

# CCBE position

## Evaluation of the Lawyers' Directives

12/09/2014

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 32 member countries and 13 further associate and observer countries, and through them more than 1 million European lawyers.

### **Introductory remarks:**

The EU Directives specifically applicable to lawyers, i.e. Directive 77/249 on provision of Services and Directive 98/5 on establishment (the Lawyers' Directives) are currently under evaluation by the European Commission.

At the request of the Commission, a study was published in 2012 on the "Evaluation of the Legal Framework for the Free Movement of Lawyers". This study was produced by the Maastricht University and the consultant Panteia.

Through its Free Movement of Lawyers committee the CCBE has been active for years in monitoring and ensuring the proper implementation of the Lawyers' Directives (notably through the issuance of guidelines for Bars and Law Societies).

The CCBE follows very carefully the evaluation process of the Lawyers' Directives and has adopted common positions on several issues raised in the Maastricht University/Panteia report, i.e.:

- (1) Registration of EU lawyers - Article 3 Directive 98/5**
- (2) Double deontology - Article 6 Directive 98/5 and Article 4 Directive 77/249**
- (3) Salaried practice - Article 8 Directive 98/5**
- (4) Integration in the host Member State - Article 10 Directive 98/5**
- (5) Legal Form Requirements**
- (6) Non-Lawyer shareholding/management - Article 11 (5) Directive 98/5**
- (7) Scope of the Lawyers' Directives in relation to law firms**

As a preliminary remark, the CCBE would like to stress that current practice shows that the combination of the Lawyers' Directives provides a model of a liberalised market for professional services in the EU. The system which has been created is simple, non-bureaucratic and very liberal and has led to easy cross-border mobility for lawyers, notwithstanding the wide diversity of legal systems among the Member States.

With these two Directives, lawyers have reached a level of free movement for the legal profession within the European Union which is, as yet, inconceivable in other parts of the world, even in the framework of federal structures (e.g. the USA). Cross-border free movement of lawyers in the European Union is a model and a goal for many lawyers outside the European Union. This specific regime is also far in advance of the structures which exist for other liberal professions in the EU.

When the Lawyers' Directives were adopted, concerns were raised with regard to the fact that lawyers qualified as such in one single jurisdiction were granted practice rights in all other

European jurisdictions as well. Such concerns have proved to be unfounded. Within the framework of said directives European lawyers temporarily rendering cross-border services or established in another Member State than where the qualification as lawyer was obtained, practice under their home Member State professional title. Clients thus do not risk to confuse domestic and migrating lawyers. In addition, due to the professional rules they are bound to abide and due to personal professional liability reasons, lawyers do not accept cases that they cannot handle. If need be, lawyers from different jurisdictions will cooperate.

## **1. Registration of EU lawyers (Article 3 Directive 98/5)**

Maastricht University/Panteia study suggests that the process of registration should be simplified and more uniform across Member States in order to facilitate the establishment of lawyers. The report makes several suggestions, among which the possibility to amend the Directive in or to use the existing CCBE identity card for registration purposes.

The CCBE would like to underline that the use of the CCBE card for registration purposes is not yet feasible. Due to missing technical details, this card is currently not at a stage where we could envisage its widespread adoption by the legal profession.

According to Directive 95/8 Member States' competent authorities may make registration of a European lawyer conditional on maximum four requirements:

- evidence that applicant is a national of a Member State, Article 1.2 a)
- evidence that the applicant is a lawyer in the sense of Article 1.2 a)
- coverage by professional indemnity insurance in the sense of Article 6 (3)
- information whether the lawyer is a member of a grouping and if the case be, any relevant information on that grouping (Article 11.4).

Consequently, Bars and Law Societies as well as legislators in Member States may not introduce additional requirements. In particular because European lawyers, are already fully qualified lawyers in their home Member State, they must not undergo a like treatment with non-lawyer applicants in the host Member State whishing to obtain the capacity of host Member State lawyers. Additional questions may be raised but on a voluntary basis only, meaning that it is not compulsory for applicants to comply with additional requirements.

**Conclusion: There is no need to amend Directive 98/5. Instead there is a need for full implementation of the Directive i.e. to focus strictly on the Directive's exhaustive list of requirements for registration.**

## **2. Double deontology**

### **(a) Establishment – Article 6.1 of Directive 98/5**

Article 6.1 provides that irrespective of the rules of professional conduct to which s/he is subject in his/ her home Member State, a lawyer practicing under his/her home Member State professional title shall be subject to the same rules of professional conduct as lawyers practicing under the relevant title of the host Member State in respect of all activities he pursues in its territory.

