

# COMMISSION OF THE EUROPEAN COMMUNITIES

COM(94) 572 final

Brussels, 21.12.1994

94/0299 (COD)

Proposal for a  
EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE

to facilitate practice of the profession of lawyer on a  
permanent basis in a Member State other than that  
in which the qualification was obtained

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(presented by the Commission)

## EXPLANATORY MEMORANDUM

### I. GENERAL CONSIDERATIONS

#### 1. Current legal framework surrounding practice of the profession of lawyer

- 1.1 The provision of services by lawyers is governed by Directive 77/249/EEC to facilitate the effective exercise by lawyers of freedom to provide services<sup>(1)</sup>. The principle on which that Directive is based is that of mutual recognition of licences to practise. A lawyer who is registered with a bar, law society or other professional association may provide services in another Member State by giving advice on the law of his home country, on that of the host country, and on international and Community law. When it comes to representing and defending a client before the courts, however, he may be obliged to work in conjunction with a local lawyer.

The Directive recently formed the subject-matter of a number of questions referred for a preliminary ruling in Case C-55/94, Gebhard v Milan Bar Council. In the observations it submitted on 24 June the Commission proposed that the activity of lawyer carried on by way of provision of services within the meaning of the Directive be defined as the activity carried on by a lawyer whose main centre of interest is in a Member State other than that of the service recipients and characterized by the temporary, precarious and discontinuous nature of the services. This broad interpretation of the concept of freedom to provide services could help resolve certain specific difficulties encountered by foreign lawyers who wish to practise outside their home countries.

- 1.2 Establishment and practice of the profession of lawyer in a salaried capacity are governed by Directive 89/48/EEC on a general system for the recognition of higher education diplomas awarded on completion of professional education and training of at least three years' duration<sup>(2)</sup>.

Under that Directive, a lawyer holding a diploma required in one Member State in order to gain access to or practise the legal profession may, before being admitted to or allowed to practise the profession in another Member State, be required, at the discretion of that host State, to complete an adaptation period or sit an aptitude test. The Directive therefore constitutes the legal framework within which the right to practise the profession on a permanent basis in a Member State other than that in which the qualification was obtained may be rendered effective.

It seeks neither to modify the rules applicable to any person carrying on a professional activity in the territory of a Member State, nor to remove migrants from the ambit of those rules.

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<sup>(1)</sup> Council Directive of 22 March 1977, OJ No L 78, 26.3.1977, p. 17.

<sup>(2)</sup> Council Directive of 21 December 1988, OJ No L 19, 24.1.1989, p. 16.

It merely lays down special measures designed to enable a migrant to comply, otherwise, and with a view to integration, with the professional rules of the host Member State.

- 1.3 This legal framework is not, however, carved in stone so to speak; a specific approach, i.e. in this case a Directive applicable to lawyers, remains possible in so far as it is capable, by building on the existing legal framework, of improving the free movement of the professionals in question.

It is from this standpoint that the present proposal is to be viewed. It takes as point of departure a proposal of the Consultative Committee of the Bars and Law Societies of the European Community (CCBE), which in October 1992 drew up a draft Directive on the right of establishment of lawyers providing for establishment under the home-country professional title; for relaxations in or exemption from the aptitude test for establishment under the host-country professional title, and for rules on joint practice of the profession.

## 2. Key features of the proposal

The aim of the present proposal is to make it easier for a lawyer to gain access to or practise the profession in a Member State other than that in which he has already been admitted to or allowed to practise the profession, by enabling him initially and for a maximum period of five years to practise under his home-country professional title.

Under what conditions may the profession be practised during that period?

- Such lawyers will have the right to give advice on the law of their home countries, on international and Community law, and on the law of the host Member State. They will also have the right to represent and defend a client in legal proceedings, if necessary working in conjunction with a lawyer who practises before the relevant judicial authority. In return, lawyers practising under their home-country professional titles will be required to register with the competent authority in the host Member State and will be subject to the obligations and rules of professional conduct applicable to lawyers from that State.

What are the conditions governing access to the profession in the host Member State during or at the end of that period?

- the lawyer may be granted automatic access to the profession in the host Member State if he can show that he has actually practised as a lawyer in the host Member State for an unbroken period of at least three years, in the law of the host Member State including Community law.
- where the unbroken period of three years in the host Member State has not encompassed practice in the law of that Member State, including Community law, the aptitude test will be limited to the law of procedure and the professional rules of conduct of the host Member State.

- in any event, the lawyer will, even where he has not practised for a period of three years, be able to gain access to the profession in the host Member State by submitting to the compensatory measures provided for by the general system on the recognition of diploma.

The proposal also contains provisions on joint practice. These provide for the possibility of practising the profession in the host Member State as part of a branch of a grouping from the home Member State, the possibility for lawyers who come from the same grouping or the same home State to set up in practice in one of the forms available to lawyers from the host Member State, and the possibility for several lawyers from different Member States, or for one or more such lawyers and one or more lawyers from the host Member State, to practise jointly. However, the host Member State will be able to maintain any ban on groupings in which decision-making power is exercised preponderantly by persons who are not members of the legal profession. Lawyers covered by the Directive will also be able to use the name of the grouping of which they are members in their home Member State.

The EFTA countries were consulted, as required by Article 99 of the EEA Agreement, in February 1994<sup>(3)</sup>. The response from the five partner countries was on the whole favourable, apart from a problem concerning use of the title of Rechtsanwalt in Austria. Once the Directive has been adopted by the Council, its provisions will be extended to the EFTA territory of the EEA by decision of the Joint Committee, which will add a reference to the Directive in Annex VII to the Agreement.

