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**The Exercise of Freedom of  
Establishment by Lawyers within  
the EU**

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# Summary

It was not until the 1970's, when the claims that lawyers profession fell within the exception of official authority (Article 45 EC) were defeated in the *Reyners* judgement and the lawyer's profession was held to be within the scope of freedom of establishment.

In 1977, the Community legislator adopted a Legal service directive. The directive applies to the lawyers from any Member State when providing services in any other than their home Member State. However, this directive covered just temporary and occasional activities of lawyers, leaving unregulated a large part of activities falling under the freedom of establishment.

Next, in 1989 the Council adopted a Directive on the recognition of diplomas, which among others also applies to the lawyer's profession. The basic conditions set in the directive were a completion of at least three years education and the necessary professional training. However, the recognition of diplomas was not granted automatically and was associated with the requirement to complete an adaptation period or to take an aptitude test in the host Member State. The results of the directive were however not as satisfactory as expected. Such way of integration into host legal system was not acceptable for experienced lawyers or to large law firms wishing to transfer a part of their working force into another Member State.

Moreover, the *Gullung* case and especially the *Gebhard* case showed that there was an urgent need to address the establishment issue of lawyers in order to meet the strong demand for lawyers to be able to establish and to provide services themselves freely across the borders inside the EU.

After 20 years of intensive negotiations, the Establishment directive was adopted in 1998. It opened up the possibility for fully qualified lawyers to establish in other Member State(s) under their home Member State title without any examinations or control of competencies. The directive also gave a second choice for lawyers: to be integrated into the host Member State's legal community after have been effectively and regularly practicing

the host Member State law, including Community law, for a period of three years.

After its adoption followed an annulment action initiated before the ECJ by Luxembourg, which in the end just firmly set a pattern supportive of Europe wide legal practice.

The *Wouters* and *Morgenbesser* cases and possible misimplementation of the Establishment directive by Luxembourg revealed still unresolved issues related to controversy between ethical and economic sides of multi-disciplinary partnerships, the free movement of trainee lawyers and legality of language requirement.

Nevertheless, apart from the above mentioned issues, there are other and maybe more important factors, such as persisting linguistic, cultural and legal differences, which suppress lawyers from taking the advantage of freedom of establishment within the EU. As a result, lawyers, sole practitioners, are still very reluctant to move and pursue a career into a Member State other than the one where they qualified. However, it is likely that the Establishment directive will serve to the major law firms with the offices in a number of Member States.

# Preface

The European Community has been growing into depth and width now for almost exactly 50 years (for a point of departure I take a signature of the Treaty of Rome in 1957). During this time, an internal market characterised by the abolition of obstacles to the free movement of goods, persons, services and capital was gradually built.

I myself used this free movement privilege and came to study in the European Affairs Programme in Lund. During the first semester of our studies, I discovered a rather large number of cases dealing with the claims of lawyers on the ground that their freedom of movement in one or the other way was illegally restricted. This encouraged me to make an investigation how we – law graduates – after qualifying for a lawyer’s profession in our home-countries could benefit from the freedom of establishment provided by the EC Treaty and whether we could encounter any difficulties in exercising the freedom of establishment within the EU. Even if I found out that the EU legislation has in depth and in width also significantly advanced in this field, I also found that a lawyer still might have to cope with some objective difficulties before s/he can firmly embed her- or himself in another Member State. However, I hope that we as law graduates will be ready to face such challenges and that maybe some of us will foster freedom of establishment of lawyers within the EU.

I express my deep gratitude to my tutor Lecturer Henrik Norinder for his guidance, comments and support in writing this thesis.

Lastly but not least I want to say my warmest thanks to my dearest family and friends for helping and being with me always even sometimes just in my thoughts.

Julija

Lund, May 2006

# Abbreviations

CCBE	Council of Bars and Law Societies of Europe
Commission	Commission of the European Communities
EC/Community	European Community
ECJ/Court	European Court of Justice
EC Treaty	Treaty Establishing the European Community
EEA	European Economic Area
EU	European Union
OJ	Official Journal

# 1 Introduction

## 1.1 Background

The free movement of goods, persons, services and capital are the four cornerstones of the European Community construction. They serve as a driving force in promoting a harmonious, balanced and sustainable development of economic activities, a high level of employment and social protection throughout the Community. Therefore, it is important to see how easily nationals of EU Member States can access these freedoms today. In order to make an in-depth and comprehensive analysis I have chosen to analyse in the thesis just a subset of these freedoms – the freedom of establishment. Moreover, as even freedom of establishment also would be a too broad subject, I will limit the examination of the freedom of establishment to one specific profession – the profession of lawyer.

Unlike the practice of, for example, civil engineering, architecture or medicine, the lawyer's profession is rather strictly regulated through national laws, setting requirements for professional training, rules of admission to the profession, code of conduct, fees and disciplinary arrangements.<sup>1</sup> In addition, prohibitions to advertise legal services, restrictions on individual lawyers' geographical range of action as well as on law firms' organisational structure rather recently could be still found in national laws of the EU Member States. Furthermore, there are great differences between the national laws and national legal orders of the EU Member States. Therefore, for a long time it was perceived as a profession, which could be acquired, accessed and exercised only within one nation state.

Nevertheless, in the 1970's it was unconfined from the nation state borders by the European Communities, when claims that lawyers profession fell within the exception of official authority in Article 45 (ex Article 55) of

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<sup>1</sup> Shaw Gisela, *German Lawyers and Globalisation: Changing Professional Identity*, German Life and Letters, Vol. 58(2), Blackwell Publishing, April 2005, p. 216.

the EC Treaty were defeated in the *Reyners*<sup>2</sup> judgement. Later, the measures taken at European level in order to implement internal market policies played a vital role in facilitating free movement of lawyers across the internal market area. The globalisation of enterprises and markets all over the world has also served as an impetus for the change of legal profession.

## 1.2 Purpose and outline

The aim of this thesis is to analyse how the freedom of establishment of lawyers has developed over the years in the EU and what problems have arisen in this regard. Moreover, this thesis tries to answer the question, whether the freedom of establishment of lawyers has been after all achieved in the EU and whether it is functioning in practice.

For this purpose, first the thesis will introduce the primary law of the European Community on the freedom of establishment in general and indicate its characteristic features. Simultaneously, the relevant case law of the Court of Justice of the European Communities will be addressed. Secondly, it will look at the developments of free movement of lawyers predating the Establishment directive<sup>3</sup> and will give the reasons why it was deemed needed. Thirdly and mainly, the attention will be drawn to the Establishment directive itself and obstacles faced in its implementation throughout Europe. Lastly, still remaining issues will be examined and conclusions on whether lawyers in reality exercise the freedom of establishment within the EU will be drawn.

## 1.3 Method

In my thesis, I will mainly use traditional legal and historical methods by describing, analysing, interpreting, comparing and evaluating developments of the freedom of establishment of lawyers in the EU.

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<sup>2</sup> Case 2/74 *Reyners v Belgian State* [1974] ERC 631.

<sup>3</sup> Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 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 (hereinafter 'Establishment directive'), 1998, OJ L 77/36.

The above-mentioned methods will be employed in the examination of primary and secondary Community law as well as in assessment of plentiful ECJ case law, which for the Community legislator often has served as a guideline in drafting directives on the free movement of lawyers across the national borders of EU Member States. A vast number of doctrine will be approached while defining the concept of establishment. When going specifically into the analysis of establishment question of lawyers mainly the information provided in scientific articles and on the website of the Council of Bars and Law Societies of Europe<sup>4</sup> (hereinafter CCBE) will be used.

#### 1.4 **Delimitations**

The concept of establishment will only be considered with regard to self-employed persons, while leaving companies aside. Further, since the main focus of this thesis is placed on the establishment of lawyers within the EU, the discussion on the issues of free movement of lawyers with the aim to provide legal services and recognition of legal diplomas will be limited to the above purpose.<sup>5</sup> The national legal systems will be also just briefly considered in order to find the answers to the questions whether freedom of establishment is really functioning in practice and whether there still exist any impediments to it.

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<sup>4</sup> <http://www.ccbe.org> page last time visited on 1 May 2006.

<sup>5</sup> Therefore, a draft Service directive is beyond the scope of this thesis. Moreover, as it follows from the Amended proposal of the Commission of the European Communities for a Directive of the European Parliament and of the Council on services in the internal market, the legal services should remain outside this framework directive since the provision of legal services is governed by a sectoral directive, which will be later discussed in this thesis. For more detail see COM(2006) 160 final of 4 April, 2006  
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006PC0160:EN:NOT>  
page last time visited on May 12, 2006.

## 2 Freedom of establishment

Cross-border legal practice in the European Community is an important aspect of free movement of persons as well as freedom of services and/or establishment in the internal European market. For example, a number of leading firms of London solicitors have either established an office in another Member State, or merged with a law firm in another Member State.<sup>6</sup> Notwithstanding that, before starting the research of the establishment of lawyers in the EU it is essential to find out what in general is meant by the concept of establishment.

### 2.1 Concept of establishment

Article 43 EC provides that “restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.”<sup>7</sup>

The subjects of this EC Treaty provision are natural persons, i.e. self-employed, and legal persons, i.e. companies. Since this thesis mainly focuses on free movement of lawyers, further the freedom of establishment is analysed only with respect to that of self-employed persons. The ‘actual pursuit of an economic activity through a fixed establishment in another Member State for indefinite period’<sup>8</sup> constitutes the object of the freedom of establishment. Thus, the core elements of establishment are an established professional base within the host Member State and ‘the stable and continuous basis’ on which the economic or professional activity is carried

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<sup>6</sup> Katsirea Irini & Ruff Anne, *Free Movement of Law Students and Lawyers in the EU: a comparison of English, German and Greek Legislation*, International Journal of the Legal Profession, Vol. 12, No. 3, Routledge, part of the Taylor & Francis Group, November 2005, p. 383.

<sup>7</sup> Article 43(1) EC.

