

REVIEW OF THE LAW RELATING TO THE FREE MOVEMENT OF LAWYERS WITHIN THE EU

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Abstract:

The European Union law offers lots of opportunities to legal professionals, who want to benefit from internal market possibilities. The article contains a review of the provisions of the directives regulating the issue of the free movement of legal professionals within the European Communities. The article's main aim is to give a general idea of how the system is constructed and how it is working.

Key words:

Legal profession; free movement; establishment; provision of services; recognition of diplomas.

1. BACKGROUND ISSUES

The Treaty of Rome 1957 established four fundamental freedoms of the internal market. Workers, including professionals were granted the right to move freely within the borders of the European Communities [EC]. Lawyers were one of the first groups that started to benefit from the rights that were provided for by the provisions of EC Treaty and consequently started moving around Europe.

The development of the rules regulating the free movement of legal professionals within the EU illustrates the expansion and enlargement of the EC, as both processes run parallel to each other. Deriving from judgments of the European Court of Justice, an extensive set of legal rules has been established. Currently, the legal professional who wants to practice law in one of the EC Member States, can choose from a wide range of possibilities.

The aim of this article is to review the provisions of the directives regulating the free movement of legal professionals within the EU, giving a general idea of how the system is constructed and how it is working. The article does not focus on the relevant rulings of the European Court of Justice, as those in general mirror the Directives rationale.

2. PARTICULAR REGULATIONS

In general, the provisions on the free movement of lawyers come down to the basic dichotomy, which differentiates between the temporary provision of services and permanent establishment in a host Member State [MS]. In the latter situation, one deals either with the law relating to the recognition of the professional qualifications, or with the rules regulating legal practice in the host MS under one's home professional title.

2.1 PROVISION OF SERVICES

The provision of legal services is covered by the principles of the Council Directive 77/249/EEC of 22 March 1977 *to facilitate the effective exercise by lawyers of freedom to*

*provide services*¹, which applies to the activities of lawyers pursued by way of provision of services and defines a notion of a 'lawyer' by referring to the list of designations under which the legal profession is pursued in a different Member States². Consequently, it applies to Polish '*adwokat*' or '*radca prawny*' as well as to Hungarian '*Ügyvéd*', or British '*barrister*' or '*solicitor*'. Note however, that some discretion was left to the Member States, which may reserve to prescribed categories of lawyers the preparation of formal documents for obtaining title to administer estates of deceased persons, and the drafting of formal documents creating or transferring interests in land (for example Polish '*notariusz*')³.

The host MS may require the lawyer providing services to establish his qualifications as a lawyer with the local competent authority⁴. According to the Directive, the incoming lawyer must use a professional title as used in the MS from which he comes, indicating the membership to the professional organisation or the court of law before which he is entitled to practise⁵. In general the incoming lawyer is entitled to represent the clients in legal proceedings or before public authorities under the same conditions as the local lawyers, being subject to the professional rules of conduct of the host MS, yet without prejudice to obligations in his country⁶. However, in a situation when the lawyer is exercising other activities than the representation of the client, he/she remains subject to his home MS rules of conduct, though at the same time shall respect the rules of conduct of the legal profession in the host MS, especially those concerning the incompatibility of the exercise of the activities of a lawyer with the exercise of other activities in that State, professional secrecy, relations with other lawyers, the prohibition on the same lawyer acting for parties with mutually conflicting interests, and publicity⁷. According to the provisions of the Directive the latter rules are applicable only if they are capable of being observed by a lawyer who is not established in the host MS and to the extent to which their observance is objectively justified to ensure, in that State, the proper exercise of a lawyer's activities, the standing of the profession and respect for the rules concerning incompatibility⁸. It is so-called '*double deontology*' rule.

Under the Directive, host Member States are vested with some special powers in respect of lawyers providing the services. Firstly, the host MS may require the incoming lawyer to be

¹ Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ L 70/100). Note that under the Lisbon Strategy the horizontal Directive 2006/123/EC of 12 December 2006 on services in the internal market (OJ L 376/36) was adopted. It also covers a provision of legal services, but in accordance with its Article 3 in the case of conflict of the provisions of the horizontal directive with other pieces of EC law, the provisions of specific sectoral acts prevail.

² *Ibid.*, Article 1 (2).

³ *Ibid.*

⁴ *Ibid.*, Article 7 (1).

⁵ *Ibid.*, Article 3.

⁶ *Ibid.*, Article 4 (2).

⁷ *Ibid.*, Article 4 (4).

⁸ *Ibid.*

introduced, in accordance with local rules or customs, to the court and/or the relevant Bar⁹. Secondly, it may require the lawyer to work in conjunction with a local lawyer, who would be answerable to the local Bar. Thirdly, those Member States, which exclude lawyers in salaried employment from the representation of its companies/entities, may impose similar restrictions on the incoming lawyers¹⁰.