3. Advantages of the proposed system ("added value") and justification for Community action
  - 3.1 The proposal will make for freer movement of lawyers than is at present the case.
    - 3.1.1 The fact that, under the proposal, a lawyer who has acquired professional experience in the law of the host Member State may become fully integrated into the legal profession in that State under more flexible conditions than those laid down so far by the national measures transposing Directive 89/48/EEC is an improvement on the present position. These more flexible conditions may even include exemption from the aptitude test where the applicant has effectively pursued for an unbroken period of at least three years an activity involving the law of the host Member State.

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<sup>(3)</sup> This was done by sending them the working paper which had been transmitted to the Member States of the Community in March 1993. The working paper was based on the principles set out in the instrument drawn up by the CCBE. The broad lines of the paper were also presented to the Joint Committee, in its Subcommittee III responsible for the free movement of persons, on 22 February 1994 in the presence of representatives of the EFTA countries, the EFTA permanent secretariat and the Surveillance Authority.

3.1.2 Unlike Directive 89/48/EEC, which covers only natural persons, the proposal contains provisions which reflect the fact that lawyers are working increasingly within joint-practice structures (e.g. partnerships, BGB-Gesellschaften, sociétés civiles professionnelles, limited partnerships, etc.). It is imperative that steps be taken to ensure that this modern form of exercise of the profession, which meets the current economic needs of lawyers and their clients and is likely to develop even more in future, does not form an obstacle to the free movement of such professionals. The measures adopted in this respect for lawyers might serve as a model for other professions, particularly those whose activities bring them into close contact with the business world.

3.2 Besides the improvements which the proposal should bring about in terms of greater freedom of movement for practitioners, mention must be made of the benefits accruing to consumers of legal services. The increasing economic requirements and trade flows resulting from the single market mean that business people setting up in other Member States increasingly have need of advisers who can help them resolve the problems posed by their cross-border transactions and who cover, thanks to their specialized knowledge, a wide variety of laws.

3.3 The proposal confines itself to laying down the minimum requirements which must be satisfied by lawyers wishing to pursue their professional activities otherwise than by way of provision of services in a Member State other than that in which they obtained their qualifications. For the rest, it simply refers to the rules, in particular on professional conduct, applicable in the host Member State to lawyers practising under the professional title used in that State.

#### 4. Legal basis

The legal basis for the proposal consists of provisions of the Treaty establishing the European Community, and in particular Article 57(1) thereof as regards mutual recognition of licences to practise, the first and third sentences of Article 57(2) as regards the provision on joint practice, and Article 49 as regards salaried lawyers. The taking into account of professional experience gained in the host country is based on Article 52 of the EC Treaty as interpreted by the Court of Justice in Vlassopoulou (Case C-340/89 [1991] ECR-I 2357).

None of the provisions of this proposal for a Directive involves in a Member State "amendment of the existing principles laid down by law governing the professions with respect to training and conditions of access for natural persons", except in the case of joint practice were, the provisions in question to be applied in Greece and Italy, which do not currently allow it. Developments providing for joint practice are expected in these two Member States.

## II. COMMENTARY ON THE ARTICLES

### Article 1

(Object, scope and definitions)

This Article defines the object and substantive scope of the proposal and contains various definitions. It specifies who is covered by the proposal, reproducing the list of professional titles of lawyers set out in Directive 77/249/EEC, as amended to take account of changes which have occurred in the meantime in Belgium, Italy and Luxembourg. Like the other Directives on the recognition of professional diplomas, the proposal concerns only Community nationals.

Paragraph 7 states that any lawyer who is salaried in his home Member State is covered by the proposal and that any lawyer so covered has the right to practise as a salaried lawyer in the host Member State where the latter so permits for lawyers practising under the professional title used there. To that extent, a salaried lawyer in the host Member State falls within the scope of the proposal if he pursues his activities there on a continuing basis and has a permanent office or chambers there. If, on the other hand, his activities in the host Member State are only temporary, the lawyer comes, via the lawyer employing him in his home Member State, under Directive 77/249/EEC.

### Article 2

(Right to practise temporarily under the home-country professional title)

A lawyer who acquires in a Member State the right to enter the profession and adopt the professional title used in that State acquires, under this Article, the right to practise, otherwise than by way of provision of services, in any other Member State, under his home-country professional title, the activities of lawyers referred to in Article 5 of the proposal. The exercise of this right is subject only to the requirement of registration with the competent authority in the host Member State (see Article 3). Consequently, he does not at this stage have to seek recognition of his diploma in accordance with the procedures laid down in Directive 89/48/EEC.

Since this is a stage in the process leading up to full integration into the profession in the host Member State on the basis of the procedures laid down in Article 10, it is necessarily limited in time. A period of five years seems appropriate in this respect.

### Article 3

(Registration with the competent authority)

Registration with the competent authority in the host Member State is a precondition for the exercise of the right of any lawyer to practise his profession otherwise than by way of provision of services in that Member State under his home-country professional title. This requirement is essential if the competent authority in the host Member State is to be able to ensure compliance with the rules of professional conduct applicable in that State.

Registration is an automatic entitlement where the applicant furnishes proof of his registration with the competent authority in his home Member State.

Each Member State is free to designate the competent authority or authorities in accordance with its own domestic rules. In most Member States it will be the bar, while in others it will be the Ministry of Justice, etc. It may, and in most Member States probably will, be the case that there are several competent authorities, and which one has to be approached will depend on how the profession is organized in a particular Member State. Thus there may be different bars e.g. for ordinary courts of law (competent to hear disputes between private individuals) or for courts of administrative jurisdiction, or according to the standing of the court (e.g. lower courts, courts of appeal, supreme courts) or the place where the courts are located. The principle of national treatment will apply here (Article 6). Like his colleagues practising under the professional title used in the host Member State, a lawyer covered by the proposal will have to choose which of these bars he wishes to register with and will, where appropriate, be authorized, like his colleagues practising under the professional title used in the host Member State and registered with the same bar, to practise only before the courts to which that bar is attached.

