the medical faculties take responsibility for ensuring that the standards set out in Article 24 are observed.

Article 50(3) of Directive 2005/36/EG contains a special provision for **qualifications** which have been issued by the responsible authority of a member state in accordance with Article 3(1) of Directive 2005/36/EG and **which relate to training delivered in whole or in part in another member state**. Where there are justified doubts, the host member state (i.e. the member state obliged to provide recognition) can check with the responsible office of the issuing member state:

- whether the training course in the relevant institution has been certificated by the training institution of the issuing member state;
- whether the qualification that has been issued corresponds to what would have been awarded if the training course had been completed in full in the issuing member state;
- whether the qualification confers the same rights to practise the profession in the sovereign territory of the issuing state.

The particular powers of scrutiny according to Article 50(3) relate on the one hand to compliance with the accreditation requirements which apply under the law of the member state that issues the diploma. Insofar as a member state requires an official accreditation of a course of medical studies under its laws, this then also applies to a course of study carried out in another member state. The "official certificate" to which Article 50 (3a) refers, relates only to a course of study as such, not to a part of training which is to be completed in another member state. However, this does not mean that the training components delivered in another member state do not have to be included in the accreditation of the course of study. A component part of the accreditation of a course of medical study that is partly completed abroad will normally be the suitability of the relevant institution for the training of doctors. Of relevance here are the regulations of the member state which issues the diploma.

On the other hand, the intention is to ensure that a member state does not issue qualifications which are good for "export" purposes, i.e. which make it possible for the holder to practise his/her profession without restriction in other states of the EU but not in the member state which issues the qualification. At the same time, this is intended to ensure quality because only those diplomas have to be recognised which are completely equivalent to the domestic diplomas of the issuing member state. The wording and the logic of this provision mean that an independent check on the content of a course of training which has been completed in the sovereign territory of a state other than the member state issuing the qualification is not covered by the provision. Therefore, a host member state can merely examine whether the qualification is in formal compliance with the relevant regulations of the issuing member state. It is true that the way in which this regulation developed indicates that it aims to prevent fraud:

"Art. 50 allows the Member States to carry out certain checks with the Home Member State to prevent fraud for training carried out under a franchise agreement. As a result, the common position recognises that training qualifications acquired under a franchise agreement are, as a matter of principle, covered by the directive".

(Joint Council Position of 21<sup>st</sup> December 2004, Council doc. 13781/2/04).

However, it is not possible to infer from this that the member state with the obligation to provide recognition has greater general powers to carry out checks with regard to the suitability and qualifications of the persons involved in delivering external training.

### ***c) Where an abuse of legal rights begins***

The rules for the recognition of a qualification to practise medicine which has been obtained in an EU/EEA state and which corresponds to the rules set out in Directive 2005/36/EG only apply in principle to EU citizens with freedom of movement who wish to work in another member state than the one in which they have acquired their professional qualification. German citizens too who do not meet the requirements of the licencing regulations for doctors or who have not completed certain prescribed elements of training but who have acquired the diploma of another

EU member state can invoke this directive. Admittedly, Recital 11 of the directive expressly states that the directive is not intended to interfere with the justified interests of member states in order to prevent some of their citizens from improperly avoiding the application of national law.

However, the Court of Justice has placed a tight restriction on the application of this clause and has only assumed there to be an abuse of rights under EU law in cases in which the aim pursued by the EU legislator of having a regulation would not be achieved.

Cf. on legal abuse of EU freedom of movement, *Hailbronner*, in an anniversary publication for R. Stürner, 2013, p. 1903 f.).

The fact that a German citizen circumvents the (stricter) German requirements regarding basic medical training by obtaining a professional qualification in another EU member state does not constitute an abuse of rights (cf. on the granting of a licence to practise as a dentist to an applicant who previously had failed the preliminary medical examination in Germany, Higher Administrative Court of Münster, NJW 1995, 1632; also section 3(1), sentence 8 of the Federal German Regulations on Medical Licensing).

An abuse of the law cannot be deemed to have taken place where, with due consideration for the regulations under EU law for setting minimum training standards, use is being made of the freedom of establishment, the freedom to provide services and the freedom of movement to offer cross-border courses of medical studies. It is true that Directive 2005/36/EG concerning the recognition of professional qualifications does not interfere with the powers of member states to set up their own regulations for the course content of medical studies and to provide for stricter requirements for the acquisition of a licence to practise medicine in Germany than the minimum requirements provided for by the directive. However, this does not give that state the power to place restrictions on a medical training course which is delivered in cross-border cooperation with German university and extra-university institutions and which is partly delivered in Germany according to the training regulations of another EU member state with due regard for the standards prescribed by EU law. Nor does it give that state the power to exclude a foreign professional qualification acquired on this basis from recognition. Irrespective of this, there remains of course the political option to point out to the state issuing the qualification that the training provided in its territory and according to its laws does not meet the standards required by EU law.

On initiating infringement proceedings, see no. 5 below.

