



# Regulation and mobility of lawyers in the European Union

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# Legal basis

- EC Directive 98/5 of 16 February 1998 to facilitate the practice of the profession of the lawyer (Establishment Directive)
  
- EC Directive 1977/249 of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (Services Directive)



## Art. 6 – Establishment Directive

1. Irrespective of the rules of professional conduct to which he is subject in his home Member State, a lawyer practising under his home-country professional title shall be subject to the same rules of professional conduct as lawyers practising under the relevant professional title of the host Member State in respect of all the activities he pursues in its territory.
  2. Lawyers practising under their home-country professional titles shall be granted appropriate representation in the professional associations of the host Member State. Such representation shall involve at least the right to vote in elections to those associations' governing bodies.
  3. The host Member State may require a lawyer practising under his home-country professional title either to take out professional indemnity insurance or to become a member of a professional guarantee fund in accordance with the rules which that State lays down for professional activities pursued in its territory. Nevertheless, a lawyer practising under his home-country professional title shall be exempted from that requirement if he can prove that he is covered by insurance taken out or a guarantee provided in accordance with the rules of his home Member State, insofar as such insurance or guarantee is equivalent in terms of the conditions and extent of cover. Where the equivalence is only partial, the competent authority in the host Member State may require that additional insurance or an additional guarantee be contracted to cover the elements which are not already covered by the insurance or guarantee contracted in accordance with the rules of the home Member State.
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## - Establishment

- \* Distinction: providing on a permanent basis or providing temporary services
  - E.g.: opening a law firm
  - Assisting a client in another member state
- \* A lawyer practising under her/his home-country professional title who has effectively and regularly pursued a professional activity in the host Member State for a period of at least three years but for a lesser period in the law of that Member State may obtain from the competent authority of that State admission to the profession of lawyer in the host Member State and the right to practise it under the professional title corresponding to the profession in that Member State (Art. 10.3 Establishment Directive)
- \* Court of Justice (*Gebhard* C-55/94) stated that an establishment implies a stable and continuous basis of professional activity



## - Obligation to register

- \* Lawyer must register with the bar of the host state
  - s/he must submit a certificate attesting to her/his registration with the home member state
  - Bar of host state may require that the certificate is not more than three months old
  - the certificate must mention all disciplinary proceedings which have commenced in the home Member State and the sanctions imposed
  
- \* The host bar must publish in its list all foreign registered lawyers
- \* They are entitled to appropriate representation in the bar authorities
  - at least a right to vote in elections for the bar governing bodies
- \* Refusal to register or cancelling a registration must be motivated
- \* If it is possible to register with more than one bar association, the applicant may choose
- \* In other countries, choose depending on language (Brussel) or the local bar of practice and if not the national bar



## - Refusal to register

- \* Under the Establishment Directive:
  - lawyer is not an EU national
  - the lawyer does not hold a professional indemnity insurance
    - professional guarantee fund, insurance in home state suffice
  - the lawyer is a member of a grouping with non-lawyers
- \* Local bar can ask for a fee (cannot be higher than lawyers of the host member state)
- \* A bar cannot add criteria beyond those (such as proficiency of language)
- \* To be distinguished from case where lawyer wants to become a full member of the bar of the host Member State
- \* E.g.: trainee who in a law firm decides to establish in an office of a country where not compulsory trainee rules apply



## - Title

- \* Title that refers to profession of lawyer (under home Member State rules)
- \* Should be understandable for the average client
- \* Not necessarily title of host state if this may lead to confusion that s/he is registered as a lawyer with the host state
  
- \* Host bar may insist on adding the reference to the home bar
- \* CCBE advises to refer to the home bar registration

## - Employment

- \* In the same manner as lawyers of host bar
  
- \* Professional indemnity insurance (host unless at home)

## - Continued education of host bar applies

- \* Unless reference is made to home bar education which must be continued



## - Law firms and groupings

- \* Lawyers working together in home state, may continue to work together in host state
- \* However, if lawyers work with other professions, the continued working together in host state depends on the local rules of the host state which may prohibit this grouping
  