Paragraph 3 relates to the special situation obtaining in the United Kingdom and Ireland, where there are two, or even three, categories of lawyer (solicitors, barristers and advocates) performing different functions. Lawyers from a Member State other than the United Kingdom or Ireland must, in either of those countries, choose the branch of the profession in which they wish to operate and register with the authority responsible for that branch. Lawyers from the United Kingdom or Ireland must register, in Ireland or the United Kingdom, with the authority responsible for the branch which corresponds to their own.

Paragraph 4 is designed to ensure that there is no discrimination between lawyers from the host Member State whose names are in one way or another brought to the attention of the public (lists posted in court-houses or given by the bar to potential clients) and lawyers practising in the host Member State under the professional title used in another Member State.

#### Article 4

(Temporary practice under the home-country professional title)

Paragraph 1 lays down the requirement that lawyers covered by the proposal must use their home-country professional title in the language or one of the languages of their home Member State for the activities they pursue in the Member State in which they are established. This is to ensure that consumers are informed of the professional origin of such lawyers and hence of their qualifications.

Paragraphs 2 and 3 afford Member States the opportunity of imposing certain further requirements aimed at ensuring that clients receive more information and at avoiding any risk of confusion with the professional title used in the host Member State. The reference to registration with the competent authority in the home Member State should make it easier for clients and other interested parties to contact that authority in the event of a dispute.

## Article 5

### (Area of activity)

The area of activity of lawyers covered by the proposed Directive in the host Member State is defined in a similar manner to that provided for in Directive 77/249/EEC. Paragraph 1 lists certain activities by way of example. It goes without saying that the giving of advice on a law other than that of the home and host Member States and the drafting of legal documents are also included. The possibility for a lawyer covered by the proposed Directive to give advice on the law of the host Member State is a useful one because of the possible overlap between the various legal systems. Such a lawyer will generally come into contact with lawyers and the law in the host Member State.

Account is taken, in paragraph 2, of the specific nature of the profession of solicitor in the United Kingdom and Ireland. In these two Member States, solicitors are entitled to draw up certain instruments which, in the other Member States, come under the notary's monopoly. The exclusion is justified by the fact that this Directive focuses on the typical activities of lawyers (the giving of legal advice, advocacy, etc.) such as they are to be found in all Member States.

Paragraph 3 provides, in respect of the activities of representing or defending a client in legal proceedings, that lawyers covered by the proposed Directive may be required to work in conjunction with a lawyer who practises before the judicial authority in question.

The Commission considers that the concept of "working in conjunction with" a local lawyer, which has already been incorporated in Directive 77/249/EEC, must be transposed mutatis mutandis in the context of the present proposal and interpreted in the light of the relevant case law of the Court of Justice (Case 427/85, Commission v Germany [1988] ECR 1123; Case C-294/89, Commission v French Republic [1991] ECR-I 3591) (e.g. a Member State may require a lawyer to work in conjunction with a local lawyer only in proceedings for which the retention of counsel is mandatory).

## Article 6

### (Rules of professional conduct applicable)

Paragraph 1 lays down the principle that a lawyer covered by the proposal is subject, in respect of the professional activities he pursues in the host Member State, to the rules of professional conduct of that State. Since it is a feature of the proposal that the lawyers covered must be registered both with the competent authority in the host Member State and with the competent authority in the home Member State, a lawyer remains subject also to the rules of professional conduct of his home Member State. Nevertheless, only the rules of professional conduct of the host Member State govern the pursuit of his activities in that State (e.g. if the home Member State permits advertising whereas the host Member State prohibits it, a lawyer may not advertise in the latter State).



Paragraph 2 requires Member States to provide appropriate measures to enable lawyers practising under their home-country professional titles to be represented within the professional bodies of lawyers from the host Member State. In view of Member States' different traditions as regards the organization of such bodies, the Commission has felt it advisable to refer, for the purpose of determining the practical details of such participation, to the rules of the Member States.

Paragraph 3 permits Member States to require lawyers covered by the proposal to take out insurance. The Commission considers that it is nowadays scarcely conceivable for lawyers to practise their profession without being insured and feels that this requirement enhances consumer protection.

The host Member State must take into consideration any insurance a lawyer covered by the proposal has already taken out in his home Member State or in another Member State. If the two sets of insurance cover correspond only partially, the host Member State may only require that supplementary insurance covering the missing elements be taken out.

In drafting this Article, the Commission has been guided both by the precedent set by the "architecture" Directive (85/384/EEC, OJ No L 233, 21.8.1985) and by the case law on the recognition of diplomas (see Vlassopoulou, supra).

#### Article 7

##### (Disciplinary proceedings)

Paragraph 1 lays down the principle of national treatment for disciplinary proceedings and penalties.

Paragraphs 2 and 3 seek to ensure a minimum of cooperation between the competent authority in the host Member State and that in the home Member State where disciplinary proceedings are instituted against a lawyer covered by the proposal. The need for cooperation is due to the dual registration with the competent authorities in the home and host Member States. It has deliberately been left to the Member States to work out the practical details of such cooperation. The cooperation is without prejudice to the principle that, where the offence was committed in the host Member State's territory, the final decision is a matter for the competent authority in that Member State alone.

Paragraph 4 provides that the competent authority in the home Member State may draw its own conclusions from the disciplinary decision taken in the host Member State.

Paragraph 5 is the logical consequence of the fact that the lawyer's right to carry on his professional activities otherwise than by way of provision of services in the host Member State is based on his right to practise the profession in his home Member State.

