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CONFERENCE

SOCIAL SECURITY FOR EUROPEAN LAWYERS

FRIDAY 26 MARCH 2004

CASSA NAZIONALE DI PREVIDENZA E ASSISTENZA FORENSE
8, VIA ENNIO QUIRINO VISCONTI – 00193 ROME

CASSA NAZIONALE DI PREVIDENZA E ASSISTENZA FORENSE

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association internationale sans but lucratif
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1 PROGRAMME OF THE CONFERENCE

09.30 - 09.50 **Opening Speech**

Maurizio de Tilla, President of the Cassa Forense

Remo Danovi, President of the Consiglio Nazionale Forense and head of the Italian delegation to the CCBE

Hans-Jürgen Hellwig, CCBE President and Chairman of the Session

09.50 - 10.15 **Free movement of lawyers and differences among the national systems of social security**
Georges-Albert Dal, President of the CCBE Free movement of lawyers Committee

10.15 - 11.00 **State of the law and the Community case-law regarding social security and future developments**

Sean van Raepenbusch, référendaire at the European Court of Justice and professor at the Université de Liège

Podromos Mavridis, DG Social Affairs, European Commission

Address by Margot Fröhlinger, Head of Unit "Services", Internal Market DG, European Commission

11.00 - 11.15 *BREAK*

11.15 - 12.00 **Difficulties encountered by the Bars and European lawyers within the framework of the free movement of lawyers within the EU and the EEA. How to solve any problems, at the CCBE level, between social security organisations?**

Maria Anna Alberti, Vice-President of the Cassa Forense, Italy

Anne Mac Gregor, Solicitor, United Kingdom

Hartmut Kilger, President of the Deutscher Anwaltverein, Germany

12.00 - 12.30 **Questions**

12.30 - 13.30 *LUNCH*

13.30 - 15.30 **Workshops on the following issues:**

1. **Which law is applicable?**
   President: Angelo Guida, member of the Cassa Forense, Italy
   Facilitator: Michael Prossliner, ABV, Germany

2. **The principle of aggregation of insurance periods and co-ordination between social security schemes**
   President: Josep Maria Antras Badia, member of the Board of the Mutualidad, representative of the Spanish Delegation in the CCBE, Spain
   Facilitator: Mary-Daphné Fishelson, Avocat, France

3. **How regulation 1408/71 could be applied to lawyers? Toward a common interpretation of circumstances in which the registration with the social security scheme of the Home or Host country is mandatory.**
   President: Antonio Soares de Oliveira, President Caixa de Previdencia e Abogados, Portugal
   Facilitator: Dominique Matthys, Advocaat, Belgium

15.30 - 15.45 *BREAK*

15.45 - 16.15 **Report on the debate by the facilitators of the various workshops**

16.15 - 16.45 **Conclusion**
Alberto Brambilla, Undersecretary of State, Ministero del Welfare, Italy
Stefano Zappala, Member of the European Parliament, Italy

16.45 – 17.00 **Closing speech**
Hans-Jürgen Hellwig, CCBE President and Chairman of the Session

2 OPENING SPEECH BY MAURIZIO DE TILLA, PRESIDENT OF THE « CASSA FORENSE »

First of all, I would like to thank the CCBE which decided with the Cassa Forense (social security scheme for Italian lawyers) to organise this colloquium on providence and social security for European lawyers which, I am sure, will arouse appropriate ideas and suggestions.

I would like to thank and welcome Mr. Hans-Jürgen Hellwig, President of the CCBE.

A warm thank also to Jean-Pierre Gross, President of the Federation of European Bars, who is here to work with us and provide us with efficient suggestions as usual.

I also welcome the President of the Consiglio Nazionale Forense, Remo Danovi, and my fellow colleague Georges-Albert Dal who is among the eminent advocate of this colloquium. Georges-Albert Dal was president of the Federation of European Bars, President of the Brussels' Bar and had important functions at national and international levels.

And, finally, I would like to thank and welcome all foreign fellow colleagues present in this room (more than 100 participants from bars of all Europe).

We also have a large number of representatives of the Committee of the Cassa Forense delegates and two Presidents of European schemes for lawyers: Daniel-Julien Nöel form the Caisse Nationale des Barreaux français and Antonio Soares de Oliveira from the Providence scheme for Portuguese lawyers.

I would like to formulate some preliminary remarks on the name of this colloquium, social security for European lawyers, an issue to which not enough attention has been paid so far.

I would like to say a few remarks and suggest a proposal. First, I would like to point out that there have been a number of progresses as far as providence and social security are concerned in the public and private sectors, but actions or work in favour of liberal professions have been rare.

In this respect, the presentation, which has just been made on the state of play of providence or social security for lawyers in each EU country, seems to me interesting. We learned that in Europe, only eleven countries do have a scheme for lawyers, while the other fourteen do not.

And even among countries which do have a scheme for lawyers, there are important differences. French and Italian lawyers have mandatory providence schemes; Spanish lawyers have a private mutual insurance with voluntary membership but with which all lawyers are registered; while German colleagues have a completely different providence and social security system.

In some countries, there is a providence scheme for lawyers only, while in others, the same providence scheme covers clerks of registrars; and in other countries there is one single providence scheme for all liberal professions. These differences show that in Europe, among the legal profession, huge differences remain as far as providence and social security is concerned, which makes the wished harmonisation difficult.

I have to say that Italy, oddly, which is not among the first in some areas, has had since 1994 a regulatory framework which is totally clear with regard to providence and social security for lawyers, due to the fact that the public scheme became a private one. Italy has a number of providence schemes covering all liberal professions: lawyers, physicians, business and tax advisers, psychologists, chemists, engineers, architects, journalists and others. We have at least 19 providence schemes for professionals, which also offer providence and additional health care. All professionals have to pay subscriptions to their respective schemes. These providence schemes offer different types of pensions, although the prevailing one for liberal professions in Italy is that of the Cassa Forense.

The 19 schemes have been participating over the last ten years in the process which enable to create a virtuous circle, opting for privatisation.

Furthermore, professional schemes moved towards a single common co-ordination organisation, the AdEPP, which plays, inter alia, an important role in the preservation of the regulatory and management independence of liberal professions towards public authorities.

Professional schemes are liable to professional orders with which they co-operate. Registration with the scheme is mandatory and is strictly linked to the registration on the roll. Besides, for the purpose of providence, professional orders are considered as reference bodies for schemes at the local level.

There is therefore a close link between orders and professional schemes.

However, the problem in Europe is that providence for lawyers is not a reality in all countries. An Italian lawyer who is going to practise his profession in Denmark will not find any scheme for lawyers, while if he goes to France, there will be a conflict between French and Italian schemes as far as providence is concerned.

Numbers of Italian colleagues who practise their profession on a regular basis in France have to strike off the roll in their home city and to register with the French scheme. Then, when they come back in Italy, we do not know the outcome of their subscriptions paid in France.

There should be first professional schemes for all European bars with a view of facilitating the practice in Europe without differences, discriminations or to provide for the possible “accumulation” of all positions.

There should be a cover system for providence which will be equal and balanced for all.

An interim solution would be to grant an “advantage” to those who have already a providence scheme in their country. Subscriptions could be paid to any other body in another EU country, but would be eventually transferred to the home scheme.

The second initiative to be promoted is to sign a series of conventions between lawyers’ schemes in different countries to co-ordinate the changes in national laws, also from the tax’s point of view.

Additional income from activities linked to the profession (company directors, censors, auditors) is not considered in Italy as professional income and is not subject to a different tax treatment.

We would like to come to a European providence, i.e. to create a European providence body which could implement optional additional providence for all European lawyers.

It would be highly interesting to launch a huge project for additional providence, which will be a first attempt by European professionals.

By a way of conclusion, I would like to thank Filippo bove, Vice-President of the Cassa Forense who, like Edoardo Vinciguerra, has worked hard for the smooth running of this colloquium.

…

I will now give the floor to Remo Danovi, President of the Consiglio Nazionale Forense and also head of the Italian delegation to the CCBE.

3 OPENING SPEECH BY REMO DANOVI, PRESIDENT OF THE « CONSIGLIO NAZIONALE FORENSE » AND HEAD OF THE ITALIAN DELEGATION OF THE CCBE

It is a great pleasure for the National Forensic Council to participate in this meeting and in this connection, we would like to extend a special welcome to the President of the *Cassa Forense*, Mr Maurizio de Tilla, who had the idea to invite delegations from all European countries and give us the opportunity to exchange our experiences and opinions for the first time ever. To this end, we would like to congratulate Vice-Presidents Mr Filippo Bove and Eduardo Vinciguerra who have participated in the plenary meeting of the *CCBE* (Council of the Bars and Law Societies of the European Union) held in the far-off Norwegian city of Bergen, where they laid the foundations for this meeting.

A special welcome also to *CCBE* President, Mr Hans-Jürgen Hellwig, whom I know personally since I've been working for the *CCBE* for many years. I firmly believe that the *CCBE* should be considered as the European Association par excellence for it groups together delegations from all European countries, is recognised by Community bodies and institutions and is in contact with all the operational centres based in Brussels. The Council has carried out and is still carrying out a praiseworthy work in connection with all issued related to legal profession, whose aim is to make the operational realities of individual member states come much closer.

It is not by chance that this conference deals with social security for European lawyers, and my first remarks concern the very European lawyers. Can we say that European Lawyers do exist?

Let's see. Certainly there exists a *European code of conduct*, which collects the core values of legal profession, but this code, as we all know, regulates only cross-boundary relations and, albeit transposed in all Member states, does not represent a common code of conduct, for each country maintains its own rules and regulations. Please note that in November 1998, when the European code of conduct was updated, a quite demanding amendment proposal was put forward with a view to making this Code become an "internal code of conduct"; however, at that time the majority of delegations considered this new perspective to be premature and unrealistic, and therefore we must limit ourselves to consider the code in a smaller framework, namely disputes among lawyers from different Member states.

Then, we've got *directives,* which range from the most well-known directives concerning the provision of services and legal profession, to more general ones concerning all professions and the recognition of professional titles. Also these directives regulate the practice of law in Europe and therefore the free movement of lawyers within the European Union. Hence, for example, Italian lawyers that establish themselves in Germany, Greece or Portugal and have their professional titles recognised. However, this does not correspond to the idea of a European lawyer, for these directives set forth only some common principles that should be transposed by individual Member States without prejudice to possible differences (or different conditions and premises).

Besides, there are many cases for which the *European Court of Justice* has issued a judgement impacting on domestic laws with a view to eliminating any provision that is apparently clashing with the freedom of movement or acknowledged fundamental rights.

Obviously, as far as Italy is concerned (our rules date from 1933), European courts have intervened more than once in domicile or citizenship cases. Actually, the most recent cases involve exactly our country. I recall for example the Morgenbesser case, a French trainee solicitor who asked to be enrolled at the trainee Roll in Genoa and had her application rejected, for her professional title had been issued by a French University (whereas the Court ruled the equivalence of professional titles, and anyway the right-duty of forensic bodies to analyse the case in detail); and then I remember the Mauri case concerning the making of Commissions responsible for state exams, whose judgement is still pending.

We are therefore witnessing a sort of monitoring over the rules applied by individual Member states, for European case law tries to intervene so as to eliminate anything that is contrary to Community principles.

This is enough to see our aspirations fulfilled, the essential condition to come to a progressive harmonisation of rules governing legal profession.

I believe that what we've done so far is still not enough, for regulatory efforts represented by directives and case law actions aimed at eliminating the principles clashing with European rules have definitely contributed to limit said differences and introduce new common principles to guarantee freedom of movement, but did not succeed in creating the image of a new European Lawyer.

Suffice is to think about training, which is differently regulated in many countries with some exceptional cases, such as Spain where the concept of lawyer training does not even exist for graduates in Spain become lawyers immediately (the day after their graduation).

I also think about rules governing fees, advertising, and the many differences that still exist amid European rules and regulations.

We should fight against these differences and encourage the initiatives taken by the *CCBE* to obtain the harmonisation of legal profession. For example, significant progress was achieved in the field of lifelong learning, even though no final result has been recorded as yet for this form of training is not commonly adopted by all European countries.

