The Practice of the Legal Profession in the European Union

Major Topics:

Lawyers – the Free Movement of Services

The Equivalence of Diplomas in Law

Lawyers – Right of Establishment

Notaries – Nationality Condition
The organisation of cross-border trade and entrepreneurial activity necessarily requires the expert contribution of lawyers, from business negotiations through the conclusion of commercial contracts to the settlement of legal disputes and the execution of court judgments.
Lawyers and cross-border trade

• Lawyers, who are well-versed both in national laws and EU law, and who practise their profession in more than one Member State of the Union are needed in the fields of law concerning business organisations, banks, contracts, securities, insurance, competition, public procurement, intellectual property and telecommunications.

• They work contributes to the creation of the single market.
Cultural ramifications

- The regulation of the legal profession also has cultural ramifications, however. All lawyers obtain their professional qualifications within the framework of university legal education in a particular Member State; so, in many ways, they are bound in their activities to the jurisdictions of their Member States, and they apply the rules of the national legal systems of their Member States, which manifest numerous particular characteristic features.
Legal education

• **Common core in the various systems of legal training** – in the study of the rudiments of Roman law, canon law, international law, or EU law;

• but, as a consequence of the **development of nation states** and the legal fragmentation of the European continent, legal education has necessarily focused on **national codes**, each bearing their particular **national characteristics**.
Different national rules

• Different rules apply to lawyers, regarding e.g. fees (success fee), the permissibility of partnerships with other professions or the advertising of lawyers’ activities.

• Thus, the terms *avvocato*, *barrister* or *Rechtsanwalt* are not only different language forms signifying a lawyer’s profession, but, to some extent, they also refer to different capacities, different legal background and knowledge.
Differences of Legal Education in the EU

- Different systems (Germany, France, UK, Hungary) – despite the Bologna process
- Different substance – despite EU law – national legal systems, codes (BGB, Code Civil, Codice Civile etc.)
- Different legal knowledge of JDs
The EU context

• The European Union (Community) has been striving to make the cross-border work of lawyers easier for decades, which primarily means ensuring for them the right of establishment (enterprise) and the freedom of providing services.

• For a long time, however, the mutual recognition of diplomas in law has run into various difficulties due to the significant differences in the legal training systems of the Member States.
Member States

• The Member States - reluctant to permit the practice of foreign lawyers for decades even in cases where problems of equivalence in law diplomas did not actually arise.

• In such cases, public policy, the protection of clients and the special responsibility inherent in participation in the administration of justice were invoked in support of restrictive measures.

• Several directives

• Rulings of the European Court
With regard to cross-border services, we must first mention the provisions of TFEU. By virtue of the Article 56 TFEU (former Article 49 of the EC Treaty),

- the restrictions on services were to be progressively abolished in respect of those citizens of the Member States who live in a Member State of the Union other than that of the person providing the service concerned.
Directive 77/249/EEC

- First step: Directive 77/249/EEC of the Council - to ensure the effective exercise of the freedom to provide services by lawyers.
- The Directive defines the professional titles attainable in the Member States which entitle a bearer to practise the legal profession in another Member State;
- in other words, it determines the person who is to be regarded as a lawyer, including, among others, “advocate, barrister and solicitor” in the United Kingdom, “avocat” in France, “Rechtsanwalt” in Germany, or – since May 2004 – “ügyvéd” in Hungary.
Residence

• The Directive lays down that the regulations of Member States requiring permanent residence or membership in a professional organization (e.g. a bar) as a condition of exercising the legal profession in a given country shall not be applicable to lawyers.

• The requirement of permanent residence would amount to ensuring a monopoly to home lawyers and a denial of the freedom to provide legal services.
Professional and ethical rules

Which professional and ethical rules are applicable: those of the state from which he comes or those of the host state? „Conflict of laws.”

(i) When representing a client, a lawyer must observe the rules of professional conduct of the host Member State, without prejudice to his obligations in his Member State of origin.

(ii) When performing other commissions, the obverse holds: he is obliged to comply with the conditions and rules of professional conduct of the country he comes from, without prejudice to respect for the rules of the host country.
The Directive lays special emphasis on adherence to the rules of the host country relating to incompatibility, professional secrecy, relations with other lawyers and the prohibition on acting for parties with mutually conflicting interests.