## Article 8

(Salaried practice)

The profession of lawyer may be practised in a salaried capacity in a host Member State only if that State's rules so permit for its own lawyers. A lawyer who is salaried in his home Member State may, of course, register in a host Member State which prohibits salaried work, but only in a self-employed capacity. In view of the controversy surrounding this manner of practising the profession in a number of Member States and the conflicting views on the subject, the Commission considers it advisable to apply here the principle of national treatment.

## Article 9

(Statement of reasons and remedies)

This Article provides minimum safeguards for lawyers covered by the proposed Directive so that they can defend themselves in the event of their meeting with a refusal when seeking registration in the host Member State or of disciplinary action being taken against them. The wording is based on the established case law of the Court (see Case 222/86, Unectef v Heylens [1987] ECR 4097; Case 222/84, Johnston v RUC [1986] ECR 1651) and on the wording of the "general system" Directives 89/48/EEC and 92/51/EEC.<sup>(4)</sup>

The obligation to state reasons is intended to enable a lawyer in respect of whom a decision has been taken to have at his disposal the information he needs if he is to be able to appeal against it. The obligation to provide for a right of appeal to the courts leaves Member States free to determine the appeal mechanisms and the nature of the courts to be seized in accordance with their own traditions.

## Article 10

(Treatment as a lawyer from the host Member State)

Paragraph 1 lays down the principle that, after the effective pursuit in the host Member State for an unbroken period of three years of an activity involving the law of that State, including Community law, the lawyer in question is granted full exemption from the compensatory measures permitted by Directive 89/48/EEC. It is for him to furnish proof of such pursuit in the form, for example, of the cases he has dealt with. It should be pointed out in this connection that in some Member States lawyers can specialise in certain branches of the law. For the purpose of establishing whether a lawyer is a specialist, Member States accept certain types of proof, and they might be guided by them here without, however, going beyond what is provided in Article 10 of the proposal. The definition of effective pursuit of an activity for an unbroken period has been taken from the judgment in Van de Bijl (Case 130/88).

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<sup>(4)</sup> Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC (OJ No L 209, 24.7.1992, p. 25).

Where the unbroken period of three years' activity in the host Member State has not encompassed the law of that State, paragraph 2 provides that the aptitude test which can, where appropriate, be required in accordance with Article 4(1)(b) of Directive 89/48/EEC shall be limited to the law of procedure and the rules of professional conduct in the host Member State.

Paragraph 3 is a reminder that lawyers covered by the proposed Directive can at any time enter the profession in the host Member State on the basis of the provisions of Directive 89/48/EEC with a view to pursuing there, without restriction, all the activities which go to make up the profession of lawyer in that Member State. The case-law of the Court (see Vlassopoulou, *supra*, paragraph 20) also applies in this context: it calls upon the competent authority to take into consideration any professional experience gained after the diploma proper was obtained.

Once the matter of the compensatory measures is successfully out of the way either by means of proof of three years' effective, continuous exercise in national law, including Community law or by means of a simplified test, the diploma of a lawyer who has practised his profession under these circumstances is recognized as being of an equivalent level. The migrant lawyer is placed on the same footing as a lawyer from the host Member State. As a result he can permanently adopt the title used in the host Member State.

Paragraph 6 stipulates that a lawyer who gains admission to the profession in the host Member State in accordance with Article 10 has the right to use his home-country professional title alongside the host-country professional title.

#### Article 11

(Joint practice)

Owing to the diversity of Member States' rules on the subject, the fact that a lawyer covered by the proposal is a member of a grouping in his home Member State may give rise to obstacles or impediments in the host Member State. Although in the majority of Member States the profession of lawyer may be practised jointly and joint practice is becoming a common method of practising the profession for those whose activities are oriented towards the business world, in two Member States joint practice of the profession of lawyer is prohibited<sup>(5)</sup>, even if in those same Member States work is in progress (and in some cases has been so for some time) with a view to conferring on practitioners the right to pursue their activities as corporate bodies. Even in those Member States where joint practice is permitted, the forms it takes vary considerably from one Member State to another. Some States permit lawyers to practise only in partnership, whereas others permit them to form limited companies, with adjustments, however, to allow for the specific nature of lawyers' activities.

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<sup>(5)</sup> Greece and Italy.

The Commission has considered it appropriate to lay down certain minimum rules in Article 11 to ensure that lawyers practising jointly in their home Member State can in fact enjoy the benefits flowing from the proposal subject to certain guarantees in those Member States who allow joint practice. The rules are also designed to encourage this form of practice of the profession and to ensure as convergent a development as possible in all Member States. Such convergence would have the advantage of facilitating freedom of movement and avoiding distortions of competition. The Commission has tried to take account of these two aspects in formulating the measures it is proposing.

A "grouping" is defined in Article 1(5) as an entity which may take any of the forms of joint practice in existence.

Paragraph 1 reiterates with respect to lawyers covered by the proposal the right enshrined in Article 52 of the EC Treaty to set up branches or agencies in the host Member State "under the conditions laid down for its own nationals by the law of the country where such establishment is effected". In certain cases, however, the text limits the possibility for the host Member State to require that the form chosen be identical to those permitted under its domestic law. The provision applies only to branches and agencies and not to subsidiaries, which are separate legal entities from their parent companies. When a new company is formed in another Member State using the subsidiary technique, it is only natural that those setting it up in the host Member State should be required to comply fully with that State's domestic law. At all events, the technique most often resorted to by lawyers seems to be the setting-up of branches and agencies, that of subsidiaries being somewhat marginal, probably because it is considered too cumbersome.

Paragraph 1 provides that, as far as the establishment of branches or agencies is concerned, a host Member State may oppose the use of the legal form chosen in the home Member State only if the fundamental rules governing the grouping in the home Member State are incompatible with the fundamental rules laid down by law, regulation or administrative action in the host Member State and compliance with the latter rules is justified by the public interest in protecting clients and third parties. This is an instance of the application of the principle of proportionality.