The *CCBE* has developed some detailed recommendations; it is just a first step, but I firmly believe we could do much more and introduce a standardised training system.

The idea of a European lawyer is a dream, maybe a myth, but we should try to make it come true, not relying only on the Court of Justice, but on the commitment by the Bars and Law Societies.

Individual organisations should therefore commit themselves with a view to attaining this goal and coming to a common social security system.

I hope that in a few years we could meet again and celebrate the birth of this new professional profile: the European Lawyer.

4 OPENING SPEECH BY HANS-JÜRGEN HELLWIG, CCBE PRESIDENT AND CHAIRMAN OF THE SESSION

It is for me a great honour to chair this first CCBE conference on social security for European Lawyers.

Furthermore, this conference is organised in partnership with the Cassa Forense and with a number of our Italian colleagues.

The CCBE project to work on social security for lawyers and the idea of setting up such a conference would not have been possible without the initiative of the Cassa Forense whose representatives we thank for having taken care of organising such an event in this splendid city.

The CCBE is the Council of the Bars and Law Societies of the European Union.

The CCBE consists of delegations from all EU and EEA countries. Besides, there are also representatives from bars of Central and Eastern Europe.

Our members are Bars and Law Societies through which we represent indirectly lawyers, i.e. more than 700,000 lawyers.

Our aim is to defend the legal profession as such, notably its core values and we are therefore the voice of the profession before the Member States and governments as well as before European institutions and all international organisations.

It is also our mission to help bars, and so lawyers, to adapt to changes arising from the construction of Europe. In this context, we work on facilitating free movement of lawyers within the EU in accordance with the objectives of the Rome Treaty and Directives applicable to lawyers. In this context, we hold this conference in order to address means aimed at facilitating establishment of lawyers from one State to another as far as social security is concerned.

The CCBE welcomes the attendance of numerous colleagues coming mainly from Member States that have a social security regime specific to lawyers (Austria, Belgium, France, Germany, Greece, Italy, and Portugal).

We are also pleased to welcome representatives from countries which will become new EU Member States on 1 May 2004 (Cyprus, Poland, and Slovenia) as well as representatives from Turkey and Macedonia.

We would like to thank them for attending this conference today.

We would also like to thank experts of the CCBE working group on social security who helped to prepare this conference and who will intervene, either delivering a speech this morning or leading working groups this afternoon.

We would also like to thank our external speakers from the DG Internal Market of the European Commission, Mrs. Margot Froehlinger, and Mr. Podromos Mavridis form DG Social Affaires. We would also like to thank especially our expert in social security issues at the European Court of Justice, Mr. Sean Van Raepenbusch who kindly accepted to draft a report on the topic addressed today.

We would be pleased to hear them after the intervention of the chairman of the CCBE Free Movement of lawyers Committee, Mr. Georges-Albert Dal.

I give the floor to my colleague, Georges-Albert Dal.

5 FREE MOVEMENT OF LAWYERS AND DIFFERENCES AMONG THE NATIONAL SYSTEMS OF SOCIAL SECURITY

5.1 Intervention by Georges-Albert Dal, Chairman of the CCBE Free Movement of lawyers Committee

Thank you, Mr. President, dear Colleagues, Ladies and Gentlemen,

When reading the title of the intervention to which I contributed “Free movement of lawyers and differences among the national systems of social security”, I thought it was impossible to tackle this issue because if differences between the national systems do arise when lawyers move, there is no particular link between the various laws.

The problem lies inside of what could be called the heart and the core activity of the European lawyer who does exist whatever we might think of.

I think it is important to remind that the core elements that make our profession come from more than those three Directives and this code. There are a number of extremely accurate bases for the legal profession which we find at the Council of Europe which issued a number of very accurate rules on the profession. Another basis consists of the European Union. The CCBE has done particularly well through its participation in the three Directives and the establishment of a code of conduct.

There are lots of initiatives which were taken and we are used to, during our professional meetings, criticising our work, which is a good thing but we have to admit that at the European level, the legal profession was amongst the pioneers.

We talk about the CCBE rightly. Already in 1960, representatives from the 6 founding bar members had an informal meeting and worked together. The bar has distinguished itself through its contribution in law case issues because if the ECJ gives decisions that go ahead, it is due to the fact that lawyers brought case before it and submitted arguments. Case law is very important in social security issues as Directives were enacted after court decisions.

In one word, what can we get from these three Directives as far as social security is concerned?

a) The first Directive is free provision of services. One of its article states that the lawyer remains subject to the conditions and professional rules of his Home Member State, without prejudice to the respect of rules of the profession in the Host Member State. It has no impact on the social security system.

b) I will also go quickly through the Diploma Directive because if it enables to assert his home title in the Host Member State and to become a bar member by taking a simple test on the knowledge, this Directive has also no impact on social security issue.

c) And finally, the latest Directive, the Establishment Directive. It comes from tough negotiations during some years which resulted a balanced system which is the outcome of a compromise that will enable lawyer to go to the Host Member State under his home title and to practise the Host law and community law without having to get a new diploma. After three years, it is possible to be assimilated if you want to a host lawyer. It should be pointed out that there are no direct links between the Establishment Directive and cross-border social security problems.

Finally, some words on the future to end my speech. The European legislator is preparing a framework Services Directive. The Bar is of course not against this general directive on services but it does not want that the progress achieved for the specific features of our profession would be undone by establishing a general system.

Within the framework of the Services Directive, the CCBE closely monitors the big project we have, and it works as follows. There is another aspect which worries us for the time being, it is the

initiative of DG Competition on professional services. Here, it is totally different from previously, the point is not to have a new regulation but to apply what already exists, i.e. article 81. The points which are currently examined by DG Competition are the following: prices namely imposed or recommended tariffs, advertising, conditions of access to the profession, and structure of undertakings with the problems which are likely to arise on the deontology field.

Now I come to the topic that interests us today. The CCBE, which closely monitors any developments, has had for years an Establishment Committee. It deals with the clarification and the monitoring of the Establishment Directive which I previously addressed. When the Establishment Directive was adopted, we drafted guidelines for the bars in order to explain Directives in a positive and active way and to help the bars with little experience in this field.

This Establishment Committee became the Free Movement Committee as we were asked by the Presidency to take account of all Directives and problems arising from them. In this context, we focused on deontology and then of professional indemnity insurance.

As for social security, there is nothing but you need not to worry about it. It is quite logical as in the end, social security rules are general ones which apply to all citizens and there is no specific reason to have sector rules. Disparities have already been addressed by the President of the Cassa Forense. In Europe, there is a real patchwork since some countries have a system specific to lawyers, some not, which leads to a difficult situation when it comes to the applicable law and aggregation of insurance periods.

A last point which concerns only the legal aspect: it should be reminded that those three Directives, about which I talked, and mainly the free provision of services Directive and the Establishment Directive, apply to all European citizens. There is a *de* facto discrimination. Free provision of services is open only to European lawyers. So, if an American is a member of a European Bar and not a European citizen, he cannot accordingly benefit from the Directive.

Thank you.

6 STATE OF THE LAW AND THE COMMUNITY CASE-LAW REGARDING SOCIAL SECURITY AND FUTURE DEVELOPMENTS

6.1 Intervention by Sean Van Raepenbusch, referendaire at the European Court of Justice and professor at the Université de Liège

I listened to the previous speakers and I am quite puzzled as I have the impression that some think there is a legal vacuum. Well, there has been a regulation applicable to lawyers relating to social security for more than 20 years and not only since they can freely move within the Community.

This regulations deals with all branches of social security – sickness insurance, retirement pension, family benefits, disability, unemployment. There are no legal vacuums. This regulation should be clarified. It lacks transparency and readability. That is why the Commission worked on a proposal of revision of this regulation in order to make it less complex and to include all benefits from ECJ case law.

We have a number of quite complex rules which are totally applicable to lawyers moving within the Community. Regulation 1408/71 coordinates 25 national regimes and a hundred of laws without having changed the contents of national social standards. I share Mr. Gross' view; I do no think that we will come even to an approximation of national laws in the social security field. In this context, there is a lock which is the unanimity of the Council. Since the beginning, the European legislator has chosen another technique than coordination which enables not to change national laws while putting forward some guidance so that persons that move might benefit from total and continuous social protection without being sanctioned due to the exercise of a fundamental right: the right to move within the territory of the European Union.

What is this guidance?

We know them well. It is the principle of equality in treatment which forbids any direct or indirect discrimination.

The principle of preservation of acquired rights. This principle enables to keep rights which have already been acquired in national laws when changing residence or activity on the territory of another Member State due to the mechanism of export of benefits.

The principle of the retention of rights in the course of being acquired. It should be avoided that a person looses some parts of his periods of insurance necessary to open rights because he changed residence or professional activity. This principle implies two well know mechanisms, those of aggregation of periods of insurance and of pro-rata of benefits.

Finally, there is the unique character of the law applicable: a worker can be subject to only one law, in general, that of the State where he practices his professional activity or if he has several activities, that of the State of residence.

There is still one problem as far as the ratione personae scope of the Community Regulation is concerned: it does apply only to conventional regimes, e.g. professional pension funds. However the whole case law remains entirely valid.

This regulation was drafted by specialists, representatives of the Commission as well as of national administrations, which explains the esoteric character of the Regulation, while it is interpreted by generalists of the ECJ. There is no special chamber at the ECJ. The Court answers to all questions for a preliminary ruling brought by national courts.

The Court, which puts forward teleological interpretations, shocks sometimes judiciaries of internal judiciary order, but played a major role in the construction of a social Europe to the extent that it has always tried to interpret community texts in the light of an idea of social justice, and also according to the needs of European integration for the people as we could draw them from treaties.

I will insist on 2 points: first, the principle of equality of treatment. This principle enabled to develop very interesting recent case law as it really removes the principle of territoriality of national social security regimes. Due to the principle of equality of treatment and to the dynamic interpretation of the Court, borders have been removed.

Second point, the idea is the duty of to act in due faith to which national authorities keeps to when applying national laws. The national authority cannot strictly apply law when the worker completes his working life in another Member State. This strict application can sometimes lead to totally unbearable situations from the basic principles or treaties' point of view, and requires some flexibility.

As far as the equality of treatment is concerned, the Court faced several times the question whether the principle of equality implied also the obligation to assimilate facts or events that occurred in other States for the opening to social benefits. This case happens often in practice as in several national laws the granting of social benefits depend upon the occurrence of one event which should normally take place on the national territory. Does the national authority have the duty to take account of the events that occurred outside of its territory to grant the benefit to the person concerned? As a matter of fact, the absence of assimilation might be considered as an indirect discrimination as it might affect more migrant workers than nationals and accordingly treat them less fairly.

The Court first hesitated and then, about ten years ago, it purely and simply implemented the Cassis de Dijon case law for free movement of goods. Therefore any national authority has the duty to take account of events having taken place abroad as if they occurred on the national territory in order to enable the opening of rights to social security benefits.

This analysis grid leads to de-territorialize the application of national rules. Do we need to take account of periods of education, which might sometimes be considered as periods of insurance for the calculation of rights to retirement pension, when these periods were completed in another State? Yes, since two years.

The principle of aggregation of Regulation 1408/71 is one the mechanisms of this case law based on the equivalence principle.

The second remark is the duty to act in due faith. The rules were drafted according to purely national situations. Applying strictly these rules to situations with external elements might lead to puzzling cases. Due to this, the migrant worker might loose its social security.

Within the application of national rules, the objectives of the treaties must be safeguarded. This is a question of efficiency of community law.

Thank you Mr. President.

6.2 Intervention by Podromos Mavridis, DG Social Affairs, European Commission

Thank you.

I will focus on the main points, one question and two remarks. The question is as follows: Does Community law provide an efficient protection to people who move and accordingly to lawyers?

My first remark is that the unique character of the law applicable aims at promoting free movement of persons and services.

My second remark is that in practice, we notice a weakening of this unique character of laws applicable.

Does Community law provide a real and efficient protection to people who move? The question does not deal with theory. The Commission is aware of several court cases (see Kessler Case). Why does this problem arise in practice? Because social security is national and will remain so for a long time. To which extent double levying is forbidden by the treaty and Regulation 1408/71, which states that workers shall be registered with a single social security regime?

