

# **Liberating the Power of Service**

## **The right of establishment**

### **The case of lawyers**

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## Outline

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- The EU context for lawyers
- Criteria to determine applicable rules
- Primary and secondary legislation
- Case law
- Scope of right of establishment for lawyers under applicable rules
- Two ways to be a "European lawyer"
- Selected practical issues
  - ownership of law firms – comp. with health sector
  - IT and "virtual" establishment: cloud computing and lawyers

## The EU context for lawyers

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- Two ways to be a "European lawyer"
  - offering a service to a client in an another Member State
  - practising law on a permanent basis in an another Member State
- Distinction between free services and right of establishment
- Impact on the rules under which lawyers are supposed to act
- Criteria to determine which freedom is applicable?

## Criteria to determine the applicable rule

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- Gebhard (case C-55/95)
  - Establishment: stable and continuous basis
    - *to participate, on a stable basis and continuous basis, in the economic life of a MS other than his State of origin and to profit therefrom*
  - Services: temporary nature of the activity
    - not only duration but also *regularity, periodicity or continuity*

# Primary and secondary legislation

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- TFEU
  - Title IV: *free movement of persons, services and capital*
  - Chapter 2: *right of establishment*
  - Articles 49 to 55 TFEU.
  - Article 49:
  - "(...) *restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. (...) [agencies, branches or subsidiaries].*
  - (...) *right to take up and pursue activities as self-employed persons* (...)
  - *under the conditions laid down for its own nationals by the law of the country where such establishment is effected (...)*"
- Directives
  - Directive 77/249/EEC (services - lawyers)
  - Directive 98/5/EC (practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained)
  - Directive 2005/36/EC (recognition of professional qualifications)
  - Directive 2006/123/EC (Services Directive)

# Case law

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- **Reyners**, 21 June 1974
  - direct effect of the right of establishment (Case 2/74)
- **Thieffry**, 28 April 1977
  - equivalence of diplomas (Case 71/76)
- **Vlassopoulou**, 7 May 1991
  - knowledge and qualifications acquired in another Member State (C-340/89)
- **Kraus**, 31 March 1993
  - non discriminatory measures / "*Cassis de Dijon*" conditions to services (Case C-20/92)
- **Gebhard**, 30 November 1995
  - distinction service/establishment (Case C-55/94)
  - non discriminatory measures / "*Cassis de Dijon*" conditions to establishment
- **Wouters**, 19 February 2002
  - multidisciplinary partnerships (Case C-309/99)
  - "(...) *not contrary to Articles 52 and 59 of the Treaty (...) to prohibit any multi-disciplinary partnership between members of the Bar and accountants, since that regulation could reasonably be considered to be necessary for the proper practice of the legal profession (...)*" (para 122)
  - several attempts in the mid-2000s to enabling non lawyers to own law firms

## Case law (2) – other cases

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- Van Binsbergen (Case 33/74)
  - professional rules
- Klopp (Case 107/83)
  - unicity of office
- Gullung (Case 292/86)
  - Bar registration
- Commission v Germany (Case 427/85) + v France (Case 294/91)
  - assistance by local counsel
- Hubbard (C-20/92)
  - national discrimination
- Reisebüro Broede (C-3/95)
  - reserved area
- Luxembourg v Council/EP (C-168/98)
  - Dir 1998
- Commission v Italy (C-145/99)
  - home Bar registration
- Morgenbesser (C-313/01)
  - recognition of qualifications
- AMOK (C-289/02)
  - assistance by local counsel
- Commission v Luxembourg (C-193/05)
  - excluded activities
- Wilson (C-506/04)
  - Bar registration – languages – Lux

## What does the right of establishment mean?

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- Article 49 TFEU
  - Prohibition of restrictions to the freedom of establishment
  - Agencies, branches and subsidiaries
  - Right to take up and pursue activities as a self-employed person and to set up and manage undertakings under the law of the country of establishment
- Directive 2006/123
  - Chap. III: freedom of establishment for providers
    - Authorisations
    - Requirements prohibited or subject to evaluation
  - Chap. IV: free movement of services
    - Art. 17 (4) – derogations for matters covered by Dir 77/249
- Practical issue under Directive 98/5: right to practice
  - under the home-country professional title
  - under the host-country professional title

## Two ways to be a "European lawyer" (1)

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- Permanent establishment under home-country professional title
- Like treatment as a lawyer of the host Member State

## Permanent establishment under home-country professional title

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- Art. 2 of Directive 98/5
  - *"any lawyer shall be entitled to pursue on a permanent basis, in any other Member State under his home-country professional title"*
- registration obligation
  - practice in a MS other than that of professional qualification
  - registration with the competent authority
  - certificate of registration in the home MS

## Like treatment as a lawyer of the host Member State

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- Re-qualification as a full member of the host State legal profession
  - Article 10 of Directive 98/5
    - *"like treatment as a lawyer of the host Member State"*
- A lawyer seeking to re-qualify in another MS must show
  - professional qualifications required in one MS and
  - good standing with home bar
- The MS where lawyer is seeking to re-qualify may require the lawyer to either
  - adaptation period (period of supervised practice) not > 3 years, and
  - oral or written clarifications (ability to practice as a lawyer of the host MS) – [NB: law of the host MS & EU law]

## Selected issues (1)

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- Ownership of international lawfirms
- Dematerialisation, virtual law firms and cloud computing

## Selected issues (2)

### Ownership of international law firms

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- Ownership of law firms by lawyers/non lawyers (accountants, estate agents, investors)
- Not authorised in most MS
  - Deontological issues (incompatibility between the activities & freedom to act)
- "Clementi" Report, 24.12.2004 – England and Wales => Legal Service Act, 2007
  - under "alternative business structure" (ABSs) solicitors, barristers and legal executives may share management and control of the firm with non lawyers such as accountants and estate agents, in a new business entity
- Other MS/jurisdictions have started consultation process
  - Scotland: "Ownership and control of firms providing legal services under the Legal Service (Scotland) Act 2010",
    - consultation paper and removal of current restrictions (on how solicitors can organise their business)

## Selected issues (3)

### Ownership of international law firms

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- Commission could start consultation process by the end of 2012
  - Communication: "*towards a better functioning Single Market for services – building on the results of the mutual evaluation process of the Services Directive*", 27.01.2011
    - removal of remaining obstacles to the functioning of the Single Market for Services
    - assess the effects of restrictions imposed by MS on the legal form and capital ownership of service providers
    - decide on the need for specific initiative
- Compare with case law in the health sector
  - Belgium clinical laboratories case and other cases (Germany, Italy, France, Greece)

## Selected issues (4)

### Virtual law firms, cloud computing and law

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- Case study for IT and European lawyers
  - German lawyer indicating his address in Brussels on his website
  - Not established in Brussels (no registration with Brussels Bar)
  - Sole link with Brussels
    - lease agreement for a virtual office
  - only provides for services – no stable basis established
  - *Gebhard* allows lawyers to mention a local address to provide service
- Issues
  - how to identify lawyers acting under services / establishment?
  - how to prohibit a lawyer from using, on a website, a temporary address? [misleading "advertising"?)

**Thank you for your attention!**

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