<sup>8</sup> Case C-221/89 *R. v Secretary of State for Transport, ex parte Factortame* [1991] ECR I-3905, paragraph 20.

on.<sup>9</sup> However, it does not apply to wholly internal situations, because the EC Treaty addresses just situations concerning the establishment of nationals of one Member State in the territory of another Member State.

Nevertheless, as the Court has indicated in the *Knoors*<sup>10</sup>, *Bouchoucha*<sup>11</sup>, *Gullung*<sup>12</sup> and *Kraus*<sup>13</sup> judgements, in certain circumstances a national can also rely on Article 43 EC against his own State. The latter case concerned a German national who has obtained the university degree of 'Master of Laws' (LL.M) outside Germany. In order to be able to use this academic title by German law he was required to get official authorisation, otherwise he could have been punished by imprisonment or fine. Thereby, the Court had to ascertain whether Articles 39 (ex Article 48) and 43 (ex Article 52) EC precluded a Member State from prohibiting one of its nationals using that title on its territory unless he has obtained administrative authorization to do so.<sup>14</sup> Further, the ECJ considered if the situation could not be regarded as purely internal and held that:

“Article 52 of the Treaty may not be interpreted in such a way as to exclude from the benefit of Community law the nationals of a given Member State when, owing to the fact that they have lawfully resided on the territory of another member State <...>, they are, with regard to their State of origin, in a situation which may be assimilated to that of any other persons enjoying the rights and liberties granted by the Treaty”.<sup>15</sup>

In other words, an individual who has engaged in free movement and then returns to his home-country may well enjoy the rights which would not be available to his non-mobile fellow nationals.<sup>16</sup>

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<sup>9</sup> Craig Paul and Búrca Gráinne, *EU Law: Text, Cases, and Materials*, 3<sup>rd</sup> edition, Oxford University Press, ISBN-13: 978-0-19-924943-5, 2004, p. 767.

<sup>10</sup> Case 115/78 *Knoors v Staatssecretaris voor Economische Zaken* [1979] ECR 399, paragraph 24.

<sup>11</sup> Case 61/89 *Bouchoucha* [1990] ECR I-3551, paragraph 13.

<sup>12</sup> Case 292/86 *Gullung v Councils de l'ordre des avocats du barreau de Colmar and de Saverne* [1988] ERC 111.

<sup>13</sup> Case C-19/92 *Dieter Kraus v Land Baden-Württemberg* [1993] ECR I-01663.

<sup>14</sup> *Ibid*, paragraph 13.

<sup>15</sup> *Ibid*, paragraph 15.

<sup>16</sup> Shine D. Bruce, *The European Union's Lack of Internal Borders in the Practice of Law: a Model for the United States?* Syracuse Journal of International Law and Commerce, Vol. 29, issue 2, ISSN 00930709, 2002, p. 221

<http://www.lub.lu.se/cgi->

[bin/ipchk/http://elin.lub.lu.se/link2elin?genre=article&issn=00930709&year=2002&volum](http://www.lub.lu.se/cgi-bin/ipchk/http://elin.lub.lu.se/link2elin?genre=article&issn=00930709&year=2002&volum)

## 2.2 Establishment of self-employed persons

The term ‘self-employed’ describes the person, who, unlike a worker, works outside a relationship of subordination, bears the risk for the success or failure of his/her employment, and is paid directly and in full.<sup>17</sup> The right of establishment for the self-employed person means that he/she can establish himself/herself in another Member State. In that capacity they have the right to take up and pursue the activities as self-employed persons under the conditions laid down for the States’ own nationals by the law of the country where such establishment is effected.

Therefore, “the concept of establishment within the meaning of the EC Treaty is a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his/her state of origin and to profit there from, so contributing to social and economic penetration within the Community in the sphere of activities as self-employed persons”.<sup>18</sup>

## 2.3 Limitations

Freedom of establishment is not absolute and cannot be enjoyed in all situations or by all persons. First, it is not applicable to the activities of the Member State, which in that State are connected, even occasionally, with the exercise of official authority.<sup>19</sup> Furthermore, exceptions from the freedom of establishment are possible on the grounds of public policy, public security or public health.<sup>20</sup> As for the first limitation, it has been interpreted restrictively in the ECJ case law and therefore in the *Reyners*<sup>21</sup> judgement a profession of lawyer was held to be outside this exception. In

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e=29&issue=2&collection=ABI&pages=207-261&resid=3ea60e6495763b523efcb1e205f45273&lang=en page last time visited on May 6 2006.

<sup>17</sup> Barnard Catherine, *The Substantive Law of the EU: the Four Freedoms*, Oxford University Press, ISBN 0-19-925135-5, 2004, p. 291.

<sup>18</sup> Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, paragraph 25.

<sup>19</sup> See Article 45 EC.

<sup>20</sup> See Article 46 EC.

<sup>21</sup> Case 2/74, *supra* note 2.

this regard, the Court stated that professional activities involving contacts, even regular and organic, with the courts, including even compulsory co-operation in their functioning, do not constitute, as such, connection with the exercise of official authority.<sup>22</sup>

## 2.4 **Direct effect**

The direct effect issue of the right to establishment was also resolved in the landmark *Reyners* case. One of the questions referred to the Court was if Article 43 EC (ex Article 52) at the end of the transitional period was a directly applicable provision, despite the absence of implementing directives prescribed by the EC Treaty. The Court gave a positive answer to this question. It held that Article 43 EC, in laying down that freedom of establishment shall be attained at the end of the transitional period, imposed an obligation to attain a precise result. Thus, it was not possible to invoke the fact that implementing directives provided by the EC Treaty were not issued.

## 2.5 **Non-discrimination**

Another important feature of the freedom of establishment is the principle of non-discrimination. It is established in the Article 43 EC, which provides that nationals of one Member State have the right to take up and pursue activities as self-employed persons in another Member State under the conditions laid down for the latter's own nationals.

This principle was also clarified in the *Reyners* case in which the ECJ underlined that the rule on equal treatment with nationals is one of the fundamental legal provisions of the Community. As a reference to a set of legislative provisions effectively applied by the country of establishment to its own nationals this norm was deemed, by its essence, capable of being directly invoked by nationals of all the other Member States.<sup>23</sup> In other words it was, made clear that Article 43 EC prohibits direct discrimination

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<sup>22</sup> Case 2/74, *supra* note 2, paragraph 51.

<sup>23</sup> *Ibid*, paragraph 25.

on the grounds of nationality if it does not fall within the express derogation. However, the prohibition of direct discrimination is not an ultimate limit for the interpretation of Article 43 EC in that regard.

## 2.6 Beyond equal treatment

Indirectly discriminatory measures also breach Article 43 EC if they cannot be objectively justified or do not fall within the exceptions provided in Articles 45 and 46 EC. Such measures are considered discriminatory, because they impose dual burden on the professionals, who take advantage of the freedom of establishment, by requiring them both to follow the rules of the home and host Member States<sup>24</sup>, while nationals remaining in their home Member State have to satisfy only one set of requirements. National laws obliging a person to be registered with a professional body, to possess an academic degree acquired in the country of establishment as well as a requirement to have a single establishment place are just few examples of indirectly discriminatory measures.

The latter measure was a subject matter of the court proceedings in the *Klopp*<sup>25</sup> case. A lawyer established in Germany was refused registration with the Paris Bar solely on the ground that he did not meet the requirement, equally applied to local and foreign lawyers, that an ‘*avocat*’ may establish chambers in one place only. Even if in the absence of specific Community rules each Member State was held free to regulate the exercise of legal profession in its territory, the ECJ ruled that the right of establishment includes freedom to set up and maintain, subject to observance of professional rules, more than one place of work within the Community. Although the Court came to this conclusion by referring to the Article 43 EC providing the right to set-up agencies, branches or subsidiaries, this case

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<sup>24</sup> The terms home and host Member States for the purpose of this thesis shall mean respectively:

- the Member State in which a lawyer acquired the right to use the professional title of a lawyer before providing services or practicing the profession or seeking recognition of his qualifications in another Member State;
- another Member State than his home Member State in which a lawyer provides services or practices or seeks recognition of his qualifications.

<sup>25</sup> Case 107/83 *Ordre des avocats au barreau des Paris v Klopp* [1984] ECR 2971.

revealed that sometimes freedom of establishment might require more than just an equal treatment.

However, not always such indirectly discriminatory measures are deemed to be in breach of Article 43 EC as quite often they can be justified. For example, in the *Gullung*<sup>26</sup> case one of the questions dealt by the ECJ was whether the establishment of a lawyer in the territory of another Member State presupposes his registration at a bar of the host Member State, where that is required by its legislation. The Court justified such requirement, because it sought to ensure the observance of moral and ethical principles and the disciplinary control of the activity of lawyers with the condition that registration is open to nationals of all Member States.

Finally, the express indication that Article 43 EC should be given broader scope than just a prohibition of discrimination was provided in the *Gebhard* case, which established 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”.<sup>27</sup>

This indicated the shift from discrimination test to the broader examination, as in the case of other freedoms (in *Dassonville*<sup>28</sup> and *Cassis de Dijon*<sup>29</sup> cases), whether the national measures are liable to prohibit, impede or render less attractive access to or exercise of the freedom of establishment. In other words, “now even in the case of a rule, which is not indirectly discriminatory, the very fact of a national rule, which is sufficiently obstructive to constitute a hindrance to the freedom of establishment, is enough to bring it within the scope of Article 43 EC and to require justification”.<sup>30</sup>

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<sup>26</sup> Case 292/86, *supra* note 12.

<sup>27</sup> Case C-55/94, *supra* note 18, paragraph 37.

<sup>28</sup> Case 8/74 *Dassonville* [1974] ECR 837.

<sup>29</sup> Case 120/78 *Rewe v Bundesmonopolverwaltung für Branntwein* [1979] ERC 649.

<sup>30</sup> Craig Paul and Búrca Gráinne, *supra* note 9, p. 786.

# 3 Why the Establishment directive was needed?

## 3.1 The Legal service directive

The first document to address the free movement of lawyers in the European Community was the Directive 77/249/EEC<sup>31</sup> that facilitates the effective exercise by lawyers of freedom to provide services.