I come to my first remark: the principle of the unique character of the law applicable aims at promoting free movement of persons and services. According to the philosophy of the Rome Treaty in 1958, free movement of workers, free establishment and free provision of services are the main grounds of the Community. All provisions of the treaty relating to free movement of persons aim at facilitating the practice of any professional activity within the Community and are against any measures that might treat unfairly these citizens when they want to practise an activity on the territory of another State.

What is the philosophy of Regulation 1408/71? The Regulation establishes the principle of the unique nature of the law applicable: that of the State where he works. The purpose of this Regulation is very simple: simultaneous application of several national laws should be avoided as well as the difficulties that might arise out of it.

This rule follows a logical thinking. In order to guarantee the practice of free movement of workers (article 42), the Treaty and the Regulation forbid double levying and accordingly impose the unique character of the law applicable. According to case law, when the obligation, which is comparable to the other, is already complied with in the Home State, the Host State cannot require to comply with such an obligation. The Treaty forbids any double obligation as it consists of an indirect discrimination and an obstacle to free movement of persons and services. However, claims on double levying have been increasing recently.

My second remark: weakening of the principle of the unique character of law applicable. Although the purpose of the Treaty and the Regulation is to facilitate free movement of persons and services, the difference in national laws and some ambiguous facts of the Regulation 1408/71 and of the case law of the ECJ led to weaken the unique character of the law applicable.

For instance, Regulation 1408 provides for that a person who simultaneously practises a salaried activity on the territory of a Member State and a non salaried activity in another Member State is subject to both legislations.

Even in case of multiple activities, the Regulation provides for, as a general principle, the principle of the unique character of the law applicable. Therefore, a person who has an employed and self-employed activity in different States is subject to the law of the state where he has his salaried activity. Besides, a person who has a self-employed activity in several Member States is subject to the law of his State of residence. Therefore, the double obligation imposed by the Regulation and the case law seems contrary to free establishment which is enshrined guaranteed by the Treaty which secures the possibility to create and keep, by keeping to professional rules, more than one activity centre on the territory of the European Union (see Kemler Case).

The third weakening of the unique character of the law applicable deals with the fact that some countries do not recognise the E101 form, i.e. a form which confirms the secondment of employed or

self-employed workers. The Court noticed that receiving such a form creates a presumption of regular membership to the regime concerned. As a matter of fact, in the said form, the competent institution of the Member State or the undertaking where he temporarily works declares that its own social security regime remains applicable to the seconded worker during the secondment period. The Court considers that the E101 form issued by the institution designated by the competent organisation of the Member State binds social security institutions of other Member States to the extent that it certifies the registration of the worker with a social security regime. In the Banks case, the Court confirmed that the certificate had a probative value and a retroactive effect.

I will end my speech by a brief conclusion and some perspectives. The unique character of the law applicable follows a basic principle which is to facilitate the free movement of employed and self-employed workers as well as of services. The cover provided in 1958 to migrant workers and to self-employed in 1981 is priceless. We have seen how the principle of the unique character of law applicable has been weakened in practice. The first remedy is to simplify the Regulation. There is a clear will of Member States to remove the exceptions mentioned in the appendixes of the Regulation.

The second remedy is that the principle of mutual recognition should come to mutual trust.

The third remedy, and the most important one, is the loyal cooperation between Member States and social security organisation. In this context, your role is important, even deciding. You have to advance practical proposals and even contact the European Commission. Your questionnaire is a very useful instrument. We should go on in this way and send out new questionnaires, transmit them to the Commission so that it could discuss these papers with the institutions concerned.

Why not doing all this? Because we are musicians playing in the same orchestra who play for the good application of the Regulation 1408 and for an efficient protection of the concerned.

Thank you for your attention.

7 ADDRESS BY MARGOT FRÖHLINGER, HEAD OF UNIT « SERVICES » INTERNAL MARKET DG, EUROPEAN COMMISSION

Grazie sig. Presidente buongiorno signore e signori, vorrei anch'io ringraziare il CCBE e la Cassa Forense per aver organizzato questa conferenza e per aver lanciato questi lavori che sono di grande importanza.

Infatti la sicurezza sociale e la protezione sociale è un elemento costitutivo della libertà dello stabilimento e anche della libera circolazione dei servizi e non soltanto per gli stessi Avvocati, ma anche per tutti i professionisti e tutti i fornitori di servizi in Europa.

Per questo la Commissione Europea segue con molto interesse questi lavori e posso aggiungere anch'io a questo che ha detto già il mio collega Podromos Mavridis, i lavori del CCBE in questo riguardo, ma non soltanto in questo, non sono soltanto un'orchestra, ma anche sono una fonte di ispirazione per la Commissione Europea.

Adesso, con vostro permesso vorrei cambiare lingua e continuare in inglese, non soltanto nell'interesse della diversità linguistica, che è tanto cara alla Commissione Europea, ma anche perché la mia lingua di lavoro è l'inglese, anche se la mia lingua d'amore non è il francese, come per il prof. Hellwig, ma è l'italiano:

Ladies and Gentlemen, as the previous speakers have made clear the social protection and social security for lawyers who exercise the freedom to establish themselves in other member states or the freedom to provide services in other member states does nor take pace in a legal void. There is already a substantive body of community law, which applies to lawyers who move to other member states. There is not only regulation 1408 which has been the subject of previous statements, but there Article 43 on free establishment and article 49 on free provision of services which both apply directly. Harmonisation and coordination of systems at community levels is only necessary where and to the extent that the primary application of the treaty is not sufficient to solve problems.

Most of the problems which lawyers faced in the past do not need to recur to a direct application of the treaty, because most of the problems can be solved through a fair application of regulation 1408. Some problems for lawyers, especially for German lawyers, come from the fact that their social security schemes were not included and that therefore these lawyers could not benefit from the application of regulation 1408.

However, this will change with the entry into force of new regulation 1408 on 1st January 2005, and from that moment on there will be only some areas where there is still need of direct application of the treaty.

As far as the direct application of the treaty is concerned, I would like to come back to the Kemler case. From the commission's point of view it is a fundamental case.

Freedom of establishment first means no discrimination. Any discriminatory treatment or rules are not consistent with this Treaty's principles. However free establishment goes further than that and unfortunately, free establishment considered as free provision of services was a freedom which had not been properly understood for many years. It was only in the 90's that the court has developed a continuous jurisprudence stating that the freedom of establishment and the freedom to provide services did not protect only against discriminations but also against disproportional restrictions which are indistinctly applicable. This has been the foundation of the Kemler case.

This German Lawyer who practised in Belgium, was already subject to a social security scheme and paid already contribution to this scheme in Germany were he was established. The Court said that wherever there was a double application of rules (a double imposition in this case), this was first of all a restriction because it hampered the freedom of establishment since it made establishment in more than one Member State more expensive and complicated. Such a restriction can only be justified if this double levying resulted in a better and additional protection, which was not the case here.

Some of the national schemes may give rise to some question marks.

As far as secondary law is concerned, apart from the abovementioned regulation 1408, we have other Community instruments which create a framework for free establishment and free provision of services for lawyers.

Finally, there is a new Directive which was already mentioned, the Directive on Services in the Internal Market, which is a horizontal framework Directive that aims at facilitating both free establishment and free provision of services for a large variety of services activities, including also the legal professions. Again, the Services Directive does not address explicitly the issue of social security. It addresses a number of other issues which matter for the legal profession, such as commercial communication, professional indemnity insurance, and multidisciplinary partnership.

There are in this Directive two general rules, which could have some impact also on social security, although only a marginal one.

As far as free establishment is concerned, there is a general obligation for member states to scrutinise their legal and regulatory systems in order to remove all remaining discriminations, regardless of what branches and families of law we are talking about. This means that for those areas which are not covered by regulation 1408/71 we also have the principle of non-discrimination that is now an additional obligation for member states not only in the treaty but also in secondary community law to examine their national legal and regulatory system and to remove all remaining discriminations, including in the social security area. And there is another horizontal rule which is likewise of importance, i.e. the country of origin principle for provision of services. The Directive requires Members States to remove these restrictions resulting from the application of national rules to providers of services established in other Member states who provide services only on a temporary basis into their territory.

Just a final remark: we have heard this morning that the European lawyer is still a myth and a dream. But the really functioning internal market for lawyers like other service providers can be achieved only through little steps.

Thank you.

8 DIFFICULTIES ENCOUNTERED BY THE BARS AND EUROPEAN LAWYERS WITHIN THE FRAMEWORK OF THE FREE MOVEMENT OF LAWYERS WITHIN THE EU AND THE EEA. HOW TO SOLVE ANY PROBLEMS, AT THE CCBE LEVEL, BETWEEN SOCIAL SECURITY ORGANISATIONS?

8.1 Intervention by Maria Anna Alberti, Second Vice-President of the « Cassa Forense »

The freedom of movement for lawyers has not fully expressed itself in Italy for this phenomenon, on an ingoing and outgoing basis alike, is extremely limited.

On the occasion of this meeting, we have seized the opportunity to collect more accurate data in this respect, for no official research nor monitoring was carried out as yet. It is very hard to have a complete overview owing to the geographical fragmentation of Bar Associations and Law Societies with different competencies and tasks.

Hence, we focused our attention on the most numerous Associations depending on the number of their members, we then collected the following data: 45 lawyers are practicing legal profession in Milan, 30 in Rome, 5 in Bologna, 8 in Florence. 2 or 3 foreign colleagues are also reported to have joined other Associations.

This adds to the Lawyers who, in pursuance of directive no. 89/48 of 21 December 1988, were put on the rolls for passing the aptitude test. There is no special list concerning the latter, thus it's impossible to have precise figures in this respect for a regulatory research should be required.

On the whole, there might be a few hundred members versus some 140,000 Italian lawyers registered on the Roll. Please note that the number of foreign Lawyers practising law in Italy is strictly related to the local economic situation and possible trades with foreign countries.

The same is true for Italian lawyers practising legal profession abroad. The Bar Association of the host Member state is actually bound to inform the Bar Association of the home Member state but this is mere correspondence not reported in the records (i.e. annotations to the Roll) that could be useful to retrieve more accurate data on this phenomenon and any related events.

Further to the research studies conducted to this end, the number of Italian lawyers practising legal profession abroad is also very limited.

Then, the first remark we could make concerns any possible interpretations of this phenomenon not only on a statistical or analytical basis, rather with a view to finding solutions to social security and fiscal problems.

The Italian Bar Associations have not reported of any difficulties related to the acceptance of applications filed by foreign Lawyers. A set of forms containing information on the documents required was developed and obligations are fulfilled.

Problems arise in connection with the obligation provided for by Legislative Decree no. 96 of 2 February 2001 whereby it is mandatory to renew the certificate of enrolment at the professional association in the home Member state. This fulfilment is prescribed, although it is not independently initiated by the aforementioned Colleagues.

The choice of the Bar Associations was to press for this certificate, with no mention however about the consequences of any neglect; among other things, said consequences are not properly regulated. However, the renewal of certificates is related to the verification of the eligibility to be

enrolled at the association in the home Member state, with a view to maintaining membership to the Italian association, since failing the former also the latter will be null and void.

Therefore, the non-submission of the certificate could cause some problems to Bar Associations either in terms of measures to take and extra bureaucratic delays.

Direct contacts among professional organisations and the mandatory communication, including for example information about the submission and the acceptance of the application in the host Member state and the confirmed enrolment at the roll in the home Member state, could be a possible solution to the problem.

Community law lays down special rules concerning the temporary private practice in a member state other than that in which professional qualifications were obtained, which as a matter of fact does not entail any changes to the applicable social security rules (that remain those set forth by the home Member state), provided that the duration of said practice does not exceed the first 12 months (article 14.2, section 1/a), or additional 12 months subject to agreement with the host member state (article 14.2, section 1/b).

Said rules concerning the temporary private practice in other member states are regularly applied by the *Cassa di Previdenza Forense Italiana* that uses to issue the E101 certificate so as to prevent any further problems.

On the other hand, I must point out that some Italian Lawyers, who have temporarily moved to another EU member state, have reported of enrolment and membership demands even if the practice of law was limited to shorter periods in pursuance of some specific and imperative national regulations that in my view are clearly clashing with the community principles embodied by the aforementioned rules.