Nevertheless, the latter rules apply in so far as they are capable of being observed by a lawyer who is not established in the host Member State and their observance is justified objectively.
Two-fold legal regime

- Lawyers practising occasionally in another Member State remain under a two-fold legal regime,
- The emphasis falls on the rule of the host country in the first case, it falls on those of the country the lawyer is from in the second. This two-fold constraint on lawyers entails no particular difficulty as long as the rules of professional conduct of the host country and the country of origin do not clash.
- Serious problems: substantial difference between the two applicable legal systems
The Interest of the Proper Administration of Justice in Member States – Case Law

• In Case 427/85, Commission v. Germany, it was indeed the extent of requiring co-operation with the lawyers of the host country that was contested.
• The German act implementing the Directive provided that a German lawyer must be present throughout all criminal or administrative proceedings, even when a foreign lawyer visits his defendant in custody.
• According to the German authorities, this was in the interest of the proper administration of justice: a lawyer from another Member State may have insufficient knowledge of the German rules of substantive and procedural law.
• The European Commission deemed this provision excessive.
In its ruling, the Court proclaimed that the freedom to provide services is one of the fundamental freedoms guaranteed under the EC Treaty, and may be restricted only in exceptional cases, by rules which are justified by the general good.

However, the German regulation went beyond what the administration of justice and the assistance of a foreign lawyer definitely required:

The knowledge or inadequate knowledge of German law forms part of the responsibility of the lawyer vis-à-vis his client, who obviously makes a decision on this when entrusting the representation of his interests to someone.
Two questions were raised in relation to the cross-border services provided by lawyers:

Can the successful party to a dispute recover from the unsuccessful party the fees of his lawyer established in another Member State in addition to the fees of the domestic lawyer required to work in conjunction with the former lawyer;

and can the fees of the lawyer from another Member State be limited to the level a domestic lawyer could claim?
• Directive 77/249/EEC precludes any jurisprudence that does not allow the reimbursement of the fees paid to the lawyer established in another Member State. A negative answer would obviously have made the provision of cross-border legal services less attractive.

• On the other hand, the Court permitted domestic rules governing the fees of lawyers to be applied to foreign lawyers with special regard to Article 4 (1) of Directive 77/249/EEC, according to which a lawyer representing his client in another Member State shall pursue his activities in accordance with the conditions laid down in respect of the lawyers of the host country. These rules cover the regulation of fees as well.
The Freedom of Establishment of Lawyers

• Pursuant to Article 43 (50) of the EC Treaty, now Article 49 TFEU, all restrictions on the establishment, i.e. business activity or undertaking, of the citizens of a Member State in another must be abolished.

• The freedom of establishment includes the initiation and pursuit of activities of self-employed persons, as well as the setting-up and management of undertakings, companies in particular, under the conditions laid down for the nationals of the given Member State - National treatment.

• The provisions on the freedom of establishment do not apply to professions which in that State are connected, even occasionally, with the exercise of official authority.
ECJ: The Concept of Establishment

• The concept of establishment within the meaning of that provision is a **very broad one**, allowing a national of the European Union to participate, on a **stable and continuous basis**, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to **economic and social interpenetration** within the European Union in the sphere of activities of self-employed persons.

• European Commission v Federal Republic of Germany, Case C-54/08
Exercising Official Authority

• The Court maintained that the freedom of establishment embodies a fundamental economic freedom, and the exceptions permitted to it must be interpreted narrowly. (Reyners case – 2/74)

• The exception of official authority provided for by Article 45 of the EC Treaty, Now Article 51 TFEU, cannot be given a scope which would exceed the objective for which it was made.
Exercising Official Authority - Lawyers

• Furthermore, as far as practising the profession of lawyer is concerned, the Court found that it cannot be regarded as the exercise of official authority.

• Even regular contact with courts is not sufficient to constitute such exercise. Indeed, the essence of this independent profession is much more one of legal consultation and representation.

• Judges, Notaries?
The Equivalence of Diplomas in Law

• Case 71/76, Jean Thieffry v. Conseil de l’ordre des avocats à la cour de Paris

• The case was related to a Belgian lawyer who had originally practised in Brussels. In due course, his diploma was recognised as equivalent by the Université de Paris, which enabled him to sit for and even pass the examination to enter the profession (bar exam).

• Having obtained all the necessary certificates, he applied for admission to the Paris Bar. The Conseil de l’ordre, however, rejected his application on the ground that he had no French diploma in law.
The French court deliberating the case requested the preliminary ruling of the European Court of Justice, The latter ruled that the refusal to admit a person to a profession who nevertheless holds a diploma which has been recognised as equivalent to the national qualification and who has in addition passed the required examination was an unjustified restriction of the freedom of establishment.
Klopp, a German lawyer practising in Düsseldorf, obtained a doctoral degree at the Université de Paris.

A decade later he passed the French bar exam, and attempted to set himself up so as to be able to practise in both Düsseldorf and Paris.