The main goal of this directive is to oblige the EU Member States to recognize as lawyers those persons, who practice the profession by providing legal services outside their own country. Consequently, the preamble of the directive clearly states that the effective exercise of the right of establishment and the provisions on the mutual recognition of diplomas is beyond the scope of this directive.

For this reason, it applies to the lawyers from any Member State only when providing services in any other than their home Member State. Moreover, it leaves the right for the Member States to reserve to prescribed categories of lawyers (national lawyers) the preparation of formal documents for obtaining title to administer estates of deceased persons and for creating or transferring interests in land.

According to the directive, the provision of services is allowed with the condition that lawyers adopt the professional title used in the Member State from which they came. Therefore, for example an '*avocat*' from France, Belgium or Luxembourg when taking advantage of free movement of services in one of these countries (other than his home Member State) would have to supplement his title with a clear indication that he belongs to a French, Belgian or Luxembourgian Bar respectively.

When representing clients in legal proceedings or before public authorities, lawyers are subject to the conditions and the rules of professional conduct laid down for by the host Member State. Else, they

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<sup>31</sup> Council directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (hereinafter 'Legal service directive'), 1977, OJ L78/17.

remain subject to conditions and rules of professional conduct of the home Member State without prejudice to respect for the rules governing the profession in the host Member State. Furthermore, Article 5 of the directive grants Member States an option to require lawyers to work in conjunction with a lawyer, who is established in this Member State.

As a result, the Legal service directive opened up the right for foreign lawyers to represent clients before the courts of the host Member State<sup>32</sup> and at least formally they could not be prevented anymore by the host Member State from advising on home State or Community law matters in that State.

However, this directive did not concern freedom of establishment or the mutual recognition of diplomas and, as it was clarified in *Gebhard* judgement, it covered just temporary and occasional activities of lawyers in another Member State. Moreover, the Legal service directive was considered “unclear and fudged” and was often used abusively as a way round establishments.<sup>33</sup> Its implementation problems were revealed in the cases *Commission v Germany*<sup>34</sup> and *Commission v France*<sup>35</sup>. For example, in the former the ECJ held that Germany has defectively implemented the directive on the six grounds:

- by requiring the lawyer to act in conjunction with a lawyer established in Germany, even where under German law there is no requirement of representation by a lawyer,
- by requiring the German lawyer, in conjunction with whom he must act, himself to be the authorised representative or defending counsel in the case,
- by not allowing the lawyer, who takes advantage of freedom to provide services, to appear in oral proceedings unless accompanied by the said German lawyer,
- by laying down unjustified requirements regarding proof of the cooperation between the two lawyers,

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<sup>32</sup> Adamson Hamish OBE. MA (Oxon), *Free Movement of Lawyers*, 2<sup>nd</sup> edition, Butterworths, London, ISBN 0 406 03698 5, 1998, p. 50.

<sup>33</sup> Lonbay Julian, *Lawyers bounding over the borders: the Draft Directive on Lawyer's establishment*, European Law Review, 1996, Vol. 21(1), pp. 50-58, [www.westlawinternational.com](http://www.westlawinternational.com) page last time visited on April 10 2006.

<sup>34</sup> Case 427/85 *Commission v Germany* [1988] ECR 1123.

<sup>35</sup> Case 249/89 *Commission v France* [1991] ECR I-3591.

- by requiring the lawyer providing services to be always accompanied by the German lawyer when visiting a person held in custody and also to correspond with that person only through the said German lawyer,
- by subjecting lawyer providing services to the rule of territorial exclusivity provided in paragraph 52(2) of the *Bundesrechtsanwaltschaftsordnung* (Federal regulation concerning lawyers).<sup>36</sup>

Thereby, this judgement made clear that the requirement to act in conjunction with a lawyer established in the host Member State is quite narrow and that lawyers have wide discretion to act independently when providing services in the host Member State.

### 3.2 **The Directive on the recognition of diplomas**

Next to the nationality requirement, a condition to have acquired all the legal training in the country, where legal profession is to be pursued, for long has been a segmenting element of the legal profession throughout the Community. Since the unanimity, as required by the EC Treaty, on the issuance of directives for the mutual recognition of diplomas could not be reached in the Council, the ECJ case law had to pave the way towards the removal of the above mentioned obstacle.

The first steps were taken by the *Thieffry*<sup>37</sup> judgement. In this judgement, the ECJ stated that there is an unjustified restriction to the freedom of establishment, where a person is refused admission to a profession of advocate solely because he does not possess the national diploma of the Member State, where the access to profession is sought. The severability of the restriction in this case emanated from the fact that the person concerned possessed a diploma of doctor of laws from his country of origin, which has been already recognised by a French university as equivalent to the French *licenciée*'s degree in law, and had subsequently obtained the '*certificat d'aptitude a la profession d'avocat*', having sat and

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<sup>36</sup> Case 427/85 *Commission v Germany*, *supra* note 34, paragraph 46.

<sup>37</sup> Case 71/76 *Jean Thieffry v Conseil de l'ordre des avocats à la cour de Paris* [1977] ECR 765.

passed that examination, in accordance with French legislation.<sup>38</sup> Thus, the Court held such restriction incompatible with the freedom of establishment guaranteed by Article 43 (ex Article 52) of the EC Treaty. In addition, it emanated from the wording of the judgement that a Member State is now obliged to take into account professional qualifications from other Member States when assessing whether an EU citizen already satisfies the national requirements for carrying on some particular profession.<sup>39</sup>

Finally, in 1989 the Council adopted a directive, setting a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years,<sup>40</sup> which among others also applied to the lawyer's profession. Any national of a Member State wishing to pursue a regulated profession in another Member State in a self-employed capacity or as an employed person fell under the scope of this directive.

The basic conditions set in the directive are a completion of at least three years education course and in addition a successful completion of the necessary professional training. Besides, in order to be subject to the provisions of this directive a lawyer has to have a diploma, which shows that the holder has the professional qualifications required for the taking up or pursuit of a regulated profession in a home Member State. Thus, the directive applies only to the lawyers, who have obtained full qualification and have been admitted to the profession in their home Member State.

However, recognition is not granted automatically to every diploma issued within the Community. A Member State with regard to major differences may require a person from another Member State, wishing to pursue a regulated profession in its territory, to complete an adaptation period not exceeding the three years or to take an aptitude test. Normally a person would have the right to choose between the two possibilities.

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<sup>38</sup> Ibid, paragraph 2.

<sup>39</sup> Broberg Morten, Holst-Christensen Nina, *Free movement in the European Union: Cases, Commentaries and Questions*, DJØF Publishing, Copenhagen, 2004, ISBN 87-574-0999-4, p. 669.

<sup>40</sup> 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 (hereinafter 'Directive on the recognition of diplomas'), 1989, OJ L19/16.

However, “for professions whose practice requires precise knowledge of national law and in respect of which the provision of advice and/or assistance concerning national law is an essential and constant aspect of the professional activity”<sup>41</sup> this right is granted to the Member States themselves. All the Member States, except Denmark, have used this opportunity and opted for the aptitude test with regard to recognition of lawyers’ diplomas and qualifications.<sup>42</sup> If applicants fulfil the above mentioned conditions, they get the right to use the professional title of the host Member State corresponding to that profession and thereby become fully integrated into the legal profession of the host Member State.

Nevertheless, the Commission has not been satisfied by the results of the directive, because aptitude testing has generated a suspicion that it is being used as a mechanism to obstruct free movement of lawyers.<sup>43</sup> Moreover, it takes long time to go through the adaptation period until full recognition is granted. In the case of aptitude test, a lawyer might also have to put a lot of time and effort before full recognition and integration into legal profession of the host Member State is achieved. For example, until the year 2000 a foreign lawyer wishing to acquire the title and rights of a German ‘*rechtsanwalt*’ (lawyer) was expected to pass an aptitude test that was hardly less comprehensive and taxing than the fully-fledged first state examination for German students of law.<sup>44</sup> Thus, such way of integration into host Member State’s legal system might not seem acceptable for experienced lawyers, who already gained professional recognition in their home Member States, or to large law firms wishing to transfer a part of their working force into another Member State.

It is important to note, departing from the chronological order of this thesis, that the Directive on the recognition of diplomas recently underwent a major reform. On the 20 October 2005 entered into force a new directive on the recognition of professional qualifications,<sup>45</sup> which will replace the

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<sup>41</sup> Article 4(1) of the Directive on the recognition of diplomas, *supra* note 40.

<sup>42</sup> Adamson Hamish, *supra* note 32, p. 66.

<sup>43</sup> *Ibid*, p. 84.

<sup>44</sup> Shaw Gisela, *supra* note 1, p. 219.

<sup>45</sup> Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, 2005, OJ L 255/22.

first directive on the 20 October 2007. Despite some attempts to withdraw the derogation from the principle of the right of the applicant to choose between an adaptation period and an aptitude test with regard to legal profession, it has been again reinserted into the new directive.

The major novelty of the new directive is a provision on “a common platform”.<sup>46</sup> It allows Member States or professional associations/organisations (in the case of lawyers it would be the CCBE) to submit to the Commission common platforms, i.e. a set of criteria of professional qualifications which are suitable for compensating for substantial differences which have been identified between the training requirements existing in the various Member States for a given profession. Based on such proposals the Commission, after consulting the Member States, may adopt a common platform. Thereby, if lawyers could reach a common platform, the requirements of an adaptation period and an aptitude test would be waived for the applicants, whose qualifications satisfy the criteria set in it.

### **3.2.1 How the degrees obtained outside national borders should be approached**

Despite the judgement given in the *Thieffry* case and just after the Directive on the recognition of diplomas was adopted, the *Vlassopoulou*<sup>47</sup> case revealed still existing reluctance of some Member States to take into account legal education and qualifications obtained outside national borders and to examine whether they correspond to the qualification and experience required by the host Member State. A Greek lawyer registered with the Athens Bar was refused access to the ‘*rechtsanwalt*’ (lawyer) profession in Germany, because she did not satisfy all the formal requirements. Namely, because she did not complete all her studies in Germany, nor pass First and Second State Examinations, nor have completed a preparatory training in between the two examinations. Moreover, neither the doctorate in law from a German university nor the professional practice at a German law firm was taken into account.