To solve this problem, all European social security organisations are required to compare their experiences and seek joint solutions.

Another problem that is quite common in the Italian practice of law, and as such reinforced by many Bar Association Councils, is the recognition of professional titles by individual member states. In this regard the European Parliament and the European Council have issued Directive no. 98/5/EC, specifically related to the practice of law, which has been already transposed in almost all member states. However, the European Parliament and the European Council are currently developing a new draft directive whereby the freedom of movement for practitioners could be deregulated thanks to the automatic recognition of professional titles. The draft proposal originally put forward by the Commission whereby practitioners practising legal profession in the home Member state should be exempted from the obligations to be enrolled at a professional organisation and a social security organisation in the member state in which they're willing to work, cannot be accepted for it would de facto create several problems.

First of all, it might risk encouraging the so-called "qualification shopping", namely the trend to acquire a qualification in the member state where it's easiest to do so (i.e. private practice is not regulated) and then practice all over the European Union. This way a real 'bear run' will be started in terms of qualifications, thus thwarting the objectives set in Lisbon, namely to turn the European Union into the most important knowledge-based economy in the world. Besides, the guarantees offered to the clients as to the quality of service will be sharply limited.

The greatest concerns, however, stem from the lack of harmonisation of the minimum training requirements to gain access to the so-called regulated professions. Hence, as already provided for by previous directives, it follows the need to take proportioned compensatory measures, which take specifically into account the professional experience gained by the applicant.

On the other hand, the necessary streamlining of said burdensome regulations requires procedures that are flexible and easily adjustable to the development of the market, but that guarantee at the same time the public interest that some professions, in particular, legal profession, are

advocating. Citizens rely on the fact that each practitioner practising the legal profession in their host Country comply with some minimum training requirements. If "travelling" Lawyers were exempted from fulfilling said minimum requirements, in the name of the freedom of movement for persons and services, the directive would encourage the creation of two categories of Lawyers practicing legal profession which would correspond to two different training levels unbeknown to citizens!

Ultimately we consider that as far as some intellectual professions are concerned, for which high levels of theoretical and practical knowledge are required, compensatory measures are inevitable. The host Member state should provide for said measures, thus including in some cases an apt professional training period without prejudice to the freedom of movement.

Apparently, the European Parliament is opting for this choice for on 11 February 2004 some amendments were made to the draft proposal originally submitted by the Commission, which to a larger extent are referable to what is hoped for in this report.

The peculiarity of the welfare system for the legal profession in Italy has brought about some disputes with lawyers from other member states, who are registered in the social security organisations of their home Member state and practicing also in Italy, who despite the present enrolment at an Italian Bar Association, were convinced not to be subject to any Italian social security regulations, in particular those concerning the obligations to report and pay contributions which are not strictly referable to as social security contributions.

The problem arises since Italian law provides for the obligation to report one's annual income and professional turnover – the so-called form 5 – and to pay a "supplementary contribution" to the Forensic Social Security Fund (*Cassa Forense*), the equivalent of 2% of said turnover, which can be charged to the clients on a solidarity basis. Said additional charges are related only to the enrolment at a Bar Association and depend strictly on the enrolment at the same Fund. To this end, it is important to recall that the enrolment at the Bar Association is not automatic, not even for Italian lawyers, but becomes mandatory once a given income is recorded (the so-called, professional continuity). For this reason, the members of the Social Security Fund are only 108,000 compared with 140,000 Bar Association members.

The provisions of the Italian law concerning the obligation to report one's professional income with which all Bar Association members should comply, even failing this income or return, have their raison d'être. They provide for a number of fiscal checks and controls that are needed to collect statistical and actuarial data, which are essential to develop provisional models and plan future social security strategies (see articles 13, 15 and 17 of Law no. 576/1980).

Hence, the *Cassa di Previdenza Forense Italiana* calls for the compliance with this 'territorial' rule with a view to enhancing the performance of the Organisation.

Form 5 is the tool currently used by Lawyers to provide the Social Security Organisation with fiscal data on the basis of which social security and solidarity contributions are reckoned, the equivalent of 2% of reported income. Therefore, Lawyers are bound to charge an additional 2% on taxable income that shall be then paid to the social security organisation, in that all Lawyers are bound to solidarity and mutual aid obligations versus their 'colleagues', namely those who are enrolled at a Bar Association and as such practice or have practiced legal profession in the same territory. These obligations stem from colleagueship bonds that are related to the "territory" and not to the notion of "nationality".

Besides, should we decide to cancel the obligation by some lawyers to pay the 2% additional charge only because they practice their profession in other EU Member states, we would encourage a form of irregular competition versus their Italian colleagues, who would be conversely bound to include said extra charge to their fees, thus undermining fair competition and causing paradoxical consequences in contrast to the principles protected by community law and the same Treaty of Rome.

All this being stated, all the disputes recorded in Italy, and submitted especially to the Court of Milan, were settled in favour of the *Cassa di Previdenza Forense Italiana*.

Please note that the payment of supplementary contributions by way of endo-professional solidarity, has put European Lawyers who established themselves in Italy in a position to gain access to welfare services delivered by the Fund, with the same rights and duties applicable to Italian lawyers, thus leaving no room for discrimination of any kind.

A source of great worry in regard to delivered services concern the application of the "totalisation" principle, set forth on more general terms for pensions by article 45 of regulation no. 1408/71. Based on this institution, the years of enrolment at a social security organisation of a given member state are automatically taken into account as to the recognition of pension rights in the member state in which these regulations are applicable, with no additional charges to be paid by the member and without prejudice to the pro-rata payment of social security benefits.

As far as private practice is concerned, however, the Italian law is apparently still lacking effective disciplinary rules that comply with equity and nationality criteria. This problem was actually examined by the Italian Constitutional Court that in a judgement delivered in 1999 invited law-makers to apply the totalisation principle to the Italian welfare system, thus referring to all workers whether in a self-employed or salaried capacity.

The *Cassa di Previdenza Forense*, in addition to any other Private Practice Social Security Funds, has actively cooperated with national relevant authorities who have drawn up a bill that meets the expectations of the parties involved and the principles set forth by community law. Said bill was the result of an agreement entered into by the Welfare Ministry, and the Italian Government has undertaken to pass soon so as to thoroughly regulate the matter.

For the present, the institution is only partially regulated by article 71 of Law no. 388/2000. Said disciplinary rules, however, are temporary and fully unsatisfactory in that they tremendously limit the number of the parties involved and thereby do not solve the problem related to the computation of benefits that should be paid in case of totalisation.

On the other hand, the lack of Italian social security regulations in terms of totalisation does not seem to be an isolated case in the welfare systems of EU member states, so as to make the institution be seemingly considered as a mere enunciation of a principle.

The problem cannot be easily solved, even because it is related to substantial differences within the Italian and the European welfare systems and the existence of many Public and Private bodies in charge of mandatory welfare services often governed by different rules as to the eligibility for benefits (age of retirement, length of service, disability etc.) and benefit payment criteria (capitalisation, wage increase, contributory pension scheme, etc.).

A common body of rules regulating the institution at a European level could be helpful in this respect, thereby encouraging the implementation of said principle by Member states and especially by the world of private practice.

As far as the computation of benefits stemming from totalisation is considered, another problem concerns the independent management of welfare services by Lawyers. In these cases the inadequacy and the generality of the computation mechanism provided for by article 46, sub-paragraph 2, of regulation no. 1408/71 appears evident. Conversely, it should be necessary to encourage disciplinary rules providing for standardised computation systems, so as to make social security benefits be reckoned on the basis of the contributions actually paid by practitioners and thus calculate the relevant pension rights, with a view also to protecting the financial stability of Forensic Social Security Organisations, which in many countries do not receive any financial support by national governments.

We cannot neglect the fact that the choice of the computation system further to totalisation is also (and above all) a problem of financial breakdown of social security costs among member states and, subsequently, among the different Social Security Organisations operating in individual member states.

In essence, we consider that whereas it might be useful to have a more accurate body of rules at a community level concerning the recognition of minimum common requirements to gain access to pension through totalisation, more room should be given to the national legal systems in regard to the computation of these benefits, without prejudice to the general principles such as the pro-rata payment of benefits by the Social Security Organisations and a correct proportionality between paid and payable contributions.

Another possible solution could be represented by bilateral agreements among institutions from different member states, so as to regulate some operational aspects in compliance with the general principles set forth by regulation no. 1408/71.

By way of example, we would like to recall that a similar rule is already included in the aforesaid regulation, more specifically in article 17, with reference to the provisions contained in articles 13 to 16 (definition of applicable rules).

Another problem concerning lawyers who practice legal profession in two or more member states at the same time is represented by the reference income basis to consider with a view to reckoning contributions and benefits, if any. Obviously this problem concerns only social security systems that provide for a close relation between reported income, contributions due, and pensions to pay, as it happens for Italian Lawyers.

In these cases, once determined which rules should apply, should the contributions due be reckoned on the basis of the aggregate income produced in all Member states? There are still many doubts in this respect, even because article 23 of regulation no. 1408/71 concerning the “computation of contributions in money” is apparently providing otherwise, albeit with some ambiguity.

However, if the correct application of the regulation should be interpreted on a restrictive basis (namely only in reference to the member state whose rules shall apply), there would be some income not subject to social security contributions, and this would clash with the general principles set forth by the Italian law and would go far beyond the idea to prevent “double contribution” phenomena that is at the basis of Community law.

The problem certainly needs to be further investigated and probably a better coordination of fiscal regimes should be introduced.

By way of conclusion, I would like to reinforce some of the afore-said proposals that are currently being put forward with a view to solving all the problems mentioned herewith.

To establish ongoing and long-lasting relationships among Bars and Law Societies, especially in terms of communication and information concerning the enrolment of foreign Lawyers and the eligibility to enrolment in the home Member state;

To record in the Roll of the home Member state any information related to the practice of law in another EU member state;

To guarantee – as far as Italy is concerned – data collection in the offices of the National Forensic Council;

To encourage European Social Security Funds to create a specific publication for foreign Lawyers containing information about social security rules and applicable fiscal rules, if any;

To probe into the problems concerning the application of the totalisation principle, the coordination of rules, the definition of taxable income, with the help of a commission set up by European Social Security Funds;

To put forward within the CCBE some proposals for the recognition of professional titles, which should be submitted to Member States and the European Community for further approval.

8.2 Intervention by Anne Mc Gregor, Solicitor, United Kingdom

Mr. Chairman, Ladies and Gentlemen,

Thank you for the opportunity to speak today at this very important conference.

I should just say a few words about the law society in England and Wales and on the professional lawyers in the United Kingdom. The law society of England and Wales represents solicitors in England and Wales and most people here would be aware that in the United Kingdom legal professional is complicated. In England and Wales we have solicitors, we also have what's known as barrister, and we also have bodies that represent a profession in other parts of the United Kingdom. I'm here today because I'm a solicitor and I practice EU law in Brussels in a large law firm, and my capacity I work in a special committee of the law society which deals with EU issues and in my capacity I was delegated to come along today.

I thought that the most helpful thing that I could do would be to present to you some live case examples of some English solicitors who have tried to move around Europe to practice their profession and have come up against certain barriers. I have contacted a number of solicitors who work for large London law firms which have offices in Europe and in particular in Italy. My original concept was to talk about what happened in two or three member states, but time was limited, and I already have a lot to say about English solicitors who go to Italy.

First of all, what happens when an English solicitor stays home? Well, we have no special security scheme just for lawyers in UK. Instead, you are simply part of the ordinary social security system, and in the UK it is called national insurance. On top of what the employee puts into the system, the employer also makes some contributions. The system and the benefits are similar to other countries. That's what happens if you don't go anywhere.

Let's imagine that you have an English solicitor who is employed by a very big London law firm which has an office somewhere in Italy. What happens to the lawyer who is sent to this office, for example, for a year? If the person is employed by a UK employer and stays employed by the UK employer, and the period in Italy is not longer that 12 months, then his E101 form will confirm to the Italian social security authorities that the contributions are going to continue to be paid in the UK.

