

Liberating the Power of Service

The right of establishment

The case of lawyers

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Outline

- 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

- 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

- 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

- 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

- **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

- 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?

- **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)

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

Permanent establishment under home-country professional title

- 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

- 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)

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

Selected issues (2)

Ownership of international law firms

- 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

- 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

- 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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