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<sup>46</sup> Ibid, Article 15.

<sup>47</sup> Case C-340/89 *Vlassopoulou v. Ministerium für Justiz, Bundes- u. Europaangelegenheiten Baden-Württemberg* [1991] ECR I-2357.

During the Court proceedings, some Member States, namely the Italian and the German Governments, argued that, in the absence of Community rules on access to and the pursuit of self-employed activities as a lawyer, Member States were entitled to make admission to a bar dependent on the fulfilment of non-discriminatory conditions laid down by national law. However, the Court did not agree and by referring to Article 43 EC stated that national requirements concerning qualifications, even applied without any discrimination, may have the effect of hindering nationals of the other Member States in the exercise of their right of establishment. Therefore, it held that in such situation Member State must take into consideration the diplomas, certificates and other evidence of qualifications which the person concerned has acquired in order to exercise the same profession in another Member State by making a comparison between the specialized knowledge and abilities certified by those diplomas and the knowledge and qualifications required by the national rules.<sup>48</sup>

Likewise, the requirement that Member States must take account of the equivalence of diplomas and if necessary, proceed to a comparison of the knowledge and qualifications required by their national rules and those of the person concerned was affirmed in the *Gebhard* judgement.<sup>49</sup>

Following these judgements, Article 4(1) of the Directive on the recognition of diplomas was supplemented with the additional requirement directed towards Member States, namely, to examine whether the professional experience gained by the applicant since obtaining his qualification(s) covers the substantial differences between the qualifications required in the home and host Member States.<sup>50</sup>

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<sup>48</sup> Ibid, paragraph 16.

<sup>49</sup> Case C-55/94, *supra* note 18, paragraph 38.

<sup>50</sup> Directive 2001/19/EC of the European Parliament and of the Council of 14 May 2001 amending Council Directives 89/48/EEC and 92/51/EEC on the general system for the recognition of professional qualifications and Council Directives 77/452/EEC, 77/453/EEC, 78/686/EEC, 78/687/EEC, 78/1026/EEC, 78/1027/EEC, 80/154/EEC, 80/155/EEC, 85/384/EEC, 85/432/EEC, 85/433/EEC and 93/16/EEC concerning the professions of nurse responsible for general care, dental practitioner, veterinary surgeon, midwife, architect, pharmacist and doctor, 2001, OJ L 206/1, Recital 3.

### 3.3 **The unanswered establishment question in the Gullung case**

The *Gullung*<sup>51</sup> case concerned a lawyer of French and German nationality, who first was refused admission to a Bar in France on the ground that he infringed the rules relating to professional ethics and later came back to France with an aim to provide services now as a German ‘*rechtsanwalt*’ (lawyer) from the office set up in Mulhouse, France. However, this time again the French bars precluded Mr. Gullung from the provision of services in France by prohibiting any member of these bars “from lending assistance” to him on the ground that he did not satisfy the necessary requirements as to good character.<sup>52</sup> Then Mr. Gullung brought actions against those decisions, which resulted in questions being referred to the ECJ.

Accordingly, from the facts of the case it can be deduced, that Mr. Gullung has come back to France and set up an office in order to provide legal services there not temporarily, but from a permanent establishment. However, the ECJ has escaped the question if there is any right of establishment under the home title for a lawyer of one Member State in another by saying that “that problem <...> does not form part of the question referred to the Court”.<sup>53</sup> It was possible since the Court apparently agreed with the Commission<sup>54</sup> that the applicant was already established in France and therefore it held that the answer to the above question would be superfluous. Thus, the Court answered the question only with regard to the situation, when a foreign lawyer comes to a host Member State in order to establish himself in its territory as a lawyer within the meaning of the host Member State’s national legislation.<sup>55</sup>

As a result, this judgement has generated some observations that, for example, it would be not necessary for a lawyer to register in France with a

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<sup>51</sup> Case 292/86, *supra* note 12.

<sup>52</sup> *Ibid*, paragraph 4.

<sup>53</sup> *Ibid*, paragraph 27.

<sup>54</sup> *Ibid*, paragraph 26.

<sup>55</sup> *Ibid*, paragraph 30.

French Bar if one wished to practice as an English solicitor in France as opposed to French lawyer. Simultaneously some other important issues arose, such as whether partners from one Member State, establishing a branch elsewhere in the Community, would be subject to the rules of the Member State where their branch is established. Which professional rules would apply in the case of inter-state mergers, or for firms employing lawyers from other Member States?<sup>56</sup>

However, the above-mentioned issues and the whole question of lawyer's establishment in a host Member State under the home Member State title once more were left for future considerations.

### 3.4 **The border line between the establishment and the provision of services**

It was not until 1994, when in the *Gebhard*<sup>57</sup> case the ECJ had the opportunity to come back to the establishment issue and for the first time to consider the relationship between the freedom of establishment and freedom to provide services with regard to legal profession.

The distinction between the two freedoms is essential as they are governed by different rules of the EC Treaty. Moreover, the conditions imposed on the establishment in the Member State in which the activity is carried out are much stricter than those imposed on the mere provision of services.<sup>58</sup> Therefore, an economic operator must not be able to circumvent the rules governing the right of establishment by passing himself off as a provider of services.<sup>59</sup> Accordingly, the core meaning of this judgement rests within the given criteria, which apply in distinguishing the activities of

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<sup>56</sup> This paragraph is based on the article of Lonbay Julian, *Case Comment: Free movement for Professionals*, European Law Review, 1988, Vol. 13(4), pp. 275-279, [www.westlawinternational.com](http://www.westlawinternational.com) page last time visited on April 6 2006.

<sup>57</sup> Case C-55/94, *supra* note 18.

<sup>58</sup> Jarvis Malcolm, *Case Comment: Freedom of Establishment and Freedom to Provide Services – Lawyers on the Move*, European Law Review, 1996, Vol. 21(3), pp. 247-252, [www.westlawinternational.com](http://www.westlawinternational.com) page last time visited on April 5 2006.

<sup>59</sup> Opinion of Advocate General Léger delivered on 20 June 1995 in the case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-04165, paragraph 25.

an established lawyer in a host Member State from the activities of a lawyer just providing services in that State.

First the ECJ has indicated the criterion of temporality, which had to be determined in the light not only of the duration of the activity, but also of its regularity, periodicity and continuity, for it to be attributed either to the exercise of freedom of establishment or freedom to provide services. In addition, the Court said that the fact that provision of services is temporary does not mean that the provider of services may not equip himself with some form of infrastructure in the host Member State as far as such infrastructure is necessary for performing the services in question.<sup>60</sup>

On the other hand, as it follows from the judgement, the exercise of the freedom of establishment is characterised by the activity carried on a stable and continuous basis in another Member State, where an established person holds himself from an established professional base.

Moreover, just to draw a connecting line with the *Gullung* judgement, now it was made clear that lawyers may establish freely in a host Member State under their home title and pursue specific activities, in the event that these activities are not subject to any rules in the host Member State. On the other hand, where the taking up or the pursuit of a specific activity is subject to certain conditions in the host Member State, a national of another Member State intending to pursue that activity must in principle comply with them.<sup>61</sup> In addition, it was stated that any rules such as a membership requirement of a professional body, which may be a condition of taking up and pursuit of particular activities, cannot themselves be constitutive of establishment.<sup>62</sup> Besides, as it was discussed above in the chapter 2.5, they could not be such as to prohibit, impede or render less attractive the access to or the exercise of the freedom of establishment.

Nevertheless, also the *Gebhard* case has not removed all the uncertainties to that of the establishment of lawyers within the EU, since at

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<sup>60</sup> Case C-55/94, *supra* note 18, paragraph 27.

<sup>61</sup> *Ibid*, paragraph 38.

<sup>62</sup> *Ibid*, paragraph 31.

that time “in at least half of the Member States the provision of legal services was still reserved to the members of the host State profession”.<sup>63</sup>

Furthermore, as a result, the application of the Legal service directive has been reduced<sup>64</sup> and therefore it was made clear that a large number of cross-border activities, which could be described as stable and continuous, were to be governed by the individual regulations of the Member States. However, the cases referred to the Court showed that these regulations differed significantly from one country to another. Accordingly, there was an urgent need to address the establishment issue of lawyers in order to meet the strong demand for lawyers to be able to establish and to provide services themselves freely across the inner borders of the EU.

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<sup>63</sup> Jarvis Malcolm, *supra* note 58.

<sup>64</sup> *Ibid.*

## 4 The Establishment directive and obstacles on the way to its implementation

Before the Establishment directive was adopted the Member States were divided into two groups:

- 1) those, who reserved all forms of legal practice to the local professionals, e.g. Italy, Germany, Austria, Spain, Portugal and Greece;<sup>65</sup>
- 2) and those, who had no monopoly for local lawyers in giving legal advice, e.g., Belgium, Ireland, Netherlands, United Kingdom, Finland and Sweden.<sup>66</sup> However, these countries, except Finland and Sweden, had reserved to local lawyers, namely notaries in Civil Law countries and solicitors or others in Common Law countries, notarial activities relating to the transfer of real property and successions to the estates of deceased persons.

It was considered that such differences between the EU Member States with regard to access to the legal profession lead to inequalities and distorted competition between lawyers from the Member States as well as constituted an obstacle to the freedom of movement.<sup>67</sup>

After 20 years of intensive negotiations, the directive was adopted on 16 February 1998. From the outset of the negotiations, there were two extremes. At the one end of the spectrum was the view that rights of establishment for lawyers could be exercised only by way of integration into the host Member State legal profession and that accordingly there were no right under Community law for a lawyer of one Member State to be established under his home title in another. At the other end of the spectrum was the view that a lawyer of one Member State should have the right to be established as such in another Member State, without any requirement for

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<sup>65</sup> Adamson Hamish, *supra* note 32, p. 87.