What happens if this person is going to stay more than 12 months? He will need an extension. At that point, the UK employer will ask for the extension to the Italian social security authorities, under form 102 before the end of the period, who can say yes, or no, and in this case the person will start paying Italian social security from the date of the expiry of the original first one year.

How long can this extension go on for? Up to five years. If you're not permanently in Italy, the Directive does not apply. If you are just posted in Italy, then the directive does not apply because you have to practice on a permanent basis in another member state and the CCBE's guidelines talk specifically about that situation.

What happens after the five years, or the person becomes self-employed in Italy? Number of issues has come up under Article 31 of the Directive; a lawyer who wants to practice in a member state has to register with the competent authority in the state. That seems to me to make a clear obligation for the person to register with the relative Italian Bar.

Some English solicitors have tried to go along to their local Italian Bar and to do this registration as a foreign lawyer procedure, and the local Bars have not been quite sure how to make it possible.

Many people did not understand why a solicitor only practicing English law had to register as a foreign lawyer under the Directive. The reason for this confusion was that a couple of large accounting firms were employed to give advice to some of the large English law firms on what the obligations for their lawyers were, and they were giving some confusing advice.

At the point the question is, is there an obligation on the English lawyers to join the Cassa, or should the solicitor just be paying the Italian social security system? What are the implications if the solicitor joins the Cassa? He's going to have an obligation to send the Cassa communications on

incoming turnover, and to make the same contributions and get the same benefits as Italian lawyers. If you don't enrol in the Cassa, you may still be asked by the Cassa to do a 2% levy on the VAT of the turnover.

But what if you're an employee, you don't have a VAT number and you work for a law firm? Can you be in the Cassa? It is very unclear

In conclusion, there is a lot of confusion.

Thank you for your attention.

8.3 Intervention by Hartmut Kilger, President of the « Deutscher Anwaltverein

Presentation of problems which are likely to cause problems

There are problems only in some specific cases

- Inappropriate use of the E101 form
- No conformity between legal residence and place of professional activity

Presentation of legal and financial bases

In Germany, pensions schemes for lawyers (Rechtsanwaltsversorgungswerke) work by capitalisation. Accordingly, they have been excluded from Regulation 1408/71 till now. Nevertheless, it is foreseen to repeal this exemption and so co-ordination will be guaranteed.

The problems which are described will finally be solved once pension schemes for lawyers are include in Regulation 1408/71.

Old-age insurance for lawyers in Germany is run by independent bodies corporate under public law, not by bars or lawyers' associations. They are not CCBE members.

Meaning of administration practice

Transparency of administrative practice is important. Bilateral agreements exempting from the obligation to pay subscriptions have a very positive impact.

Conclusion

The method of co-ordination will bring expected results.

It is impossible to find solutions for the practice of procedure at CCBE level, but solutions might be worked out exclusively between bodies corporate under public law or between their general associations (e.g. ABV in Germany).

9 WORKSHOP N°1: WHICH LAW IS APPLICABLE?

9.1 Programme of the workshop n°1

President: Angelo Guida, Delegato e componente della Commissione di studio legislazione Casse professionali italiane ed estere, Italy

Facilitator: Michael Prossliner, legal adviser ABV, Germany

Agenda

I. Welcome

II. Introduction (Mr Guida)

III. The law applicable (Mr Prossliner)

1. Goals and broad lines of regulation 1408/71
2. The law applicable in case of a salaried or non salaried activity in an EU/EEA Member State
   a) Salaried or non salaried activity only in one Member State
   b) Salaried or non salaried activity in various places
3. Proposals

IV. Discussion

9.2 Intervention by Michael Prossliner, ABV

When attorneys start practicing as employed or self-employed workers in Europe, the issue of social insurance emerges. In this connection, Regulation no. 1408/71 (EEC), applying in particular to all the nationals of the Members States and of the European Economic Area, contains a number of provisions. My brief contribution offers an overview on if and on what condition within the framework of EU Law, the legislation of a Member State or Germany applies.

I. Introduction

The European Parliament and Council Directive no. 98/5/EC of 16th February 1998, aimed at favouring the permanent practice of the profession of attorney in a Member State other than that in which the professional qualification was awarded has been transposed by virtually every European Union Member State. In the opinion of the European Commission, with the new Directive on services provision, in the future also attorneys will be able to benefit more extensively from the internal market compared to what has been the case so far.

As a consequence, it is highly probable that in the future, the already large number of German attorneys who have started practicing abroad at European level shall increase considerably. Since the free movement of workers and the freedom of establishment and service provision for self-employed workers within the framework of EU law is only foreseen provided that those exercising this right do not see their social security right impaired, the issue of social insurance – in particular within the framework of old-age insurance – becomes extremely relevant at legal and especially at practical level. My presentation provides an overview of the basic framework conditions in European Social Law when starting pursuing a professional activity abroad within a European context.

II. Consequences of starting practicing as an employed or self-employed worker abroad within a European context with reference to old-age insurance.

For an attorney starting practicing abroad within a European context, the issue of which old-age social insurance system applies emerges invariably. German social insurance law, with its provisions on conflicts among laws valid for the entire social security code (SGB), in Article 3 and subsequent ones of the SGB IV does not provide an answer as far as German attorneys and all the other free-lance professionals are concerned. Indeed, these Social Security Code provisions do not apply to the social security funds specific for attorneys OR to the other pension funds for free-lance professionals.

Hence, EEC Regulation no. 1408/71 of 14th June 1971 on the application of social security systems in the case of employed and self-employed workers and their family members moving within the EU plays a crucial role. In this scenario, it should be pointed out that the German social security institutions for professionals, as those for attorneys, in compliance with Article 1, Paragraph j), Sub-paragraph 4, jointly with Annex II of Regulation 1408/71 are currently excluded from regulation's field of application *ratione materiae*. In order to take into account the crucial importance acquired by the migration of free-lance professionals, on 1st January 2005 an amendment – according to which professional social security funds will be included in the *field of application ratione materiae* of Regulation no. 1408/71 – will enter into force. A corresponding amendment has already been proposed by the European Commission. The fact that at the moment social security institutions are not included in Regulation no. 1408/71, however, does not simply imply that its provisions do not apply to German attorneys. The application of the provision in the presence of conflict, i.e. when the problem of establishing what legislation applies to a given attorney arises, is still to be approved. In order to establish if the provisions of Regulation 1408/71 apply to attorneys, it has to be established whether attorneys fall within the field of application *ratione personae* of Regulation 1408/71. According to Article 2, Sub-paragraph 1 of Regulation 1408/71, the latter applies to employed and self-employed workers when they fall under the legislation of one or more Member States. To acquire the rights of employed or self-employed workers, the latter must comply with the legislation of a Member State. By way of example, a German attorney practicing both in Italy and in Germany therefore falls within the field of application *ratione personae* of the Regulation, as the social security fund of attorneys, in

compliance with Article 45, Sub-paragraph 3 jointly with Annex IV of Regulation 1408/71, is included in the *field of application ratione materiae* of Regulation 1408/71. In addition, the fact that in Germany these attorneys are insured with a professional social security fund, excluded from the field of application *ratione materiae* of the Regulation, in compliance with Article 1, Paragraph j), Sub-paragraph 4, jointly with Annex II of Regulation 1408/71, is irrelevant. And, for all purposes, this interpretation has also been supported by Mr Van Raepenbush in his paper.

At any rate, what is important is that at the latest on 1st January 2005, all the provisions contained in Regulation 1408/71 referring both to professional social security funds, and, as a system, to attorneys, will enter immediately into force.

1. The Regulation's goals and underlying principles

According to Article 3, Sub-paragraph 1 of Regulation 1408/71, nationals residing in the EEA (European Economic Area), living in a Member State and falling within the scope of Regulation 1408/71 enjoy the same rights and duties foreseen by the legislation in force in a Member State as the latter's nationals do, provided it has not been otherwise explicitly established. This reinforces and gives practical application to the general prohibition against citizenship-based discrimination, as set forth in Articles 12 and 39 of the Application Law in the field of Social Security.

The services export principle forbids tying the provision of services to the permanence by the institution offering the service in the relevant Country. This is crucial in preventing effects hindering the mobility of social insurance schemes from emerging. However, this is not set forth in general terms in Regulation 1408/71. Article 10, Sub-paragraph 1 of Regulation 1408/71 eliminates the clause of residence for the provision of services for a consideration in the case of disability, old age, or for the survivors, or of pensions for occupational accidents or diseases, or compensation in the case of death.

In order to avoid beginning new periods of suspension/waiting in the case of journeys across borders individually made to different Member States, for all service provider categories, relevant periods will be established for insurance purposes (insurance period, employment period, residence period), to acquire, maintain, or recover a right to insurance.

Especially with reference to old age pensions and pensions in favour of survivors, in order to achieve an overall acceptable benefit level for the party entitled and a sustainable sharing of expenses by the relevant social security institutions, each Member State will determine the amount of pension that would result if all the relevant periods for insurance purposes had been completed in its own territory only based on the legislation in force at the time of ascertaining the social security benefit. The portion corresponding to all the relevant periods for insurance purposes corresponds to the amount due. On the contrary, the pension amount estimated only based on national law will prevail, were it to be higher.

2. Applicable law in case of practice as an employed or self-employed worker abroad within a European context

Recourse is made to provisions on conflicts or limitations foreseen by Article 13 to 17 of Regulation 1408/71 to ascertain if, as practicing in another EEA Member State, there exists any insurance obligation in this Member State or with the correspondent social security institution.

In this case, the principle established in Article 13, Sub-paragraph 1 of Regulation 1408/71 – stating that practice as an employed or self employed worker in the EEA always entails an insurance obligation in a Member State only – applies. This is the case regardless of whether the person practices as an employed or self-employed workers in a single Member State, or more than one occupation or free-lance activity are pursued in different Member States.

At this stage, though, the problem arises concerning in which Member State insurance obligations emerge. Here follows an analysis of the cases in which an occupation or free-lance activity is pursued in a single Member State (a) or in more than one (b).

a) Employed or self-employed work in a single Member State

In compliance with Article 13, Sub-paragraph 2 of Regulation 1408/71, the principle according to which an attorney either practicing as an employed worker on a self-employed basis in a different Member State only falls under the Social Security law of that Member State applies. The provision so regulates the principle of the Country of employment both for employed attorneys and self-employed ones. The connection with the Country of employment prevails over that of the Country of residence since, according to Article 13 of Regulation 1408/71, the Country of employment plays a decisive role also when someone lives in another Member State. From this it may be inferred that the Country of employment principle prevails over that of the Country of residence.

aa) Exceptions to the Country of employment principle

As a rule, employed and self-employed workers who, within the context of their employed work or self-employed activity, were to stay for a relatively brief period of time in a different Member State do not need to change their social security system. These exceptions are provided for under Article 14 and subsequent ones of Regulation 1408/71. These provisions establish that the person concerned, although de facto employed in a Member State, does not fall under the local social security system, but will on the contrary continue to be insured in the system of origin. The goals of these provisions consist among others in making things simpler, with a view to avoiding or reducing administrative expenses. Application with no exceptions of the Country of employment principle could in addition lead to difficulties, in some cases, which could result in delays in the transmission of documents concerning the workers, and therefore be detrimental to their free movement. In the case of self-employed workers, this would represent a barrier against the provision of services were they to be obliged to access the social security system of a different Member State also in the case of the pursuit of professional activities on a temporary basis.

The Regulation foresees exceptions to the Country of employment principle in the case of a secondment not exceeding 12 months, in the case of self-employed professional activities pursued in a different Member State for a period not exceeding 12 months, or in the presence of a special agreement under Article 17 of Regulation 1408/71. In this context, it should be pointed out that, as underscored, the above mentioned provisions are of an exceptional nature and should be interpreted, as a rule, stringently.

(1) Secondment of employed attorneys

Preconditions for a secondment according to Article 14, Sub-paragraph 1 of Regulation 1408/71 are the following:

- Existence of employment relations with an employer in the territory of a Member State.
- Existence of the secondment.
- Continuity in the employment relation with the employer until that time during secondment.
- Pre-established limited duration of the secondment period.