Finally, in a situation of non-compliance with the local rules of conduct and professional obligations, the local Bars may determine according to the local rules and procedures the consequences of such non-compliance, and when necessary may notify the competent authority in the home MS of the decision taken against the incoming lawyer¹¹. However such a decision is not binding for the lawyer's home Bar and does not oblige the home MS authorities to take appropriate actions in accordance with national rules and procedures. As a result it seems that a practitioner may return home and carry on with his legal practice with no adverse implications of the unfavourable decisions of the host MS authorities.

2.2 RECOGNITION OF LEGAL QUALIFICATIONS

The issue of the recognition of legal qualifications is covered by the horizontal Directive 2005/36/EC *on the recognition of professional qualifications*¹². The Directive covers the recognition of professional qualifications for lawyers whose purpose is the immediate establishment under the professional title of the host MS.

The Directive applies to all EU nationals wishing to pursue a regulated profession in a MS other than that in which they obtained their professional qualifications, on either a self-employed or employed basis¹³. The purpose of the Directive is to establish the rules under which Member States will allow the access to or pursuit of a regulated profession in their territory (hereinafter referred to as the host MS) and the rules according to which host MS shall recognise professional qualifications obtained in one or more other Member States (referred to hereinafter as the home MS)¹⁴.

The Directive sets out the basic rules for qualifications' recognition process, indicating documents and certificates that might be demanded by the competent authorities of the host MS which decide on an application for recognition of professional qualifications¹⁵.

⁹ *Ibid.*, Article 5.

¹⁰ *Ibid.*, Article 6.

¹¹ *Ibid.*, Article 7 (2).

¹² Directive 2005/36/EC of 7 September 2005 on recognition of professional qualifications (OJ L 255/22). Note that the system of the recognition of the professional qualifications was established under the provisions of the Directive 89/48/EEC of 21 December 1988 on general system for recognition of higher-education diplomas awarded on completion of professional education and training of at least 3 years' duration (OJ L 19/16) and in large it remained unchanged in the 2005 Directive, which was passed under the Lisbon Strategy.

¹³ *Ibid.*, Article 2 (1).

¹⁴ *Ibid.*, Article 1.

¹⁵ *Ibid.*, Article 50.

In case of legal professionals a ‘*professional qualification*’ is understood as a ‘*a diploma certifying that the holder has successfully completed a post-secondary course of at least four years’ duration, or of an equivalent duration on a part-time basis, at a university or establishment of higher education [...and] that he has successfully completed the professional training required in addition to the post-secondary course*’¹⁶.

Under Article 13 the competent authority of the host MS shall permit access to and pursuit of that profession, under the same conditions as it applies to its nationals. However, the Member States are also provided for with the compensation measures. Namely host MS has a right to decide on either an adaptation period or aptitude test that would be required to take by the applicants representing ‘*professions whose pursuit requires precise knowledge of national law and in respect of which the provision of advice and/or assistance concerning national law is an essential and constant aspect of the professional activity*’¹⁷.

The ‘*adaptation period*’ is defined as a period of a supervised practice under the responsibility of a qualified member of the profession, which is subject to an assessment and might be accompanied by further training¹⁸.

The ‘*aptitude test*’ is a test limited to the professional knowledge of the applicant, aiming at assessment of his/her abilities to pursue a regulated profession in the host MS. The list of subjects covered by the test shall be set up on the basis of comparison of the education and training required in the host MS and that already received by the applicant. The test must take account of the fact that the applicant is already a qualified professional in his home MS and therefore it should only verify the knowledge of those subjects and professional rules, which are essential to practice as a lawyer in host MS¹⁹.

As a result of the process of recognition of the professional qualification, the applicant shall be granted with an access to the same profession of the host MS, as that for which he/she was qualified in his/her home MS. Consequently he/she has a right to pursue the profession under the same conditions as local professionals²⁰. Persons whose professional qualifications were recognised may use the professional title of the host MS and make use of any associated initials²¹.

It is worth mentioning that the Directive establishes a certain novelty, determining that professionals who are benefiting from the recognition of professional qualifications shall have a knowledge of languages necessary for practicing the profession in the host MS²². Peculiarly,

¹⁶ *Ibid.*, Article 11 (c).

¹⁷ *Ibid.*, Article 14 (3).

¹⁸ *Ibid.*, Article 3 (1) (g).

¹⁹ *Ibid.*, Article 3 (1) (h).

²⁰ *Ibid.*, Article 4.

²¹ *Ibid.*, Article 52 (1).