Paragraph 2 provides, with reference to, among others, lawyers who are members of the same grouping in their home Member State, that lawyers covered by the proposal may, if they come from the same grouping or the same home Member State, set up between themselves a grouping of lawyers in the host Member State. As to the different forms that may be chosen, the principle of national treatment applies. Subject to the exception provided for in Article 15(3) as regards Greece and Italy, where joint practice is not yet permitted, it is stipulated that each Member State is required - but only for lawyers covered by the proposal - to make available at least one legal form, which it is free to determine.

This provision also applies to lawyers covered by the proposal who come from the same home Member State but who have not yet set up a grouping between themselves in that State.

Paragraph 3 is designed to permit the formation of multinational practices composed of lawyers from different home Member States and, where appropriate, lawyers practising under the professional title used in the host Member State. The creation of such practices is an expected effect of the principle of equal treatment and of the right enshrined in the proposal for lawyers to practise under their home-country professional titles. Moreover, such practices

fit logically into the context of the completion of the internal market, given the increasing overlap between Member States' economies and laws. The multinational practice is as much in the interest of the lawyers who constitute it as in that of consumers of legal services, being the technique which makes best use of the complementarity of the services on offer. The choice of possible legal forms is determined by the domestic law of the host Member State.

Paragraph 5 deals with the measures Member States may take to ensure that the principle of the independence of lawyers practising within a grouping is respected. As far as the Commission is aware, the principle of the professional independence of lawyers is observed in all the Member States. The practical consequences flowing from it in relation to multidisciplinary, that is to say the possibility for lawyers to form a grouping with members of other professions or even with non-professionals, differ from one Member State to another. Leaving aside the most extreme conception of independence, namely the idea that lawyers should practise only on their own, some Member States allow only groupings consisting entirely of lawyers (unidisciplinarity), while others allow lawyers to link up only with certain other professions (which, however, are not the same in all the Member States which have opted for this approach); a final group - consisting of those Member States which allow the formation of limited companies - does not rule out, albeit within certain clearly defined limits, the employment of outside capital.

In view of this diversity, and so as not to exclude de facto from the scope of the proposed Directive multidisciplinary groupings which are lawfully constituted in their home Member State but which include non-lawyer members in a proportion different from that provided for under the internal rules of the host Member State, the Commission considers that a Community rule is necessary. It is proposed that Member States which impose such restrictions should be allowed to apply them to lawyers who are members of a multidisciplinary grouping only if in the grouping in question decision-making power is preponderantly in the hands of non-lawyers. A member of such a grouping would, of course, still be able to avail himself of the proposal in order to practise his profession otherwise than by way of provision of services in the host Member State on an individual basis under his home-country professional title.

#### Article 12

(Name of the grouping)

This Article requires Member States to permit lawyers covered by the proposal to use, in the host Member State, the name of the grouping of which they are members in their home Member State. The reasoning behind this is that a grouping's name serves to distinguish it from other groupings in the minds of clients. A grouping's name is therefore something on which an economic value can be placed. A derogation is, however, provided for in Article 15(3) for Greece and Italy, where joint practice is not yet permitted.

### Article 13

(Cooperation between the competent authorities in the home and host Member States)

Like Article 7 in the disciplinary sphere, Article 13 lays down a general obligation of close collaboration between the competent authority in the host Member State and that in the home Member State in order to ensure that the system provided for is properly implemented and to prevent the rights arising from the proposal from being misapplied and used for fraudulent purposes. As exchanges of information may cover questions connected with clients' files, the proposal imposes a duty of confidentiality on the competent authorities.

### Article 14

(Designation of the competent authorities)

This is the usual clause requiring Member States to designate the authorities responsible for handling matters to do with persons covered by the proposal.

### Articles 15 and 16

(Implementation/addressees)

These are standard final provisions.

Proposal for a  
**EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE**

to facilitate practice of the profession of lawyer on a  
permanent basis in a Member State other than that  
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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 49, Article 57(1) and the first and third sentences of Article 57(2) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the Economic and Social Committee,

Acting in accordance with the procedure referred to in Article 189b of the Treaty,

- (1) Whereas, pursuant to Article 7a of the Treaty, the internal market is to comprise an area without internal frontiers; whereas, pursuant to Article 3(c) of the Treaty, the abolition, as between Member States, of obstacles to freedom of movement for persons and services constitutes one of the objectives of the Community; whereas, for nationals of the Member States, this means among other things the possibility of practising a profession, whether in a self-employed or a salaried capacity, in a Member State other than that in which they obtained their professional qualifications;
- (2) Whereas, pursuant to Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration<sup>(1)</sup>, a lawyer who is fully qualified in one Member State may already ask to have his diploma recognized with a view to establishing himself in another Member State in order to practise the profession of lawyer there under the professional title used in that State; whereas the objective of Directive 89/48/EEC is to ensure that a migrant lawyer is integrated into the profession in the host Member State, and the Directive seeks neither to modify the rules regulating the profession in that State nor to remove such a lawyer from the ambit of those rules;
- (3) Whereas while some migrant lawyers may become quickly integrated into the profession in the host Member State *inter alia* by passing an aptitude test as provided for in Directive 89/48/EEC, others may envisage such integration at the end of a period of professional practice in the host Member State under their home-country professional titles;

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<sup>(1)</sup> OJ No L 19, 24.1.1989, p. 16.