(2) Secondment certificate E 101

As a rule, the Administration authorities of the foreign Country of employment do not know that the German legislation in the field of social security alone may be applied to an occupation practiced in a different Member State. Hence, Article 11 of EEC Regulation no. 574/22 of 21st March 1972 establishing provisions for the enforcement of Regulation 1408/71 sets forth that, in the secondment cases here taken into account, the employed worker or his/her employer are issued upon request a special certificate on the application of the German legislation to the employment relation having given rise to the secondment. This certificate (Form E 101) must be promptly requested so that it may be already in the other Member State at the time of the beginning of the employment having given rise to the secondment, and be submitted to the relevant foreign social security administrative body. This prevents foreign contributions from being wrongfully applied for.

Should the E 101 form be unavailable at the beginning of employment, and should the foreign social security administrative body ask for the payment of mandatory contributions, the suspension of payment of foreign contributions is to be requested until Form E 101 is submitted.

Through two rulings, the European Court of Justice has established that the E 101 secondment certificate issued by the relevant office of the Country where the secondment has taken place not only has the value of a statement, but also of a deed. The Court of Justice has established that the issuing of the E 101 form represents an assumption that the adhesion by the seconded worker to the social security system of the relevant Member State is regular. Until an E 101 form is not cancelled or declared to be null by the social security institution of the Member State having issued it, the relevant institution of the Member State in which the employed worker has been seconded has no right to submit the same to its own social security system.

For all purposes, the European Community Court of Justice has also established that the issuing institution has the obligation to assess that the E 101 certificate is regular, and, as the case may be, to cancel it, in case the institution of the Member State where the worker has been seconded were to express doubts on the regularity of the certificate. In practice, this translates into the fact that an employed attorney, seconded by a Law firm to a Member State, or by a company with registered office in Germany, possessing the E 101 form, in principle is not subject to mandatory insurance in the foreign Member State.

(3) Self-employed workers: professional activity on a temporary basis in a different Member State

Article 14 of Regulation 1408/71, Sub-paragraph 1 establishes that a person practicing as a self-employed worker, and working in the territory of a different Member State is subject to the legislation in force in the first member State insofar as the foreseeable duration of this activity does not exceed 12 months. Should this activity exceed 12 months for unforeseeable reasons, the legislation of the first Member State shall apply until this activity is concluded, insofar as the relevant authorities of the State in which the self-employed worker temporarily practices grant their authorisation. This authorisation has to be applied for before the first 12 months expire, and it may not be granted for a period exceeding 12 months.

Also self-employed attorneys temporarily practicing in a different Member State must comply with the same formalities foreseen for employed workers. Also in their case, they are required to apply for the E 101 form. The preconditions for “self-secondment” by the self-employed worker basically correspond to those foreseen for the secondment of the employed worker.

(4) Special agreement under Article 17 of Regulation VO 1408/71

The opportunity provided to enter into a special agreement under Article 17 of Regulation 1408/71 aims at going beyond the limiting nature of the terms set forth in Articles 14 and 14a of Regulation 1408/71. This special agreement is resorted to when right form the start it is established that the duration of the occupation or free-lance activity pursued in a different Member State will exceed 12 months. In particular, the opportunity afforded by Article 17 of Regulation 1408/71 is resorted to also in order to safeguard the application of the national law until then considered, including in the case of secondments going beyond what set forth in the provisions of Article 14 of Regulation 1408/71. It should be pointed out that the granting of a special agreement for the application of German legislation to social security refers equally to all insurance fields falling within the scope of Regulation 1408/71. Hence, it is extended not only to old-age insurance, but also disease, health care, accidents, and unemployment insurance, as well as to benefits for family members. At any rate, it is impossible for the agreement to be only applicable to individual sectors of the corresponding system.

As a rule, in the case of a special agreement, as well as of an employment relation with a national company, a predetermined employment duration is required, as well as the benefit for the worker to place him/herself under the German Law.

As a rule, a special agreement application is successful when right from the start employment abroad is not based on duration. In this case, what varies is the maximum uninterrupted submission to the legislation of the Country of origin based on a special agreement in the different Member States. Most of the Member States grant exemption from their legislation for a period of five years.

After all, the willingness to enter into a special agreement has to make the object of a declaration. Motivation for a special agreement may include, among others, the following (from the standpoint of social security):

- Avoiding partial pensions in the future (German pension and Member State pension), or
- Single proceedings with the relevant social security institution, or
- Return to Germany, and legal practice in this country.

In this case, a request has to be submitted jointly with the employer. The decision on the special agreement request rests, in case of employment in a different Member State, with the relevant Ministry of the foreign Country in which the profession is practiced, or with the administrative body indicated by the same.

A special agreement request does not have a deadline. The letter of Article 17 of Regulation 1408/71 does not contain references to the fact that the opportunity to request special agreements may only be foreseen for the future. The meaning and the context of the provisions of Article 17 of Regulation 1408/71 on the contrary set forth that this agreement may also be entered into retroactively.

There is no form to apply for a special agreement. The request in writing has to be sent on plain paper to the office indicated for this purpose in Regulation 574/72.

In order to avoid having to answer additional questions, the following data has to be provided:

- Name and surname, date of birth, nationality, place of residence until the present time, and, if any, the new address in the Country of employment.
- Beginning and foreseen termination of employment in the Country of employment.
- Assignment in the Country of employment
- Full description and address of both the employer in the Country of origin and of the working place in the Country of employment.
- Type of working relation between the employed worker and the employer in the Country of origin during assignment in the Country of employment
- Motivation according to which it is to the benefit of the worker that the legislation of the Country of origin continues to be applied.
- Full description and address of the office which will comply with the contribution and notice obligations for the period foreseen in the request.

Moreover, an additional declaration should be annexed to the special agreement request to the effect that that it is clearly stated how entering in the agreement in compliance with Article 17 of Regulation 1408/71 is in the best interest of the applicant.

bb) Temporary results

A temporary result is that German attorneys wishing to practice as employed or self-employed workers in a different Member State are provided the opportunity to enter into an insurance scheme with a professional insurance fund, if the above mentioned requirements are met.

b) Employed or self-employed work in more than one Member State

Based on the provisions of Article 13, Sub-paragraph 1 of Regulation 1408/71, according to which, as a rule, only the legislation of a Member State may apply to an employed or self-employed worker, the Regulation also contains coordination provisions for employed and self-employed workers practicing in different Member States.

Both in the case of employed and self-employed workers, the principle according to which the employed or self-employed worker practicing in the territory of different Member States is subject to insurance obligation in the Country of residence should he or she also practice as an employed or self-employed worker in this member State applies. This means, for instance, that a German lawyer practicing as an employed or self-employed worker both in Germany and in a Member State, is subject to insurance obligation in Germany, should Germany be the Country of residence. On the contrary, should he or she live in the Member State in which he or she practices as an employed or self-employed worker, the insurance obligation would arise there.

In addition, both for employed and self-employed workers the case is provided for in which employed or self-employed work is not performed in the Country of residence of the employed or self-

employed worker. In this case, employed workers are subject to insurance obligation in the Country in which their employer has its registered office. The same applies to self-employed attorneys. They are subject to the obligation of insuring themselves in the Member State in which they pursue their main professional activity. In order to ascertain their main professional activity, first and foremost the distance between the place of residence and the individual places where this activity is pursued is taken into account. In case it proved impossible to define an individual's main professional activity, type and duration of each single activity are considered, as well as the services provided and the income earned.

An attorney normally practicing as an employed or self-employed worker in more than one Member State shall therefore inform the relevant body of the Country in which he or she resides. Should there exist no insurance obligation in the Country of residence, the relevant body of the same Country shall to this effect inform the body of the Country in which the registered office of the firm is located. The relevant body of the Country whose legislation is applicable to the case under review subsequently issues a certificate stating that its legislation is applicable to the case, and sends a copy of the same to the bodies of the other Member States concerned. As the case may be, the bodies of these countries provide the necessary information for the purpose of assessment on contributions.

3. Final remarks

By way of conclusion, it should be ascertained whether the attorneys practicing as employed or self-employed workers in one or more EEA Member State are subject to the obligation of insuring themselves in their Country of origin in the case of secondment lasting for a period not in excess of 12 months. For all purposes, the possibility of extending this period for an additional 12 months has been foreseen. Should it be established, from the BEGINNING THAT the employed or self-employed activity in the other Member State will exceed in duration the period of 12 months, there is an opportunity to enter into a special agreement under Article 17 of Regulation 1408/71. It should be taken into consideration that practices vary from Member State to Member State. Usually, this extraordinary agreement is only granted for a period of five years. In case of employed or self-employed work in more than one Member State, exclusive insurance obligation in the Country of origin exists if the employed or self-employed occupation is performed also in the Country of origin, and if the attorney resides in the same.

III. Note

Following the inclusion of professional social security bodies in the field of application *ratione materiae* of Regulation 1408/71, probably as at 1st January 2004 all the provisions in the Regulation focusing professional social security bodies will become directly valid. For attorneys transferring their main business for a long period of time to a different Member State, this means that the periods they have completed in the professional social security institution shall be taken into account in the future by the old-pension insurance system of the Member State concerned, as meeting the qualifying (waiting) period criterion. The inclusion of professional social security bodies in Regulation 1408/71 however does not entail that German attorneys starting practicing in a different Member State are to be exempted FROM INSURANCE obligation in favour of the relevant professional social security body or that they enjoy a right of option in this connection.

9.3 Report on the debate of the working group by Michael Prossliner, legal advisor

1. Regulation 1408/71 is applicable to lawyers, both employed and self employed lawyers.
2. Rules from Articles 13 to 17a of Regulation 1408/71 enable to determine the law applicable in general to cross-border cases.
3. Therefore, the law of the State where the professional activity is practised is applicable (lex loci laboris), in case of multiple places of professional activity, the law of the State of residence applies.
4. If, despite the application of Articles 13 to 17a of Regulation 1408, cases of double levying arise, the schemes concerned should co-operate to come to solutions, in accordance with the lawyers' interests.
5. It is unsure, whether the provision, according to which lawyers in Italy have to add 2% on their bills on behalf of the Casse Forense, is a benefit covered by the material scope of Regulation 1408/71.

10 WORKSHOP N°2: THE PRINCIPLE OF AGREGATION OF INSURANCE PERIODS AND CO-ORDINATION BETWEEN SOCIAL SECURITY SCHEMES

10.1 Programme of the workshop n°2

President: Josep Maria Antras Badia, member of the Board of the Mutualidad
Representative of the Spanish Delegation in the CCBE, Spain

Facilitator: Mary-Daphné Fishelson, Avocat, France

Agenda

1. Intervention of Mrs. Mary-Daphné Fishelson (facilitator) on the following points:
   a) Current situation as regards social security for lawyers in the various EU Member States and description of the different systems and organisations
   b) Problems of aggregation of insurance periods in the different systems
   c) Proposed solutions
2. Intervention of participants and discussion

10.2 Report on the debate by Mary-Daphné Fishelson, Avocat

The three following principles should be respected: free movement, non discrimination and fair competition:

These three principles are necessary to solve the problem at stake.

Generally speaking, the lawyer has to use the providence system.

Yet, this system depends upon the Member State concerned and also upon the type of activity the lawyer practises, i.e. employed or self-employed activity.

There should be a distinction between retirement pension and other benefits such as actual medical assistance as far as the management and application of the principle of aggregation are concerned.

Two ideas were proposed by the working group:

- working on the drafting of a regulation which could allow compensation between benefits in order to come to a balance between subscriptions and benefits;
- in the meanwhile, maintaining the home obligation, i.e. applying the system of the country of origin as provided by Regulation 1408/71 in case of secondment, but without any time limit.

11 WORKSHOP N°3: HOW REGULATION 1408/71 COULD BE APPLIED TO LAWYERS? TOWARD A COMMON INTERPRETATION OF CIRCUMSTANCES. IN WHICH THE REGISTRATION WITH THE SOCIAL SECURITY SCHEME OF THE HOME OR HOST COUNTRY IS MANDATORY

11.1 Programme of the workshop n°3

President: Antonio Soares de Oliveira, President of the Caixa de Previdencia e Abogados, Portugal

Facilitator: Dominique Matthys, Advocaat, Belgium

Agenda

1. Welcome
2. Introduction
3. Communication from the Portuguese mission
4. Is regulation 1408/71 applicable to lawyers?

   Report from Professor Sean Van Raepenbusch
5. Determination of the individual, material and territorial scope of application of regulation 1408/71
6. Main principles of the international co-ordination of social security schemes
   1) Equal treatment
   2) Determination of the law applicable
   3) Conservation of acquired rights and rights which are being acquired
7. Specific provisions for non-salaried workers
8. Possible difficulties of application
9. Interventions of participants and discussion
10. Report from the facilitator

11.2 Intervention by Antonio Soares de Oliveira, President of the « Caixa de Previdencia e Abogados »

I. GENERAL CONSIDERATIONS

As we know, Regulation (CEE) N. 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, co-ordinates the social security schemes of the Member States.