However, the governing French law and the rules of the Paris Bar did not allow a lawyer to have a second chamber outside the region under the principle of the unity of practising the profession, the “Unicité de cabinet.”
The freedom of establishment includes taking up and pursuing self-employed activities under the conditions laid down by the host Member State.

In the absence of specific European rules on the matter, each Member State is free to regulate the exercise of the legal profession in its territory.

Nevertheless, that rule does not mean that the legislation of a Member State may require a lawyer to have only one establishment throughout the territories of the Community.

This would mean that a lawyer would be able to enjoy the freedom to establish himself only at the price of abandoning the establishment he already had.
Establishment or Provision of Services

*Gebhard case, C-55/94*

- Overlapping rules

- If someone performs his professional activity *continuously or permanently* in another Member State, he is subject to the rules of establishment; however, if he works abroad only *temporarily, on an occasional basis*, the provisions on the free movement of services govern.

- The temporary nature of his activities is to be determined in the light of their *duration, regularity, periodicity* and *continuity*. 
A lawyer who establishes a chamber in another Member State will naturally have to maintain appropriate contacts with his or her clients, and must comply with the rules of professional conduct of the host country. (Klopp)
• Directive 89/48/EEC on the **mutual recognition** of diplomas – automatic recognition

• In the case of diplomas in law, however, it is relatively easy to demonstrate **significant differences** in the content of the education, and thus to lay down special conditions for recognising a diploma in law.

• **Aptitude tests** - the Directive expressly allows Member States to stipulate aptitude tests for professions where a **precise knowledge of national law** is required, or where the provision of advice or assistance concerning national law is an essential and constant aspect of the professional activity
• *Commission v. Italy*, case C-145/99, the Court declared that the Member States, pursuant to Article 1 (g) of the Directive, are obliged to specify and publish the subjects regarded as indispensable for practising the profession concerned and the rules regulating the conduct of the aptitude test,

• so that applicants can be aware, in a general way, of the nature and content of the test which they may be required to sit for.

• Where there is a lack of a normative settlement of these issues, we can hardly talk of the full transposition of the Directive, because arbitrary, even discriminatory practices can develop in aptitude tests.
ECJ stated that the German authorities were obliged to examine the qualifications of the Greek lawyer who wished to practise her profession in Germany, and that they must accept them if they found them to correspond to those required by national law.

Foreign applicants must also be afforded the opportunity to provide evidence that they satisfy the aptitude requirements laid down should their qualifications prove wanting.

Thus, the Court tried to transcend the formalistic approach by urging national authorities to examine professional qualifications and the actual knowledge content behind them.
Establishment of Lawyers
Directive 98/5/EC

- **Preamble justification** - essentially three grounds:
  - The **internal market** is to comprise an area without internal frontiers: possibility of **practising a profession** in a Member State other than that which the professional qualifications were obtained in.
  - The protection of the interests of recipients of legal services who, owing to the increasing trade flows resulting, in particular, from the internal market, seek advice when carrying out **cross-border transactions** in which international economic law, Union law and domestic laws often overlap.
  - **Significant disparities** between national laws: the differences might lead to **inequalities**, distorting competition between the lawyers of the Member States.
A lawyer has two modes of practising his profession in a Member State other than that in which he obtained his diploma:

- under a home-country professional title,
- integration into the profession of lawyer in the host Member State, whereby he is entitled to use also the professional title under which lawyers practise there. (Using the host-country professional title)
Using Home-country Professional Title

- Pursuant to Article 2 of the Directive, any lawyer is entitled to pursue his profession on a permanent basis under his home-country professional title in any other Member State.

- An Italian lawyer may therefore practise in Austria as an “avvocato.” All he is required to do for this is to register appropriately with the competent authorities of the host country, which is hardly going to run into difficulties so long as he can attest to his registration at home.
Using Home-country Professional Title

- **Scope** of the activities: Practising under his home professional title, a lawyer may give advice on the law of his home Member State, on EU law, on international law and the law of the host Member State, naturally always in keeping with the rules of procedure applicable in the national courts.

- Work related to the law of the **host state** is nevertheless **not excluded** in principle from the possible areas of activity of lawyers from other Member States, though it might not be accidental that it appears last on the list in the Directive.