The policy underlying article 6.1 of the Establishment Directive is that a lawyer established in a host Member State should be subject to the same rules of professional conduct as lawyers practicing under the professional title of the host State.

Any other policy would create uncertainty, unequal treatment and unfair competitive advantage in favour of either the lawyers of the host State or those lawyers from another Member State practising in the host State.

Hence the official interpretation of article 6.1 adopted by the CCBE which reads:

***A lawyer practising under his/her home Member State professional title remains subject to the rules of professional conduct of his/her home State only to the extent that these***

***do not conflict expressly or impliedly with the rules of professional conduct of the host State. In case of conflict between rules of conduct, host State rules override home State rules.***

The Final Report of the Panteia/Maastricht University research group has, with regard to the German version of the directive 95/8, highlighted an understanding of Article 6.1 as providing for a "double deontology" rule. Such interpretation would admittedly create legal insecurity for established lawyers. The German version of Article 6.1 being deviant from all other language versions does not, however, , constitute an obstacle to adopting the above interpretation, which is in line with the directive's aim "to facilitate" establishment.

**Conclusion: There is no need to amend Directive 98/5. Article 6.1 should be interpreted as stated above.**

(b) Temporary services – Article 4 of Directive 77/249

The Maastricht/Panteia study concludes that the complexity of complying with two different and sometimes conflicting sets of deontological rules at the same time can preclude lawyers from providing temporary cross border services. The final report suggests overcoming the difficulties connected to double deontology by introducing a simple rule: whereas established lawyers should comply with host country rules only, temporarily servicing lawyers should solely be bound by their home country rules (page 230). This suggestion is not elaborated in detail.

There should be a distinction between Article 4.1 and 2 covering the representation of a client in legal proceedings and Article 4 .4 covering out of court work.

- Article 4.1 and 2- representation of clients in legal proceedings

With regard to the representation of clients in legal proceedings, according to Article 4.1, the lawyer pursues that activity "under the conditions laid down" for lawyers established in the host Member State. The "conditions laid down for lawyers established" in the host country for the pursuit of such representation do comprise specific proceeding-related professional rules in some jurisdictions. Rules that are considered to be rules of civil or criminal procedure in one Member State may be considered to be professional conduct rules in another Member State. Temporarily servicing lawyers have to comply with these rules without regard to their qualification as procedural or professional conduct rules.

Article 4.2 stipulates that "*a lawyer pursuing these activities shall observe the rules of professional conduct of the host Member State, without prejudice to his obligations in the Member State from which he comes*".

The CCBE considers that the only interpretation of Article 4.2 (in the sense of a conflict rule), in line with the Directive's language is the same interpretation as already adopted on Article 6 of Directive 98/5, i.e. "***in case of a conflict between home and host State professional rules the host Member State's professional rules prevail.***"

**Conclusion: There is no need to amend Directive 77/249 with regard to the representation of clients in legal proceedings. Article 4.2 should be interpreted as stated above.**

- Article 4.4- advice and representation of clients "out of court" and other legal proceedings

According to Article 4.4 a lawyer pursuing activities other than those referred to in paragraph 1, i.e. "out of court" work, "*shall remain subject to the conditions and rules of professional conduct of the Member State from which he comes*". But at the same time host Member State professional rules are applicable as well "*to the extent to which their observance is objectively justified to*

*ensure, in that State, the proper exercise of a lawyer's activities, the standing of the profession and respect for the rules concerning incompatibility".* As a general rule the lawyer has to comply with home country professional rules without regard to host country rules – this general rule is consistent with the E-Commerce-Directive's country of origin regime where cross-border services are provided under circumstances governed by said directive. In exceptional situations however host country professional rules come into play.

On the basis of fact finding done by the CCBE, it appears that, with regard to individual lawyers, there is no field of application for Article 4.4 2nd sentence; i.e. no cases of such conflicts have come to the knowledge of Bars and Law Societies, and no complaints from clients and/or lawyers seem to have been made. Consequently, there is no evidence that this provision would discourage lawyers from rendering cross border services. A conflict between provisions of criminal law in two Member States, as referred to in the Maastricht/Panteia study (pp. 105-106 ), does not contradict these findings. Whatever conflict rule with regard to professional rules might be introduced, it will not serve as a conflict rule in the field of criminal law.

Nevertheless, it is desirable to uphold the provision of Article 4.4 2nd sentence in order to be able to deal with conflicts of rules should such conflicts occur in the future. Such potential situations might arise if professional rules in other Member States undergo drastic changes, e.g. in case a Member State should abolish the interdiction to directly address another lawyer's client, thereby depriving said client of his/her lawyer's advice and protection.