As a co-ordination instrument, it does not modify the substance of the legislation involved.

Its objective is not to harmonise the national social security systems.

On the contrary, the special characteristics of national social security legislation and obviously the special characteristics of benefits should be respected.

Thus, within the framework of the co-ordination, Regulation N. 1408/71 particularly aims at guaranteeing the materialization of the fundamental principles of co-ordination of social security legislations:

- Equality of treatment
- Determination of the legislation applicable
- Maintenance of the acquired rights, and
- Maintenance of rights in course of acquisition.

But is Regulation N. 1408/71 applicable to lawyers?

II. THE PERSONAL AND THE MATERIAL SCOPE OF REGULATION N. 1408/71

1. To begin with, after the adoption of Regulation (CEE) N. 1390/81 enlarging the scope of Regulations 1408/71 and 574/72 to self-employed persons and to the members of their families, the community rules on social security apply to lawyers, be they employed persons or self-employed persons as defined in Article 1(a).

In fact, according to Article 2, "This Regulation applies to employed or self-employed persons (…) who are or have been subject to the legislation of one or more Member States (…) or who are stateless persons or refugees residing within the territory of one of the Member States, as well as to members of their families and their survivors."[1]

2. At a national level, lawyers can be covered by general schemes, by special schemes or by both schemes in relation to different benefits.

But we should focus on the perspective of lawyers moving within the Community.

In presence of so many general and special schemes covering lawyers all over the EU and the EEE, we cannot limit our approach to the application of the latter, the characteristics of which, however, have to be analysed.

On the one hand, according to Article 4 (2), Regulation N. 1408/71 applies to "(…) all general and special social security schemes, whether contributory or non-contributory (…) in respect of the benefits referred to in paragraph 1", and these relate to sickness and maternity, invalidity including the

[1] Subject to the provisions laid down in the respective regulations extending the scope of Regulation 1408/71, the provisions of this Regulation also apply to students and to nationals of third countries.

maintenance or improvement of earning capacity, old-age, survivors, accidents at work and occupational diseases, death, unemployment and family benefits.

It also applies to special non-contributory benefits in conformity with the provisions established in Article 4 (2a).

However, it does not apply to social and medical assistance, to benefit schemes for victims of war or its consequences.

On the other hand, the definition of legislation laid down in Article 1 (j) excludes "(…) provisions governing special schemes for self-employed persons the creation of which is left to the initiatives of those concerned or which apply only to a part of the territory of a Member State concerned, irrespective of whether or not the authorities decided to make them compulsory or extend their scope. The special schemes in question are specified in Annex II"[2].

Taking into consideration this frame, we can undoubtedly say that the legislation concerning the Portuguese special social security scheme for lawyers and solicitors is covered by this Regulation.

In fact, the "Caixa de Previdência dos Advogados e Solicitadores", which is responsible for the Portuguese special social security scheme for lawyers and solicitors, was created by Decree-Law N. 36550 of 22 October 1947 and recognized as a providence organisation by Act N. 1884 of 16 March 1935. It is part of the second category of those mentioned in Base I of the abovementioned Act, and is therefore considered as a pension or providence organisation, i.e. an institution for which the registration is mandatory for persons who are not dependent from any employee's organisation and practise certain profession, services or activities.

III. SOLUTIONS RESULTING FROM THE APPLICATION OF REGULATION N. 1408/71 PARTICULARLY TO THE SPECIAL SCHEMES FOR LAWYERS

It seems that we should now concentrate on the fundamental provisions of Regulation N. 1408/71 giving effect to the co-ordination principles:

- As regards equality of treatment, which is considered to be the main principle, Article 3 (1) lays down that subject to the special provisions of the Regulation, persons resident in the territory of one of the Member States to whom the Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State.

Therefore, the application of schemes, be they general or special, covered by the Regulation N. 1408/71 should comply with this principle and subsequently any discriminating clauses due to nationality must be removed.

More or less difficulties may arise according to the different design and development of the national schemes.

In general terms, the Portuguese general social security scheme and the special social security scheme for lawyers and solicitors do not include any discriminating clauses on the grounds of nationality.

- The provisions relating to another principle, the determination of the legislation applicable, treated in Title II of the Regulation, may not bring difficulties when applying the general rules laid down in Article 13.

[2] According to the Common position adopted by the Council with a view to the adoption of a Regulation of the European Parliament and of the Council on the coordination of social security systems, of January 2004, this exclusion does not appear. Consequently, also the reference to the respective Annex was deleted.
In the same sense, as Regulation N. 1408/71 is at present being object of miscellaneous amendments, which will apply until the entry into force of the new regulation, there is a proposal from Austria and Germany of deleting the respective entries in Annex II.

However, some difficulties may arise with the application of special rules, namely when analysing the relationship between the undertaking and the worker or the activities pursued by the self-employed person in the territory of the State where he was established before moving to another Member State.

The awareness of such difficulties gave rise to the Decision No 181, of 13 December 2000, of the Administrative Commission of the European Communities on Social Security for Migrant Workers[3].

Beyond the decisions in respect of undertakings and employed persons, paragraph 2 of this Decision clarifies as regards self-employed persons that "Article 14a(1) requires the worker to have been self-employed in the territory of the sending State before performing work on the territory of the State of employment. It is therefore assumed that the worker has been pursuing significant activities for a certain length of time in the territory of the State where he is established before moving to another Member State to perform work in an employed or self-employed capacity, the content and duration of which are predefined and the existence of which must be proven by the relevant contracts.

Moreover, in the course of the period during which the worker performs such work, he must continue to fulfil in the sending State the conditions enabling him to pursue his activity when he returns. To this end, he must maintain the infrastructure he needs to pursue his activity in the State in which he is established, in accordance with the legal provisions in force in that State, such as having use of office space, paying social security contributions, paying taxes, having a professional card and a VAT number or being registered with chambers of commerce or professional bodies."

The Administrative Commission also states in paragraph 8 that "(…) whether a self-employed worker maintains the infrastructure needed to pursue his activity in a State, must be defined objectively, notified to the interested parties and applied consistently and evenly in the same or similar situations."

However, if a specific situation cannot be solved by the institutions involved, then, according to paragraph 9 of the Decision N. 181, "(…) they may submit to the Administrative Commission, through their government representative, a note which will be examined at the first meeting following the 20th day after its submission with a view to reconciling the opposing views on the legislation applicable to the case."

Therefore, it appears that difficulties arising from the application of Title II of Regulation N. 1408/71 may be solved with a good co-operation between the institutions involved, and even in the cases where this co-operation fails, there is always the possibility of submitting them to the Administrative Commission.

- Moving on to another principle – the maintenance of acquired rights - materialized by means of the payment of benefits abroad - Regulation N. 1408/71 lays down in Article 10 (1) a general rule applicable to invalidity, old-age or survivors' cash benefits, pensions for accidents at work or occupational diseases and death grants, as well as to lump-sum benefits granted in cases of remarriage of a surviving spouse who was entitled to a survivors' pension.

Specific provisions related to the other benefits are established in the respective Chapters.

It seems that the application of the provisions relating to those benefits does not bring substantial difficulties since the legislation concerned does not include, as a rule, residence clauses.

In fact, under those legislations such benefits are, in principle exportable, excepting the special non-contributory benefits, which due to their specific nature are treated differently.

This is the case of the Portuguese general social security scheme and of the special social security scheme for lawyers and solicitors that allow for the exportation of the respective benefits.

[3] Composition, working methods and tasks of the Administrative Commission on Social Security for Migrant Workers are laid down in Title IV of Regulation N. 1408/71.

The Portuguese special social security scheme for lawyers and solicitors grants the following benefits: retirement pension, invalidity pension, survivors' pension, death grant and cash sickness benefits.

Other allowances, of an assistance nature, may be provided in cases of funeral, assistance, birth, maternity, recovery after hospital or surgical intervention (depends on subscription), refunding of costs arising from hospital, surgical intervention or maternity of the beneficiary or his/her spouse.

After having analysed these benefits, it is our understanding that the latter fall within the concept of social assistance and therefore, according to Article 4 (4), they are not covered by Regulation N. 1408/71.

However, the scheme does not provide for a different treatment in relation to foreign beneficiaries residing in Portugal.

But if one of these benefits might hypothetically be covered by Regulation N. 1408/71, which would imply its qualification as a special non-contributory benefit, then, according to Article 10a(1), such benefit would not be exportable, provided that it were listed in Annex IIa.

We are aware that the sole criterion of being considered as an assistance benefit under national legislation is not sufficient to include a benefit in the concept of non-exportable benefits.

For that reason, other factors relating to each benefit, in particular its purpose and the conditions for the respective granting were analysed.

A similar analysis led to the inclusion of some non-contributory benefits of the Portuguese general social security scheme in Annex IIA.

It should also be mentioned that although the special social security scheme for lawyers and solicitors does not cover all the social security branches, the respective beneficiaries may be entitled to other benefits provided either under the general social security scheme or by the National Health System, namely family allowance for children and young people and health care.

- At last, the maintenance of rights in course of acquisition also deserves a deep reflection.

Many schemes make the awarding of certain benefits dependent on a qualifying period.

In cases of people pursuing their activity in more than one Member State, it may happen that the periods completed in each Member State are not sufficient to give entitlement to benefits.

So, the mechanism of aggregation of periods of insurance or residence, the definitions of which are laid down in Article 1(r) and (sa), respectively, completed by the beneficiary aims at giving effect to the principle in question.

This mechanism should be used, where necessary, to determine the acquisition of the right in the cases where a qualifying period is required and to calculate the amount of the benefits.

Each Chapter of Title III lays down the provisions relating to the aggregation of periods applicable to each branch.

However, considering the importance of the benefits, we shall specially analyse the provisions relating to invalidity, old-age and survivor's pensions.

Article 45 (1) of Regulation 1408/71 lays down the general provision concerning periods of insurance or of residence completed under a general scheme or a special scheme and either as an employed person or a self-employed person.

Paragraph 2 regulates the aggregation of "(…) periods of insurance having been completed only in an occupation which is subject to a special scheme for employed persons or, where appropriate, in a specific employment (…)", in the sense that only periods completed in another Member State "" (…) under a corresponding scheme or, failing that, in the same occupation or, where appropriate, in the same employment (…)" shall be taken into consideration.

Likewise, paragraph 3 regulates the aggregation of periods of insurance having been completed only in an occupation which is subject to a special scheme for self-employed persons. In this case, only periods completed in another Member State under a corresponding scheme or, failing that, in the same occupation shall be taken into consideration. These special schemes are listed in Annex IV, part

B.

The Portuguese special social security scheme only takes into consideration periods of insurance completed by lawyers and solicitors under that scheme.

Where a lawyer pursues an activity in Portugal as an employed person and as a self-employed person, he shall make contributions to the general social security scheme and to the private social scheme and shall benefit from both schemes. Each scheme awards the benefits the person concerned is entitled to.

Thus, it seems that Article 45 (3) applies to this special scheme, although it is not listed in Annex IV, part B.

Actually, in this case, it seems that the Annex would have to be considered as having an informative nature as it would not be reasonable to conclude that the aggregation of periods could not be carried out - and consequently people would be deprived of their rights - only due to the non-inscription of the scheme concerned in that Annex.

And, in order to ensure the maximum protection, Article 45 (3) also provides that "(…) if the person concerned does not satisfy the conditions for receipt of such benefits, these periods shall be taken into account for the granting of the benefits under the general scheme or, failing this, under the scheme applicable to manual or clerical workers, as the case may be, subject to the condition that the person concerned has been affiliated to one or other of these schemes.".