However, the limits to exercising the guarantees under EU law of professional and educational freedom are reached when the exercise of these freedoms serves the sole purpose of undermining the licensing regulations regarding basic medical training. The aims pursued by the directive on the recognition of professional qualifications of promoting market freedoms in a joint internal market are based in principle on the model of achieving liberalisation by "automatic recognition" despite differences in education and training insofar as minimum requirements under EU law are observed. The directive is not intended to call into question the principle that

German regulations – subject to the minimum standards required by EU law - apply to medical training in Germany. The aim of liberalisation as defined above would be missed entirely, however, if medical training were to be completed predominantly in Germany but were to be delivered “pro forma” in conjunction with a (private) university of another EU member state solely for the purpose of undermining the licensing regulations in order to achieve recognition in Germany of the qualification to practise medicine that had been acquired on this basis.

This also applies if franchise constructions are used to undermine the minimum requirements of Article 24 of the directive whereby substantial parts of the medical training or the entire medical training is provided solely at one or several hospitals (“bedside teaching” – see above) without sufficient provision being made for academic/scientific training at a university. This would constitute an abuse of the law.

It is also an abuse of the law to invoke the obligation to provide automatic recognition if an EU member state is issuing diplomas or certificates which intend to undermine the standards of a course of medical training with regard to the scientific/academic nature of the training as set out in the directive. The principle of automatic and unconditional recognition of medical diplomas issued by other EU member states serves to open up the freedom of movement across the EU for doctors to be employed or self-employed in the medical profession. The freedom of movement which this achieves is subject to the proviso under EU law of securing a high-quality of medical provision for the population. For this reason, the rulings of the European Court of Justice recognise that the protection of the general public from persons practising medicine who have been given training of insufficient quality and the guarantee of a high standard of professional training represent a limit to market freedoms (cf. judgement *Valentina Neri*, case no. C-153/02, note 46). Therefore, insofar as the desire to achieve the recognition of diplomas is consciously aiming to undermine the standards set out in the directive, an abuse of the law is deemed to have taken place.

However, the limits under the law indicated here have not been specified up to now. There is no evidence of relevant national and European case law. In general, the European Court of Justice has shown itself to be reluctant with regard to applying the idea of an abuse of the law. This is particularly evident in the assessment reached under EU law of the relevance of studies completed in EU member states abroad.

#### **4. Requirements under EU law for counting study which has been completed in a practical or theoretical part of a medical course of study at a foreign institution of higher education**

As a rule, cross-border courses of medical study are characterised by the fact that parts of the training are completed in several EU member states and/or non-EU member states. Typically, a distinction is drawn between the teaching of basic theoretical knowledge and skills for the diagnosis of illnesses and clinical practice. It follows from Article 24 of Directive 2005/36/EG that medical training overall must be carried out at a state or state-recognised university, whereby the generally recognised criteria under EU law as to the requirements that must be met for an institution to be a university must be taken as a pre-requisite. The further

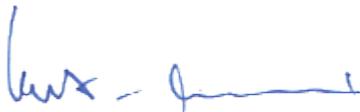
requirement that the training must be provided at a university or “under the supervision” of a university means that institutions outside of the university can also be involved (e.g. during the practical year) insofar as they are under the supervision of a university, as already explained.

Article 24 does not prescribe the areas in which or the extent to which phases of training outside of the university that are completed in an EU member state abroad or at home are permissible as component parts of a university medical education which leads to the acquisition of a qualification to practise medicine, but leaves this to national law. In principle, therefore, it is the job of the member states to determine the extent to which time spent or training completed in an EU member state abroad or at home is to be recognised as part of the studies prescribed in national education and training law (regulations on medical licensing) insofar as the minimum requirements of Article 24 have been met.

## **5. Conclusions regarding European law**

EU law requires member states to recognise automatically and unconditionally a diploma for professional medical training of another EU member state when it is listed in the Annex to Directive 2005/36/EG. It is the exclusive responsibility of the issuing EU member state to check the requirements under EU law for the issuing of a medical diploma. The possibilities for checking the recognition of a diploma which, in formal terms, has been issued correctly by another EU member state essentially restrict themselves to the request for additional certificates or confirmation – as set out in Article 50 of Directive 2005/36/EG – if there are justified doubts regarding the authenticity or correctness of these certificates.

This doesn't say anything about the pre-conditions which the issuing member state has to observe with regard to the requirements set out in Article 24. However, if there are indications that this is not a diploma which is formally correct because it was issued even though the minimum requirements according to Article 24 of Directive 2005/36/EG have not been observed (scientific/academic training at a university), there are options according to Article 50(2) of the directive and, if necessary, also Article 50(3) of the directive. Furthermore, the member state – if compliance with the requirements of the directive has been certified even though it shouldn't have been – can ask the European Commission to initiate review proceedings and, if necessary, infringement proceedings. Alternatively, the member state can initiate infringement proceedings itself before the European Court of Justice.

  
Prof Dr Max-Emanuel Geis

  
Prof Dr Kay Hailbronner, LL.M.