- (4) Whereas at the end of that period, which may not be longer than five years, the migrant lawyer should be able to gain access to the profession either automatically, where he has effectively practised the law of the host Member State including Community law for an unbroken period of three years, or, where that is not the case but where he can furnish evidence of professional experience in the host Member State, after undergoing a compensatory measure in the form of a simplified aptitude test;
- (5) Whereas action along these lines is justified at Community level not only because, compared with the general system for the recognition of diplomas, it provides lawyers with a new means whereby, after a transition period, they can practise the profession on a permanent basis in a host Member State, but also because, by enabling lawyers to practise temporarily under their home-country professional titles, it meets the needs of consumers of legal services who, owing to the increasing trade flows resulting from the internal market, seek advice when carrying out cross-border transactions in which international law, Community law and domestic laws often overlap;
- (6) Whereas action is also justified at Community level because a few Member States already permit in their territory pursuit of the activities of lawyers, otherwise than by way of provision of services, by lawyers from other Member States practising under their home-country professional titles; whereas, however, in the Member States where this possibility exists the practical details concerning, for example, the area of activity and the obligation to register with the competent authorities differ considerably; whereas such a diversity of situations leads to inequalities and distortions in competition between lawyers from the Member States and is an obstacle to freedom of movement; whereas only a directive laying down the conditions governing practice of the profession, otherwise than by way of provision of services, by lawyers practising under their home-country professional titles is capable of resolving these difficulties and of affording the same opportunities to lawyers and consumers of legal services in all Member States;
- (7) Whereas, in keeping with its objective, this Directive does not lay down any rules concerning purely domestic situations, and where it does affect national rules regulating the legal profession it does so no more than is necessary to achieve its purpose effectively; whereas it is without prejudice to national legislation governing access to and practice of the profession of lawyer under the professional title used in the host Member State;
- (8) Whereas lawyers covered by this Directive should be required to register with the competent authority in the host Member State in order that that authority might ensure that they abide by the rules of professional conduct in force in that State; whereas the effect of such registration as regards the jurisdictions in which, and the levels and types of court before which, lawyers may practise is determined by the law applicable to lawyers in the host Member State;
- (9) Whereas lawyers who are not yet full integrated into the profession in the host Member State should practise in that State under their home-country professional titles so as to ensure that consumers are properly informed and to distinguish between such lawyers and lawyers from the host Member State practising under the professional title used there;



- (10) Whereas lawyers covered by this Directive should be permitted to give advice on the law of their home Member States, on Community law, on international law and on the law of the host Member State; whereas this is already allowed under Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services<sup>(2)</sup>, as last amended by the Act of Accession of Austria, Finland and Sweden, as regards the provision of services; whereas, however, provision should be made, as in Directive 77/249/EEC, for the option of excluding from the activities of lawyers practising under their home-country professional titles in the United Kingdom and Ireland the preparation of certain formal documents in the conveyancing and probate spheres; whereas this Directive in no way affects the provisions under which, in every Member State, certain activities are reserved for professions other than the legal profession; whereas the provision in Directive 77/249/EEC concerning the right of the host Member State to require a lawyer practising under his home-country professional title to work in conjunction with a local lawyer when representing or defending a client in legal proceedings should also be incorporated in this Directive; whereas that requirement must be interpreted in the light of the case law of the Court of Justice of the European Communities, in particular its judgment of 25 February 1988 in Case 427/85, Commission v Germany<sup>(3)</sup>;
- (11) Whereas the list of professional titles used in Italy must be extended to include procuratore legale, as such persons now carry on the same activities as an avvocato;
- (12) Whereas a lawyer registered under his home-country professional title in the host Member State must remain registered with the competent authority in his home Member State if he is to retain his status of lawyer and be covered by this Directive; whereas for that reason close collaboration between the competent authorities is indispensable, notably in connection with any disciplinary proceedings;
- (13) Whereas lawyers covered by this Directive may, irrespective of their status of salaried or self-employed lawyers in their home Member States, practise as salaried lawyers in the host Member State where that Member State offers this possibility to its own lawyers;
- (14) Whereas the purpose pursued by this Directive in enabling lawyers to practise temporarily in another Member State under their home-country professional titles is to make it easier for them to practise the profession without restriction in accordance with Directive 89/48/EEC; whereas under Articles 48 and 52 of the Treaty as interpreted by the Court of Justice the host Member State must take into consideration any professional experience gained in its territory; whereas, after the effective pursuit in the host Member State for an unbroken period of three years of an activity involving the law of that State including Community law, it is reasonable to assume that a lawyer will have gained sufficient experience to become fully integrated into the legal profession there; whereas total exemption from any compensatory measures must therefore be automatically granted; whereas, if the unbroken period of activity in the host Member State does not involve the law of that State, including Community

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(2) OJ No L 78, 26.3.1977, p. 17.

(3) [1988] ECR, p. 1123.

law, the compensation measures must be limited to an aptitude test on the law of procedure and the rules of professional conduct in the host Member State;

- (15) Whereas lawyers practising under their home-country professional titles must be afforded the opportunity of attending lectures or seminars in the host Member State so that they might acquire a knowledge of that State's law, including the rules regulating professional practice and conduct, or add to their existing knowledge in those areas;
- (16) Whereas, for economic and professional reasons, there is a growing tendency for lawyers in the Community to practise jointly; whereas the fact that lawyers belong to a grouping in their home Member State should not be used as a pretext to prevent or deter them from establishing themselves in the host Member State; whereas Member States should be allowed, however, to take appropriate measures with the legitimate aim of safeguarding the profession's independence; whereas certain guarantees should be provided in those Member States which permit joint practice,

HAVE ADOPTED THIS DIRECTIVE:

### Article 1

#### Object, scope and definitions

1. The purpose of this Directive is to facilitate practice of the profession of lawyer on a permanent basis in a self-employed or salaried capacity in a Member State other than that in which the professional qualification was obtained.
2. For the purposes of this Directive:
  - (a) "lawyer" means any person who is a national of a Member State and who is authorized to pursue his professional activities under one of the following professional titles:

Belgium:	Avocat/Advocaat/Rechtsanwalt
Denmark:	Advokat
Germany:	Rechtsanwalt
Greece:	Δικηγόρος
Spain:	Abogado
France:	Avocat
Ireland:	Barrister, Solicitor
Italy:	Avvocato, Procuratore legale
Luxembourg:	Avocat
Netherlands:	Advocaat
Portugal:	Advogado
United Kingdom:	Advocate, Barrister, Solicitor
  - (b) "home Member State" means the Member State in which a lawyer acquired the right to use one of the professional titles referred to in (a) before practising the profession of lawyer in another Member State.