Where a team of lawyers from different jurisdictions handles a client's case, national conflict of interest rules may differ from one another. Law firms in such a case apply in practice the strictest rule one of the lawyers concerned will have to comply with and may on these grounds from time to time refuse to accept a client's case. The Maastricht University/Panteia study's suggestion to introduce a conflict rule according to which only home country rules should be applicable obviously would not be helpful in situations where lawyers from different Member States jointly handle a common client's case.

In summary it appears that:

- Real practical problems do not occur with regard to individual lawyers.
- Practical problems that may occur where lawyers from different jurisdictions handle cases within a team cannot be tackled by a conflict rule in favour of home country rules, but by application of the strictest home country rules.
- The assumption that the complexity of complying with two different and sometimes conflicting sets of deontological rules at the same time might preclude lawyers from providing temporary cross border services lacks a factual basis.

**Conclusion: There is no need to amend Article 4.4 of Directive 77/249 since it does not impede cross border legal services of individual lawyers and law firms**

### **3. Salaried practice - Article 8 Directive 98/5**

Article 8 of the Establishment Directive provides that a lawyer registered in a host Member State under his home – State professional title may practice as a salaried lawyer in the employ of another lawyer, an association of lawyers, or a public or private enterprise to the extent that the host Member State so permits for lawyers registered under the professional title used in that State.

The official interpretation of article 8 adopted by the CCBE reads:

***Article 8 gives the right to a lawyer practising in a host Member State under his home Member State professional title to have access to the forms of salaried practice available to lawyers of the host State, irrespective of any restrictions on salaried practice applicable in the Member State from which he comes.***

***However when practising in his/her home State, the employed lawyer remains subject to all restrictions on salaried practice applicable to lawyers in his/her home State, including, if applicable, the prohibition to represent or assist, in his/her home Member State, a client who employs him/her.***

**Conclusion: There is no need to amend Directive 98/5. Article 8 should be interpreted as stated above.**

#### **4. Integration in host Member State (Article 10 of Directive 98/5)**

It appears that a limited number of lawyers are integrated into the host Member State through Article 10 of Directive 98/5 after 3 years of effective and regular practise under his/her home title. The Maastricht/Panteia study concludes that such a situation would result from problems related to Article 10.

However, the CCBE would like to stress that establishment under the home Member State's title is in no way a transitory measure that is intended necessarily to end up in the integration into the host Member State's profession of the lawyer established therein. Lawyers established under their home title enjoy all the desirable practicing rights and consequently in general do not see the need to practice under the host Member State title. The limited number of applications for integration through Article 10 of Directive 98/5 is therefore not due to particular obstacles that would exist in the way it is applied but to the choice lawyers make in not using it.

Neither does the lower number of integration procedures under Article 10, compared with the number of integrations through an aptitude test within the framework of the Professional Qualifications Directive, constitute evidence that the integration procedures under Article 10 of Directive 98/5 would be flawed. Lawyers have different reasons to choose the aptitude test instead of integration through Article 10. They may choose to establish without seeking integration at all, as establishment under the home country title is an option explicitly offered by the Directive (recital 3) and provides for all practicing rights. They may also choose to pass the aptitude test in order to be integrated in the host Member State immediately, without having to wait for the period of establishment required under Article 10 to have elapsed. Finally, they may choose to pass the aptitude test while not seeking establishment in the host Member State. That is for instance the case for a large number of young lawyers, especially those seeking to obtain the qualification as solicitor in England and Wales through the Professional Qualifications Directive, in order to improve their chances to find employment by a law firm in a country other than the UK.

**Conclusion: There is no need to amend Directive 98/5. There is no evidence that the relatively low number of lawyers using Article 10 is due to obstacles arising out of this provision.**

#### **5. Legal Form Requirements**

According to Articles 54, 62 TFEU, companies enjoy the same free movement rights as individuals. According to ECJ case law (Überseering, Centros, Inspire Art) host Member States may not impede, on grounds of legal form, the free movement of companies regularly incorporated in their home Member State. This, however, does not exempt companies from the obligation to comply with rules regarding the carrying on of a profession, a trade or other host Member State regulation designed to be compulsory for individuals or companies without regard to legal form.

Article 11.1 reads:

*"where the fundamental rules governing a grouping of lawyers 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 insofar as compliance therewith is justified by the public interest in protecting clients and third parties."*

If this provision is implemented in line with Articles 54, 62 TFEU and the quoted case law, the establishment of groupings will not be rejected on grounds of legal form but they, and lawyers practicing jointly within their framework, will have to comply with the host Member States'

professional rules or other general regulations insofar as compliance therewith is non-discriminatory and justified.