<sup>66</sup> *Ibid*, p. 88.

<sup>67</sup> Recital 6 of the Establishment directive, *supra* note 3.

registration by the host Member State authorities. The resolution of those two extreme approaches towards the permanent establishment of lawyer under home title in a host Member State was largely facilitated by the delivery of ECJ judgement in the *Gebhard* case, which indicated the existence of a permanent right to practice under home title.

Thus, the Establishment directive<sup>68</sup> filled the gap left by the two previous directives and introduced the rules, enabling lawyers to practice under their home-country professional title on a permanent basis in a host Member State.

## 4.1 The Establishment directive

By laying down the conditions governing practice of the legal profession for lawyers working under their home-country professional title, the Establishment directive aims to resolve existing difficulties and afford the same opportunities to lawyers and consumers of legal services in all Member States.<sup>69</sup>

### 4.1.1 Object and scope of the directive

Under Article 1(1) of the Establishment directive, its purpose is to facilitate the 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. The directive provides an exhaustive list of professional titles, which bring the persons, authorised to pursue professional activities under these titles, within the scope of the directive. Accordingly, in order to enjoy the rights granted by the directive, the lawyer must be a Member State national and have to be registered with the home Member State Bar.<sup>70</sup>

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<sup>68</sup> Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 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, *supra* note 3.

<sup>69</sup> Recital 6 of the Establishment directive, *supra* note 3.

<sup>70</sup> The application of the Establishment directive by the Decision of the EEA Joint Committee No. 85/2002 was extended to the EEA, namely Iceland, Liechtenstein and Norway, OJ N L 266/50. Additionally Switzerland has a special bilateral arrangement.

It is important to note that the provisions of the Establishment directive apply both to the lawyers practising in a self-employed capacity and to the lawyers practising in a salaried capacity. However, the right of a lawyer established under home Member State title to practice as a salaried lawyer in the employ of another lawyer, an association or firm of lawyers, or a public or private enterprise is conditional.<sup>71</sup> It is possible only to the extent that the host Member State so permits for its own lawyers. Thus, a Belgian lawyer could be employed in the United Kingdom by a law firm even if his home-country profession prohibits it.<sup>72</sup>

The core provision of the directive is Article 2, which expressly states that any lawyer shall be entitled to pursue on a permanent basis, in any other Member State under his home-country professional title, the activities specified in Article 5, which will be discussed later. Thereby, a lawyer practising under home Member State title is basically placed on the same level with the legal professionals of the host Member State.

#### **4.1.2 Registration**

The directive also introduces a requirement for a lawyer wishing to practice under his home Member State professional title in a host Member State to register with its competent authority.<sup>73</sup> The establishing lawyer can be registered only upon the presentation of a certificate attesting to his registration with the competent authority in the home Member State. For this purpose, the directive separately addresses the situation of the United Kingdom and Ireland by providing that barristers and solicitors from one of these countries establishing in another shall register respectively with their authority responsible for the profession of barrister (and advocate) or the authority responsible for a solicitor profession.

As a result, other lawyers, practising under a professional title other than those used in the United Kingdom or Ireland, have the choice to either

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<sup>71</sup> Article 8 of the Establishment directive, *supra* note 3.

<sup>72</sup> Gromek-Broc Katarzyna, *The Legal Profession in the European Union – A Comparative Analysis of Four Member States*, Liverpool Law Review, Vol. 24, Kluwer Academic Publishers, 2002, p. 112.

<sup>73</sup> Article 3 of the Establishment directive, *supra* note 3.

register with the authority responsible for the profession of barrister (or advocate) or with the authority responsible for the profession of solicitor in the above mentioned countries.

The authority registering a lawyer who wishes to practice pursuant to this directive has a duty to inform the competent authority in the home Member State of the registration. This requirement is in line with the Article 13 of the Establishment directive, laying down the rules on the cooperation between the competent authorities in the home and host Member States. It also provides a guarantee that a foreign lawyer retains his registration with a home-country bar, which is a precondition for the coverage under this directive.

The main implication of the registration requirement is that it helps the competent authorities of the host Member State to control, that lawyers established under their home country professional title practice solely under that title and follow the rules of professional conduct in force in the host Member State.

### **4.1.3 Practice under home Member State title**

The only remaining appreciable difference between an established lawyer and a lawyer who acquired the right to use his professional title in a certain Member State is the title. Therefore, with the aim “to ensure that consumers are properly informed”<sup>74</sup>, Article 4 provides that a lawyer practising in a host Member State under his home-country title shall do so under that title. Moreover, that title must be expressed in the official language or one of the official languages of his home Member State in an intelligible manner and in such a way as to avoid confusion with the professional title of the host Member State.<sup>75</sup> For this purpose, a host Member State may require an establishing lawyer 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 practice. In addition, a lawyer practising under his home-country professional title may also be

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<sup>74</sup> Recital 9 of the Establishment directive, *supra* note 3.

<sup>75</sup> Article 4(2) of the Establishment directive, *supra* note 3.

required to include a reference to his registration with the competent authority in the host Member State.

Thus, for example, a Greek lawyer ‘*dikigoros*’ when establishing her/himself in a host Member State might have to indicate that she/he is a lawyer registered with the Athens Bar.

#### **4.1.4 Area of activity**

The area of activity of a lawyer practising under his home-country professional title is very broad: he may, with certain qualifications, *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.<sup>76</sup> The latter field of advice, even if it has been already for few decades included into the Legal services directive, became an object of controversy between the Member States, cf. chapter 4.2.1.

Nevertheless, the directive allows Member States to exclude from the area of activity the functions relating to preparation of deeds for obtaining title to administer estates of deceased persons and for creating or transferring interests in land. As it follows from the wording of Article 5(2), this derogation applies only in the Member States, where those activities are carried by a prescribed category of lawyers, which in other Member States are reserved for professions other than that of a lawyer, namely notaries. In practice, this provision enables the United Kingdom and Ireland to exclude lawyers from all other Member States from preparing such documents.

With regard to the representation or defence of a client in legal proceedings the Member States may require lawyers practising under their home-country professional titles to work in conjunction with a lawyer who practices before the judicial authority in question and who would, where necessary, be answerable to that authority or with an ‘*avoué*’ practicing before it.<sup>77</sup> This requirement should be interpreted narrowly and in line with the ECJ case law, in particular, its judgement *Commission v Germany* more extensively addressed in the chapter 3.1 of this thesis.

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<sup>76</sup> Article 5 of the Establishment directive, *supra* note 3.

<sup>77</sup> Article 5(3) of the Establishment directive, *supra* note 3.

Moreover, the Member States may lay down specific rules for access to supreme courts, such as the use of specialist lawyers.<sup>78</sup> This exception is made in order to ensure the smooth operation of the justice system in the Member States. Following the principle that derogations from a general rule should be narrowly construed, the term ‘supreme courts’ should cover only the highest courts in the hierarchy. Thus, it would not cover, for example, the whole of the High Court system in England and Wales, even though it is described as ‘the Supreme Court’.<sup>79</sup>

#### **4.1.5 Rules of professional conduct and disciplinary proceedings**

Since a lawyer practicing under home-country title is permitted to carry almost all the activities of the host Member State lawyer, it is logical “to subject him to the same rules of professional conduct as lawyers practicing under the relevant professional title of the host Member State in respect of all the activities he pursues in its territory”.<sup>80</sup>

Accordingly, Article 6(1) of the Establishment directive stipulates a grant of rights to lawyers practicing under the home Member State title with regard to representation in the professional associations of the host Member State, such as the right to vote in elections to those associations’ governing bodies.

On the other hand, the host Member State may require a lawyer practicing under his home-country professional title either to take out professional indemnity insurance or to become a member of a professional guarantee fund. Nevertheless, the directive takes into account the fact that a lawyer practicing under his home-country professional title might be already covered by insurance taken out or a guarantee provided in accordance with the rules of his home Member State. Thereby, in order to avoid placing a dual burden, the directive demands for a lawyer, satisfying the above conditions, to be exempted from such a requirement.

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<sup>78</sup> Second paragraph of Article 5(3) of the Establishment directive, *supra* note 3.

<sup>79</sup> Adamson Hamish, *supra* note 32, pp. 106-107.

<sup>80</sup> Article 6(1) of the Establishment directive, *supra* note 3.

As well as in the case of the professional conduct, in the event of failure to fulfil obligations in force in the host Member State, a lawyer practicing under his home-country professional title is subject to the same disciplinary regime, which applies to the host Member State lawyers. For this purpose, Article 7 of the Establishment directive provides for the cooperation between the home and host Member States in subjecting such lawyer to the rules of procedure, penalties and remedies of one of these States. The directive even stipulates that during the appeal of disciplinary proceedings in a host Member State the competent authority of the home Member State should be guaranteed the right to make submissions to the bodies hearing the case. Consequently, Article 7(5) of the directive makes clear that the temporary or permanent withdrawal by the competent authority in the home Member State of the authorisation to practice the profession shall automatically lead to the temporary or permanent prohibition from practicing under home title in a host Member State. On the other hand, the home Member State is not dependent on the decision taken by the host Member State. It is not obliged to apply disciplinary measures to the lawyer practicing under his home-country professional title and is free to decide what action to take under its own procedural and substantive rules.

#### **4.1.6 Integration into the host Member State legal profession**

The purpose of the directive was not only to enable lawyers to practice in another Member State under their home-country professional title, but also to facilitate the obtainment of a host Member State legal title. Under Article 10 of the Establishment directive, a permanently established lawyer is considered to be eligible for a full integration after three years of *effective and regular* activity “in the host Member State in the law of that State including Community law”.<sup>81</sup> The expression “*effective and regular*” is defined as the “actual exercise of the activity without any interruption other than that resulting from the events of everyday life”.<sup>82</sup>

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<sup>81</sup> Article 10(1) of the Establishment directive, *supra* note 3.