- (c) "host Member State" means the Member State in which a lawyer practises pursuant to this Directive.
  - (d) "home-country professional title" means the professional title used in the Member State in which a lawyer acquired the right to use that title before practising the profession of lawyer in the host Member State.
  - (e) "grouping" means any entity, with or without legal personality, formed under the law of a Member State, within which lawyers pursue their professional activities jointly under a joint name.
3. This Directive shall apply both to lawyers practising in a self-employed capacity and to lawyers practising in a salaried capacity in the home Member State and, subject to Article 8, in the host Member State.
  4. Practice of the profession of lawyer within the meaning of this Directive shall not include the provision of services, which is covered by Directive 77/249/EEC.

## Article 2

### Temporary right to practise under the home-country professional title

Any lawyer shall be entitled to pursue for five years in any other Member State under his home-country professional title the activities specified in Article 5. Practice on a permanent basis in the host Member State shall be subject to Article 10.

## Article 3

### Registration with the competent authority

1. A lawyer who wishes to practise in a Member State other than that in which he obtained his professional qualification shall register with the competent authority in that State.
2. The competent authority in the host Member State shall register the lawyer upon presentation of a certificate attesting to his registration with the competent authority in the home Member State. It may require that, when presented, the certificate be not more than three months old. It shall inform the competent authority in the home Member State of the registration.
3. For the purpose of applying paragraph 1 in the United Kingdom and Ireland, lawyers practising under a professional title other than those used in the United Kingdom or Ireland shall register either with the authority responsible for the profession of barrister or advocate or with the authority responsible for the profession of solicitor.

For the purpose of applying paragraph 1 in the United Kingdom, the authority responsible for a barrister from Ireland shall be that responsible for the profession of barrister or advocate, and the authority responsible for a solicitor from Ireland shall be that responsible for the profession of solicitor.

For the purpose of applying paragraph 1 in Ireland, the authority responsible for a barrister or an advocate from the United Kingdom shall be that responsible for the profession of barrister, and the authority responsible for a solicitor from the United Kingdom shall be that responsible for the profession of solicitor.

4. Where the competent authority in a host Member State publishes the names of lawyers registered with it, it shall also publish the names of lawyers registered pursuant to this Directive.

#### Article 4

##### Temporary practice under the home-country professional title

1. A lawyer practising in a host Member State under his home-country professional title shall do so under that title expressed in the official language or one of the official languages of his home Member State.
2. A host Member State may require a lawyer practising under his home-country professional title to indicate the professional body of which he is a member in his home Member State or the judicial authority before which he is entitled to practise pursuant to the laws of his home Member State. A host Member State may also require a lawyer practising under his home-country professional title to include a reference to his registration with the competent authority in that State.
3. Where there is a risk of confusion with the professional title used in the host Member State, the competent authorities in that State may ask that a reference to the home Member State be added.

#### Article 5

##### Area of activity

1. Subject to paragraphs 2 and 3, a lawyer practising under his home-country professional title shall carry on the same professional activities as a lawyer practising under the professional title used in the host Member State and may inter alia give advice on the law of his home Member State, on Community law, on international law and on the law of the host Member State.
2. Member States which authorize in their territory a prescribed category of lawyers to prepare formal documents for obtaining title to administer estates of deceased persons and for creating or transferring interests in land which, in other Member States, are reserved for professions other than that of lawyer may exclude from such activities lawyers practising under a home-country professional title conferred in one of the latter Member States.

3. For the pursuit of activities relating to the representation or defence of a client in legal proceedings and in so far as the law of the host Member State makes representation by a lawyer mandatory, that Member State may require lawyers practising under their home-country professional titles to work in conjunction with a lawyer who practises before the judicial authority in question and who would, where necessary, be answerable to that authority or with an "avoué" or "procuratore" practising before it.

## Article 6

### Rules of professional conduct applicable

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 rules of professional conduct 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, in so far 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.

## Article 7

### Disciplinary proceedings

1. In the event of failure by a lawyer practising under his home-country professional title to fulfil the obligations in force in the host Member State, the rules of procedure, penalties and remedies provided for in the host Member State shall apply.
2. Before initiating disciplinary proceedings against a lawyer, the competent authority in the host Member State shall inform the competent authority in the home Member State as soon as possible, furnishing it with all the relevant details.
3. Without prejudice to the decision-making power of the competent authority in the host Member State, that authority shall cooperate throughout the disciplinary proceedings with the competent authority in the home Member State. In particular, the host Member State shall take the measures necessary to ensure that the competent authority

in the home Member State can make submissions to the bodies responsible for hearing any appeal.

4. The competent authority in the home Member State shall decide what action to take, under its own procedural and substantive rules, in the light of a decision of the competent authority in the host Member State concerning a lawyer practising under his home-country professional title.
5. Although it is not a prerequisite for the decision of the competent authority in the host Member State, the temporary or permanent withdrawal by the competent authority in the home Member State of the authorization to practise the profession shall automatically lead to the lawyer concerned being temporarily or permanently prohibited from practising under his home-country professional title in the host Member State.