The only situation which the CCBE delegations have identified in which the fundamental rules governing a grouping in the home Member State may be incompatible with the fundamental rules laid down in the host Member State arises when limited liability structures want to establish a branch or agency in a Member State where domestic lawyers may not limit their professional liability to the extent that the limited liability structure would effectively do. However, in light of Articles 54, 62 TFEU this conflict cannot be solved simply by prohibiting the establishment of a branch of limited liability structures in such Host Member State.

The solution in line with the structure's establishment rights is to allow the establishment of European lawyers practicing within a branch of a limited liability structure in a host Member State, provided that such lawyer may be held personally liable in the host Member State at least to the same extent as lawyers practicing under that Member State's title.

In some Member States, where law firms as such are members of the bar and law firms as such may represent clients in and out of court, these rights will have to be granted to migrating law firms where they fulfill the host Member States requirements.

**Conclusion: the application of Article 11.1 of Directive 98/5 respecting primary law and ECJ case law do allow for compliance with home Member State company law as well as compliance with host Member State's fundamental rules governing the carrying on of the legal profession in that State.**

## **6. Non-Lawyer shareholding/management - Article 11 (5) Directive 98/5**

Maastricht University/Panteia study suggests to clarify Article 11.5 of Directive 98/5 which allows a host Member State to refuse the establishment in its territory of an individual lawyer or a law firm's branch or agency from another Member State under certain conditions. Article 11.5 reads:

*(5) Notwithstanding points 1 to 4, a host Member State, insofar as it prohibits lawyers practicing under its own relevant professional title from practicing the profession of lawyer within a grouping in which some persons are not members of the profession, may refuse to allow a lawyer registered under his home-country professional title to practice in its territory in his capacity as a member of his grouping.*

*The grouping is deemed to include persons who are not members of the profession if*

- *the capital of the grouping is held entirely or partly, or*
- *the name under which it practices is used, or*
- *the decision-making power in that grouping is exercised, de facto or de jure, by persons who do not have the status of lawyer within the meaning of Article 1 (2).*

*Where the fundamental rules governing a grouping of lawyers in the home Member State are incompatible with the rules in force in the host Member State or with the provisions of the first subparagraph, the host Member State may oppose the opening of a branch or agency within its territory without the restrictions laid down in point (1).*

**The CCBE would first like to stress that, similarly to a vast majority of legislators in Member States, the CCBE considers that the investment of third party capital (equity) in law firms, and certainly a majority interest, may constitute a severe danger to the proper practice of the legal profession and thus to the sound administration of justice, as well as citizens' access to justice.**

However, non-lawyer involvement in law firms is not restricted to third party capital, i.e. non-lawyer investors being owners or co-owners of a law firm. Non-lawyer involvement does occur in certain Member States in a range of particularly different forms, e.g., retired partners, widows or offspring of former partners to avoid law firms having to be liquidated as a result of the death or retirement of a partner, lawyer's spouses or other non-lawyers acting as clerks or managers and earning their own living within the firm, or non-lawyer professionals practicing within a common structure. The extent to which, these non-lawyers are bound by professional rules, particularly those relating to the duties to act in full independence, to act in the sole interest of clients, to avoid conflicts of interest and to strictly observe professional secrecy, in the same way as lawyers,

in the structure's home Member State, differs from case to case. Of equal importance is the question whether the non-lawyers involved in the law firm in the Member State of origin are exempt from the duty to give evidence with regard to confidential client information and whether documents and files such non-lawyers have access to are nonetheless exempt from seizure by the public prosecutors, courts or other public authorities.

With regard to these differences the CCBE considers that, notwithstanding its wording, the exercise of the possibility provided by Article 11.5 for Member States to refuse the right of establishment is subject **to a proportionality test on a basis of a case-by-case evaluation**.

In its judgment of 30 November 30 1995 (case C-55/94 Gebhard), the Court applied for the first time the proportionality principle in relation to free movement of lawyers and more specifically to establishment. At that time, temporary services had already been facilitated by the Lawyers Services Directive, whereas the Establishment Directive 5/98 had not yet been adopted. The Court ruled that "national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions:

- they must be applied in a non-discriminatory manner;
- they must be justified by imperative requirements in the general interest;
- they must be suitable for securing the attainment of the objective which they pursue;
- and they must not go beyond what is necessary in order to attain it."

These four conditions are referred to as the "proportionality test" hereafter.

