

INFORMATION

FREEDOM TO PROVIDE SERVICES

FREEDOM OF LAWYERS TO PROVIDE SERVICES IN THE COMMUNITY.

150/77

On 22 March the Council of the European Communities adopted a directive to facilitate the effective exercise by lawyers of freedom to provide services.

This is the second profession for which a directive has been introduced to facilitate freedom of movement, the first having been that of doctors in respect of which the Council adopted two directives relating to right of establishment and freedom to provide services on 16 June 1975.

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The present directive relates only to freedom to provide services. The Commission considered that the right of establishment of lawyers who have not been trained in the host country was a difficult objective to attain effectively, at least in an initial stage.

The reason why the Commission has paid particular attention to the activities of lawyers is that the opening up and interpenetration of markets has greatly increased the international activities of lawyers, a phenomenon that the Commission considered itself obliged to monitor and regulate to the extent that it could thereby prevent such activities from being governed by agreements between professional associations of lawyers which would probably not be uniform or cover the profession as a whole.

Unlike the directive on doctors, that on lawyers does not provide for the mutual recognition of qualifications which, as is known, entails lengthy comparisons of the content, duration and nature of education and training. In view of the fact that the profession of lawyer is very closely connected with a socio-cultural environment - case law, procedures and customs that differ enormously from country to country - the approach of mutual recognition of qualifications scarcely seemed practicable, at least in an initial stage. Accordingly, the Commission

based the directive on the concept of recognition of the status of lawyer as defined in each Member State.

The acceptance of this approach demonstrates the Member States considerable degree of mutual trust which is also based on the fact that the profession is everywhere subject to rules and to the control of vigilant disciplinary authorities.

In spite of the fact that it is only the provision of services that is dealt with and not establishment, a considerable number of problems emerged which account partly for the length of time taken for the directive to be adopted. The work involved was long and complex. The first Commission proposal dates from 1969. Since the accession of three new member countries, two of which operated under the common law system, raised a number of new questions, and as the Court of Justice of the Communities by its decisions in the Reyners and van Binsbergen Cases, in 1974, had unravelled the situation, in particular as far as lawyers were concerned, and had stated that, save in the exceptional circumstances provided for in the Treaty, discrimination could not be based on nationality or permanent place of residence, and amended proposal was submitted in 1975 and was successful.

The functions and powers of lawyers are not identical in all member countries ; for example, there are major differences between continental lawyers and those in Ireland and the United Kingdom. In the United Kingdom differences exist between barristers and solicitors. Only solicitors are entitled to be paid employees of an undertaking and to represent it before the courts but otherwise they enjoy the same rights as lawyers practising under the rules of profession on the continent. This relatively limited problem of compatibility between the pursuit of the profession as an employee and the representation of the employer in legal proceedings has been resolved by enabling Member States which do not permit the two functions to be carried on simultaneously to bar lawyers who are paid employees of an undertaking from representing or defending that undertaking in legal proceedings in so far as their own nationals are not authorised to pursue those activities.

What will lawyers be able to do ?

The directive covers all activities which lawyers may exercise in their country of origin, the country "in which they are established", that is to say, litigation leading to a decision of the court and extrajudicial acti-

vities such as consultations, etc...

In order to take account of existing situations and the exceptions referred to above provision has been made for Member States to be able to reserve to prescribed categories of lawyers the preparation of formal documents (documents for obtaining title to administer estates of deceased persons or documents creating or transferring interests in land). It is worthwhile recalling here that while lawyers in certain countries are entitled to prepare such documents, in other countries this right is reserved for another profession. The directive will not therefore alter existing powers.

How will they be able to do it ?

Here we are faced with the extremely delicate question of rules of professional conduct, that is to say all the rules that define the duties of a lawyer towards the courts, his clients, colleagues and society in general. First of all it will be noted that a lawyer providing services is exempt in the Member State in which he provides such services from any conditions requiring residence or registration with a professional organization. This can obviously be explained by the fact that since the lawyer is providing services, he is already "established" in a Member State and fulfils that State the relevant conditions.

Representing clients in legal proceedings or before public authorities

A lawyer practises in each host Member State under the same conditions as lawyers established in that State. In carrying out these activities he is subject to a dual code of professional conduct ; more specifically he is required to observe "the rules of professional conduct of the host Member State, without prejudice to his obligations in the Member State from which he comes".

Member States may also require these activities to be carried out in conjunction with a local lawyer which is a guarantee both for the profession and the person subject to the law.

In other words, it has been considered necessary to maintain the unity of operation of the judicial system in the broad sense, and it has been regard-

ed as essential that in his relations with that system the lawyer providing services must scrupulously observe the same rules as his established colleagues.

Extrajudicial activities

The predominant idea here is to look upon the lawyer as travelling about with his own gown or set of rules. This it will be understood that he remains subject to the rules of professional conduct of his State of origin, without prejudice, however, to certain essential rules of the host country of which a non-exhaustive list is given. These rules apply to him however only if the following two conditions are fulfilled :

- they do not prevent his providing services, and
- they are necessary from an objective point of view to ensuring that his activities as a lawyer are properly carried out.

The directive will enable the present situation to be put in order to some extent by extending and regulating practices which frequently derive from bilateral agreements between lawyers' associations in two or more towns in different countries.

It is worth pointing out that at present there are approximately 125.000 lawyers in the Community and that the directive will enter into force on 24 March 1979, that is two years after notification. This will permit considerable extension of the activities of lawyers who will thus be in a position to defend the interests of their clients in all Community countries.