<sup>82</sup> *Ibid.*

This condition precludes lawyers established in the host Member State under home-country title from merely moving in and out of their host Member State while maintaining a primary practice in their home-country of residence.<sup>83</sup> However, interruptions ‘from the events of every day life’ should allow a lawyer practicing under home-country title to discontinue temporarily his activity due to such reasons as illness, usual holiday leave, and perhaps even maternity leave.<sup>84</sup> Moreover, following the spirit of the directive it is arguable if the three-year’s period should be necessarily continuous.

Where a lawyer satisfies the above requirements, he is exempted from the conditions, including subjection to the aptitude test, set out in Article 4(1) of the Directive on the recognition of diplomas.

Furthermore, a lawyer, who could not meet the requirements of Article 10(1) of the Establishment directive, has a second chance to be integrated into the legal profession of the host Member State under its Article 10(3) without being subjected to the Directive on the recognition of diplomas. A lawyer, who has effectively and regularly pursued a professional activity in the host Member State for a period of at least three years, but for a lesser period in the law of that State, may obtain admission to the profession of lawyer in the host Member State under that provision. However, in this case the competent authority of the host Member State has more discretion. Therefore, it has to assess and “take into account the effective and regular professional activity pursued during the above mentioned period and any knowledge and professional experience of the law of the host Member State, and any attendance at lectures or seminars on the law of the host Member State, including the rules regulating professional practice and conduct”.<sup>85</sup>

The competent authorities of the host Member State on their part in both above mentioned cases have the right to require to provide evidence of lawyers professional competence in that State: any relevant information and documentation, notably on the number of matters he has dealt with and their nature.

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<sup>83</sup> Shine D. Bruce, *supra* note 16, p. 242.

<sup>84</sup> Adamson Hamish, *supra* note 32, p. 116.

<sup>85</sup> Article 10(3)(a) of the Establishment directive, *supra* note 3.

If a lawyer fails to prove that he satisfies the requirements of Article 10(1) or 10(3) of the directive and the competent authority rejects his application for the admission to the profession of lawyer in the host Member State by adopting a reasoned decision, this decision can still be subject to appeal.

Apart from that of failure to satisfy the requirements of Articles 10(1) and 10(3) of the directive, the competent authority of the host Member State can refuse admission to its legal profession if it considers that this would be against public policy, in particular because of disciplinary proceedings, complaints or incidents of any kind.

In addition, a lawyer who gains the admission to the lawyer's profession in the host Member State retains the right next to his new title to use his home-country professional title.<sup>86</sup>

Nevertheless, the two above discussed ways of integration into the legal profession of the host Member State do not abolish the possibility existing under the Directive on the recognition of diplomas. At any time, a lawyer practising under his home-country professional title in a host Member State may apply to have his diploma recognised under that directive.

#### **4.1.7 Joint practice**

Last, but not least, the directive has introduced provisions on joint practice of lawyers.<sup>87</sup> Joint practice in a host Member State may include exclusively lawyers from one home Member State or lawyers from different home Member States along with one or more lawyers from the host Member State.

It is the first time that the Community legislator has addressed the reality that cross-border practice rights are usually exercised not by individual lawyers, but by law firms acting in forms of association.<sup>88</sup> However, this right is not absolute and it is exercised only as long as such joint practice is not contrary to the host country's law. Thereby, the host Member State's laws, regulations and administrative provisions always prevail over the

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<sup>86</sup> Article 10(6) of the Establishment directive, *supra* note 3.

<sup>87</sup> See Article 11 of the Establishment directive, *supra* note 3.

<sup>88</sup> Adamson Hamish, *supra* note 32, pp. 121-122.

home Member State's rules with regard to lawyers wishing to pursue their activities in a branch or agency of their grouping in the host Member State.

Moreover, notwithstanding clear opposition from the civil law professions, the directive leaves open the possibility of multi-disciplinary partnerships.<sup>89</sup> For this purpose, a multi-disciplinary practice is one where the capital of the firm is held entirely or partly, or the name under which it practices is used, or the decision-making power is exercised, *de facto or de jure*, by persons who do not have the status of lawyer within the meaning of Article 1(2) of the directive.<sup>90</sup> Even if the provision on the joint practice with the persons who are not members of the profession is negatively worded,<sup>91</sup> the host Member State, which allows its own professionals such practice, may not refuse the right to a lawyer registered under his home-country title to practice in its territory in his capacity as a member of such grouping.

Nevertheless, the directive allows Member States to take measures against multi-disciplinary practices with the legitimate aim of safeguarding the profession's independence and establishes that:

“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)”.<sup>92</sup>

#### 4.1.8 Comments

The Establishment directive has achieved its main goal and opened up the possibility for fully qualified lawyers to establish in other Member State(s) under their home Member State title. This allows a lawyer without any examinations or control of competencies to practice the host Member State law on an equal footing, although with some reservations, with the host State's own lawyers. In doing so, the directive has reversed a long

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<sup>89</sup> Gromek-Broc Katarzyna, *supra* note 72, p. 112.

<sup>90</sup> Adamson Hamish, *supra* note 32, 1998, p. 124.

<sup>91</sup> See Article 11 (5) of the Establishment directive, *supra* note 3.

<sup>92</sup> Second paragraph of Article 11(5) of the Establishment directive, *supra* note 3.

existed perception, that a lawyer first should acquire knowledge and training in the host Member State's law before actually starting to practice it.

The directive has also provided a second choice for lawyers who would like to become full members of the legal profession of the host Member State – to be integrated into its legal community with a sole fulfilment of the requirement to have been effectively and regularly practicing the host Member State law, including Community law, for a period of three years. It simultaneously acknowledged the existence of salaried lawyers and joint practices, including multi-disciplinary practices, in the EU, but still left the right of choice to have or not to have such types of legal practice for the Member States, who did not allow them.

Accordingly, this directive did not aim to unify legal profession in all the Member States, but just had an objective to facilitate its practice within the EU. Therefore, the Member States generally remain free to regulate the access to and practice of legal profession, keep their national cultures and traditions of the profession.

However, “the Establishment directive remained controversial to the end”.<sup>93</sup> Luxembourg and Spain voted against the final draft of the directive and the former initiated an action for annulment before the ECJ.

## 4.2 **Obstacles on the way towards the implementation of the Establishment directive**

### 4.2.1 **Luxembourg v Parliament and Council**

Just after the Establishment directive was adopted, Luxembourg brought an action for its annulment<sup>94</sup> before the ECJ, alleging infringement of the second paragraph of Article 43 EC, infringement of the second sentence of Article 47(2) EC and infringement of Article 253 EC.

Luxembourg was unsatisfied with the alleged inequalities created by the Establishment directive between the ‘migrant lawyer’ practising under the

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<sup>93</sup> White, Robin C.A., *Workers, Establishment, and services in the European Union*, Oxford University Press, ISBN 0-19-826776-2, 2004, p. 236.

<sup>94</sup> Case C-168/98 *Luxembourg v Parliament and Council* [2000] ECR I-9131.

professional title of the host Member State and the one practising under the home Member State professional title. In its opinion, this inequality was stipulated by dispensing the lawyer practising under home Member State title from any assessment of his knowledge of the law of the host Member State. However, the Court concluded that the fundamental principle of Community law, that comparable situations should not be treated differently unless such difference in treatment is objectively justified, was not at stake here. The situation of a migrant lawyer practising under his home Member State title and the situation of a lawyer practising under the professional title of the host Member State were held to be incomparable.<sup>95</sup> Mainly, because the latter may undertake all the activities of the profession of lawyer in the host Member State, while the former may be subject to certain restrictions and obligations with regard to some of the activities.<sup>96</sup>

Luxembourg also considered that the way the interests of consumers were safeguarded in the Establishment directive was inappropriate. It argued that by abolishing all requirements of training in the law of the host Member State, the directive prejudiced the public interest, in particular, the protection of consumers, pursued by the various Member States in requiring legally prescribed qualifications.

In that regard, the Court observed that a lawyer practising under his home-country professional title is required to do so under that title. This way the consumers are informed that the lawyer in question has not obtained his qualifications in the host Member State and that his initial training did not necessarily include the host Member State's national law. Besides, the ECJ drew attention to the fact that the lawyer practising under the home Member State title is subject to certain restrictions and conditions with regard to some activities. He is also subject to the rules of professional conduct as well as to the disciplinary proceedings applicable to the host State own lawyers. The Court also stressed that there are some financial

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<sup>95</sup> Ibid, paragraph 24.

<sup>96</sup> E.g., the right of the host Member State to exclude lawyers practising under a home Member State professional title from the activity of preparing deeds for obtaining title to administer the estates of deceased persons or for creating or transferring interests in land (Article 5(2) of the Establishment directive); the requirement to work in conjunction with a lawyer (*avoué*) of that State (Article 5(3) of the Establishment directive).

guarantees, such as the requirement to take out professional indemnity insurance or to become a member of a professional guarantee fund, and obligations of reciprocal information and cooperation between the competent authorities of the home and host Member States. Thus, in consequence of these arguments the ECJ rejected the plea of Luxembourg.

However, one question related to the above plea, which was presented during the oral hearing of the case, deserves a particular attention. Specifically, could it be understood from the Article 10(1)<sup>97</sup> of the directive that a lawyer, who practices exclusively the Community law, is entitled to full integration into the host Member State profession even if he has not gained any experience of the host Member State law? Some authors favour a positive answer to this question.<sup>98</sup> In their view, the fact that the Community law forms part of the national laws of the Member States supports this position. Unfortunately, the Court left the question without any clear answer. The Advocate General on his part first pointed out that “Community law forms an integral part of the law of the Member States and <...> is applied in the national context”.<sup>99</sup> Nevertheless, in the end he also refrained from giving his opinion on the issue by saying that “it will be for the Member States concerned, including its judicial bodies, and, in some cases, the Court of Justice, to interpret the precise scope of the provisions of the directive”.<sup>100</sup>

Practice shows that some Member States, e.g. the United Kingdom, have already opted for a broad interpretation and granted the right for the lawyers practising under their home Member State title to be fully integrated into their legal profession after practicing just European Union law.<sup>101</sup> However, under the directive the host Member State should still have the right to require the proof of practice in its law in addition to that of the

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<sup>97</sup> For detailed analysis of Article 10(1) of the Establishment directive see chapter 4.1.6 of this thesis.