Under Article 54 TFEU, companies enjoy the same establishment rights as individuals. According to ECJ case law (Überseering, Centros, Inspire Art) host Member States may not impede the free movement of companies on grounds of legal form. This does not exempt companies from the obligation to comply with rules regarding the carrying on of certain trades, professions or businesses (ECJ Centros C-212/97(26)) i.e. host Member State regulation designed to be compulsory for individuals or companies without regard to legal form. Article 11.5 has to be interpreted in the light of this general rule.

Consequently, a Member State cannot refuse the establishment in its territory of a lawyer from another Member State on the ground that such lawyer is part of a firm who has non-lawyers among its owners or management, even if its own lawyers are so prohibited, without applying the conditions of Article 11.1 of the Directive (which constitute in effect a Gebhard - type proportionality test). This means that the way in which the option is exercised needs to be justified by overriding reasons in the general interest and be subject to a proportionality test (confer ECJ Case C-289/02 Amok (20);(37,40) and Case C-55/94 Gebhard).

On the basis of the ECJ's case law<sup>1</sup>, the following elements should, among other, be considered as overriding reasons in the general interest: sound administration of justice, protection of consumers of legal services, proper practice of the legal profession, independence of lawyers, duty to act in the sole interest of clients, observance of the duty to avoid any risk of conflict of interest, and strict observance of professional secrecy.

**Conclusion: There is no need to amend Article 11.5 of Directive 98/5 because, in light of EU primary law and the ECJ case law, the exercise of the possibility provided by this provision for Member States to refuse the right of establishment is subject to a proportionality test, on the basis of a case by case evaluation**

<sup>1</sup> See in particular see cases C 309/99 Wouters, C-422/11 P Prezes UKE and C-550/07 Akzo Nobel, C-531/06 Commission vs. Italy.

## **7. Scope of Lawyer's Directives – Including Law Firms**

The Maastricht University/Panteia study suggests that the scope of both directives be extended to "law firms (at least those without non-lawyer owners/managers)" as opposed to individual lawyers. According to the researchers, inclusion might be helpful in order to provide legal security as inclusion would allow to clarify "*under what conditions who/what can be refused and who/what should be allowed*".

The CCBE agrees that legal form requirements should not impede free movement and that clarity is needed with regard to non-lawyer ownership. To meet these challenges is necessary. But it will by no means turn out to be less intricate to extend the scope of both directives to law firms than to deal with both problems through implementation of the existing provisions.

Article 11 of the Establishment Directive as it stands already deals with joint practice/groupings, i.e. law firms, in respect of all matters which seem to be relevant. It does so from the perspective of the individual lawyer, but achieves in practice the desired result. In addition, law firms that comply with professional rules in the host Member State already benefit –without regard to legal form- from free movement rights due to primary law and the ECJ's case law.

With regard to non-lawyer ownership or management in law firms, a distinction should be made between outside capital on one side and other forms of non-lawyer involvement, be it professionals practicing within the firm, former lawyers and their heirs or managers on the other side.

The CCBE considers that according to primary European Law and the ECJ's case law, Member States already are obliged to exercise the option Article 11.5 offers, subject to a proportionality test (see part 5 on Article 11.5 above.). Therefore, Member States will have to make up their mind with regard to implementation of Article 11.5 as it stands, in the same way and on the same grounds, on the basis of a case-by-case assessment, that will probably render equally difficult the effort to clarify "under what conditions who/what can be refused and who/what should be allowed" i.e. which structures would benefit from broadening the scope of the directives. There is no simple rule conceivable that might provide legal security regarding the differing regimes in Member States allowing non-lawyer involvement – almost all are incompatible with one another. Therefore, the application of a proportionality test is the most appropriate approach. Extending the Directives' scope to law firms will not allow for better solutions than the application of the proportionality test. It would not provide for added value or additional legal security in this regard.

**Conclusion: If Article 11 is implemented correctly in line with EU primary law and the ECJ's case law, there is neither need nor incentive to amend the Directive in order to widen its scope of application to law firms.**

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**GENERAL CONCLUSION:**

**There is no need to amend the Lawyers' Directives. All issues identified by Maastricht University/Panteia study can be resolved by alternative solutions i.e. common interpretation and proper implementation of the Directives, in light of EU primary law and case law of the EU Court of Justice.**

**Opening the Lawyers' Directives to possible changes intrinsically creates a risk of weakening the existing well balance framework which took several years to achieve.**

**The lawyers' Directives are the pillars of Free Movement of Lawyers in Europe and should be preserved.**

**As mentioned by the Commission itself during the conference "*A Single Market for Lawyers: valuing achievements, tackling remaining challenges*" in October 2013, the Lawyers' Directives are a success story and a unique regime without any equivalent and the way to tackle the remaining issues does not necessarily need to be through a legislative process.**