- Home-country professional title indicates to the clients that he does not have a diploma of the host country or its equivalent; “consumer protection”.
Reservations

• A prescribed category of lawyers to prepare deeds for obtaining title to administer estates of deceased persons and for creating or transferring interests in land,

• the representation or defence of a client in legal proceedings by home lawyers: work in conjunction with a lawyer who practises before the competent judicial authority. (However, Commission v. Germany case)

• representation before supreme courts may also be reserved to specialist lawyers to ensure the smooth operation of the justice system.
The Use of the Professional Title of the Host State

• **Full integration** into the profession of lawyer in the host Member State, including the right to use its customary professional title:

• e.g. the Italian *avvocato* practising in Vienna may hang a name plate with the word *Rechtsanwalt* on the door of his chamber.
Use of the Professional Title of the Host State - Three Ways


- A lawyer practising under his home-country professional title who has effectively and regularly practised in the host Member State in the law of that State including Union law, for a period of at least three years, must be exempted from the conditions set out in Directive 89/48/EEC.

- Should the lawyer have met all the required conditions, but the three-year adaptation period has not elapsed, he can refer to the professional experience he attained through other professional activities and attend courses and seminars.
• Right of establishment – using the professional title of the host state (Hungary)

• The reference has been made in the course of proceedings between Mr Ebert, a German national and lawyer registered as a ‘Rechtsanwalt’ at the Düsseldorf Bar (Germany), and the Budapest Bar Association, Hungary as to the right claimed by Mr Ebert to use the title ‘ügyvéd’ (lawyer in Hungary) without being a member of the Hungarian Bar Association.

• According to Hungarian law: A person wishing to practise as a European lawyer on a permanent basis in the Republic of Hungary shall apply to the Bar Association to be added to the register of European lawyers.
ECJ: It is clear from Directive 98/5 that even lawyers practising under their home-country professional title in a host Member State are subject to the same rules of professional conduct as lawyers practising under the professional title of that State.

Therefore neither Directive 89/48 nor Directive 98/5 precludes national rules laying down the requirement to be a member of a body such as a Bar Association in order to practise the profession of lawyer under the title of lawyer of the host Member State.

There is no discrimination based on nationality.
The reference has been made in the course of a dispute between Ms Jakubowska and Mr Maneggia concerning the payment of damages, which gave rise to proceedings currently pending before the Giudice di pace di Cortona (Magistrates’ Court, Cortona),

in which the lawyers representing Ms Jakubowska were removed from the register of the Ordine degli Avvocati di Perugia (Perugia Bar Council (Italy)).

Ms Jakubowska submitted a statement in which she requested that her lawyers be authorised to continue to represent her, arguing that Italian law is contrary to the EC Treaty and the general principles of the protection of legitimate expectations and acquired rights.
The registration in a host Member State of lawyers practising under a professional title acquired in another Member State is to be subject to the rules of professional conduct in force in the host Member State.

Those rules, unlike those concerning the preliminary conditions required for registration, have not been harmonised and may therefore differ considerably from those in force in the home Member State.

EU law does not preclude national rules which prevent part-time public officials from practise the profession of lawyer, despite their being qualified to do so, by laying down that they are to be removed from the register of the competent Bar Council.
Legal loopholes – fields, not covered

A young French national living in Italy applied for enrolment as a trainee ("praticante") to the Genoa bar in view of the diploma she acquired in France.

Her application was rejected, partly because the job required a diploma issued or confirmed by an Italian university, and partly because praticante work was deemed to constitute part of legal training, and thus the praticante activity could not be described as a “regulated profession” within the meaning of Directive 89/48/EEC; and so Directive 98/5/EC could not be applied either.
Morgenbesser - Ruling

- ECJ: interpretation of law in the Vlassopoulou and the Bobadilla cases govern:
- In other words, it is the duty of the competent authority concerned to examine whether, and to what extent, the diploma granted in another Member State and professional experience obtained there, together with the experience obtained in the host Member State must be regarded as satisfying, even partially, the conditions required for access to the activity concerned.
- If the comparative examination of diplomas results in the finding that the knowledge and qualifications certified by the foreign diploma correspond to those required by the national provisions, practice must be permitted on the basis of that diploma.
Trainee Lawyers (2)

Pesla v. Justizministerium Mecklenburg-Vorpommern, C-345/08

• The approach of Morgenbesser ruling was confirmed.

• The reference was made in the course of proceedings between Mr Peśla, a Polish national, and the Justizministerium Mecklenburg-Vorpommern (Ministry of Justice of Mecklenburg-Western Pomerania) concerning the latter’s refusal to admit the applicant to serve as a legal trainee (Rechtsreferendar) without first taking an aptitude test in the compulsory legal subjects under the ‘erstes juristiches Staatsexamen’ (first State examination in law).

• EU Law does not preclude the requirement of the aptitude test.