<sup>98</sup> Adamson Hamish, *supra* note 32, p.386; Katsirea Irini & Ruff Anne, *supra* note 6, p. 386.

<sup>99</sup> Opinion of the Advocate General Ruiz-Jarabo Colomer delivered on 24 February 2000 in the case C-168/98 *Luxembourg v Parliament and Council* [2000] ECR I-09131, paragraph 73.

<sup>100</sup> *Ibid.*

<sup>101</sup> Katsirea Irini & Ruff Anne, *supra* note 6, p. 388.

Community law. First, because the Article 10(3) of the directive specifically deals with the situation, when a lawyer practicing under his home-country title has pursued the activity in a host Member State for three years, but '*for a lesser period in the law of that Member State*' without mentioning the Community law. Moreover, from the Article 5(1) it can be deduced that Community law and laws of the host Member State are considered as separate bodies of law. Nevertheless, they are closely interconnected and in reality, it would be difficult for a lawyer to carry activity only under Community law without involving national laws of the Member State(s). Besides, all the above-mentioned arguments provided by the ECJ in this court case on the protection of consumers would be irrelevant for the present purpose. Therefore, there is little ground for the interpretation of the directive that the sole practice of Community law could open the doors into the legal profession of the host Member State.

In addition, Luxembourg believed that the directive should have been adopted not by a qualified majority procedure under Article 251 EC, but unanimously in accordance with the second sentence of Article 47(2) EC. Basically, because, in its view, in several Member States Articles 2, 5 and 11 of the directive specifically amended the existing major principles governing training and conditions of access for natural persons to the profession of lawyer. Nonetheless, the Court once more rejected the allegations of Luxembourg. It held that the directive established a mechanism for the mutual recognition of the professional titles of migrant lawyers, which just supplemented that established under the Directive on the recognition of diplomas. Therefore, the argument that there was an amendment of existing principles was irrelevant. As with regard to Article 11 of the Establishment directive, the Court stated that it does not deal with a condition for access to the profession of lawyer, but with a condition for the exercise of that profession.<sup>102</sup>

Luxembourg was also unsuccessful in its last plea that the directive failed to state the reasons on which it is based.

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<sup>102</sup> Case C-168/98, *supra* note 94, paragraph 59.

Consequently, the ECJ's decision in the *Luxembourg v Parliament and Council* case scattered all the doubts about the legality of the Establishment directive and firmly set a pattern supportive of Europe wide legal practice.

#### 4.2.2 Late implementation

In addition to the mistrust about the legality of the Establishment directive expressed by Luxembourg, other Member States, namely Belgium, France, Ireland, the Netherlands and Portugal, were reluctant and failed to implement the directive on the term prescribed by its Article 14 on the 14th March, 2000.<sup>103</sup>

With regard to two of them, France<sup>104</sup> and Ireland<sup>105</sup>, the Commission brought an action under Article 226 EC for a declaration that by failing to adopt the laws, regulations and administrative provisions necessary to comply with the Establishment directive, the French and Irish Republics have failed to fulfil their obligations under that directive. Accordingly, the ECJ adopted the decisions in which it affirmed the claims of the Commission against France and Ireland.

Even if such failure cannot be considered as a direct indication of the low mobility of lawyers inside the EU, it can at least signify a low priority of Member States to comply with the EU law.

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<sup>103</sup> Written question E-2410/01 by Gerhard Schmid (PSE) to the Commission. Implementation of Directive 98/5/EC in Spain, OJ 040 E, 14/02/2002, p. 244.

<sup>104</sup> Case C-351/01 *Commission v France* [2002] ECR I-810.

<sup>105</sup> Case C-362/01 *Commission v Ireland* [2002] ECR I-11433.

# 5 Still unresolved issues

## 5.1 Wouters

The Establishment directive was rather neutral with regard to joint practice of lawyers under home-country title with other professionals in the host Member State and left the right of self-determination for the Member States, which did not allow such practice for their own lawyers. In several Member States, including, *inter alia*, Germany and Spain, bar members were permitted to enter into cooperation with accountants. While other Member States with support of the CCBE<sup>106</sup> kept the ban on multi-disciplinary practices of lawyers with accountants. The situation of Netherlands was special, because it allowed multi-disciplinary practices with the professions of notary and tax adviser, but not with that of the accountant.

As a result, the issue on the multi-disciplinary partnerships of lawyers with the accountants through a preliminary rulings procedure came to the ECJ with the *Wouters*<sup>107</sup> case. Due to the fact, that the Court considered the Dutch Bar as an association of undertakings, it could be subjected to the competition rules. The judgement recognised that the prohibition of multi-disciplinary partnerships of lawyers with the accountants produces negative effects on competition and may affect trade between Member States. The prohibition in question precludes the one-stop shop advantage, the achievement of economies of scale, which might have positive effects on the cost of services, as well as the possibility to meet the needs created by the increasing interpenetration of national markets and consequent necessity for continuous adaptation to national and international legislation.<sup>108</sup> However, the Court adopted a restrictive view regarding the joint activity of lawyers and accountants. The ECJ held that such prohibition escapes from the

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<sup>106</sup> For the CCBE Position on Multi-disciplinary Partnerships see [www.ccbe.org](http://www.ccbe.org)

<sup>107</sup> Case C-309/99 *Wouters and others* [2002] ECR I-1577.

<sup>108</sup> *Ibid*, paragraphs 87 to 89.

application of competition law as long as it is necessary for the proper practice and functioning of the legal profession.

Since it was a wholly internal situation, the Court did not analyse the prohibition of multi-disciplinary partnerships in the Netherlands with respect to the right of establishment and/or freedom to provide services. Nevertheless, it stated that in the case of restriction of both of those freedoms such restriction of multi-disciplinary partnerships would in any event be justified.<sup>109</sup>

Thereby, the ECJ just reinforced the position, created by the Establishment directive, without providing “a unique solution for Europe and a general prohibition of multi-disciplinary practices”.<sup>110</sup>

## 5.2 **Morgenbesser**

Another issue was disclosed in the *Morgenbesser*<sup>111</sup> case. A French national who had obtained her *maîtrise en droit* in France, was refused enrolment into the Italian register of *praticanti* (trainee lawyers). Her application was rejected on the ground that she had not completed her education in Italy. The ECJ found that neither the Directive on recognition of diplomas nor the Establishment directive applied to trainee lawyers as the activity of trainee lawyer could not be described as a regulated profession nor could it satisfy the criteria of fully qualified lawyer’s profession.

Nevertheless, the Court found the way to apply the principles set out in the *Vlassopoulou* and *Fernández de Bobadilla*<sup>112</sup> cases through the direct application of Articles 39 and 43 EC. Thus, the Italian authorities had to examine, whether, and to what extent, the knowledge certified by the diploma granted in France and the qualifications obtained there, together with the experience obtained in Italy (where the candidate seeks enrolment), must be regarded as satisfying, even partially, the conditions required for access to the activity concerned.<sup>113</sup>

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<sup>109</sup> Ibid, paragraph 122.

<sup>110</sup> Gromek-Broc Katarzyna, *supra* note 72, p. 113.

<sup>111</sup> Case C-313/01 *Morgenbesser* [2003] ECR I-13467.

<sup>112</sup> See C-234/97 *Fernández de Bobadilla* [1999] ECR I-4773, paragraph 33.

<sup>113</sup> Case C-313/01, *supra* note 111, paragraph 67.

Even if the present case did not deal with a fully qualified lawyer, it demonstrated that potential future exercisers of the benefits provided by the Establishment directive still face illegal obstacles to their freedom of establishment within the EU. Simultaneously it showed that, in order to ensure that inequalities between Member States with regard to legal profession are eliminated, there was a need to address an issue of free movement of lawyers in the EU already from the moment, when a future legal professional begins his training. Thus, the Court extended the principles applied to fully qualified lawyers and thereby “allowed semi-finished lawyers to travel and have access to legal training in a host Member State”.<sup>114</sup>

### 5.3 New pending cases

Finally, despite all the obstacles on the way towards its implementation, today the Establishment directive is considered to be fully implemented in all the 25 EU Member States. However, that still might not be the case, because there are two pending cases before the ECJ against Luxembourg.

One of them was submitted to the Court under the preliminary ruling procedure and raises the following questions:

Should Article 9 of the Establishment directive be interpreted as precluding appeal proceedings as provided for under the Luxembourgian law? Are the competent authorities of a Member State authorised to subject the right of a lawyer of another Member State to practise on a permanent basis the profession of a lawyer under his home-country professional title in the areas of activity specified in Article 5 of the Establishment directive to a requirement of proficiency in the language of the first Member State?<sup>115</sup>

Another action was brought by the Commission, in which the Court is asked to declare that by maintaining, for the purpose of establishing oneself under the home-country professional title, language knowledge

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<sup>114</sup> Lonbay Julian, *Legal ethics and professional responsibility in a global context*, 28 October 2005, p. 615  
[http://law.wustl.edu/Publications/WUGSLR/Issues/Volume4\\_3/p609Lonbaybookpages.pdf](http://law.wustl.edu/Publications/WUGSLR/Issues/Volume4_3/p609Lonbaybookpages.pdf)  
page last time visited on May 5 2006.

<sup>115</sup> Pending case C-506/04 *Wilson*, <http://curia.eu.int/en/content/juris/index.htm> page last time visited on May 5 2006.

requirements, a prohibition on being a person authorised to accept service and the obligation to reproduce each year the certificate from the home Member State, Luxembourg has failed to fulfil its obligations under Articles 2, 3 and 5 of the Establishment directive.<sup>116</sup>

The most appealing question from the above is whether a language requirement can legally preclude a lawyer from enjoying the rights granted under the Establishment directive. The Court in its earlier case law has already addressed the issue of compatibility of language requirement with the freedom of establishment. Accordingly, in the *Haim*<sup>117</sup> case the applicant's challenge to a language restriction imposed on his appointment as a social security dental practitioner in Germany was unsuccessful. The Court stated that it is in the interest of patients whose mother tongue is not the national language that there exist a certain number of dental practitioners who are also capable of communicating with such persons in their own language. However, in the end it held that it is more important that the dental practitioner will be able to communicate effectively with his patients, whose mother tongue is that of the Member State concerned, and with the administrative authorities and the professional bodies of that State. Thereby, the language requirement was considered not to go beyond what is necessary to attain that objective.