#### Article 8

##### Salaried practice

A lawyer registered in a host Member State under his home-country professional title may practise as a salaried lawyer in the employ of another lawyer, an association or firm of lawyers, or a public or private enterprise where the host Member State so permits for lawyers registered under the professional title used in that State.

#### Article 9

##### Statement of reasons and remedies

Decisions not to effect the registration referred to in Article 3 or to cancel such registration and decisions imposing disciplinary measures shall state the reasons on which they are based.

A remedy shall be available against such decisions before a court or tribunal in accordance with the provisions of national law.

#### Article 10

##### Integration as a lawyer of the host Member State

1. A lawyer practising under his home-country professional title who has effectively pursued for an unbroken period of at least three years an activity involving the law of the host Member State including Community law shall, with a view to his gaining admission to the profession of lawyer in the host Member State and practising there under the professional title corresponding to the profession in that State, be exempted from any aptitude test which may be required under Article 4(1)(b) of Directive 89/48/EEC.

It shall be for the lawyer concerned to furnish proof of such effective pursuit for an unbroken period of at least three years of an activity involving the law of the host Member State. To that end, he shall provide the competent authority in the host Member State with any relevant information and documentation, notably on the

number of cases he has dealt with and their nature. "Effective pursuit for an unbroken period" means actual exercise of the activity without any interruption other than that resulting from the events of everyday life.

2. A lawyer practising under his home-country professional title who has effectively pursued for an unbroken period of at least three years a professional activity in the host Member State may be required, in accordance with Article 4(1)(b) of Directive 89/48/EEC only to take an aptitude test limited to the law of procedure and the rules of professional conduct of the host Member State.
3. A lawyer practising under his home-country professional title may apply at any time during the five-year period referred to in Article 2 to have his diploma recognized pursuant to Directive 89/48/EEC with a view to gaining permanent admission to the profession of lawyer in the host Member State and practising it under the professional title used in that State.
4. When it examines an application, the competent authority shall take into account any attendance by the applicant at lectures or seminars on the law of the host Member State, including the rules regulating professional practice and conduct.
5. The representatives of the competent authority entrusted with the examination shall preserve the confidentiality of any information received.
6. A lawyer who gains admission to the profession of lawyer in the host Member State in accordance with paragraphs 1 to 5 shall be entitled to use his home-country professional title, expressed in the official language or one of the official languages of his home country, alongside the professional title used in the host Member State.

#### Article 11

##### Joint practice

Where joint practice is permitted in the host Member State, it must take place in accordance with the following rules.

1. One or more lawyers who belong to the same grouping in their home Member State and who practise under their home-country professional title in a host Member State may pursue their professional activities in a branch or agency of their grouping in the host Member State. However, where the fundamental rules governing that grouping in the home Member State are incompatible with the fundamental rules laid down by law, regulation or administrative action in the host Member State, the latter rules shall prevail in so far as compliance therewith is justified by the public interest in protecting clients and third parties.

2. Each Member State shall afford two or more lawyers from the same grouping or the same home Member State who practise in its territory under their home-country professional titles access to a form of joint practice. If the host Member State gives its lawyers a choice between several legal forms in which to practise, those same legal forms shall also be made available to the aforementioned lawyers. The manner in which such lawyers practise jointly in the host Member State shall be governed by the laws, regulations and administrative provisions of that State.
3. The host Member State shall take the measures necessary to permit joint practice also between:
  - (a) several lawyers from different Member States practising under their home-country professional titles;
  - (b) one or more lawyers covered by point (a) and one or more lawyers from the host Member State.The manner in which such lawyers practise jointly in the host Member State shall be governed by the laws, regulations and administrative provisions of that State.
4. A lawyer who wishes to practise under his home-country professional title shall inform the competent authority in the host Member State of the fact that he is a member of a grouping in this home Member State and furnish any relevant information on that grouping.
5. Notwithstanding points 1-4, a host Member State which prohibits practice of the profession of lawyer within a grouping controlled by persons who are not members of the profession may refuse to allow a lawyer registered under his home-country professional title to practise in its territory in his capacity as a member of his grouping if the decision-making power in that grouping is exercised preponderantly by persons who do not have the status of lawyer.

#### Article 12

##### Name of the grouping

Whatever the manner in which lawyers practise under their home-country professional titles in the host Member State, they may employ the name of any grouping to which they belong in their home Member State. The host Member State may require that, in addition to that name, mention be made of the legal form of the grouping in the home Member State and/or of the names of any members of the grouping practising in the host Member State.

#### Article 13

##### Cooperation between the competent authorities in the home and host Member States

In order to facilitate the application of this Directive and to prevent its provisions from being misapplied for the sole purpose of circumventing the rules applicable in the host Member State, the competent authority in the host Member State and the competent authority



in the home Member State shall collaborate closely and afford each other mutual assistance. They shall preserve the confidentiality of the information they exchange.

#### Article 14

##### Designation of the competent authorities

Member States shall designate, within the period provided for in Article 15, the competent authorities empowered to receive the applications and to take the decisions referred to in this Directive. They shall communicate this information to the other Member States and to the Commission.

#### Article 15

##### Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 1996. They shall immediately inform the Commission thereof.

When Member States adopt these provisions, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

#### Article 16

##### Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Communities.

#### Article 17

##### Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament  
The President

For the Council  
The President

## Fiche financière

La présente proposition de directive n'a pas d'incidences financières sur le budget.

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ISSN 0254-1475

COM(94) 572 final

# DOCUMENTS

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Catalogue number : CB-CO-94-635-EN-C

ISBN 92-77-83628-8

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Office for Official Publications of the European Communities  
L-2985 Luxembourg