²² *Ibid.*, Article 53.

the provisions of the Directive do not reach beyond that bare statement, i.e. do not establish a system of verification of language proficiency.

Summing up, the fundamental assumption standing behind the Directive is that the recognition should be granted automatically to the *'finished/end products'*, i.e. the fully qualified lawyers, and not solely to the university degrees²³.

2.3 ESTABLISHMENT IN A HOST MEMBER STATE

The situation of a legal professional who wants to practice the profession on a permanent basis in a self-employed or salaried capacity in a Member State other than in which the professional qualification was obtained is regulated under so-called Establishment Directive (Directive 98/5/EC)²⁴.

According to Article 2 any lawyer is entitled to practice on a permanent basis in another MS under the home-country professional title, once fulfilling the formal obligation of the registration with the competent local authority²⁵. The professional title must be expressed in the official language of his home MS, in a manner which will avoid the confusion with the professional title of the host MS²⁶. The incoming lawyer is entitled to carry on the same professional activities as local lawyers and may, inter alia, give advice on the law of his home MS, on Community law, on international law and on the law of the host MS²⁷, complying with the local rules of the procedure. In respect of the activities pursued in the territory of the host MS, the lawyers are subject to the local rules of the professional conduct, notwithstanding the obligations he is subject to from his home Bar. Accordingly, the lawyer may be requested to prove that he is covered by the appropriate indemnity insurance or a professional guarantee fund, and if not shall be obliged to do so²⁸. In case of disciplinary proceedings taken against the incoming lawyer in relation to his professional activities in the host MS, the rules of the procedure, penalties and remedies provided for in the host MS shall apply²⁹. Yet, the Directive imposes the obligation on the MS to cooperate with each other before and during the proceedings³⁰.

²³ Note however that the ruling of the European Court of Justice in *Morgenbesser case* undermines this principle, as it extends the right of recognition of qualifications to those who are still in training and are not yet a fully-qualified lawyers. For details see: Case C-313/01 *Christine Morgenbesser v. Consiglio dell'Ordine degli avvocati di Genova* [2003] ECR I-13467.

²⁴ Directive 98/5/EC of 16 February 1998 to facilitate practice of profession of lawyer on a permanent basis in a Member State other than in which the qualification was obtained (OJ L 77/36).

²⁵ *Ibid.*, Article 3.

²⁶ *Ibid.*, Article 4 (1).

²⁷ *Ibid.*, Article 5.

²⁸ *Ibid.*, Article 6.

²⁹ *Ibid.*, Article 7 (1).

³⁰ *Ibid.*, Article 7 (2-5).

The rules set out in the Directive give some more opportunities to incoming lawyers. The Directive enables to circumvent the strict requirements on compensation measures set out in Directive *on the recognition of professional qualifications* – in principle, it is possible to gain admission to the local Bar without the need to sit the aptitude test or to undertake the adaptation period. According to Article 10 a lawyer, who practices effectively and regularly for a period of at least three years the law of the host MS, shall be exempted from the obligation to take compensation measures. According to the procedure established under the Directive, the interested party shall provide the competent authority of the MS with any relevant and appropriate documents and information on the nature of the activities undertaken by him/her in the last 3 years time period. After the verification process, a positive decision of the competent authority means that the lawyer may use both professional titles, i.e. his home-country professional title expressed in his home MS language, as well as the professional title corresponding to the profession of lawyer in the host MS³¹.

3. SUMMARY

Nowadays the EU law offers a basket full of opportunities to legal professionals, who want to benefit from internal market possibilities. One might either decide to move his/her legal practice to another MS or just to provide temporary services.

The development of EC law within the area of free movement of workers removed major impediments for those courageous individual lawyers, who want to practice law in different Member States. It seems that currently it is relatively easy for legal professionals to move from one MS to another, and the only restraint is one's willingness.

Literature:

- Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ L 78/10);
- Directive 89/48/EEC of 21 December 1988 on a general system for recognition of higher-education diplomas awarded on completion of professional education and training of at least 3 years' duration (OJ L 19/16);
- Directive 98/5/EC of 16 February 1998 to facilitate practice of profession of lawyer on a permanent basis in a Member State other than in which the qualification was obtained (OJ L 77/36);
- Directive 2005/36/EC of 7 September 2005 on the recognition of professional qualifications (OJ L 255/22);
- Directive 2006/123/EC of 12 December 2006 on services in the internal market (OJ L 376/36);

³¹ *Ibid.*, Article 10.

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Brno : Masaryk University, 2009, ISBN 978-80-210-4821-8*

- Case C-313/01 *Christine Morgenbesser v. Consiglio dell'Ordine degli avvocati di Genova*
[2003] ECR I-13467.

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