Nevertheless, the Court's decision with respect to lawyers has still to be seen and there is likelihood that the end result might be different. Namely, because this time a question does not concern a lawyer who wishes to work in a social security system, but is about a lawyer practising on the commercial grounds, where clients are free to choose a lawyer and *vice versa*. Another important factor is that a lawyer wishes to practice in another Member State under his home Member State title as a foreign lawyer.

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<sup>116</sup> Pending case C-193/05 *Commission v Luxembourg*, <http://curia.eu.int/en/content/juris/index.htm> page last time visited on May 5 2006.

<sup>117</sup> Case C-424/97 *Haim* [2000] ECR I-5123.

## 6 Conclusion: do lawyers in reality exercise the freedom of establishment within the EU?

The facilitation of the effective exercise by lawyers of freedom of establishment has been a slow step-by-step process, during which obstacles to the free movement of lawyers were eliminated by the EU legislation and on a case by case basis by the ECJ. Finally, today the CCBE holds that the issue of freedom of establishment for lawyers on the EU level has been in principle resolved.<sup>118</sup>

However, the statistics shows that in practice a number of lawyers, taking the advantage of the freedom of establishment, is marginal. For example, in Germany until the year 2005 in comparison to 133.113 members of the Bar there were only 206 foreign lawyers registered under their home-country professional title.<sup>119</sup> Similar situation is inherent to all the other Member States, except Belgium and Luxembourg, where respectively in comparison to 14.529 and 718 members of the Bar there were 509 and 30 lawyers registered under their home-country professional title until the year 2005.<sup>120</sup> However, it should be born in mind that the situation of Belgium and Luxembourg is special, because they attract so many lawyers wishing to practice under their home-country title due to the fact that the capitals of those two Member States house Community institutions, in particular, the Court of Justice of the European Communities.

Thus, apart from *Wouters* and *Morgenbesser* issues and possible misimplementation of the Establishment directive by Luxembourg, there are other and maybe more important factors, which suppress lawyers from taking the advantage of freedom of establishment within the EU.

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<sup>118</sup> Information received from Mr Simone CUOMO Legal Advisor of the CCBE by email on 18 April 2006.

<sup>119</sup> See the supplement on number of lawyers in CCBE Member Bars.

<sup>120</sup> Ibid.

One of the reasons why a lawyer's profession is still mostly confined to one national state is that the high degree of heterogeneity is pertinent to the legal profession around the EU. Even the *Wouters* judgement stated that in the absence of specific Community rules in the field, each Member State is in principle free to regulate the exercise of the legal profession in its territory; and for that reason, the rules applicable to the profession may differ greatly from one Member State to another.<sup>121</sup> For example, notwithstanding high concentration into large law firms, specialization and high degree of competitiveness of lawyers in the United Kingdom, its legal profession still notably differs from that of the continental Europe. In particular, a lawyer's profession in the United Kingdom is divided into two professional branches (barristers and solicitors) and geographically into the legal profession of England and Wales, Scotland, and Northern Ireland.<sup>122</sup>

Another important reason is the existing linguistic differences between the Member States. Lawyers tend to move and enjoy the rights granted by the Establishment directive between the countries, which have the same national languages and similar legal systems. For example, quite many Irish lawyers move to practice in the United Kingdom.<sup>123</sup> Likewise, lawyers from France, Belgium and Luxembourg also move between those countries easier than to other Member States.<sup>124</sup>

Moreover, even if all continental Europe for centuries has shared a civil law tradition, it would take some time for a lawyer, who gained all his professional qualification in his home-country, to start practicing in a host Member State its law on an equal level of competence with local lawyers. Especially it would be difficult to adjust for a lawyer moving from the country following Napoleonic Code tradition to the country with the dominant German law tradition.

Since the Community legislator did not aim to unify laws of the Member States regulating legal profession, we can see multidimensional, confined to one nation State, liberalization of legal profession around

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<sup>121</sup> Case C-309/99, *supra* note 107, paragraph 99.

<sup>122</sup> Gromek-Broc Katarzyna, *supra* note 72, p. 115.

<sup>123</sup> Gromek-Broc Katarzyna, *supra* note 72, p. 119.

<sup>124</sup> Lonbay Julian, *supra* note 33.

Europe. As a result, one can find law firms housing hundreds of lawyers in the United Kingdom, such as Clifford Chance with 923 lawyers alone in the United Kingdom and having 28 offices in 19 countries around the World.<sup>125</sup> While in Germany, there are no more than about 10 % of lawyers working in large international law firms and about 51 % of lawyers practising alone.<sup>126</sup> The segmentation of the legal professionals in Germany is largely the result of a *Rechtsanwalt's* (lawyer's) monopoly of legal advice and just recently released principle of localization. This principle limited the activity of a lawyer to the territory to which he was attached.

However, each Member State carried and continues to carry the reforms in liberalising and opening national markets for foreign lawyers with the support and impetus from worldwide globalisation and Community developments, including the Commission Report on Competition in Professional Services. This report scrutinised the regulations of liberal professions, including lawyer's profession, in five main categories: "(i) price fixing; (ii) recommended prices; (iii) advertising regulations; (iv) entry requirements and reserved rights; and (v) regulations covering business structure and multi-disciplinary practices".<sup>127</sup> The analysis showed that Italy, Germany and Austria maintained minimum price fixing for lawyers and that the effective advertising prohibition for lawyers still existed in Greece, Portugal and Ireland (for barristers). Consequently, the Commission contacted the national regulatory authorities and asked to report on any measures taken within the scope of the report. This resulted in the Commission releasing a Follow-up report<sup>128</sup> in 2005. This report showed some progress, but on the other hand also stated that the weight of tradition, lack of activity from the profession itself in promoting reforms precluded significant economic and consumer benefits.

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<sup>125</sup> Webpage <http://www.cliffordchance.com> last time visited on 6 May 2006.

<sup>126</sup> Shaw Gisela, *supra* note 1, p. 222.

<sup>127</sup> COM (2004) 83 final, Brussels, 9 February 2004, paragraph 30, <http://ec.europa.eu/comm/competition/antitrust/legislation/prof.html> page last time visited on 4 May 2006.

<sup>128</sup> COM (2005) 405 final, Brussels, 5 September 2005, <http://ec.europa.eu/comm/competition/antitrust/legislation/prof.html> page last time visited on 4 May 2006.

Despite all the difficulties, the phenomena of globalisation, Community developments and national reforms paved the way for the alternatives to that of the physical movement of lawyers in a traditional sense. In particular, the conditions were created for a faster and less costly movement of legal services through an establishment of professional networks between the law firms working in different Member States or an establishment of branches/agencies of law firms all over the EU, employing local lawyers of the Member States concerned.

On the other hand, the business sector itself is rather mobile. It can without longer delays “travel” and get the legal service in the Member State in which laws it is interested. Therefore, lawyers tend to restrict themselves to the law of one Member State and specialize in one specific branch of law in order to provide their clients with a comprehensive and best quality service.<sup>129</sup>

Malcolm Jarvis has concluded his comment of the *Gebhard* judgement by saying that it will be some time before the Establishment directive (which at that time was still just a draft) will be implemented and the concept of lawyers on the move becomes real. Today, 10 years after this case comment has been published, I conclude that even if the Establishment directive has been fully implemented, the words that the “concept of lawyers on the move still remains more illusory than real”<sup>130</sup> are still true. That is the case mainly due to the persisting linguistic, cultural and legal differences between Member States. As a result, lawyers as sole practitioners are still very reluctant to move and pursue career into a state other than the one where they qualified.

However, this does not mean that the EU legislative achievements can be regarded unsuccessful. The reason is that the Establishment directive is

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<sup>129</sup> For example, on February the 8, 2006 during the meeting with the staff members of one of the largest Swedish law firms, housing 160 employees, Setterwalls it was stressed that Setterwalls provides consultations to the clients from all over the world, but exclusively on Swedish law matters. Therefore, Setterwalls employs just lawyers having Swedish law degree, <http://www.setterwalls.se> page last time visited on 4 May 2006.

<sup>130</sup> Jarvis Malcolm, *supra* note 58.

likely to serve to the major law firms with the offices in a number of Member States rather than to the small law firms or sole practitioners.<sup>131</sup>

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<sup>131</sup> Katsirea Irini & Ruff Anne, *supra* note 6, p. 395.

# Supplement on number of lawyers in CCBE Member Bars

Number of lawyers in CCBE Member Bars <sup>132</sup> Last update: 2005			
Country	Total number of lawyers members of the Bar	Number of (foreign) lawyers registered under their home country title	Number of lawyers that had demanded the admission to the profession in the host country
Austria	4.678	28	8
Belgium	14.529	509	9
Cyprus	1.577	5	0
Czech Republic	7.947	11	11
Denmark	4.635	15	5
Estonia	447	4	1
Finland	1.735	4	2
France	47.354	150-200	
Germany	133.113	206	10
Greece	35.000	100	1
Hungary	8.900	15	0
Iceland	690	1	0
Ireland	7.500		
Italy	128.000		
Latvia	833		0
Liechtenstein	112	1	20
Lithuania	1.382	0	0
Luxembourg	718	30	0
Malta			
The Netherlands	13.111	44	7
Norway	5.770	4	0
Poland	21.500		
Portugal	22.575	33	0
Slovak Republic	3.994	23	
Slovenia	992	4	0
Spain	148.543	74	1
Sweden	4.321	5	0
Switzerland	7.289	100	0
United Kingdom	123.500		

Note: empty lines indicate that the data is not available.

<sup>132</sup> Table composed using the statistics provided on the CCBE webpage [www.ccbe.org](http://www.ccbe.org)

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