The aggregation of periods of insurance or residence is closely linked to the award of pro-rata pensions.

This method of calculation of the pension amount is used where the person concerned has been subject to the legislation of more than one Member State and the qualifying period giving entitlement to pensions is not fulfilled in one or all the States involved.

In this case, according to Article 46(2) (a) of Regulation N. 1408/71, the competent institution shall calculate the theoretical amount of the benefit by considering all periods of insurance or residence completed under the legislation of the Member States as if these were completed in the State in question under the legislation which it administers. If, under this legislation, the amount of the benefit is independent of the duration of the periods completed, the amount shall be regarded as being the theoretical amount.

Subsequently, according to Article 46(2) (b), the competent institution determines the actual amount of the benefit on the basis of the theoretical amount "(…) in accordance with the ratio of the duration of the periods of insurance or of residence completed before the materialization of the risk under the legislation which it administers to the total duration of the periods completed before the materialization of the risk under the legislations of all the Member States concerned".

And according to Article 46(3), the person concerned shall be entitled to the highest amount, subject to the provisions concerning reduction, suspension or withdrawal provided for by the legislation under which the benefit is due.

IV. SUMMARY AND CONCLUSIONS

The objective of this paper is not to deeply analyse all the provisions of Regulation N. 1408/71, but only to reflect on the main provisions and on some difficulties that may arise from the application of this Regulation to lawyers.

This reflection may be summarized as follows:

- Regulation (CEE) N. 1408/71 co-ordinates the social security schemes of the Member States.
- Lawyers are covered by the personal scope of Regulation N. 1408/71.
- The material scope of Regulation N. 1408/71 applies to general and special schemes.
- According to the national scheme or schemes covering lawyers, general or special provisions apply.
- Direct and indirect discrimination on grounds of nationality is prohibited.

The aggregation of periods of insurance or of residence and the payment of benefits abroad other than some special non-contributory benefits must be guaranteed.

11.3 Report on the debate by Dominique Matthys, Advocaat

The members of the working group listened to the speeches, which were sometimes ambitious, of the plenary session this morning.

They understood however that their work was limited to a less ambitious area, albeit an important one, notably the scope of practice in the different countries concerned.

The topic of this conference as we read it in the invitation is “social security for European lawyers” and not “social security in Europe”, nor “social security in Europe for European lawyers”.

From this idea, the working group n°3 looked at one of the most important instruments to try and solve the problem of social security for lawyers practising cross-border, i.e. Regulation 1408/71.

In this view and after having discussed some practical cases showing the problems, the working group n°3 has not expressed any recommendations, but only discussed the phrasing of some principles which will no doubt be a starting point for the work which will be beyond a doubt carried on.

The working group notes that:

1. Regulation 1408/71/CEE should enable us to maximize free movement of persons and free provision of services within the European Union;
2. Regulation 1408/71 is not a legally binding instrument for harmonisation;
3. Regulation 1408 does not aim at harmonising social security schemes but co-ordination them;
4. Having regard to the evolution of the contents of regulation 1408 and to the related case-law of the European Court of Justice, this regulation is applicable to both employed and self-employed lawyers;
5. As far as social security is concerned, four fundamental principles are enshrined in Regulation 1408/71:
    (1) Equality of treatment and determination of the law applicable
    (2) Preservation of acquired rights
    (3) Preservation of rights in the course of being acquired
    (4) Unique character of the law applicable
6. General or specific regimes of regulation 1408 are applicable under regime(s) to which lawyers are subject;
7. Direct or indirect discrimination based on nationality is forbidden;
8. Aggregation of periods of insurance or residence should be guaranteed in order to implement the preservation of rights in the course of being acquired;
9. Aggregation of periods of insurance of residence is closely linked to the grant of pro-rata retirement pension;
10. Exportation of benefits should also be secured.

12 CONCLUSION BY STEFANO ZAPPALÀ, MEMBER OF THE EUROPEAN PARLIAMENT

Thank you for the invitation. And thank you also for the introductory words. I hope I did not and will not disappoint all my fellow lawyers and professionals.

Rather than focussing on the specific contents of the work that you have done so far, I should like to provide information on the legislative procedure that is being followed in Europe on professions, including the legal profession. Therefore, I will seize this opportunity to do so.

Last February 11th, the draft Directive was approved on first reading in Strasbourg. It is now under scrutiny by the European Council, and I believe that, within reasonable time, the whole process will come to a conclusion by the end of the year.

Very often, across Europe there is scant or inadequate knowledge on the institutional framework of European legislation, which brings about confusion. On the one hand, there is a certain Commissioner, Mr. Monti, who raises issues with everybody paying heed to him and getting concerned, while on the other hand there are people who are not familiar with the matter, thus running the risk of mixing up things.

Considering n. 47 of the directive on contracts sets forth that in public services contracts awarding criteria shall not impact on the application of national provisions pertaining to the payment of certain services, such as those provided by architects, engineers, lawyers, etc.

In more simple terms, this means that fees, if any, shall be complied with. Now, this holds true for architects, engineers and lawyers.

Regarding professions and competition, some statements delivered by Commissioner Monti have been discussed during the proceedings of the European Parliament, leading to a resolution against the Commissioner, which the European Parliament passed by a unanimity vote.

The legislative procedure is being launched on professional qualifications, and one of the fundamental principles is among others the atypical nature of intellectual professions. Currently, article 4 defines private practice as the activity exercised by those who provide independent intellectual services, based upon specific professional qualifications, and acting in a private capacity and on their own responsibility in the interest of their clients and the community.

This is a novelty for Europe. As written in the press here in Italy yesterday or the day before, so far enforced legislation has set forth that, as a matter of fact, the professional as a service provider can be considered on an equal footing with a business. In other words, the professional is a service provider.

Services are subject to public contracts; hence the professional can be treated as a businessman.

Conversely, the directive in the pipeline, already passed on first reading in Strasbourg, provides for very different things. It covers regulated and intellectual professions and makes a clear-cut distinction between the two. It states the reason why some professions are regulated and others are not and sets forth access requirements to certain professions.

It also paves the way for non regulated professions to become or not regulated over time, if appropriate.

The European Parliament has taken an unquestionable stance, as shown by the vote of last February 11th. So much so that the Directive itself does not provide for the free circulation of professional titles or, as we put it in Italy, the free circulation of paper diplomas. On the contrary, the Directive sets forth the free movement and automatic free circulation of professions, recognized as such. A further

distinction is made between practice on a temporary and on a permanent basis, when it comes to the exercise of the right of establishment.

The free circulation of professions is thus sanctioned, but with a clear-cut distinction between intellectual professions and professions of other kind related to crafts, business and industry. The distinction is further articulated as a function of different qualification levels ranging from a basic level, which simply requires vocational training, to the highest level 5, reached by postgraduates after several years of practice.

It is equally set forth that access to profession is gained with a professional title and practice and is maintained through life-long learning.

Bars and other professional Associations shall have in all member States full powers and responsibility to check and verify that conditions are set for access to professions and those requirements are fulfilled in terms of code of conduct and life-long learning.

Moreover, as said before, free service provision has been sanctioned, with a distinction between temporary and permanent service provision.

Professionals move freely within Europe, as a result of their professional expertise that has been recognized to them in their countries of origin. In case of free service provision, they practise profession exactly as they were practising in their home countries, i.e. in their countries of origin, albeit complying with the principles of host countries, through enrolment at all associations and other institutions as provided for in host countries. This enrolment will be a matter of form and shall not raise specific difficulties.

If freedom of establishment is exercised, full compliance with the rules of the host country is needed, it being understood that the professional arrives in the host country with the professional title and expertise he or she has previously gained. If the professional profile in the host country matches exactly the professional profile gained in the country of origin, everything is all right. The profession is practised with the professional title of the host country.

If the professional profile of the incoming person matches only in part that of the host country, generally speaking, there are two options: either the profession is practised under the title of the country of origin, or the host country can require professionals to attend training courses for a certain period of time or complement their knowledge, in order to get the professional title and profile required in the host country.

The process shall be automatic. Member States cannot set hindrances to the free circulation of professionals, except on justified and non discriminatory grounds.

As a result of all this, competition shall be the widest possible, albeit taking into account that intellectual professionals are atypical professionals. Therefore, the principle of economy-based competition is not allowed for, nor is that of competition on grounds of misleading advertising.

European legislation is always framework legislation, although it goes into a number of details, from which Member States cannot derogate too much when implementing it.

You, as lawyers, fall within the general part of the Directive on regulated professions, while the two Directives currently enforced respectively on free service provision and freedom of establishment will continue to be enacted.

Thank you Mr President.

13 CLOSING SPEECH BY HANS-JÜRGEN HELLWIG, CCBE PRESIDENT AND CHAIRMAN OF THE SESSION

I would like to thank Mr Stefano Zappala, Member of the European Parliament for his intervention on the conclusion of such a day which was particularly rich in speeches from lawyers and non lawyers from various backgrounds.

We are happy to see that the workshops were indeed a good opportunity to discuss social security for European lawyers in the context of European regulation 1408/71.

We will now have to collect the input of all participants and to think how we need to work further in this area within our working group composed of representatives of the Cassa from many European countries. We will continue our work outside the conference for the benefit of lawyers in cross-border practice.

We might not share the same ideals; some are speaking of harmonisation, others of coordination; it is for sure that we need through the bars and law societies and through the various organisations dealing with social security for lawyers, to improve co-ordination and dialogue. Social security is such a difficult matter, but also an important one which concerns everyday life and our future with benefits such as retirement pensions.

The CCBE is pleased to say that there is a common wish shared already by those of the CCBE working group to continue monitoring these issues in the context of the free movement of lawyers as set out by the existing directives.

I would like to end this day by saying thank you to the Cassa Forense for the wonderful organisation, thank you to the speakers, the chairpersons and the facilitators for the working groups, thanks to the CCBE organisers and special thanks to the interpreters.

Thank you everybody for your participation and for your attention in the conference.

14 PRESS RELEASE

The Council of the Bars and Law Societies of the European Union (CCBE) which through its Member Bars represents more than 700,000 European lawyers, held a successful first conference on cross-border social security problems for lawyers in Europe, in partnership with the Cassa Nazionale de Previdenza e Assistenza Forense (social security scheme for Italian lawyers), on 26th March in Rome.

The conference's aim was to discuss existing cross-border difficulties in social security for lawyers within the framework of the free movement of lawyers in Europe, notably under the Establishment Directive, and Regulation 1408/71.

The conference gathered together representatives from bars of the European Economic Area and the candidate countries, as well as representatives from social security schemes for lawyers in Belgium, France, Germany, Portugal, and Spain. There were also representatives from the Directorate General Social Affairs of the European Commission and of the European Court of Justice. Ms. Margot Fröhlinger from DG Internal Market congratulated the CCBE for the work undertaken and declared that the CCBE had played a pioneering role in this field.

The 90 participants unanimously agreed that the CCBE should continue, through its working group on social security for lawyers, to act as a forum for discussion of the existing difficulties in this area and to exchange information in order to improve mutual understanding.

It was also agreed that the CCBE working group should work on practical solutions to assist lawyers and social security schemes for lawyers, namely:

- draw up a list of the various social security organisations existing in the European Union and the European Economic Area where lawyers, wishing to practise in another Member State, could find information,
- improve exchange of information between the various social security organisations,
- Explore possibilities for better coordination regarding the application of Regulation 1408/71.

Hans-Jürgen Hellwig, CCBE President, declared today: "The CCBE is delighted to continue its work in this important field, as it is already successfully doing in the area of professional indemnity insurance, in order to enable the bars, schemes or organisations better to grasp the social security issues involved in cross-border practice, and to improve the coordination between themselves and the lawyers involved, so as to facilitate the free movement of lawyers pursuant to the objectives enshrined in the Treaty".

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15 ANNEX

The following papers were circulated at the conference:

1: CCBE Survey on social security schemes for European Lawyers

2: Report from Sean Van Raepenbusch – Social security for persons, having special regard to lawyers, moving within the European Community

3: Council Regulation (EC) n° 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community.

The papers can be viewed on the CCBE website under the following link:

http://www.ccbe.org/en/comites/securite_en.htm