- \* Alternative business structures (ABS), allowing non-lawyer participation
  - quid professional secrecy
- \* Capital interest by non-lawyers
  - family members, outgoing lawyers
  - managers
  - listed law firms
  
- \* Host member state (the bar) may refuse working in an ABS if one of following conditions is met
  - capital of the grouping is held entirely or partly by non-lawyers, or
  - the name under which the grouping practises is used by non-lawyers, or
  - the decisionmaking power is exercised by non lawyers
  
- \* Branches with only lawyers: overriding reasons of general interest and subject to proportionality test on the basis of case-by-case evaluation
  - if the rules governing the grouping of lawyers are incompatible with the rules of the host Member State: bar may oppose opening of branch (without further justification)





## Art. 4 Services Directive

1. Activities relating to the representation of a client in legal proceedings or before public authorities shall be pursued in each host Member State under the conditions laid down for lawyers established in that State, with the exception of any conditions requiring residence, or registration with a professional organization, in that State.

2. A lawyer pursuing these activities shall observe the rules of professional conduct of the host Member State, without prejudice to his obligations in the Member State from which he comes.

4. A lawyer pursuing activities other than those referred to in paragraph 1 shall remain subject to the conditions and rules of professional conduct of the Member State from which he comes without prejudice to respect for the rules, whatever their source, which govern the profession in the host Member State, 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 publicity. The latter rules are applicable only if they are capable of being observed by a lawyer who is not established in the host Member State 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 incompatibility.



## - CCBE has combined both rules in two set of rules

- \* Foreign lawyer is subject to rules of his original bar of which s/he remains a member, and subject to the professional rules of the bar of the country where s/he has established an office
- \* In the event of conflicting rules, rules of host state override the home state rules
- \* Representation of clients in legal proceedings of host state is subject to rules and conditions applicable to lawyers of the host state
- \* This applies to
  - specific proceeding-related professional rules
  - rules of civil and criminal proceeding
  - for ex. rules relating to communication between lawyers
- \* In the event in relation to offered legal services several professional rules apply, the host state rules apply, but for cross border matters, the strictest rules apply




## - Disciplinary sanctions

- \* Possible in both jurisdictions, as s/he is subject to the professional rules of both jurisdictions
- \* This applies to the case of a lawyer having an office in a host country and her/his home country (registered with two bars)
- \* This applies also to the lawyer who is registered fully at both bars on basis of Article 10 Establishment Directive
- \* This does not apply to lawyers not established in another Member State (except if the local law provides otherwise)
- \* Neither applicable to a lawyer working in a local office of a law firm that is established in another Member State



## - Treatment of lawyers who offer services in other Member State

- \* Foreign lawyers need to benefit from same conditions as local lawyers in court and in relation with authorities (CJ, C-20/92, *Hubbard*)
- \* Same treatment in access to courts
  - no additional searches for safety reasons
  - no additional conditions for access to prisons
- \* Same protection of attorney-client privilege
- \* Some local legislation may limit access to criminal files
  - in such case work with local lawyer
  - idem, in case of access to electronic platforms set up by courts
- \* Access to private professional networks managed by the bar must be open in the same manner as for local lawyers (CJ, C-99/16 *Lahorgue*)



- \* **Conflict of interest**

- law firms need to apply the strictest rules

- \* **Incident before a judge**


- local bar is competent to intervene

- \* **Same right to be defended as a local lawyer**

- if the lawyer is held in custody, same support from local bar

## Correspondence between lawyers from different bars

- Sender wishes correspondence to be confidential s/he should indicate this in the letter (or without prejudice)
- Recipient should immediately indicate whether s/he can keep correspondence confidential



# Foreign lawyer can obtain host Member State professional title

## Subject to national legislation

- \* No harmonisation by European law
- \* But entitled to pass professional qualification test, i.e., an aptitude test or passing an adaptation period
- \* Alternative: three years effective or regular practice while established in the Member State
  - continuing practice without interruption other for normal events of everyday life (holiday)

# Questions?



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