• Possibility of partial recognition of the knowledge of the applicant - „should be more than merely notional”
Bars and the Competition Law of the European Union

• The *Arduino* case - C-35/99 - brought up the question whether or not Article 81 EC (now Art. 101 TFEU) prohibiting cartels preclude a Member State from defining, on the basis of an opinion delivered by a professional body made up of members of a bar, a tariff fixing minimum and maximum fees for members of the profession.

• According to the jurisprudence of the European Court, Article 81 EC is infringed even where a Member State requires or favours the adoption of agreements distorting competition, or where it divests its own legislative scope by delegating to private economic operators the responsibility for taking decisions affecting the economic sphere.
• So reads Article 81 (1): “The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.” Now Article 101 paragraph 1.TFEU.
• ECJ: In this case, it was merely a draft the Italian Bar had produced on the tariff, and it was the Italian Minister for Justice who decreed the act after obtaining the opinion of other state bodies;

• the state therefore did not waive legislation to private authority, and thus did not breach the said provisions of the EC Treaty.
Central issue: The legality of the regulation of the Bar of the Netherlands that, in contrast to former practice, stipulated strict conditions on partnerships between lawyers and other professionals, and prohibited future partnerships of the Members of the Bar with accountants.
Main questions of the Dutch court – preliminary ruling:

For the purposes of Article 81 (Art. 101 TFEU) of the EC Treaty, are lawyers to be regarded as undertakings, and should a rule they adopt be deemed a “decision by associations of undertakings”?

Does the prohibition of joint professional activity on the part of a bar comply with Article 81 of the EC Treaty?

Does the prohibition on the abuse of dominant position under Article 82 EC apply to a bar?

Is such a regulation compatible with the freedom of services and establishment in the single market?
Wouters - Ruling

• The bar is an “association of undertakings” and its regulatory activity, essentially defining the lawyers’ economic activities, as a “decision by associations of undertakings”

• The prohibition of multi-disciplinary partnerships restricted competition because it prevented lawyers from making use of the proportions of such a firm and the integrated services it provided.

• However, not all restrictions on competition are prohibited. The regulation of the Dutch Bar is thus justified by the public interest, the appropriate exercise of the profession of lawyer, and it therefore does not infringe Article 81 (85) paragraph 1. of the EC Treaty.
• Abuse of dominant position: The ECJ declared that the bar could not be regarded as an undertaking or a group of undertakings within the meaning of Article 82 EC (Art. 102 TFEU), since it does not carry on any economic activity, its registered members are not sufficiently linked to each other to adopt the same conduct on the market.

• Furthermore, the article mentioned cannot be applicable because the legal profession is not concentrated to any significant degree but is highly heterogeneous and characterised by a high degree of internal competition.

• The Bar is not in a dominant position.
The decision of Bar of the Netherlands managed to scrape through the different prohibitions of Community law;

However, the lasting value of the judgement lies in the fact that not only can the activities of lawyers and bars be assessed in terms of the four economic freedoms (Grundfreiheitenkontrolle), but the applicability of Community competition law can also be considered with special regard to the regulating activity of bars and the ban on cartels
The Member States are reluctant to open up this profession to practitioners coming from other Member States, referring to tradition, consumer protection and the interests of administering justice, or even to protecting the economic interests of home lawyers.

Nevertheless, the European regulation of the profession of lawyer is a good example of the fact that, though a unified training in law cannot be achieved and the mutual recognition of diplomas in law has only a limited applicability, the mutual recognition of capacity as lawyer may open up the markets to lawyers from other Member States.
Notaries

• European Commission v. Federal Republic of Germany, Case C-54/08, Judgment of the ECJ 24 May 2011

• Exercise of official authority? – **nationality condition** for access to the profession of civil law notary – only German nationals

• Authentication of legal acts, other tasks in the field of „preventive administration of justice“ (transfer of the ownership of land, marriage settlements)

• A notarial act has a **probative force**

• Requirement of **proper administration of justice**
Commission v. Germany - Ruling

- Exercise of official authority – is an exception to the fundamental rule of freedom of establishment – strict interpretation.
- The notary cannot unilaterally alter the agreement he is called on to authenticate without first obtaining the consent of the parties.
- The activity of authentication entrusted to notaries does not therefore, as such, involve a direct and specific connection with the exercise of official authority.
- Consequently, the nationality condition required by German legislation for access to the profession of notary constitutes discrimination on grounds of nationality prohibited by Article 43 EC (now Art, 49 TFEU).
After the ruling of the ECJ:

Notaries are in the position of lawyers – before Directive 98/5/EC

Recognition of diplomas in law is a precondition

However, nationality condition is excluded